NO PARENTS LEFT BEHIND: A FEMINIST AND INTERSECTIONAL PERSPECTIVE ON CANADIAN AND ARGENTINE PARENTAL LEAVE LAWS

by

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Abstract

Gender inequality in the distribution of unpaid care work and participation in the labour market is a critical issue around the world. Many countries have introduced parental leave policies as a mechanism to mitigate this gender disparity, having a direct impact on two main aspects of a person’s life: family and work. Nevertheless, most of these policies continue to be based on a nuclear family and the standard worker models, which are outdated. Families and work have recently experienced profound transformations, becoming more complex and diverse. Several families and types of employment have emerged, disputing the prevalence of the nuclear family and standard worker models. This leads to questioning whether parental leave policies have addressed these transformations and ensured equal protection for all parents across different families and employment relationships, closing the gender gaps or, conversely, these policies have reinforced not only gender but also social inequalities. Through a comprehensive comparative study of the Argentine and Canadian laws, this thesis deconstructs the assumptions about an ideal family and worker that underpin the parental leave regulations and the outcomes for parents in various families and employment relationships. Despite the Canadian legislation appearing to be more progressive and gender-inclusive than the Argentine, this thesis argues that both countries' parental leave laws fall short in ensuring equal access to and scope of leave benefits for parents in different families and employment arrangements. Through feminist and intersectional lenses, several indicators of the preference for an ideal nuclear family and standard worker that persist in the parental leave regulations of Argentina and Canada are identified. Furthermore, the negative effects experienced by certain non-traditional families and non-standard workers when trying to access parental leave benefits
in the compared jurisdictions are discussed. This thesis concludes that in Argentina and Canada, non-traditional families and non-standard workers encounter greater barriers to access to and receive less parental leave benefits than parents in nuclear families and standard employment, which reinforces gender and social inequalities. The understanding of the unequal protection granted to different families and workers in the context of parental leave policies may benefit future legal reforms.
Lay Summary

Parental leave policies involve two of the most important aspects of a person’s life: family and work. Both institutions have experienced significant transformations that resulted in the emergence of many families and employment types. This thesis investigates whether parental leave laws have addressed these changes by offering equal access to the same benefits for parents in different families and forms of employment. By comparing the laws of Argentina and Canada, this study shows that parental leave regulations have not yet been adapted to the new paradigms. In both countries, the parental leave laws remain based on assumptions about a traditional nuclear family and standard worker. Consequently, non-traditional families and non-standard workers face greater difficulties to access parental leave benefits. This study contributes to the understanding that ensuring equal parental leave protection for all families and workers is an essential step toward promoting gender and social equality.
Preface

This thesis is original, unpublished, independent work by the author Sofia Cornejo.
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List of Abbreviations

ART Assisted Reproductive Technologies

CHA Comunidad Homosexual Argentina

EI Act Employment Insurance Act

ILO International Labour Organization

INDEC Instituto Nacional de Estadística y Censos [National Institute of Statistics and Censuses of Argentina]

LCL Argentine Labour Contracts Law

LGBTQ+ Lesbian, gay, bisexual, transgender, queer, and all gender identities and sexualities that are not included in the previous groups.

NSER Non-standard Employment Relationships

OECD The Organization for Economic Co-operation and Development

OIT Organizacion Internacional del Trabajo

QPIP Quebec Parental Insurance Plan

SER Standard Employment Relationships

SMC Single Mothers by Choice

UI Act Unemployment Insurance Act

UN United Nations
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In loving memory of my father, Marcelo,

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Chapter 1: Introduction

According to the International Labour Organization (ILO), women perform about three-quarters of the total hours of unpaid care work, which means that women spend 3 hours more than men per day performing unpaid care work.\(^1\) This gendered unequal distribution of care work negatively affects female participation in the labor market.\(^2\) Although the female employment rate has significantly risen over the last decades, the gender gap in employment is still striking.\(^3\) In 2017, the global labour force participation rate for men was about 26% higher than for women, and this gender gap reached roughly 50% in some regions such as India, Pakistan, and Algeria.\(^4\) Moreover, in both developing and developed countries, female


\(^{3}\) According to the UN, “[i]n 2018, young women were more than twice as likely as young men to be unemployed or outside the labour force and not in school or in a training programme.” UN Women & UN DESA, “Progress on the Sustainable Development Goals: The Gender Snapshot 2019” (2019) at 14, online: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2019/progress-on-the-sdgs-the-gender-snapshot-2019-single-pages-en.pdf?la=en&vs=5813>.

workers are paid less than their male counterparts, overrepresented in part-time and other non-standard jobs, and underrepresented in managerial positions.\(^5\)

Parental leave policies have been proposed as a mechanism to reduce gender inequalities. These policies have a considerable impact on two of the most important aspects of a person’s life: family and work.\(^6\) It has been shown that parental leave policies may lead to a more gender-egalitarian distribution of unpaid care work by boosting men’s involvement in childcare, affecting the family dimension.\(^7\) For instance, a 2019 research study found a positive link between fathers’ parental leave-taking and the time allocated to childcare and housework.\(^8\) Moreover, the study showed that fathers who had taken parental leave continued to be involved in childcare activities even after returning to work.\(^9\) Simultaneously, parental leave policies can help to reduce the gender gap in employment and improve women’s opportunities in the


\(^8\) Marcus Tamm, \textit{supra} note 7 at 190.

\(^9\) \textit{Ibid.}
labour market. Previous research has demonstrated that parental leave policies may encourage women of childbearing age to enter into the labour force, increase the retention of female employees, and the rate of mothers who return to work after childbirth.

Many countries have implemented policies to reduce gender inequalities at home and in the workplace. According to ILO, in 2013, more than 120 nations provided maternity leave, 69 countries offered paternity leave, and 66 countries granted parental leave benefits. In Canada, the Employment Insurance Act (EI Act) grants shared parental leave benefits to all parents who meet the eligibility requirements regardless of their gender. Furthermore, recent reforms have extended the length of parental leave benefits, introduced a voluntary option into the system for self-employed parents, and a sharing bonus to promote gender equality in the household and the workplace. However, the full length of parental leave benefits is not equal for both parents given that only the parent who gave birth is eligible for maternity leave benefits up to 15 weeks. On the other hand, the Argentine parental leave system seems to be outdated compared with the Canadian system. Fixed to the male-breadwinner/female-caregiver


12 ILO, supra note 6.

paradigm, the Labour Contracts Law (LCL)\textsuperscript{14} still assumes that women are the main and only caregivers\textsuperscript{15} and regulates uneven maternity and paternity leave benefits. Specifically, mothers can take up to 90 days of maternity leave, whereas fathers can only take 2 days of paternity leave. Unlike the Canadian Employment Insurance Act, the Argentine Labour Contracts Law does not regulate shared parental leave benefits. Also, the use of gendered vocabulary in the Argentine labour legislation leads to the exclusion of LGBTQ+ parents from access to leave benefits.\textsuperscript{16} Although the Canadian parental leave system seems to be more progressive than the Argentine legislation, both countries’ parental leave regulations remain based on assumptions about an ideal family and worker model which restricts access to the benefits for parents who do not meet these expectations.

All over the world, including Argentina and Canada, families and work have recently experienced profound transformations, becoming more diverse and complex. Social, cultural, and legal changes have led to the emergence and recognition of diverse family models. Similarly, economic, and empirical factors have produced the proliferation of various types of employment. Therefore, the nuclear family and the standard worker that have been traditionally assumed as the ideal models in laws and policies, seem to be outdated. This leads


to questioning whether the Argentine and Canadian parental leave policies have addressed these transformations and ensured equal protection for all parents across different families and employment relationships, closing the gender gaps or, conversely, reinforcing not only gender but also social inequalities. This thesis argues that to effectively promote gender equality through parental leave policies, the benefits should be effectively available for all parents across different families and forms of employment.

The traditional family model, the nuclear family, composed of two heterosexual parents and their biological children, has been assumed as the ideal model in laws and policies, including parental leave legislation. However, over the last decades, families have experienced important transformations challenging the prevalence of the nuclear family standard. In Argentina and Canada, adoptive, same-sex, lone-parent, and multi-parent families, among others, coexist today with the traditional nuclear family. In this context, this thesis claims that the Argentine and Canadian parental leave laws have fallen short in recognizing the diversity and complexity of families. Using feminist and intersectional lenses, this study identifies several indicators that demonstrate that the ideal nuclear family continues to be the preferred family model in both countries’ laws. Therefore, non-traditional families face greater barriers to access and receive fewer benefits than nuclear families. Furthermore, the nuclear family, based on a heterosexual union, is by its definition highly gendered and strongly connected with a gender division of labour. Thus, some non-traditional families challenge the gender foundations of the nuclear family and likely encounter the biggest constraints to access parental leave benefits. To illustrate it, LGBTQ+ parents are effectively excluded from access to maternity and paternity leave benefits in Argentina, while in Canada, gay same-sex parents are granted a shorter period of leave than their heterosexual counterparts.
Simultaneously, the standard employment relationship (SER) has been assumed as the ideal worker model in Western countries, including Argentina and Canada. Nevertheless, recent transformations in the economic and political global contexts have resulted in the emergence and proliferation of several forms of non-standard employment. Part-time work, self-employment, informal work, to mention a few, are displacing the full-time, full-year, and dependent standard worker as the dominant model in the labour market. This thesis argues that the parental leave policies in Argentina and Canada remain underpinned by assumptions about a standard worker, which negatively affects access to leave benefits for non-standard workers. In both countries, informal, part-time, among other non-standard jobs, pay lower wages, offer more precarious working conditions, and few or non-existent social protections. Hence, restricting access to parental leave benefits for non-standard workers has an impact on social equality, being the lower socio-economic groups disproportionally affected.

While acknowledging that parental leave policies may help to counterbalance gender inequality in the household and workplace, this study claims that to effectively promote gender and social equality, the benefits should be accessible for all parents across different families and forms of employment. Through a comprehensive comparative study of the Argentine and Canadian parental leave regulations, this thesis demonstrates that both countries’ laws remain based on assumptions about an ideal nuclear family and standard worker, models that no longer represent the reality. Consequently, although the differences in the policies design, both the Argentine and Canadian parental leave regulations fall short in granting equal access to and scope of benefits for parents in non-traditional families and non-standard employment arrangements. Drawing on a feminist and intersectional perspective, it is revealed that the differential treatment offered by the compared parental leave laws has a profound impact on
gender and social inequality. In Argentina and Canada, women and LGBTQ+ persons from lower socio-economic sectors are disproportionately affected.

1.1 Conceptual Framework

1.1.1 Deconstructing Gender: Nancy Fraser’s Feminist Approach to Gender Equity

Nancy Fraser’s article *After the Family Wage*\(^1\) provides a suitable theoretical framework to discuss the gender implications of social benefits. According to Fraser, welfare states, and the social benefits granted by them, are premised on the assumption of a traditional gender order that is now in crisis.\(^2\) The old gender order, centered on the family wage, relied on the assumption that people were “organized into heterosexual, male-headed nuclear families, which lived principally from the man's labor market earnings.”\(^3\) The male/breadwinner and women/caregiver division of labour is now undergoing a normative and conceptual crisis.\(^4\) Over the last decades, productive and reproductive work have been fundamentally transformed\(^5\), and “a new world of economic production and social reproduction is emerging – a world of less stable employment and more diverse families.”\(^6\)

\(^{18}\) *Ibid* at 591-592.
\(^{19}\) *Ibid* at 591.
\(^{20}\) *Ibid* at 592.
\(^{21}\) *Ibid*.
\(^{22}\) *Ibid*.
Although being in decline, the old gender order is still the supporting pillar of the welfare state and its social benefits. Against this background, Fraser proposes a radical transformation; the development of a new welfare state that effectively addresses people’s needs.\(^{23}\) In Fraser words,

“It is clear (...) that the old forms of welfare state, built on assumptions of male-headed families and relatively stable jobs, are no longer suited to providing this protection. We need something new, a postindustrial welfare state suited to radically new conditions of employment and reproduction.”\(^{24}\)

Having declared the need for a fundamental transformation, Nancy Fraser asks: “[w]hat then should a postindustrial welfare state look like?”\(^{25}\) She concedes that this new welfare state must support a gender order, “[b]ut the only kind of gender order that can be acceptable today is one premised on gender equity.”\(^{26}\) Throughout the rest of the article, Fraser undertakes a thought experiment and analyses two possible gender orders that could replace the old one: the \textit{universal breadwinner}\(^ {27}\) and \textit{caregiver parity model}.\(^ {28}\) She concludes that neither of these alternatives “delivers full gender equality.”\(^ {29}\)

\(^{23}\) \textit{Ibid} at 593-594.  
\(^{24}\) \textit{Ibid} at 592.  
\(^{25}\) \textit{Ibid}.  
\(^{26}\) \textit{Ibid} at 593.  
\(^{27}\) \textit{Ibid} at 601-605.  
\(^{28}\) \textit{Ibid} at 605-610.  
\(^{29}\) \textit{Ibid} at 611. “Neither model, however, promotes women’s full participation on a par with men in politics and civil society. And neither values female-associated practice enough to ask men to do them, too; neither asks men to change.” \textit{Ibid} at 610
Therefore, Fraser advances a third option that consists of deconstructing gender to achieve gender equity. Deconstructing gender demands a radical transformation in society that involves fundamental changes in productive as well as in reproductive work. Regarding the productive work, “all jobs would assume workers who are caregivers.” Regarding reproductive work, Fraser reimagines it as follows:

“[E]mployees would not be assumed to shift all care work to social services. Some informal care work would be publicly supported and integrated on a par with paid work in a single social-insurance system. Some would be performed in households by relatives and friends, but such households would not necessarily be heterosexual nuclear families. Other supported care work would be located outside of households altogether-in civil society.”

In summary, to achieve gender equity, Fraser proposes reimagining a new gender order that will replace the old one. Social rights that aim to achieve substantive equality, including parental leave, should be attuned to this new gender order.

1.1.2 Applying Fraser’s Approach to Comparative Research on Parental Leave Policies

Nancy Fraser’s article After the Family Wage offers a suitable theoretical framework for this dissertation, for several reasons. Fraser’s theoretical approach supports the starting

30 “Achieving gender equity in a postindustrial welfare state, then, requires deconstructing gender.” Ibid at 612.
31 Ibid.
32 Ibid at 612-613.
33 Ibid.
point of my research, which is that parental leave regulations rely on assumptions about an ideal family and worker models. As described above, Fraser has argued that welfare states, and the benefits provided by them, support an old gender order that is attached to the ideal family and worker models.\textsuperscript{34} Moreover, her approach serves to justify the structure of this dissertation. In her article, Fraser considered the transformations in families and the labour market, aware of the implications of the normative assumption of an old gender order in productive as well as in reproductive work.\textsuperscript{35} To assess the inclusiveness of Argentine and Canadian parental leave benefits, I also draw on these two axes that are family models and employment relationships.

Besides providing the foundations for my starting argument and the structure for this dissertation, Fraser’s approach seems to be the most adequate theory to explain my findings and to understand the gender outcomes of the compared parental leave policies. Fraser’s transformative perspective and focus on gender equity support the claim that parental leave policies should be reformed to provide equal access and effective protection to all parents irrespective of the family models and working arrangements. Throughout this dissertation, and across the two axes, I intend to shed light on the gender implications of the compared parental leave policies. Fraser’s approach assists in identifying these gender outcomes and answering the question of whether Argentine and Canadian parental leave policies are promoting gender equity or reproducing gender inequalities. For all these reasons, this dissertation relies on Nancy Fraser’s \textit{After the Family Wage} theoretical approach.

\textsuperscript{34} \textit{Ibid} at 591-592.

\textsuperscript{35} \textit{Ibid}.
1.1.3 Key Concepts: Parental Leave, Maternity Leave, and Paternity Leave

Throughout this dissertation, I use the term parental leave with two different meanings: specific and general. In a specific sense, parental leave involves paid leave benefits granted to both parents, where there are two parents. These benefits may consist of a transferable individual right, a non-transferable individual right, or a family right that both parents can take simultaneously or alternatively. In contrast, in a general application, parental leave is an umbrella term that includes maternity, paternity, and parental leave. Hence, in this generic sense, parental leave is understood as a paid leave benefit granted to either both or one parent of a newly born or adopted child. Other relevant concepts used throughout this dissertation are maternity and paternity leave. While maternity leave is a paid leave benefit exclusively granted to mothers or the person who gave birth, paternity leave is a paid leave benefit available, usually for a short period, for fathers only.

[36] “Leave available equally to mothers and fathers, either as: (i) a non-transferable individual right (i.e. both parents have an entitlement to an equal amount of leave); or (ii) an individual right that can be transferred to the other parent; or (iii) a family right that parents can divide between themselves as they choose.” International Network on Leave Policies and Research, Alison Koslowski et al. Eds, 15th International Review of Leave Policies and Related Research 2019, (International Network on Leave Policies and Research, 2019) at 5 online [link](https://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/annual_reviews/2019/2._2019_Compiled_Report_2019_0824_.pdf) accessed 30 November 2020.


[38] International Network on Leave Policies and Research, supra note 36 at 5.

[39] “Paternity leave is generally a short period of leave for the father immediately following childbirth. Its aim is to enable fathers to assist the mother to recover from childbirth, which is also crucial in establishing breastfeeding, take care of the newborn as well as other children, attend to the registration of the birth and other family-related responsibilities.” International Labour Organization (ILO), supra note 6 at 52.
The Argentine Labour Contracts Law does not provide for parental leave benefits in a specific sense. Under the Argentine labour law, eligible mothers and fathers can take maternity and paternity leave benefits, respectively. On the other hand, the Canadian EI Act entitles eligible parents to parental leave benefits in a specific sense. Also, the Canadian law grants maternity leave to eligible mothers; however, it does not provide for paternity leave benefits.

1.2 Legal Framework

Politically, Argentina and Canada are organized under federal systems; thus, constitutional and legislative jurisdiction are divided into a federal government and several provinces. Nonetheless, these two countries have different legal traditions. On the one hand, Argentina embraces a civil law tradition. Therefore, written laws are the core of the legal system, and previous judicial decisions are not recognized as formal sources of law. On the other hand, Canada follows a common-law tradition. Since this legal tradition relies on the *stare decision* doctrine, Canadian judges must decide cases according to precedents and many legal principles are found in case law.

Moreover, both countries’ labour and employment law systems reveal important differences. In Argentina, the federal government, concretely the National Legislative, is competent to enact labour law legislation, although the local governments can adopt laws to

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40 Currently, Argentina is composed of 23 provinces while Canada is divided into 10 provinces and 3 territories.

41 *Constitucion Nacional de la Republica Argentina* [National Constitution of Argentina], Ley Nº 24.430 [Law No 24.430] Art. 75 inc. 12 [article 75.12] online
regulate the rights and obligations for public employment relationships within the jurisdiction.

The Argentine labour law system can be depicted as a pyramid (figure 1).\textsuperscript{42} On the top are the National Constitution and international treaties assimilated to the constitutional law, followed by international treaties with a hierarchy above the laws.\textsuperscript{43} Below is the Law of Labour Contracts. Next, at the bottom compartments of the pyramid, are other laws and professional statutes, collective agreements, employer-employee private agreements made in the context of the employment contract, and, lastly, the uses and customs.\textsuperscript{44}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{Argentine Labour Law System}
\end{figure}


\textsuperscript{43} \textit{Constitucion Nacional de la Republica Argentina}, supra note 41 at Art. 75 inc. 22 [article 75. 22].

\textsuperscript{44} \textit{LCL}, supra note 14 at art. 1.
Conversely, in Canada (figure 2), excluding Quebec, the contract of employment, which emerges from the freedom of negotiation between employer and employee, is the first source of labour and employment law.\textsuperscript{45} The second source is collective agreements between trade unions and employers.\textsuperscript{46} Labour and employment statutes, which can be enacted by the federal government as well as by the provinces, made up a third source.\textsuperscript{47} All employment relationships – whether individual or collective – are governed and constrained by provincial or federal legislation, as the case may be, in accordance with the constitutional division of powers. Lastly, constitutional and international law are considered an additional source.\textsuperscript{48} Holding in mind these differences in legal traditions and labour and employment law systems, in the following paragraphs, I will briefly describe the Argentine and Canadian legal frameworks for parental leave benefits.

\textbf{Figure 2: Canadian Labour Law System}

\begin{itemize}
\item Contract of Employment
\item Collective Agreements
\item Federal and Provincial Statutes
\item Constitutional and International Law
\end{itemize}


\textsuperscript{46} \textit{Ibid} at 2 and 6 – 12.

\textsuperscript{47} \textit{Ibid} at 2 and 12-16.

\textsuperscript{48} \textit{Ibid} at 2 and 16-19.
1.2.1 The Argentine Maternity and Paternity Leave Laws

In Argentina, different laws and collective agreements provide the legal framework for maternity, paternity, and parental leave benefits. On the one hand, the Labour Contracts Law, LCL, introduced in 1976 and still in force, provides for two types of leave: maternity and paternity leave. These leave rights are granted to employees who hold formal employment contracts executed within the national territory, with the exceptions listed in the law. It is important to note that, to date, no shared parental leave rights have been granted by the Argentine labour law. On top of the LCL provisions, collective agreements may include clauses that improve the LCL maternity and paternity leave benefits for workers in a specific sector. On the other hand, given that workers in the public sector, agricultural sector, and domestic workers are excluded from the scope of the LCL, special laws confer parental leave rights to them. Although acknowledging this plurality of laws that rule parental leave

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49 LCL, supra note 14.

50 Ibid at article 2.

51 Specific regulations grant parental leave benefits to workers in the public sector.

52 The law No. 26727, called Regimen de Trabajo Agrario [Agriculture Labour Law], regulates the parental leave benefits for rural workers. This special law provides for a thirty-day paternity leave, which is considerably longer than the LCL's benefit. Regimen de Trabajo Agrario [Agriculture Labour Law], Law No 26727, December 21, 2011, online http://servicios.infoleg.gob.ar/infolegInternet/anexos/190000-194999/192152/norma.htm accessed 9 September 2020.


54 LCL, supra note 14.
rights in Argentina, this dissertation will focus exclusively on maternity and paternity leave rights granted under the Labour Contracts Law (LCL).

1.2.1.1 Maternity Leave

The Argentine Labour Contracts Law grants a 90-day paid maternity leave benefit for mothers employed in the formal sector. Under Title VII, called *Women’s Work*, chapter II: *Maternity Protection*, the LCL prohibits pregnant employees to work during 45 days before the expected date of delivery and 45 days after childbirth. Nevertheless, the law allows certain flexibility to female employees who may opt for reducing the pre-birth leave to up to 30 days while extending the period of leave after childbirth. During the leave, female employees will receive economic compensation which amount integrally replaces the wages that they will have earned if were working. This maternity allowance is paid by the National Social Insurance System, funded with the compulsory contributions of employees and employers.

After the expiration of the 90-day maternity leave, female employees can choose among three options. First, they can return to their former positions. The LCL imposes on employers

55 *LCL, supra* note 14 at Titulo VII: Trabajo de Mujeres, Capitulo II: De la Protección de la Maternidad, Articulo 177 [Title VII: Women’s Work, Chapter II: Maternity Protection, Article 177].
56 *Ibid*
the obligation to keep open the job position for employees on maternity leave. Second, female employees can take extended unpaid leave for a minimum period of three months and a maximum of six months. This extraordinary unpaid leave does not count as a working period, which negatively affects the amount of future pensions and other social security benefits. Finally, female employees can opt to resign their jobs to stay at home and care for their children. In that case, employers must pay a reduced compensation for employment termination. Considering the short period of paid leave and the provision of an economic compensation for mothers who opt out the labour market to have more time available for childcare, the LCL maternity leave system appears to discourage women’s employment.

58 LCL, supra note 14 at article 183.a.
59 Ibid at article 183.c.
60 Delfina Schenone Sienra, Apuntes para Repensar el Esquema de Licencias de Cuidado en Argentina (Buenos Aires, 2020) at 10.
61 In the case of opting for resigning employment after the expiration of the maternity leave, female workers are entitled to economic compensation that equals 25% of the compensation for wrongful dismissal. LCL, supra note 14 at article 183.b).
62 It is important to note that the duration of maternity leave in Argentina remains below international standards. According to ILO, the minimum duration for maternity leave should be fourteen weeks, while in the Argentine labour law this benefit is granted for twelve weeks. Convention 183, Maternity Protection Convention, 2000 (No. 183) ILO, 88th ILC Sess. (2000) at article 4: Maternity Leave, online https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183 accessed on 2 September 2020.
1.2.1.2 Paternity Leave

By assuming that women are mainly responsible for unpaid care work, the LCL entitles fathers to a brief period of paternity leave. In Argentina, fathers who are in an employment relationship within the scope of the LCL are eligible for a 2-day paternity leave that must be taken right after childbirth. Like maternity leave, during the period of paternity leave, workers will receive an income compensation that replaces a 100% of their earnings. The short duration of paternity leave and the requirement of providing at least 1 working day out of 2 leave days suggests, as Mario Ackerman has noted, that the intention of the labour law is allowing fathers to complete the paperwork in connection to childbirth rather than encourage them to participate in care work.

1.2.2 The Canadian Parental Leave System

Canada offers an extraordinary case study since two main parental leave programs coexist within its territory. On the one hand, parents who work in Canada outside Quebec fall under the federal program and can access to parental leave benefits provided under the

64 Valeria Esquivel & Eleonor Faur, supra note 15.
65 LCL, supra note 14 at Titulo V: De las Vacaciones y otras Licencias, Capitulo II: De las Licencias Especiales, Articulo 158.a [Title V: Vacations and other Leaves, Chapter II: Extraordinary Leaves, article 158.a].
66 Ibid, at article 159.
67 Ibid, at article 160.
Employment Insurance Act (EI Act). Also, since 2011, the EI parental leave benefits have been extended to self-employed workers who voluntarily opt into the system. On the other hand, since 2006, the Quebec Parental Insurance Plan (QPIP) entitles parents who work in Quebec to parental leave rights. Previous research has demonstrated that Quebec’s parental leave program imposes less restrictive qualifying requirements and provides more generous benefits than the EI federal program, reinforcing territorial inequalities.69 Also, the Canada Labour Code rules maternity and paternity leave benefits available for employees in federally regulated workplaces all over the country, including Quebec.70 Despite this territorial division of parental leave programs, the scope of this dissertation focus on the analysis of the parental leave rights entitled under the Employment Insurance Act.


70 Canada Labour Code, RSC 1985, c L-2, ss. 206 (maternity leave) and 206.1 (parental leave), online <http://canlii.ca/t/54b5q> accessed 3 September 2020.
1.2.2.1 Maternity Leave

The EI federal program entitles eligible biological mothers, including surrogate mothers, with up to 15 weeks of maternity leave benefits payable at 55% of their average weekly earnings. Exceptionally, if the child is hospitalized, the maternity leave period may be extended, up to a maximum of 52 weeks after the date of birth. The economic compensation paid during maternity and parental leaves is funded by the premiums regularly paid by employees and employers.

To qualify for maternity leave benefits, claimants must meet four eligibility requirements. Parents who intend to take maternity leave in Canada must demonstrate that they are unable to work due to pregnancy or childcare; have paid the EI premiums; have experienced a reduction in their regular weekly earnings by more than 40% for at least one week; and, have

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72 This maximum amount is regularly updated. In September 2020, the earnings ceiling was $573 per week. Ibid.

73 EI Act, supra note 13 at s. 22(6).

74 Ibid at s. 22(7).

75 Lindsey McKay et al, supra note 69 at 4.
accumulated at least 600 insurable hours\(^{76}\) of employment during the last 54 weeks.\(^{77}\) These strict eligibility criteria, especially the accumulation of 600 insurable hours, have been pointed out as one of the main barriers that restrict access to maternity and parental leave benefits.\(^ {78}\) The same eligibility requirements must be met to access parental leave benefits.

### 1.2.2.2 Parental Leave

The EI Act entitles biological and adoptive parents to parental leave rights to care for their newborn or adopted child. Since 2017, the EI Act allows eligible parents to opt between two alternative parental leave programs: *standard* and *extended*. The option between the two programs must be selected when applying for the EI benefits, and that decision will be irrevocable.\(^ {79}\) Under the standard system, eligible parents can take up to 35 weeks of parental leave benefits.


\(^{78}\) Lindsey McKay et al., *supra* note 69.

\(^{79}\) EI Act, *supra* note 13 at ss. 23. (1.1) (1.2) and (1.3), Canada, Employment and Social Development, *Backgrounder: Information for EI Claimants*, online https://www.canada.ca/en/employment-social-
leave\(^{80}\) paid at 55% of their average insurable earnings to a prescribed maximum.\(^{81}\) In contrast, the extended parental leave program entitles qualifying parents with up to 61 weeks of leave\(^{82}\) paid at 33% of their average insurable weekly earnings.\(^{83}\)

Besides choosing between the standard and extended programs, the EI federal system allows eligible parents to share the leave period or allocate the whole period on one parent. To promote a more gender-egalitarian distribution of childcare and encourage fathers to take up parental leave,\(^{84}\) the EI Act was recently amended to introduce the *Parental Sharing Benefit*. This new *use it or lose it* right allows parents who have opted for sharing the leave to take 5 extra weeks of standard parental leave or 8 extra weeks of the extended benefit.\(^{85}\) Thus, in case of sharing the leave and opting for this new benefit, the maximum duration of the parental leave benefit will be 40 and 69 weeks in the standard and extended program, respectively.\(^{86}\)

Like maternity leave benefits, parental leave benefits are funded with premiums paid by employees and employers. As noted above, the benefits paid during maternity and parental leave result in a significant reduction of the claimants’ regular earnings. To mitigate the impact

\(^{80}\) EI Act, *supra* note 13 at ss. 12 (3)(b)(i) and (4.01) (a).
\(^{81}\) *Ibid* at s.14(1).
\(^{82}\) *Ibid* at ss. 12 (3)(b)(ii) and (4.01) (b).
\(^{83}\) *Ibid* at s.14(1).
\(^{85}\) *Ibid*.
\(^{86}\) *EI Act, supra* note 13 at ss. (4.1) (a) and (b).
of such an income reduction, some employers provide a *Supplemental Unemployment Benefit*, also known as a *top-up benefit*, that partially or entirely makes up the difference between the EI income replacement and the claimant’s regular earnings.\(^{87}\) Moreover, recognizing that the income reduction may be a barrier in access to maternity and parental leave rights, the EI Act provides an economic supplement for low-income families.\(^{88}\)

1.3 Limitations and Future Research

This dissertation holds some limitations. To begin with, I compare the parental leave benefits granted by two countries and under two laws: The Labour Contract Law in Argentina and the Employment Insurance Act in Canada. Given the important contrasts between the two countries’ parental leave systems and the differences in the legal, economic, and social contexts in general, this comparison makes a valuable contribution to the literature. However, expanding the comparison to the parental leave systems of several other developing and developed countries may help to better understand whether and to what extent the nuclear family and standard worker models remain as the ideal legal model in parental leave laws. Comparing other countries may enable us to find common patterns and differences in the limitations that parents in different families and working arrangements encounter when seeking

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\(^{88}\) *EI Act*, supra note 13 at ss. 16 (1) and (2). To date, to be eligible for this supplement, the annual net family income must not exceed $25,921. Also, see Employment and Social Development Canada, *EI Maternity and Parental Benefits: How Much you could Receive*, online https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental/benefit-amount.html accessed 3 September 2020.
access to parental leave benefits. Moreover, the scope of this dissertation is limited to the LCL in Argentina and the EI Act in Canada. Future research could assess the inclusiveness of the parental leave benefits granted under other laws. For instance, it could assess the benefits granted under different sector’s collective agreements or compare the benefits provided under provincial laws.

Secondly, this dissertation deconstructs the different barriers experienced by parents who seek access to parental leave benefits according to their family organization and position in the labour market, revealing the impact on gender and social inequalities. Future research could focus on one family model or one employment arrangement and study in further detail the barriers that these parents experience to access parental leave benefits. In addition, future studies could benefit from using empirical methodologies such as interviews. Extensive research on the impact of parental leave policies not only on gender but also on social inequalities is needed.

1.4 Thesis Outline

This thesis provides a comprehensive comparative analysis of the inclusiveness/exclusiveness of the Argentine and Canadian parental leave provisions for parents in different family structures and employment relationships. The dissertation is organized into five chapters. In the present chapter, I have provided the introduction and the theoretical and legal frameworks.

Following this, in chapters two and three, I assess the inclusiveness of parental leave benefits according to the family model. Specifically, in chapter two, I discuss the legal
assumptions about the nuclear family model. The chapter begins with an overview of the ideal nuclear family model and its main features. Next, I identify and discuss the legal assumptions about the nuclear family that remain in the Argentine LCL and Canadian EI parental leave regulations. In chapter three, I assess the inclusiveness/exclusiveness of parental leave benefits for parents in different families. In this chapter, I identify the barriers and exclusions that parents who do not fit the ideal family model experience when seeking access to parental leave benefits in Argentina and Canada. Through gender and intersectional lenses, I unveil the implications of these barriers for women and vulnerable groups. I conclude this third chapter by asserting that the Argentine and Canadian parental leave laws remain attached to the ideal nuclear family, imposing several barriers and often excluding parents in non-traditional family models. I show that, by neglecting the diversity of the familial institution, both countries' parental leave laws reinforce gender and social inequalities.

The inclusiveness of parental leave benefits with regards to the position of the parents in the labour market is assessed in chapter four. I begin this last analytical chapter by depicting the ideal standard worker model. Over the chapter, I show that the Argentine and Canadian parental leave systems remain based on assumptions about an ideal standard worker. Following this, I examine the barriers and exclusion experienced by parents who are part-time, self-employed, temporary, and informal workers. I conclude the chapter showing that, in Argentina and Canada, the legal assumption about an ideal standard worker led to significant limitations to qualify for parental leave benefits for non-standard and informal workers. Also, I reveal the gender and class implications of these barriers.
Finally, in chapter five, I summarize the findings concerning the differential treatment that the Argentine and Canadian parental leave regulations offer to parents according to their family and employment statuses. Also, I provide some final thoughts on the gender and social inequality effects of the barriers imposed by the two countries’ parental leave laws. Following this, I propose some future directions for law and policy to grant a more egalitarian parental leave system.
Chapter 2: Preferred by the Law: Parental Leave and the Nuclear Family

In Argentina and Canada, the familial institution has experienced several changes over the last decades. The increasing participation of women in the workplace, the legal recognition of same-sex relationships, including marriage, the development of assisted reproductive technologies, among other factors, have transformed family structures. Nevertheless, the traditional nuclear family continues to be invoked as the ideal model in laws and policies.

Against this backdrop, in this chapter, I aim to unpack the main expectations regarding the nuclear family that continue to inform the Argentine and Canadian parental leave laws. The analysis will be limited to the parental leave provisions under the Argentine Labour Contracts Law (LCL) and the Canadian Employment Insurance Act (EI). This chapter considers the extent to which the nuclear family model influences the parental leave regulations in Argentina and Canada. It also discusses the assumptions regarding the nuclear family that remain in both countries’ laws. The chapter will be structured as follows. First, it will conceptualize the ideal nuclear family by discussing its main features and gender implications. Subsequently, it will briefly introduce some relevant cultural, social, and legal changes that have challenged the traditional family model. Lastly, it will unveil the main assumptions regarding the ideal family that remain in the parental leave regulations in Argentina and Canada.

89 LCL, supra note 14.
90 EI Act, supra note 13.
2.1 The Ideal Model: The Nuclear Family

2.1.1 Conceptualization

Family is a complex and dynamic institution that is continuously changing and adopting new structures. The development of assisted reproductive technologies and the increasing visibility of lone-parent households, same-sex parents, and blended families are just a few examples of the diversity of Argentine\(^{91}\) and Canadian families.\(^{92}\) However, the traditional nuclear family, “composed of a heterosexual husband and wife and their biological children,”\(^{93}\) prevails in social and legal discourses.\(^{94}\) Laws and policies attempt to protect and reproduce this ideal family structure,\(^{95}\) which is assumed to be natural\(^{96}\) and normal.

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\(^{95}\) Jennifer Johnson, supra note 94.

\(^{96}\) Martha Fineman, supra note 94.
Conversely, family models that do not conform to the ideal model are considered deviant\(^97\) and labeled as \emph{special or other}.\(^98\)

Three main assumptions define the ideal family model. The nuclear family must be heterosexual, made up of two adults, and founded on biological ties. According to the first assumption, the core of the nuclear family is a heterosexual union. In this regard, Fineman has introduced the concept of \emph{sexual family}\(^99\) and explained that, in the social and legal imagination, the ideal family is expected to be “founded on the romantic sexual affiliation between one man and one woman.”\(^100\) The heteronormative presumption that informs the ideal family model is also manifested in the social expectation regarding parenting. As Butler explains, the social idealization of parenting demands the presence of a father and a mother, consequently, “those who enter kinship terms as non-heterosexual will only make sense if they assume the position of mother or father.”\(^101\) Another indicia of the heteronormativity of the nuclear family is the social value assigned to marriage. Accordingly, Fineman points out that “marriage is constructed as essential, not only to the foundational relationship of the nuclear family but to the very basis of society itself.”\(^102\) In Argentina, the strong influence of

\(^97\) Martha Fineman, \emph{Ibid.}

\(^98\) Catherine Krull, \emph{supra} note 93 at 11.

\(^99\) The concept \emph{sexual family} was first introduced by Martha Fineman in 1995 in the book “The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies” (New York: Routledge, 1995)


\(^102\) Martha A Fineman, \emph{supra} note 94 at 47.
the catholic church in law and society has reinforced the heteronormativity of the ideal family.¹⁰³

The second assumption is the couple-based family unit. The family is expected to be a self-sufficient system that needs two adults to distribute productive and reproductive work.¹⁰⁴ Thus, the ideal model relies on a gender division of labour in which one of the members, usually the woman, carries out domestic and care work; while the other adult, the man, is the provider of the family’s economy, the main breadwinner.¹⁰⁵ In this context, the increased participation of women in the workplace and the rise of lone-mother families appear as perversions of the ideal family model.¹⁰⁶ By allocating domestic and productive work in one person, these women threaten the gender division of roles presumed as the basis for the family’s self-sufficiency.

Finally, the ideal family is supposed to be founded on biological ties between parents and children. Appleton argues that there is an understanding of inferiority¹⁰⁷ of adoptive families in the social imaginary, which is reflected in laws and judicial decisions. The preference for biological ties is also evident in the assumption of infertility as a tragedy. The

¹⁰⁵ Martha Fineman, Ibid.
¹⁰⁶ Martha Fineman, Ibid at 2206 - 2211.
¹⁰⁷ “According to the conventional wisdom in family law, families formed through adoption are ‘second best’ to those based on biological ties,” Susan Frelich Appleton, “Planned Parenthood: Adoption, Assisted Reproduction, and the New Ideal Family’ (1999) 1 Wash UJL & Pol’y 85 at 85.
negative perception of infertility that prevails in society expresses the strong desire to “produce genetically related offspring.”

2.1.2 Gender Inequality and the Nuclear Family

The heterosexual nuclear family model is one of the most gendered institutions in current society. This family model produces and reproduces gender inequality by attributing different roles to men and women. According to Fenstermaker, West & Zimmerman, “the persistence of an unequal distribution of household labor and the belief that the distribution of these tasks is fair and equitable suggest that in doing housework, men and women also do gender.”

To understand the unequal distribution of domestic and productive work within the family, it is important to first understand the allocation of productive and reproductive work in broader society. The family, as a social institution, performs an important function, it “is the natural repository for inevitable dependency.” In this context, reproductive work has been

109 Martha Fineman, supra note 94 at 49.
111 Martha Fineman, supra note 104 at 2205.
privatized, transferred from the public sphere of the state to the family.\textsuperscript{112} Consequently, the nuclear family model is assumed as a self-sufficient and independent system that will perform social reproductive functions without requiring state funding.\textsuperscript{113}

To fulfill its social function, the self-sufficient family must distribute productive and reproductive work between its members, and this allocation of labour is gendered.\textsuperscript{114} Under the \textit{separate spheres} and \textit{family-wage} models,\textsuperscript{115} men and women's productive and reproductive roles were delineated. On the one hand, men were assumed as breadwinners and expected to provide economic support to their wives and children by participating in the labour market. On the other hand, women, primarily understood as caregivers, were supposed to stay at home performing domestic and care work.\textsuperscript{116} By the end of the 20\textsuperscript{th} and beginning of the 21\textsuperscript{st} centuries, economic and political transformations resulted in the emergence of a new paradigm, the \textit{dual-earner family}.\textsuperscript{117} In this new model, women and men are expected to equally participate in the labour force.\textsuperscript{118} However, reproductive work is not evenly distributed and

\begin{itemize}
  \item \textsuperscript{113} Martha Fineman, \textit{supra} note 104.
  \item \textsuperscript{114} \textit{Ibid} at 2206.
  \item \textsuperscript{115} According to Nancy Fraser, the separate spheres was the ideal model during the liberal competitive capitalism in the XIX Century. In the XX Century, whit the emergence of the welfare states, the separate spheres model shifted to a family wage model. Nancy Fraser, “Contradictions of Capital and Care” (2016) 100 \textit{New left Rev} 99.
  \item \textsuperscript{116} Martha Fineman, \textit{supra} note 104.
  \item \textsuperscript{117} Nancy Fraser, \textit{supra} note 115.
  \item \textsuperscript{118} \textit{Ibid} at 114.
\end{itemize}
continues to be mainly performed by women. Consequently, this double burden imposed on women reinforces gender inequality.

The gender division of labour within the nuclear family is informed by patriarchal ideology. From this perspective, male members are the head of the family, while female members are dependents. According to Fineman, “the patriarchal family is an ‘assumed institution’ with a well-defined, socially constructed form complete with complementary roles—husband/head of household, wife/helpmate, child.” In this context, the female/caregiver and the male/breadwinner roles are assumed as natural and necessary.


121 Martha Fineman, supra note 94 at 47.

122 Fineman has distinguished between inevitable and derived dependency. “Dependency is “inevitable” in that it flows from the status and situation of being a child and often accompanies aging, illness, or disability.” Derived dependents are the caretakers which dependency flows “from their roles and the need for resources their caretaking generates.” Taking care of inevitable dependents is one of the functions of the family that is generally assumed by women, who therefore are derived dependents. Martha Fineman, supra note 94 at 60.


124 Martha A. Fineman, supra note 104 at 2188.

125 Catherine Krull, supra note 93 at 12.
2.1.3 Alternative Family Models. Looking Beyond the Nuclear Family

Families are complex and diverse. Among different ethnicities, cultures, times, and countries the organization of the familial institution and how care work is performed vary considerably. Even within the same culture, social, economic, and legal changes may reshape family structures\(^{126}\) Hence, the traditional nuclear family only subsists as an idealization.\(^{127}\) The next paragraphs will examine three factors that challenge the traditional family model and contribute to family diversity. These factors are socio-cultural variations, legal changes, and the development of assisted reproductive technologies.

The traditional nuclear family is a Western idea that obscures the organization of non-western families. Regarding the essentialist character of the ideal family, Hill Collins has stated that “the sexual family has arguably never been reflective of families because it reflects a white, middle-class ideology, which has not accounted for dominant practices of childcare across different ethnic and social backgrounds.”\(^{128}\) Accordingly, Baines and Freeman explain that the gender division of roles, the devaluation of care work, and the structure of the


traditional nuclear family are aliens to Indigenous cultures. In most Indigenous communities, the traditional family model is the extended family and care work is considered as a communitarian rather than individual responsibility. Thus, the imposition of the nuclear family model appears as an expression of colonialism that has produced devastating effects on Indigenous peoples in Canada. In Argentina, Indigenous communities were decimated, and the few survivors have mostly adopted the Western family model.

Besides Indigenous communities, the ideal nuclear family excludes the experiences of many women and families within and beyond Western societies. For instance, the female/caregiver and male/breadwinner roles do not reflect the real experiences of Black women. Historically, these women have combined work and caring responsibilities and have relied on women-centered and communal groups to raise their children. Moreover, lone


130 Throughout this dissertation, I will use the term Indigenous peoples because it seems to be the most adequate for a comparative study. As Chelsea Vowel has pointed out, the term Indigenous has an international connotation, making it applicable to communities in Canada as well as in Argentina. Also, the use of the plural peoples seems more fitted than the singular people since “[i]t speaks to the incredible diversity of Indigenous peoples as hundreds of culturally and linguistically distinct groups, rather than one homogenous whole.” Chelsea Vowel, “Just Don’t Call us Late for Supper. Names for Indigenous Peoples” in Chelsea Vowel, ed, Indigenous Writes: A Guide to First Nations, Métis, and Inuit Issues in Canada (Portage & Main Press, 2017) 7 at 10.

131 “Residential schools for Aboriginal children, the Sixties Scoop, and foster care are cases in point. The primary objective of earlier government policies was to The Canadian government implemented programs, such as Residential Schools for Aboriginal children, directed to ‘purge Aboriginal children of all traditional cultural identifiers.’ As a result, “many Aboriginal communities suffer the lowest living standard of any other family group in the country and have suicide rates two to seven times that of the national population.” Ibid at 18.

132 Elizabeth Jelin, supra note 126 at 54.

133 Jennifer Johnson, supra note 94 at 129.
motherhood, adoptive, same-sex, and ensembled families challenge the expectations of the ideal nuclear family structure, demonstrating that the traditional nuclear family is certainly far from reality.\textsuperscript{134}

Apart from cultural variations and social changes, legal reforms may reshape family structures, challenging the expectations regarding the nuclear family. Some of these legal changes are adoption laws, same-sex marriage rights, and no-fault divorce. Firstly, the legal regulation of adoption defies the assumption of and preference for biological parenting. As Satz has pointed out, “while traditionalists base family ties on biological relatedness, adoption shows the multiple ways in which such ties can be secured.”\textsuperscript{135} Also, the regulation of open adoptions may confront the assumption of a two-parents unit. Open adoptions make possible an extended family structure in which children build connections with adoptive as well as with biological parents.\textsuperscript{136}

Furthermore, the legalization of same-sex marriage confronts the heteronormativity of the traditional nuclear family. The recognition of the rights of LGBTQ+ persons to get married and to become parents challenges the ideal of a family composed of one man and one woman. In 2005, the Bill C-38\textsuperscript{137} legalized same-sex marriage in Canada. Since then, the number of

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\textsuperscript{135} Debra Satz, \textit{supra} note 108.

\textsuperscript{136} \textit{Ibid} at 534.

\end{flushleft}
same-sex couples, married and in common-law unions, as well as the number of same-sex couples who had children living with them has increased considerably.\footnote{The number of same-sex couples grew from 45,350 in 2006 to 72,880 in 2016. Similarly, the percentage of same-sex couples who had children living with them rose from 8.6% to 12.0% over the same period. Statistics Canada, \textit{Same-sex Couples in Canada in 2016}, Census in Brief, Catalogue no. 98-200-X2016007 (Statistics Canada, August 2, 2017) online: \url{https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016007/98-200-x2016007-eng.cfm} accessed 25 February 2021.} Likewise, Argentina became the first Latin American country to legislate equal rights for same-sex couples by enacting the Egalitarian Marriage Law\footnote{\textit{Ley 26.618 Matrimonio Civil [Civil Marriage Law]} B.O. 22/7/2010, online at \url{http://www.jus.gob.ar/media/3109833/ley_26618_matrimonio_igualitario.pdf} accessed 20 November 2020.} in 2010. Consequently, the proportion of same-sex families in this country has risen, however, it remains low compared to other family models.\footnote{Juan Ignacio Piovani & Agustín Salvia, \textit{La Argentina en el siglo XXI: Cómo somos, vivimos y convivimos en una sociedad desigual: Encuesta Nacional sobre la Estructura Social}, (Ciudad Autonoma de Buenos Aires: Siglo XXI, 2018) at 433.}

The legalization of no-fault divorce is another significant legal change that has reshaped family structures. Concretely, lone-parent families and blended families are non-traditional models that may result from divorce. Regarding the former, divorce has been pointed out as one of the causes of lone parent-families.\footnote{In Argentina, the major cause of higher-income lone mothers is the growing trend in the divorce rate. Elizabeth Jelin, \textit{supra} note 126 at 65.} After divorce, children's custody is

\footnote{In Canada, statistical data reveals that since 1971, most lone-parent families were comprised of divorced or separated parents and their children. Nevertheless, over the last decades, the number of lone parents by choice has rapidly increased. For instance, the percentage of Canadian lone parents who never married in 2011 almost doubled the percentage of 1991. Statistics Canada, \textit{Lone-parent families: The New Face of an Old Phenomenon}, Canadian Megatrends, Catalogue no. 11-630-X (Statistics Canada: 2015), online \url{https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015002-eng.htm} accessed 3 December 2020. The rapid rise in lone mothers by choice in Canada has been also pointed out by Fiona Kelly. Fiona Kelly, “Autonomous Motherhood and the Law: Exploring the Narratives of Canada’s Single Mothers by Choice” (2012) 28:1 \textit{Can J Fam Law} 63.}
generally allocated to one of the parents, usually to the mother. Consequently, the two parents unit is dismantled and replaced by a lone parent unit in which the same person performs reproductive and productive work. Regarding the latter, blended families are a new family structure that has appeared as a side effect of divorce. These ensembled families, composed of stepparents and stepchildren with half-siblings and stepsiblings, defy the ideal family unit. In Canada, over the last decades, the number of simple stepfamilies has remained steady, whereas the number of complex stepfamilies has shown an upward trend. In Argentina, the proportion of ensembled families is difficult to estimate because the national census has

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143 Fineman refers to the dilemma produced by lone motherhood.

“If she [lone mother] devotes her time to market work to support her child, then she will not be available as a caretaker. However, since she is single, if she fulfills her assigned obligations for the burdens of dependency, then with no wage earner to support her she will starve or ‘go begging to the state.’ In either case, her family has not privately dealt with its dependencies.” In Martha Fineman, supra note 94 at 62.

144 Jennifer Johnson, supra note 94 at 128.

145 A Simple stepfamily is “a couple with: Children of the father only or the mother only born or adopted in a previous union. No children born or adopted in the current union.” Statistics Canada, Being a Parent in a Stepfamily: A Profile. 2011 General Social Survey: Overview of Families in Canada, by Mireille Vézina, Catalogue no. 89-650-X — No. 00 (Statistics Canada, 2012) online: https://www150.statcan.gc.ca/n1/pub/89-650-x/89-650-x2012002-eng.htm accessed 26 February 2021

146 A complex stepfamily is

“a couple with: Children of the father only or the mother only born or adopted in a previous union. Child(ren) born or adopted in the current union. Or a couple with: Children of the father and of the mother born or adopted in a previous union. Child(ren) born or adopted in the current union. Or a couple with: Children of the father and of the mother born or adopted in a previous union. No children born or adopted in the current union.”

Ibid.

147 Ibid.
not distinguished this category. However, using available statistical data, a study has estimated that this kind of family makes up about 4% of Argentine families. 148

Lastly, the development of assisted reproductive technologies (ART) confronts the traditional family model by providing new methods to become a parent. 149 Surrogacy, in vitro fertilization, donor insemination, and implantation of frozen eggs, to mention a few, have expanded the possibilities to form a family. 150 Infertile couples, single people, and same-sex couples now have a variety of options to become parents. 151 Also, assisted reproductive technologies “have expanded the possibility that children will have multiple parents.” 152 The use of ART is significant among Canadian couples 153 and single people, 154 and is expected to continue escalating. 155 In Argentina, the number of families who use ART is rising, yet, at a


149 Debra Satz, supra note 108. The ideal family unit is “composed of a heterosexual husband and wife and their biological children.” Catherine Krull & Justyna Sempruch, supra note 93 at 11.


151 Debra Satz, supra note 108.

152 Jennifer Johnson, supra note 94 at 128.

153 By interpreting the data collected through the Infertility Component of the 2009/2010 Canadian Community Health Survey, a research study has shown that “about one in seven couples who attempted pregnancy sought medical help for conception.” Tracey Bushnik et al. “Seeking Medical Help to Conceive” (2012) 23:4 Health Reports, Catalogue No 82-003-X online: https://www150.statcan.gc.ca/n1/pub/82-003-x/2012004/article/11719-eng.htm accessed 1 March 2021.

154 Fiona Kelly, supra note 141.

155 Ibid.
slower pace than in North America. These transformations of the familial institution call into question the main assumptions regarding the nuclear family and lead one to conclude, as Krull did, that “the traditional nuclear family is certainly not as prevalent as it once was.”

2.2 Parental Leave and the Nuclear Family

Family is and has always been a complex institution. Socio-cultural factors, legal changes, and the development of assisted reproductive technologies have accelerated the transformation of the family, leading to the emergence of multiple and diverse family models. Lone-parent families, same-sex families, stepfamilies, among others, coexist today with the traditional nuclear family. However, the nuclear family, comprised of two heterosexual adults and their biological children, endures as the ideal legal model. Laws and policies continue attached to assumptions about the ideal nuclear family, reinforcing the gender division of labour and the stereotypes of male/breadwinner and female/caregiver. Against this background, I ask whether and to what extent the Argentine and Canadian parental leave laws rest on the assumption of an ideal nuclear family. To answer these questions, in the next section, I identify and discuss some of the main assumptions about the nuclear family that remain in both countries’ parental leave regulations.


157 Catherine Krull, supra note 93 at 12.
2.2.1 The Remains of the Nuclear Family Model in the Argentine Parental Leave Law

In Argentina, there is a legal inconsistency regarding families’ equality. On the one hand, the National Constitution and the Civil and Commercial Code recognize the heterogeneity of families. The National Constitution, article 14 bis, compels the state to provide social welfare to the country inhabitants, including the obligation to grant comprehensive social protection for families, protection that is not limited to the traditional nuclear family. Since 1994, the recognition of family diversity has been expanded with the introduction into the constitutional text of several Human Rights Treaties that promote equal treatment and protection for families. An example of these international treaties is the American Convention on Human Rights, which recognizes the rights of the family in article 17. According to the Inter-American Court of Human Rights' interpretation, the protection granted by article 17 is not limited to a traditional family model, but rather, to the family in

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159 Constitucion Nacional de la Republica Argentina, supra note 41.
161 Constitución de la Nación de la Republica Argentina, supra note 41 at art. 14 bis [article 14 bis].
162 Aida Kemelmajer de Carlucci, supra note 91.
163 Constitución de la Nación de la Republica Argentina, supra note 41 at article 75.22.
any of its forms and models.\textsuperscript{165} Moreover, to align the private law with the constitutional and human rights framework, a new Civil and Commercial Code\textsuperscript{166} was enacted in 2014. Since then, civil legislation recognizes the variety and complexity of Argentine families.\textsuperscript{167} Detached from the nuclear family expectation, the Civil and Commercial Code regards the family as a social construction and grants equal rights to diverse family models.\textsuperscript{168}

On the other hand, the Labour Contracts Law (LCL)\textsuperscript{169}, that rules maternity and paternity leave benefits, is still fixed to the traditional nuclear family model.\textsuperscript{170} Thus, several expectations regarding the nuclear family can be identified in the current maternity and paternity leave provisions in Argentina. A first hint of the nuclear family's domain is the assumption of a two-parent family, comprised of a mother, a father, and their children. Some examples of this expectation are found in the provisions governing maternity and paternity leave, which are restricted to mothers and fathers respectively, and in the lack of regulation of

\textsuperscript{165}“The Court confirms that the American Convention does not define a limited concept of family, nor does it only protect a “traditional” model of the family. In this regard, the Court reiterates that the concept of family life is not limited only to marriage and must encompass other de facto family ties in which the parties live together outside of marriage.”


\textsuperscript{166} Código Civil y Comercial de la Nación, \textit{supra} note 160.

\textsuperscript{167} Eleonor Faur, \textit{supra} note 16.

\textsuperscript{168} Aida Kemelmajer de Carlucci, \textit{supra} note 91.

\textsuperscript{169} \textit{LCL, supra} note 14.

parental leave in its specific sense, it is as a family entitlement available for either or both parents. A second hint is the use of gendered vocabulary in the legal text, which reveals a preference for the heterosexual family.\textsuperscript{171} The LCL refers to the \textit{mother} and the \textit{father} as the recipients of the benefits. This use of gendered vocabulary results in the exclusion of same-sex parents.\textsuperscript{172} Another trace of the traditional family model in the Argentine labour law is the preference for biological ties. The current legislation relies on pregnancy and childbirth as conditions for qualifying to maternity and paternity leave benefits.\textsuperscript{173} This assumption neglects adoptive parents' needs, excluding them from parental leave benefits.\textsuperscript{174}

The gender implications of the Argentine parental leave system deserve special consideration. Informed by the nuclear family and patriarchal expectations, the current system reinforces the gender division of roles within the household. The labour law assumes that women are the exclusive caregivers.\textsuperscript{175} Thus, it grants a 90-day maternity leave to female employees,\textsuperscript{176} whereas males can take a maximum of 2 days of paternity leave.\textsuperscript{177} The

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\textsuperscript{171} Eleonor Faur, \textit{supra} note 16.
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\textsuperscript{172} \textit{Ibid}.
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\textsuperscript{173} Referring to the Argentine parental leave legislation, among others in Latin America, Faur has stated that the “current perspective is linked to the protection of ‘biological motherhood’, that is, protection during the gestation period, delivery and lactation, and clearly for women/mothers.” \textit{Ibid} at 133.
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\textsuperscript{175} Eliana Cutili & Romina Aspiazu, \textit{supra} note 158.
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\textsuperscript{176} \textit{LCL, supra} note 14 at art. 178.
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\textsuperscript{177} \textit{LCL, supra} note 14 at Titulo V: De las Vacaciones y otras Licencias, Capitulo II: De las Licencias Especiales, Art. 158.a.
\end{flushleft}
maternity leave benefit, whose length remains below international standards,\textsuperscript{178} is only available for biological mothers. Therefore, adoptive mothers and non-female parents are not eligible. Also, the maternalistic\textsuperscript{179} perspective in the labour law has a negative impact on women’s opportunities in the workplace, widening the gender labour gap.\textsuperscript{180}

Considering the negative impact on female employment, Aspiazu & Cutuli have classified the Argentine parental leave legislation as a passive policy.\textsuperscript{181} Passive policies encourage mothers to stay at home, whereas active policies promote women's participation in the paid labour force.\textsuperscript{182} Although the Argentine maternity leave system recognizes female employment and intends to protect pregnancy and maternity in a workplace context, it encourages women to stop working. Once the maternity leave period concludes, apart from returning to the former position,\textsuperscript{183} the law gives mothers two more options. According to the LCL article 183, mothers can take an extra 3 to 6 months of unpaid leave, called \textit{estado de excedencia}. Also, if they choose to resign, the law grants to female workers a compensation

\begin{itemize}
\item\textsuperscript{179} Even though it has not been ratified by Argentina, this international recommendation is a useful and objective standard to assess maternity leave provisions. Carolina Aulicino et al, Documento de Trabajo No 106. Licencias: Protección Social y Mercado Laboral. Equidad en el Cuidado (Buenos Aires, 2013) at 15.
\item\textsuperscript{180} From a maternalistic perspective, women are assumed “as mothers, and mothers as the main caregivers to children”. Valeria Esquivel & Eleonor Faur, \textit{supra} note 15 at 104.
\item\textsuperscript{181} Employees may perceive that the provision of maternity benefits makes female employment more costly, which reinforces gender stereotypes and hinders women’s opportunities in the workplace.
\item\textsuperscript{182} Romina Cutuli & Eliana Aspiazu, \textit{supra} note 63.
\item\textsuperscript{183} Ibid.
\end{itemize}
equivalent to 25% of the amount of the compensation resulting from the length of service in case of unjust termination.184

In addition to maternity leave, the current paternity leave regulation reinforces gender stereotypes by assuming that fathers are breadwinners and excepted from care responsibilities. Instead of promoting a gendered egalitarian distribution of childcare, the LCL grants fathers an insignificant leave. In Argentina, male parents can take only two days of paid leave right after the child was born.185 These provisions of labour legislation reinforce gender biases that remain in Argentine culture.186

These gender stereotypes are reproduced in several bills of reform187 introduced between March 2019 and April 2020. Half of the surveyed bills propose extending paternity

184 LCL, supra note 14 at art 183 b).

For a greater understanding of how to calculate the compensation resulting from the length of service, see LCL, supra note 14 at art. 245. According to LCL art. 245 first paragraph, in cases of unjust termination, employers become liable to pay the dismissed employee an amount resulting from the length of service, among other compensations. The amount of this payment equals one month of salary for each year worked or period over 3 months. To calculate the compensation, it will be considered the best regular salary earned over the last working year. Take as an example the hypothetical case of employee "A". Employee A, who worked in the same company for 5 years and 6 months, was terminated without cause. Considering that her best regular salary during the last working year was $2000, the employer is liable to pay employee A $12,000 in compensation for the length of service ($2000*6 = $12,000). If instead of being terminated, employee A resigned from her job upon finishing maternity leave benefit, she will be entitled to a payment which amount equals 25 percent of the payment granted under LCL art. 245. Continuing with the same example, in this last case, the employer will owe $3000 to employee A (25 percent of $12,000).

185 LCL, supra note 14 at art. 158.a.


187 The analysis has been limited to bills that propose reforming the parental leave legislation introduced to the Argentine Parliament from March 2019 to April 2020. The source of the data was the official
leave benefits to promote gender equality; however, most of them still rely on women as main caregivers and provide longer maternity than paternity leaves. To illustrate, 6 out of 9 bills propose extending the paternity leave duration up to 15 days, but only one suggests granting the same length as maternity leave, at 90 days. Hence, it is possible to assert that the biases regarding gender roles still govern legal discourses.

Among the bills introduced in the period March 2019 - April 2020 that proposed amendments to parental leave regulations, an important share, 44.44%, expressed the intention to promote gender equality.\textsuperscript{188} However, the idealization of a nuclear family and the webpage of the Argentine National Congress and Senate. The keyword was “licencia” (leave). It is important to note that the bills that propose parental leave benefits for employees of the public sector were excluded.

\textsuperscript{188} Reform Bills introduced by the Senate, Senado de la Nacion Argentina:


Reform Bills introduced before the National Chamber of Deputies:


maternalistic perspective of women as caregivers still prevail in these proposed reforms. Consequently, only a few propose the introduction of shared parental leave benefits. These shared benefits consist of enabling the gestating parent to transfer to or to share with the other parent part of the maternity leave period. Several bills propose longer maternity and/or

189 3 out of 18 reform bills contain this sharing option. See:


Among the bills that propose longer maternity leaves, the suggested duration range from 100 to 180 days.


paternity leaves. However, most of them still rely on women as main caregivers and provide a significantly longer length of maternity than paternity leave.

Regarding family models, more than half of the bills grant benefits for adoptive parents, a few introduce protections for employees who are undergoing assisted reproduction treatments, and a smaller number includes provisions regarding same-sex families. Despite these recognitions of family diversity, the bills do not offer considerable advances in terms of gender and family equality.

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191 The next reform bills propose longer paternity leave benefits:


192 As pointed out above, the bills that propose longer paternity leaves suggest a length from 10 to 90 days.

193 More than half of the bills propose pre-placement and/or adoption leaves.

194 3 out of 18 bills introduce protection for workers who are receiving assisted reproduction treatments.

195 One bill proposes extending maternity leave benefits to non-gestational mothers in co-maternity families.
2.2.2 The Remains of the Nuclear Family Model in the Canadian Parental Leave Law

In Canadian society, the nuclear family model is no longer as predominant as it once was. However, it is resistant to abandoning its dominant position in legal discourses, and the Canadian parental leave legislation is not the exception. One hint of this legal preference is the assumption of a two-parent family. Even though, in 2016, 69.7% of the families in Canada were composed of two parents and their children, this family model coexists with other diverse structures. Nevertheless, the Canadian parental leave law still assumes this model as dominant. The federal parental leave provisions intend to promote the distribution of caring work between two eligible parents, which is demonstrated by the possibility to split the leave benefits. In the current legal system, the benefits can be taken entirely by one parent or divided between two eligible parents. In this last scenario, the law provides greater flexibility to decide how to distribute the benefit. Thus, the claimants can take parental leave simultaneously

196 Catherine Krull, supra note 93 at 12.


199 Canada, Employment and Social Development Canada, Digest of Benefit Entitlement Principles Chapter 13 - Section 1, online: https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-13/parental-benefits-payments.html#a13_1_0 accessed 3 April 2021.
or separately and can choose how many weeks each parent will take.\textsuperscript{200} Although lone parents can take the entire leave benefit, long periods of leave involve important income reductions which may discourage lone parents to take long benefits. The high cost of taking parental leave results especially detrimental for lone parents in non-standard jobs who will unlikely receive top-up benefits from their employers.

This legal assumption of a two-parent unit has been strengthened by recent amendments introduced to the Employment Insurance (EI) Act. First, the Budget Implementation Act. 2017 No.1\textsuperscript{201} has increased the system’s flexibility by providing two types of parental leave benefits, standard and extended. Both options enable parents to take longer leaves but at a reduced income replacement, which equals 55\% and 33\% of the average weekly income in standard and extended programs, respectively.\textsuperscript{202} Subsequently, starting in March 2019\textsuperscript{203}, a new \textit{use it or lose it} benefit called \textit{Parental Sharing Benefit} is available.\textsuperscript{204}

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\textsuperscript{200} The only limitation is that “once parents start receiving the benefits, the options cannot be changed.” Canada, Parliament, \textit{supra} note 77 at 6.


\textsuperscript{202} \textit{EI Act, supra} note 13 at s. 14 (1).


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Aiming to challenge gender inequality in the workplace and at home, the new benefit grants to two-parent families, whenever they have shared the parental leave benefit, with 5 and 8 extra weeks in standard and extended programs, respectively. However, since lone parents are unable to split the parental leave benefit with a second parent and eligibility has not been expressly extended to them, lone parents result indeed excluded from access to the Parental Sharing Benefit.

Another trace of the influence of the nuclear family in Canadian parental leave regulations is the distinction between biological and adoptive parents in the eligibility criteria for maternity leave benefits. In the current legislation, only pregnant and biological mothers, including surrogate mothers, are eligible to take up to 15 weeks of maternity leave. To

205 Regarding this new benefit, The Department of Finance Canada has expressed that “the Government of Canada is committed to breaking down barriers to gender equality so that women and girls can participate in, and contribute to, Canada's growing economy.” Also, it has stated that “this type of benefit has been proven to encourage a more balanced sharing of child-care responsibilities that goes well beyond the five-week period.” Canada, Department of Finance, supra note 84.

206 Regarding the inclusiveness of different family models, the Department of Finance’s backgrounder document expresses that “[t]he new benefit will be available to eligible two-parent families, including adoptive and same-sex couples. Ibid.

207 A recent comparative study found out that, in most OECD countries, including Canada, the parental leave benefits available for single-parent families are shorter than those granted to two-parents. The article also pointed out that one of the causes of inequality is that “single parents may be unable to access any ‘bonus’ durations of leave that are made available when both parents in a two-parent household take a minimum amount of leave, unless legislation specifies otherwise.” Judy Jou et al, “Paid Parental Leave Policies for Single-Parent Households: An Examination of Legislative Approaches in 34 OECD Countries” (2020) 23:2 Community, Work Fam 184 at 193 online https://www.tandfonline.com/doi/pdf/10.1080/13668803.2018.1517083?needAccess=true 7 December 2020.

208 “EI maternity benefits are offered to biological mothers, including surrogate mothers, who cannot work because they are pregnant or have recently given birth.” Canada, Employment and Social Development Canada, Employment Insurance Maternity and Parental Benefits in Reports: Employment Insurance (EI) online https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/maternity-parental.html accessed 3 September 2020
support this distinction, it has been noted that the legal purpose of the maternity leave regulation is ensuring income replacement to the birth parent while undergoing the physiological and psychological changes resulting from pregnancy and childbirth.\textsuperscript{209} Particularly, the availability of maternity leave benefits for “birth mothers who give up their children for adoption” has been understood as a strong indication of the mentioned health recovery aim.\textsuperscript{210}

2.3 Chapter Conclusions: The Preferred Family Model

The familial organization is dynamic and subject to continuous transformations. Today, diverse family structures coexist with the traditional nuclear family. Despite this complexity, the ideal nuclear family, assumed as heterosexual, comprised of two adults, and founded on biological ties, still informs Argentine and Canadian parental leave laws. In this chapter, I have outlined the main features of the nuclear family model and its connection with the male-breadwinner/female-caregiver gender order. Following this, I have pointed out some factors that have led to the proliferation of diverse family structures that challenge the expectations about the traditional nuclear family. Against this background, I claimed that the Argentine and Canadian parental leave regulations remain attached to an ideal nuclear family model and deconstructed the main assumptions that underpin both countries’ laws. I found out that the


\textsuperscript{210} \textit{Ibid} at para 99.
laws governing parental leave benefits in Argentina and Canada still assume a two-parent family and exhibit a preference for biological ties. Also, by using gendered vocabulary, the Argentine parental leave legislation reveals an expectation for a heterosexual family.

All in all, the parental leave laws in Argentina and Canada remain attached to assumptions regarding an ideal nuclear family, neglecting the family's heterogeneity. In the following chapter, I will unpack the effects of these legal expectations on non-traditional families by identifying the barriers and exclusions that adoptive parents, lone-mothers, same-sex parents, and other families, meet when seeking access to parental leave benefits in Argentina and Canada.
Chapter 3: Non-traditional Families: Exclusions and Limitations in the Parental Leave Laws

Having identified some assumptions regarding the traditional nuclear family that remain in Argentine and Canadian parental leave laws, now, I discuss the outcomes of these legal expectations on certain non-traditional families.\(^\text{211}\) The objective of this chapter is identifying the barriers and exclusions that the legal preference for a nuclear family model produces for adoptive, same-sex, lone-parent families, and other non-traditional families in Argentina and Canada. Throughout the chapter, I discuss the extent to which parental leave laws in Argentina and Canada address the needs of non-traditional families. I further identify some variations on the eligibility requirements and scope of parental leave benefits for different family models. This chapter is divided into five sections. In the first four sections, I discuss the barriers that

\(^{211}\) Although there is not a single agreed definition of non-traditional families, I follow the conceptualization of the European Commission that states:

“a non-traditional family can describe any family group outside of one that includes a mother and a father living together with their biologically-related children. Non-traditional families, therefore, might include families with lone parents, families with same-sex parents, families with adopted or fostered children, families with parents living apart, families with step-parents and step-siblings (‘reconstituted’ families) and families that consist of other relatives living together in ways outside the traditional formulation.”

adoptive, same-sex, lone-parents, and multi-parent families encounter when seeking access to parental leave benefits in Argentina and Canada. Following this, in the last section, I draw some conclusions from the analysis discussed in the chapter.

3.1 Parental Leave and Adoptive Families

In its ideal form, the nuclear family is comprised of a heterosexual couple and its biologically related children. In this respect, adoptive families do not comply with the ideal family's conditions; they challenge the assumption of a biological tie between parents and children. Bearing this in mind, I discuss whether parental leave regulations in Argentina and Canada grant equal benefits to adoptive and biological families. Over this section, I identify some barriers, derived from the legal assumption of an ideal nuclear family, that restrict access to parental leave benefits for adoptive families.

3.1.1 Adoptive Families in Argentina

In Argentina, adoptive families were legally recognized for the first time in 1948, even before the enactment of the Labour Contracts Law (LCL). Notwithstanding this recognition,

the labour legislation does not grant parental leave benefits to adoptive families. Based on the assumption of a biological family, the Argentine labour law relies on pregnancy and childbirth as conditions to access maternity and paternity leave benefits. This legal expectation results in practice in the exclusion of adoptive parents from access to parental leave benefits.

To bypass the legal exclusion, adoptive families in Argentina have filed judicial complaints pursuing the extension of the LCL’s maternity leave benefits. In several precedents, courts and tribunals have considered the legal gap in the provision of parental leave benefits for adoptive parents as discriminatory and, therefore, decided to extend to adoptive parents the same benefits available for biological parents. However, the results of the judicial procedures are uncertain. Following a civil law tradition, in Argentina, judicial decisions have not binding force and the outcomes are limited to the particular case. To illustrate, in the case M. V. M. C. y otro, an adoptive mother filed an amparo action against the decision that denied her

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214 LCL, supra note 14 articles 193 and 172.a).

215 Delfina Schenone Sienra, supra note 60.


maternity leave benefits based on the absence of stipulations in the LCL that expressly regulates maternity leave benefits in cases of adoption.\(^{218}\) The local court of appeal understood that denying maternity leave benefits to adoptive mothers and providing differential treatment to biological and adoptive mothers and their children was discriminatory and breached the constitutional right of equality, which is protected under the National Constitution, several international human rights treaties, and local legislation.\(^{219}\) The court decided to fill the gap in the labour law by extending the benefits to adoptive families\(^ {220}\) and ordered to grant maternity leave benefits to the claimant since the day of the child’s placement.\(^ {221}\)

The legal gap in the LCL’s maternity leave regulation regarding adoptive families was also interpreted by a federal court of appeal in *A.G.M.L. v Alianza Francesa.*\(^ {222}\) Although the main issue considered was whether an employee who was terminated at the time of the placement of her adoptive child was unfairly dismissed, the court expressed his opinion about the gap in the LCL maternity leave regulation. Drawing on international human rights treaties,\(^ {223}\) the court understood that, within the Argentine legal system, adoptive and biological

\(^{218}\) M. V., M. C. y otro S/ Amparo, supra note 216 at considerando 1, page 1.

\(^{219}\) Ibid, at considerando 2 – 5, pages 1-4.

\(^{220}\) Ibid, at considerando 5, page 4

\(^{221}\) Ibid, at considerando 5 and resuelvo no. II, page 5.

\(^{222}\) A.G.M.L. v Alianza Francesa s/ despido, Ciudad Autonoma de Buenos Aires, 08-05-2014, Cámara Nacional de Apelaciones del Trabajo, Sala V.

\(^{223}\) The court’s decision relied on The Convention on the Elimination of All Forms of Discrimination Against Women (Convención sobre eliminación de todas las formas de discriminación contra la mujer), art. 16.1, and on the Convention on the Rights of the Child (Convención sobre los Derechos del Niño), art 21. Ibid, at 2 – 3. These human rights treaties have been incorporated into the National Constitution
families have equal rights.\footnote{224}{En dichos términos, encuentro que la adopción está equiparada jurídicamente a la maternidad}. Hence, the court concluded that adoptive mothers can claim and receive maternity leave benefits under the LCL. Importantly, the Supreme Court of Argentina confirmed the court of appeal’s decision\footnote{225}{El Supremo de la República Argentina es el Tribunal Supremo en el país. A.G.M.L. v Alianza Francesa s/despido, Ciudad Autonoma de Buenos Aires, 29-09-2015, Corte Suprema de Justicia de la Nacion}.

Moreover, Argentine courts have decided cases in which the extension of the LCL’s leave benefits was claimed by same-sex adoptive parents. For instance, in \textit{A. L. B. Y A. I. O.}\footnote{226}{A. L. B. Y A. I. O. s/ Materia A Categorizar (Declaracion De Adoptabilidad), Mar del Plata, 15/07/2015, Juzgado de Familia No 5 de Mar del Plata} a gay couple adopted two children and claimed an extended paternity leave benefit, in the same terms as the LCL’s maternity leave, for one of the parents.\footnote{227}{Ibid, considerando I, page 1} This case reveals that the limitations in access to parental leave benefits do not affect all adoptive parents to the same extent. Same-sex parents who adopt children encounter a double barrier. On the one hand, as adoptive families, they struggle with the legal gap on the provision of leave benefits for adoptive families. On the other hand, since the LCL’s parental leave provisions are highly gendered, the benefits cannot be directly extended to same-sex parents.\footnote{228}{Ibid} This case and the difficulties that same-sex families encounter to access parental leave benefits will be discussed in detail in section 3.3 of this chapter.
Although some courts and tribunals have attempted to fill the gap in the LCL and granted leave benefits to adoptive parents, the lack of legal provision in this respect is yet problematic. Since adoptive parents are not expressly included in the LCL’s maternity and paternity leave provisions, these parents find barriers that hinder their access to parental leave benefits. As the above cases have shown, the lack of legal provision results in the denial of their applications for leave benefits. Consequently, to be entitled to maternity or paternity leave benefits, adoptive parents must file judicial complaints. The results of these judicial procedures are uncertain since in Argentina judges are not bound by precedents. Although Argentine tribunals usually draw on case law to guide or support their decisions, it has a "persuasive rather than precedential value." Thus, different judges may decide similar cases differently and, for instance, dismiss the claim or provide diverse benefits to adoptive parents.

To ensure equal access to parental leave benefits for adoptive as well as for biological families and adjust the labour legislation to the National Constitution and international human rights standards, the LCL needs to be amended. Over the last years, some bills have proposed reforming the LCL’s parental leave regulations to include adoptive families. Particularly, in the period 2019-2020, eleven reform bills proposed the introduction of adoption leaves, with a

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229 Argentina has a civil law tradition; thus, the lower tribunals and courts are not bound by the decisions of superior tribunals. Despite this general principle, the precedents of the Supreme Court of Argentina are considered as legally binding. As Sagüés has pointed out, the inferior courts and tribunals, either national and provincial, only can diverge from the Supreme Court precedent by expressing new and relevant arguments. Néstor Pedro Sagüés, “La Eficacia Vinculante de la Jurisprudencia de la Corte Suprema de Justicia en EE.UU. y Argentina.” (2006) 4:1 Estud Const Rev del Cent Estud Const 17.

230 Gabriela T Mastaglia & Valerie Oosterveld, supra note 42 at 918.
length that ranged from 10 to 130 days\textsuperscript{231}. Four of these bills contemplated the case of the adoption of multiple children, granting extra days of leave in such circumstances.\textsuperscript{232} Four bills introduced a pre-placement leave benefit, with a length that varied from a short period, 1 to 12


\textsuperscript{232} See bills: No. S-0020/2020, Blas, article 3; 0120-D-2020, Regimen de Licencias Especiales, article 2; 5400-D-2019, Modificaciones a la Ley de Régimen de Contrato de Trabajo, article 1; 1269-D-2019, article 1, supra note 229.
days, to a lengthy leave of 45 days.\textsuperscript{233} Several bills claimed the purpose to promote equality among diverse family models;\textsuperscript{234} however, most of them offered more generous benefits to biological than to adoptive parents. To illustrate, only four bills granted equal length of leave for adoptive and biological parents,\textsuperscript{235} while almost double that number provided a shorter leave for adoptive parents. Overall, these bills promised important progress toward the recognition of the needs of adoptive parents in the Argentine parental leave legislation. Nevertheless, most of the proposed amendments revealed a preference for the traditional nuclear family and failed to advance equal benefits for adoptive families.

3.1.2 Adoptive Families in Canada

In Canada, the EI Act entitles adoptive parents to parental leave benefits from the day of the child’s placement\textsuperscript{236} with the same compensation and duration as biological families.\textsuperscript{237} However, adoptive parents are not allowed to take paid leave before the placement day. They are excluded from maternity leave benefits which are only available to the person who gives


\textsuperscript{234} 11 out of the 18 surveyed bills mentioned family’s equality among the main purposes.


\textsuperscript{236} \textit{EI Act}, supra note 13 s. 23.2.b “Subject to section 12, benefits under this section are payable for each week of unemployment in the period: b) that begins with the week in which the child or children (…) are actually placed with the claimant for the purpose of adoption.”

\textsuperscript{237} Canada, Employment and Social Development, \textit{supra} note 208.
birth. In addition, except for the province of British Columbia, the current legislation in Canada does not provide pre-placement leaves.

As a result of the exclusion from maternity leave, adoptive parents are entitled to a shorter period to care for the newly adopted child compared to biological families (figure 3). Considering that only biological mothers are eligible for maternity leave benefits, biological parents can combine maternity and parental leave and take a longer period than adoptive families. Consequently, adoptive parents and adopted children have a shorter and usually

![Figure 3: Total Length of Parental Leave by Family Model, Including Parental Sharing Benefits](image)

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238 British Columbia, Pre-placement Adoption Leave for B.C. Government Employees, online [https://www2.gov.bc.ca/gov/content/careers-myhr/all-employees/leave-time-off/maternity-parental-pre-placement-adoption/pre-placement-adoption](https://www2.gov.bc.ca/gov/content/careers-myhr/all-employees/leave-time-off/maternity-parental-pre-placement-adoption/pre-placement-adoption) accessed 16 December 2020.


240 Combining maternity and parental leave, biological parents can take up to 55 or 84 weeks off work. However, adoptive families are only eligible for parental leave benefits and excluded from the 15 weeks of maternity leave. Thus, the maximum number of weeks that they can take is 40 in the standard program and 69 in the extended.

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insufficient time\textsuperscript{241} for attachment and bonding.\textsuperscript{242} Furthermore, the EI Act does not entitle adoptive families to pre-placement leave benefits, neglecting their special needs during the transition stage.\textsuperscript{243} Before the child’s placement, parents who seek to adopt must go through an “onerous and intrusive”\textsuperscript{244} application phase. During that process, prospective adoptive parents often need to take time off work to attend the mandatory pre-placement visits and go through other legal procedures. The unavailability of a pre-placement leave constrains their options and forces adoptive parents to use vacation time or go on unpaid leave to complete the application and transition processes,\textsuperscript{245} which may lead to disruptions in employment. Adoptive parents who hold unionized or higher-earning jobs are more likely granted employer benefits than adoptive parents in precarious and lower-earning jobs. Therefore, the absence of preplacement leave benefits disproportionally affects adoptive parents with lower-socio economic status.

The inadequacies of the current parental leave system do not affect all adoptive parents to the same extent. Women, LGBTQ+ parents, lone parents, and families with lower-economic

\textsuperscript{241} A group of researches conducted an online survey of adoptive and awaiting parents in 2018. In total, 9 parents and caregivers participated in the survey. Referring to the EI Act parental leave benefits, a significant share of participants, 72\%, expressed that “the system did not provide enough time for at least one of their children to adjust to their new family and form attachments.” Caroline McLeod et al, supra note 239 at 18-19.

\textsuperscript{242} In cases of adoption, attachment time is regarded as essential for children's health and development. Caroline \textit{Ibid}.

\textsuperscript{243} \textit{Ibid}.


\textsuperscript{245} The declaration of a survey respondent exemplifies this point. “I am NOT eligible to start my parental leave until AFTER the transition period has completed, even though this transition period is critical for a successful placement. I will have to take an unpaid leave from work for this period.” Caroline McLeod et al, supra note 239.
status are the most affected groups among adoptive families. In Canada, “women are the predominant providers of (...) care to children.”\textsuperscript{246} Hence, they are more likely to take paid and unpaid leaves,\textsuperscript{247} which impacts negatively on their professional careers and incomes. Also, LGBTQ\textsuperscript{+}\textsuperscript{248} and lone parents\textsuperscript{249} bear the extra-burden of the social stigma that may hinder the adoption process. Finally, people with lower-socio economic status and lower-earning jobs are less likely to receive extra benefits from their employers and may find greater difficulties to afford the costs of taking unpaid leaves; thus, the lack of pre-placement leave benefits could constrain the possibilities to adopt children for families from lower-socio economic sectors.


\textsuperscript{247} By 2010, the percentage of women taking leaves for care to children was 83.1\% paid leave and 21.5\% unpaid leave; whereas only 12.9\% men took paid leave and 14.2\% unpaid leave. Statistics Canada, \textit{Leave Practices of Parents after the Birth or Adoption of Young Children}. Table 1 Type and Length of Leave Taken by Working Mothers and Fathers of Children Aged 1 to 3, by Leanne C. Findlay and Dafna E. Kohen, Canadian Social Trends, Issue 2012002, online https://www150.statcan.gc.ca/n1/pub/11-008-x/2012002/t/11697/tbl01-eng.htm accessed 16 December 2020.


3.1.2.1 Discrimination Claims

The exclusion of adoptive families from maternity leave benefits has been challenged as discriminatory in violation of section 15 of the Canadian Charter in several cases. However, since the leading case *Schafer v Canada*, these claims have been repeatedly dismissed. To dismiss the complaints, the courts have based their decisions on the different purposes of maternity and parental leave provisions. They have stated that the purpose of maternity leave is women’s recovery from childbirth, whereas the aim of parental leave is caring and bonding. As adoptive parents do not need time to recover from the physical and physiological changes resulting from pregnancy and childbirth, the courts have concluded that it is reasonable to exclude them from maternity leave benefits.

In *Schafer v Canada*, two adoptive mothers pursued declarations that the subsections of the Unemployment Insurance (UI) Act that rule maternity and child-care leave benefits are discriminatory and contrary to section 15 of the Charter. Under the UI Act regulations,


251 *Schafer v Canada* (Attorney General), 1997 CanLII 1508 (ON CA), <http://canlii.ca/t/6hf0>, accessed 14 December 2020

252 *Tomasson v Canada*, supra note 209 at para 98. Also, *Schafer v. Canada, supra* note 251 at para 70.

253 *Tomasson v Canada, supra* note 209 at para 134.

254 The applicants were entitled to parental leave but denied maternity leave benefits due that eligibility for these last benefits was restricted to biological mothers. *Schafer v. Canada* (Attorney General), 1996 CanLII 8150 (ON SC) at paras 6, 7 and 15, online <http://canlii.ca/t/1w5p6>, accessed 14 December 2020.

255 Relevant for this dissertation is the application of declaration regarding UI Act subsections 11. 3) and 11.4).

256 *Schafer v Canada, supra* note 251 at para 6.
biological families, who may combine maternity and parental leaves, resulted in an entitlement to a longer leave benefit than adoptive families. While biological parents could take up to 25 weeks of maternity plus parental leave, adoptive families were granted a maximum of 10 weeks of parental leave.  

The applicants claimed that by creating such a distinction, the UI Act provisions discriminated against adoptive mothers and adopted children. The Ontario Court of Justice coincided with the applicants and declared the impugned subsections of the UI Act as discriminatory and contrary to s. 15.  

To reach that conclusion, Cameron J. understood that the purpose of the legislation was “to facilitate the process of family formation, whether by pregnancy or adoption.” The Attorney General of Canada appealed the decision. The Court of Appeal reversed the lower court’s decision and dismissed the declaration of discrimination of subsections 11.3 and 11.4 of the UI Act. In the Court of Appeal’s opinion, Cameron J. misinterpreted the purpose of the UI Act since “[t]he focus of that legislation is the circumstances surrounding employment and unemployment, not the formation of families.” Therefore, the court of appeal understood that “the purpose of the maternity benefit is to protect women who work from the economic costs of pregnancy and childbirth.” According to the Court of Appeal, adoptive and biological mothers experience different challenges, which

257 Ibid at para 6.  
258 Schafer v Canada, supra note 254 at para 261.  
259 Ibid at para 155  
260 Ibid at para 84.  
261 Ibid at para 35.  
262 Ibid at para 38.
justify the legal distinction in the entitlement of maternity leave benefits.\textsuperscript{264} Drawing on that interpretation, the Court of Appeal determined that the distinction in the UI Act maternity and parental leave provisions did not comprise discrimination against adoptive mothers.\textsuperscript{265}

In 1996, the maternity and parental leave provisions switched from the UI Act to the EI Act; however, eligibility for maternity leave benefits remained restricted to biological mothers. In \textit{Tomasson v Canada,}\textsuperscript{266} the differential treatment gave to adoptive and biological mothers under the EI Act maternity leave regulation was challenged as discriminatory and contrary to section 15 of the Charter.\textsuperscript{267} Patti Tomasson applied to the EI Act leave benefits twice upon the placement of each of her adoptive children.\textsuperscript{268} On both occasions, given that she was an adoptive mother, the applications for maternity leave benefits were denied.\textsuperscript{269} Against these rejections, Tomasson challenged the constitutionality of the EI Act maternity leave regulations before the Umpire, claiming that, by providing differential treatment to adoptive and biological mothers, the EI Act maternity leave provision discriminated against adoptive mothers and

\begin{flushright}
\textsuperscript{264} \textit{Ibid} at paras 61 to 70. At para 68 the court stated, \\
“To summarize, it is not necessarily discriminatory for governments to treat biological mothers differently from other parents, including adoptive parents. In order to cope with the physiological changes that occur during childbearing, biological mothers require a flexible period of leave that may be used during pregnancy, labour, birth and the postpartum period. Indeed, such leave provisions may be necessary in order to ensure the equality of women generally, who have historically suffered disadvantage in the workplace due to pregnancy-related discrimination: see Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219 (S.C.C.).”
\end{flushright}

\begin{flushright}
\textsuperscript{265} \textit{Ibid} at paras 61-70 and 84. \\
\textsuperscript{266} \textit{Tomasson v Canada, supra} note 209. \\
\textsuperscript{267} \textit{Ibid} at para 14. \\
\textsuperscript{268} \textit{Ibid} at para 5. \\
\textsuperscript{269} \textit{Ibid}.
\end{flushright}
breached s. 15 of the Charter.\textsuperscript{270} The Umpire, drawing on the Ontario Court of Appeal’s decision in \textit{Shafer}, dismissed the discrimination complaint.\textsuperscript{271} The Umpire’s decision was appealed before the Federal Court of Appeal. The Court\textsuperscript{272} analyzed the purposes of the impugned legislation and found that the EI Act maternity and parental leave benefits served different goals.\textsuperscript{273} On the one hand, maternity leave benefits aim “to provide income while a mother is incapacitated from work due to pregnancy or recuperation.”\textsuperscript{274} On the other hand, parental leave allowances intend “to provide income while parents are caring for or bonding with their children.”\textsuperscript{275} Based on these two different legal purposes, the court understood that the legal distinction in maternity leave benefits relied on the different needs of biological and adoptive parents, concluding that the differential treatment resulting from the impugned regulations was legitimate and did not constitute discrimination against adoptive mothers.\textsuperscript{276} Therefore, the court dismissed the appeal.\textsuperscript{277}

Considering that women and other pregnant people have historically experienced discrimination in the labour market due to pregnancy and childbirth, I agree with the Canadian courts that it is reasonable to provide specific leave entitlements to the person who gives birth, including surrogate parents. Nevertheless, it is important to recognize that adoptive parents

\textsuperscript{270} \textit{Ibid} at paras 7 to 10 and 14.
\textsuperscript{271} \textit{Ibid} at para 15.
\textsuperscript{272} Vote of M. Nadon J.A. In agreement K. Sharlow J.A. J.D.D. and Pelletier J.A. \textit{Ibid}.
\textsuperscript{273} \textit{Ibid} at para 98.
\textsuperscript{274} \textit{Ibid} at para 122.
\textsuperscript{275} \textit{Ibid} at para 122.
\textsuperscript{276} \textit{Ibid} at para 130.
\textsuperscript{277} \textit{Ibid} at para 135.
also need to take time off work during the pre-placement period and that the absence of paid leave benefits during this period may lead to discrimination in the labour market among other negative effects, disproportionally affecting women. In my opinion, in both Schafer and Tomasson, the Canadian courts have lost an opportunity for assessing gender discrimination in the context of complex and heterogeneous families. After discussing the different purposes of maternity and parental leave entitlements, the courts could have gone further by considering whether the needs of adoptive parents are addressed in the current parental leave system and the consequent outcomes for gender inequality.

3.1.3 Section Conclusions: Adoptive Families and Parental Leave Policies

In Argentina and Canada, legislation granting parental and maternity leave benefits still reveal a preference for biological families which hinders adoptive parents’ access to these benefits. In both jurisdictions, the laws that grant parental leave benefits overlook the special needs of adoptive families; however, the extent of the unequal treatment varies between countries. In Argentina, there is a gap in the regulation of parental leave benefits for adoptive parents. Eligibility for maternity and paternity leaves is limited to biological parents, excluding adoptive families from access to these benefits. In contrast, the Canadian EI parental leave system recognizes adoptive families but grants them a shorter leave benefit. The exclusion from maternity leave place adoptive families in a less favorable position compared to biological families. Also, by not providing pre-placement leave benefits, the Canadian law ignores the barriers and difficulties that prospective adoptive parents encounter before the child’s placement day.
The unequal treatment of adoptive families in the parental leave provisions has led to litigation in both countries. Nevertheless, Argentine and Canadian courts have decided the cases differently. On the one hand, Argentine judges and courts have recognized that granting different benefits to biological and adoptive families results in discrimination against the latter. Thus, aiming to fill the gap in the labour legislation, they have provided adoptive parents the same maternity benefits as biological mothers. On the other hand, Canadian courts, have been reluctant to declare that the exclusion of adoptive parents from maternity leave constitutes discrimination.

Adoptive parents need to take time off work to care for and bond with their children, and even before the placement day, they may need to take leave to comply with the adoption proceedings. The current laws that regulate parental leave benefits in Argentina and Canada have demonstrated to fall short in providing support to adoptive families, reinforcing inequality among different family models. Despite some differences, both countries' parental leave laws present significant obstacles for adoptive parents that prevent them from access the same benefits available for biological families.

3.2 Same-Sex Parents

3.2.1 Same-Sex Families in Argentina

3.2.1.1 The Legal Inconsistency in the LCL Maternity and Paternity Leave Regulations

In Argentina, there is legal inconsistency in the recognition of LGBTQ+ families. Over the last decades, Argentina has made significant advances in the recognition of LGBTQ+
rights, which has transformed Argentine families. However, the LCL leave regulations have not been reformed to include these families, producing a legal inconsistency between civil and labour laws.\textsuperscript{278} Incongruous with the egalitarian civil legislation, the LCL parental leave regulations remain attached to a heterosexual nuclear family, excluding same-sex parents and non-cisgender parents.\textsuperscript{279} In the next paragraphs, I identify the obstacles that same-sex and other non-heterosexual parents encounter to access parental leave benefits in Argentina. I argue that the exclusion of LGBTQ+ parents from access to parental leave benefits is mostly due to three features of the LCL maternity and paternity leave regulations. These three aspects are the maternalistic perspective\textsuperscript{280} of care, the use of gendered vocabulary, and the assumption of biological parenthood.

Argentina is internationally known for leading the recognition of LGBTQ+ rights in Latin America. As a result of years of intense activism,\textsuperscript{281} several laws were introduced during the last decade granting equal rights and recognition to members of LGBTQ+ communities. This legal transformation began in 2010 with the enactment of the Egalitarian Marriage Law.\textsuperscript{282}

\textsuperscript{278} Eleonor Faur, \textit{supra} note 16.
\textsuperscript{279} \textit{Ibid}.
which enabled same-sex couples to get married for the first time in Latin America. The next breakthrough took place in 2012 with the introduction of the Ley de Identidad de Genero\textsuperscript{283} that recognized the right of self-perceived gender identity. Subsequently, the enactment of a law regulating medically assisted reproduction\textsuperscript{284} in 2013 constituted a significant step forward the recognition of same-sex families.\textsuperscript{285} To complete this process, in 2015, the new Commercial and Civil Code included gender-neutral vocabulary and recognized gender and family diversity.\textsuperscript{286}

This legal progress produced important transformations in Argentine families,\textsuperscript{287} including the recognition of same-sex parents. According to the 2010’s national census, same-sex couples represented 0.33\% of Argentine couples\textsuperscript{288} and only 21\% have children living with them.\textsuperscript{289} Even though same-sex families represent a tiny proportion, this family model reveals a growing trend.\textsuperscript{290} According to data published by the Homosexual Community of Argentina,
CHA, the number of same-sex marriages has skyrocketed since the enactment of the Egalitarian Marriage Law. In 2013, after three years of the law’s enactment, were registered about 7000 same-sex marriages in Argentina, a number that was doubled by 2016.

The legal advances in the recognition of LGBTQ+ rights and the consequent transformations in family structures have not reached labour legislation in general and parental leave provisions in particular. As Eleonor Faur has expressed, “there is a stark contrast between the revolution in Argentina’s LGBT rights, and maternalistic childcare policy.”

Inconsistent with the egalitarian civil legislation, the LCL parental leave regulations remain attached to a heterosexual nuclear family, excluding same-sex, transgender, and other non-heterosexual parents.

I argue that three characteristics of the Argentine labour law lead to the exclusion of LGBTQ+ parents from access to parental leave benefits. These features are the maternalistic perspective of care, the use of gendered vocabulary, and the assumption of biological parenthood. Regarding the first character, Esquivel & Faur have pointed out that parental leave

291 Comunidad Homosexual Argentina (CHA)
293 Ibid.
295 Ibid.
296 According to Blofield and Franzoni, policies with a maternalist perspective are those that value and support care work as a female responsibility, reinforcing the gender division of labour and gender stereotypes of men as main breadwinners and women as main caregivers. Merike Blofield & Martínez Franzoni, supra note 280.
policies in Argentina remain embedded with a maternalistic perspective of care.\textsuperscript{297} By assuming that women are always primary caregivers, the LCL grants uneven benefits to mothers and fathers, being maternity leave significantly longer than paternity leave. This maternalism and the consequent gender division of roles do not match the experiences of many LGBTQ+ parents, producing unfair outcomes. For instance, if the current regulations are taken literally, only one of the mothers in a lesbian couple could take 90 days of maternity leave and, in a gay male family, only one of the fathers could take 2 days of paternity leave.\textsuperscript{298}

Connected to the law’s maternalistic approach, the second factor is the use of gendered vocabulary. Unlike the civil code, the LCL parental leave provisions have not introduced gender-neutral language.\textsuperscript{299} Terms such as \textit{female employee}, \textit{mother}, and \textit{father} persist in the text of the labour law, excluding same-sex and other parents who do not conform to the female/male binary.\textsuperscript{300} The third factor that leads to the exclusion of LGBTQ+ families is the legal assumption of biological parenthood.\textsuperscript{301} Under the LCL regulations, eligibility for maternity and paternity leave benefits is restricted to the biological mother and the biological father, respectively.\textsuperscript{302} Moreover, the LCL does not grant similar benefits for adoptive families

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\textsuperscript{297} Valeria Esquivel & Eleonor Faur, \textit{supra} note 15.
\textsuperscript{299} Eleonor Faur, \textit{supra} note 16 at 622 - 623.
\textsuperscript{300} A. L. B. Y A. I. O. s/ Materia A Categorizar, \textit{supra} note 226.
\textsuperscript{302} LCL, \textit{supra} note 14 articles 157.a and 177.
\end{flushright}
and does not provide income replacement for parents who need to take time off work to undergo assisted reproductive treatments. Considering that adoption\textsuperscript{303} and the use of assisted reproductive techniques\textsuperscript{304} are important alternatives for same-sex couples to become parents, the lack of provision of paid leave in these cases is especially detrimental for same-sex families.

3.2.1.2 The Outcomes of the LCL Inconsistency: Litigation and the Need for Legal Reform

In Argentina, the LCL maternity and paternity leave regulations exclude LGBTQ+ parents.\textsuperscript{305} The maternalistic assumptions, the gendered vocabulary, and the attachment to biological parenthood that characterize the LCL leave regulations restrict access to maternity and paternity leave benefits for same-sex and other families that do not conform to the heterosexual nuclear family. This legal exclusion has led to extensive litigation.\textsuperscript{306}

The case \textit{A. L. B. Y A. I. O. S}\textsuperscript{307} illustrates the struggles experienced by gay male same-sex families. In this case, a gay couple adopted two children and claimed extended leave

\textsuperscript{303} The enactment of the egalitarian marriage law entailed the legalization of same-sex adoptions. Before 2010, only heterosexual couples were allowed to adopt. Diana Maffía, \textit{supra} note 285.

\textsuperscript{304} According to Maffía, most same sex-parents are female and have used assisted reproductive techniques to conceive their children. \textit{Ibid} at 98.


\textsuperscript{306} \textit{Ibid}.

\textsuperscript{307} \textit{A. L. B. Y A. I. O. s/ Materia A Categorizar, supra} note 226.
benefits for one of the parents, to the same extent as the LCL maternity leave benefit.\textsuperscript{308} The judge understood that the LCL regulations, by only granting maternity and paternity leave benefits,\textsuperscript{309} do not match the experiences of same-sex families, perpetuating gender stereotypes.\textsuperscript{310} By asking which father should receive the benefits, the judge concluded that entitling only one of the fathers with an extended “paternity leave” would still be discriminatory.\textsuperscript{311} Hence, the judge ordered granting leave benefits, with the same extension and compensation provided by the LCL maternity leave regulation, simultaneously to both fathers.\textsuperscript{312}

In several cases,\textsuperscript{313} non-gestating mothers in lesbian same-sex families have filed judicial complaints against the decisions that denied them maternity leave benefits and claimed the extension of the same allowances available for gestating mothers.\textsuperscript{314} Overall, the courts have

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{308} \textit{Ibid}, considerando I, page 1.
\item \textsuperscript{309} \textit{Ibid}, considerando II, pages 1 -2.
\item \textsuperscript{310} \textit{Ibid}, considerando III, pages 2-3.
\item \textsuperscript{311} \textit{Ibid}, considerando III, page 2.
\item \textsuperscript{312} \textit{Ibid}, resuelvo, page 4, last paragraph.
\item \textsuperscript{313} See Natalia Saralegui, \textit{supra} note 305.
\end{itemize}
\end{footnotesize}

It is important to mention that, in these cases, the legislation considered was maternity leave regulations under provincial labour laws and professional statutes rather than the LCL maternity leave provisions. Nevertheless, the issues, arguments, and judicial decisions may be applicable to future litigation regarding the LCL regulations.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{314} \textit{M. M. C. c GCBA s/ Amparo} (Expte. 21864/2018-0), Ciudad Autónoma de Buenos Aires, 08/08/2018, Juzgado De 1ra Instancia En Lo Contencioso Administrativo Y Tributario Nº 15 Secretaría N°30.
\item \textit{N.G. N. c GCBA S/ medida cautelar autónoma} (Expte. 35690/2018-0), Ciudad Autonoma de Buenos Aires, Octubre 2018, Juzgado en lo Contencioso y Tributario N° 12 de CABA.
\item \textit{Diaz Reck c ARBA s/ Medida autosatisfactiva} (Expte Nº50832/2018), La Plata, 27/12/2018, Juzgado en lo Contencioso Administrativo Nº1 de La Plata.
\end{itemize}
\end{footnotesize}
agreed with the claimant and ordered to grant maternity leave benefits to the non-gestating mother in a lesbian couple with equal length and compensation as those available for gestating mothers. To illustrate, in the cases *M. M. C. c GCBA*, *N. G. N. c G.C.B.A.*, *Diaz Reck M. c A.R.B.A*, and *E. B. A. y otros c G.C.B.A* the courts assisted reason to the claimants and ordered to provide equal maternity leave benefits to the non-gestating mother.

However, in other cases, courts have reached adverse decisions for the claimants, granting less favorable benefits to the non-gestating mother or even dismissing the discrimination claim and denying access to maternity leave benefit for the claimants. For instance, in *Pasarin Y. B. c INSSJP – PAMI*, a federal court confirmed the lower court’s decision that granted maternity leave benefits to the claimant, a non-gestating mother in a lesbian family, but for a shorter period than that available for gestating mothers. In this case, the non-gestating mother was allowed to take only the maternity leave benefit corresponding

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E. B. A. y otros c GCBA, Ciudad Autónoma de Buenos Aires, 19/03/2019, Juzgado en lo Contencioso Administrativo y Tributario No 1 de la Ciudad Autónoma de Buenos Aires.

*M. M. C. c GCBA s/ Amparo (Expte. 21864/2018-0), Ciudad Autónoma de Buenos Aires, 08/08/2018, Juzgado De 1ra Instancia En Lo Contencioso Administrativo Y Tributario Nº 15 Secretaría Nª30.

*N. G. N. c GCBA s/ medida cautelar autónoma (Expte. 35690/2018-0), Ciudad Autonoma de Buenos Aires, October 2018, Juzgado en lo Contencioso y Tributario N° 12 de CABA.

*Diaz Reck c ARBA s/ Medida autosatisfactiva (Expte N°50832/2018), La Plata, 27/12/2018, Juzgado en lo Contencioso Administrativo N°1 de La Plata.

E. B. A. y otros c GCBA, Ciudad Autónoma de Buenos Aires, 19/03/2019, Juzgado en lo Contencioso Administrativo y Tributario No 1 de la Ciudad Autónoma de Buenos Aires.


to the period after the day of childbirth. Moreover, in \emph{R. C. M.}, a provincial court of appeal overturned the lower court’s decision that granted maternity leave benefits to the non-gestating mother. The court understood that the exclusion of non-gestating mothers from maternity leave benefits did not constitute discrimination on the grounds of gender or sexual orientation. According to the court, the differential treatment granted to gestating and non-gestating mothers under the laws that regulate maternity leave benefits was reasonable and attended to these mothers’ different experiences. Concretely, the biological transformations experienced by gestating mothers justified the legal differentiation.

Bearing in mind the different outcomes of the cited case law, access to parental leave benefits for same-sex families in Argentina appears uncertain. To include LGBTQ+ families, avoid future litigation, and align labour laws with the rest of the national legislation, the LCL leave regulations should be urgently amended. Accordingly, between March 2019 and April

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  \item 321 The impugned collective agreement (Convenio Colectivo de Trabajo para los Trabajadores del INSSJP) grants a maternity leave benefit for a maximum of 100 days. Within this period, 30 days must be taken before the day of childbirth, leaving a maximum of 70 days that can be enjoyed after that day. In \emph{Pasarin}, the court ordered to grant the claimant maternity leave for a period of 70 days corresponding to the post-partum benefit. \textit{Ibid}, considerando VI, page 5-6; resuelvo I [resolutive section I] page 9.
  \item 322 \textit{R. C. M. P/ Medida Autosatisfactiva, Cámara de Apelaciones en lo Civil, Comercial, Minas, de Paz y Tributario No 3, Mendoza, 12/02/2020}, online \url{http://www2.jus.mendoza.gov.ar/listas/proveidos/vertexto.php?id=7528979096} accessed 18 December 2020.
  \item 323 \textit{Ibid}, Resuelve 1º [resolutive section 1º], page 16.
  \item 324 \textit{Ibid} at 1, vote Dr. Lamena point No. 1.
  \item 325 \textit{Ibid} at 12.
  \item 326 \textit{Ibid} at 9.
  \item 327 \textit{Ibid}.
  \item 328 The urgent need for legal reform was expressed in the case \textit{Diaz Reck} “Es imperioso en este sentido que la legislatura local avance en el dictado de una normativa que contemple esta nueva realidad de conformación familiar y de parentesco de un modo inequívoco, con la finalidad de evitar la reiteración
\end{itemize}
2020, some legislators have proposed reforms to the LCL leave regulations to include same-sex and other non-heterosexual families. With this aim, some bills have proposed using gender-neutral vocabulary in the legal text, replacing gendered terms such as mother and father for other more gender-inclusive, like parent.\textsuperscript{329} One bill introduced in 2019 addressed the difficulties experienced by lesbian same-sex families by proposing a new type of leave benefit, a \textit{co-maternity leave}.\textsuperscript{330} The submitted bill stated that the non-gestating mother in a lesbian same-sex couple has the right to access equal maternity leave benefits as the gestating mother.\textsuperscript{331} Nevertheless, to date none of these proposed amendments have succeeded; thus, LGBTQ+ families in Argentina continue struggling to access parental leave benefits.

\section*{Notes}


\textsuperscript{331} Ib\textit{id}, at 1.
3.2.2 Same Sex Families in Canada

In Canada, same-sex marriage was legalized in 2005 through the enactment of the Civil Marriage Act.\textsuperscript{332} Even before that year, some rights were recognized to same-sex couples at the federal level and in some provinces.\textsuperscript{333} For instance, since the 1970s, same-sex couples in Canada have been entitled to some rights and duties of marriage.\textsuperscript{334} Furthermore, beginning in the mid-1990s, some provinces have recognized same-sex couples as common-law relationships.\textsuperscript{335} The growing legal recognition of LGBTQ+ families has reshaped the organization of Canadian households. The 2016 Census revealed that the percentage of same-sex couples in Canada sharply rose by over 60% between 2006 and 2016.\textsuperscript{336} The percentage of same-sex couples with children living with them also grew from 8.6% in 2001 to 12% in 2016.\textsuperscript{337} Among same-sex couples who had children living with them, lesbians couples

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Ibid.
\item Ibid at 5.
\end{enumerate}
\end{footnotesize}
significantly outnumbered gay male couples, accounting for four-fifths of the total of same-sex couples in 2016.\footnote{Ibid. Following Fiona Kelly’s opinion, one possible explanation of the prevalence of lesbian parents over gay parents is “the fact that lesbians can, more easily than gay men, create the types of families envisaged by the law — nuclear families where the donor is anonymous — ”and therefore the legal system “tend to offer a more favourable framework for lesbians.” Fiona Kelly, “One of these Families is Not Like the Others: The Legal Response to Non-normative Queer Parenting in Canada” (2013) 51:1 Alberta Law Reviw 1 at 2.}

Considering that some assumptions of an ideal nuclear family remain in the legislation, the legal recognition of LGBTQ+ families in Canada has not been even. While some families, such as lesbian families, have been largely recognized by the legal system, other non-heterosexual families still find several legal challenges, as in the case of non-normative queer families.\footnote{Ibid.} In this regard, Fiona Kelly has argued that LGBTQ+ families who most resemble the nuclear family model have the greatest chances to be legally protected.\footnote{Ibid at 2-3.} Conversely, the more divergent from the nuclear family the LGBTQ+ family is, the highest the challenges to access to legal rights and benefits.\footnote{Ibid at 3.} The same reasoning may apply to parental leave regulations. Families composed of two same-sex biological or adoptive parents are closer to the ideal model; thus, they will likely enjoy parental leave benefits like those conferred to heterosexual parents. In contrast, non-normative queer families, who deviate more from the nuclear family norm, will more likely find hurdles to access equal parental leave benefits as heterosexual parents. In section 3.5, I analyze with more detail the barriers to and the exclusion from access to parental leave benefits experienced by non-normative queer families.
Regarding same-sex parents, the EI parental leave system appears highly inclusive, granting equal benefits to parents regardless of gender. The scarce literature on the topic has found that the policy design, especially the use of gender-neutral or gender-inclusive language, is a determining factor in the inclusiveness of parental leave benefits for same-sex families.\(^{342}\)

In Canada, shared parental leave benefits are granted in gender-neutral terms to “parents”, including different-sex and same-sex parents. The use of gender-neutral vocabulary is also evident in the recently introduced Sharing Parental Leave Benefit that has been made available for the “other parent”\(^ {343}\) rather than restricted to fathers.\(^ {344}\) Hence, same-sex couples who have shared the leave benefit can enjoy the extra weeks granted under this new allowance.\(^ {345}\)

Although same-sex parents in Canada are entitled to parental leave benefits, the maximum total duration of the accumulated parental leave entitlement differs among heterosexual and female same-sex biological parents, on the one hand, and male same-sex

\(^{342}\) Wong et al have compared the duration of parental leave benefits available for different and same-sex parents in 34 OECD. To carry out this comparison they relied on the legislative language and classified maternity, paternity, and parental leave policies as gender-restrictive, gender-neutral, and gender-inclusive. Elizabeth Wong et al, “Comparing the Availability of Paid Parental Leave for Same-Sex and Different-sex Couples in 34 OECD Countries” (2020) 49:3 J Soc Policy 525 doi 10.1017/S0047279419000643 accessed 4 January 2021.


\(^{343}\) These “take it or lose it benefits” are generally implemented to promote gender equality in heterosexual families by encouraging men to take some weeks off work to take care of their children.

parents, on the other hand.\textsuperscript{346} Given that eligibility for maternity leave benefits is restricted to biological mothers, only lesbian and heterosexual couples can qualify for this benefit, whereas male same-sex parents are excluded. Consequently, male same-sex families, unable to accumulate maternity and paternity leave benefits, are granted a shorter maximum number of weeks of leave than their lesbian and heterosexual counterparts.\textsuperscript{347} Specifically, lesbian and heterosexual couples can accumulate maternity and parental leave benefits and take up to 55 weeks of maternity plus regular parental leave or 84 weeks of maternity plus extended parental leave, when including the sharing bonus of 5 and 8 weeks, respectively (figure 3), or 50 and 76 weeks if the bonus is not considered. In contrast, male same-sex couples can take a maximum of 40 and 69 weeks of regular or extended parental leave benefits, respectively (figure 3).

3.2.3 Section Conclusions: Same-sex Parents and Parental Leave Policies

The analysis of the Argentine and Canadian parental leave regulations reveals a stark contrast between the benefits available for same-sex parents in each country. In Argentina, parental leave provisions remain attached to maternalistic perspectives, use gendered vocabulary, and rely on biological parenthood. Thus, parental leave benefits do not address the lived experiences of same-sex families, resulting in unequal access across gender. In several precedents, tribunals intended to fill the gaps in the labour law and comply with the civil legal

\textsuperscript{346} Elizabeth Wong et al, \textit{supra} note 342.

\textsuperscript{347} \textit{Ibid.}
framework, expressing the need for legal reform. However, only a few bills introduced in the last year address the needs of same-sex parents. In contrast, the Canadian federal legislation grants parental leave benefits to eligible parents regardless of gender, making parental leave benefits accessible for same-sex parents. Nevertheless, there are some differences in the length of leave benefits granted to lesbian and gay same-sex parents due to limitations associated with the extension of maternity benefits to biological mothers. Unable to access maternity leave benefits, gay same-sex parents are entitled to a shorter leave period than lesbian and heterosexual couples.

### 3.3 Lone-Parent Families

*Lone-parent family* refers to families composed of one parent and at least one dependent child living with them. It is used as an umbrella term that includes divorced, never-married, and lone-parents by choice. The analysis in this section will focus primarily on lone motherhood with a brief reference to the situation of lone fathers. Lone mothers are prominent among lone-parent families; in Argentina and Canada, more than 80% of lone-parents are women.\(^{348}\) In addition, lone mothers exhibit the highest risk of poverty among family groups,

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and deal with distinct stereotypes, bad mother\textsuperscript{349} and deviant mother.\textsuperscript{350} For these reasons, this study will focus on lone motherhood.

### 3.3.1 Lone Motherhood, Vulnerability, and Parental Leave Policies

The proportion of lone-parent families has considerably increased over the last decades and is gaining prominence. Statistics show that, in Argentina, the percentage of lone-parent families rose from roughly 12\% in 1986 to 19\% in 2018.\textsuperscript{351} Similarly, in Canada, the percentage of lone-parent families almost doubled between 1981 and 2011, increasing from 12.7\% to 21.5\% over that period.\textsuperscript{352} An important fact is that lone-parent families are mostly headed by women. Thus, lone mothers represented 85\%\textsuperscript{353} and 81\%\textsuperscript{354} of lone-parent families in Argentina and Canada, respectively, revealing the gender dimension of this family model.

\begin{flushright}
\textsuperscript{349} Nitya Iyer, "Some mothers are better than others: A re-examination of Maternity Benefits" In Susan B. Boyd, ed., Challenging the Public/Private Divide: Feminism, Law, and Public Policy (Toronto: University of Toronto Press, 1997) 168.


\textsuperscript{351} Gala Díaz Langou et al, “Día de la Madre: las Políticas Públicas Todavía no se Adaptan a los Cambios en las Familias”, CIPPEC, chart 1, online \url{https://www.cippec.org/textual/dia-de-la-madre-las-politicas-publicas-todavia-no-se-adaptan-a-los-cambios-en-las-familias/?fbclid=IwAR1rR8-rtbEa9oannypJBzf2YP74oRkZD8AwJVxcY3pcx5uVbbIE12DiCCs} accessed 2 February 2021.

\textsuperscript{352} According to Statistics Canada, in 1981, 12.7\% of children aged 24 and under lived with one parent, while 84.7\% lived with two married parents. By 2011, the percentage of children living with one parent accounted for 21.5\%, yet, the percentage of two married families dropped and made up 64.9\%. Statistics Canada, Lone-parent Families: The New Face of an Old Phenomenon, Canadian Megatrends, Online \url{https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015002-eng.htm} accessed 2 February 2021.

\textsuperscript{353} Georgina Binstock, supra note 348.

\textsuperscript{354} Statistics Canada, supra note 348.
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Several studies indicate that lone parents, and especially lone mothers, are a vulnerable group who reports significantly higher risks of poverty than two-parent families.\(^\text{355}\) To illustrate, empirical research reveals that 30.9% of lone mothers in Argentina were indigent and 17.8% lived in poverty by 2010.\(^\text{356}\) Likewise, in 2014, lone mothers living in low-income households in Canada made up 26%, whereas couples with children accounted for 5.1%.\(^\text{357}\) One possible explanation is the fact that lone mothers must deal alone with productive and reproductive work.\(^\text{358}\) This double burden may trap them in a circle of vulnerability.


\(^{358}\) Carina Lupica, *supra* note 356 at 16.
The lack of flexibility to care for their children makes lone mothers more likely to be employed part-time and in precarious jobs. For instance, in Argentina, only 4 out of 10 lone-mothers secured formal employment by 2010, while in Canada, 21.7% of lone mothers worked part-time compared to 6.3% of lone fathers by 2014. Non-standard jobs pay lower wages, which adversely affects lone mothers' financial independence. Consequently, lone


Also, statistics show that lone parents are less likely to work full-time and full year than coupled parents. Statistics Canada, Results from the 2016 Census: Work activity of families with children in Canada, by André Bernard, Insights on Canadian Society, Catalogue no. 75-006-X (Otawa: May 15, 2018) online: https://www150.statcan.gc.ca/n1/pub/75-006-x/2018001/article/54969-eng.htm accessed 4 February 2021.

361 Carina Lupica, supra note 356 at 16.

362 Statistics Canada, supra note 352.

363 ILO defines non-standard forms of employment as “an umbrella term for different employment arrangements that deviate from standard employment. They include temporary employment; part-time and on-call work; temporary agency work and other multiparty employment relationships; as well as disguised employment and dependent self-employment.” ILO, Non-standard Forms of Employment, online https://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm accessed 4 February 2021
mothers\textsuperscript{364} are usually unable to afford to delegate care work to daycare,\textsuperscript{365} which hinders their chances to remain in the workforce.\textsuperscript{366}

Some scholars\textsuperscript{367} agree that parental leave policies that address the special needs of lone parents, along with other work-family policies,\textsuperscript{368} may be effective tools to reduce lone mothers' poverty risks. The availability of parental leave benefits may increase lone-mothers' chances to remain in the workforce and reduce the negative impacts on employment. However, parental leave policies that overlook the particularities of lone-mother families may reinforce their vulnerabilities.\textsuperscript{369}

### 3.3.2 Lone-Parent Families in Argentina

In Argentina, parental leave legislation, embracing a maternalistic perspective, grants protection to working mothers regardless of whether they are lone or partnered. The LCL allows all eligible female employees to take 90 days of paid maternity leave. Despite this

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\textsuperscript{365} “For lone mothers, poverty results in part from their inability to seek employment because of a lack of daycare that is accessible, affordable, and of reasonable quality.” Barbara Harris et al., \textit{supra} note 355 at 172.

\textsuperscript{366} Not surprisingly, statistics show that “one third of single mothers with young children had no reported work activity in 2015.” Statistics Canada, \textit{supra} note 352.

\textsuperscript{367} Rense Nieuwenhuis & Laurie Maldonado, \textit{supra} note 355.

\textsuperscript{368} Some examples of work-family policies are childcare support, family allowances, and affordable and available daycare.

\textsuperscript{369} Barbara Harris et al., \textit{supra} note 355 at 171.
apparent equality, lone mothers face significant barriers to access maternity leave. The LCL parental leave regulations are attached to formal employment, excluding informal workers and unemployed parents.\(^{370}\) Considering that lone mothers exhibit higher rates of unemployment\(^{371}\) and informal employment than their partnered counterparts, they will more likely be excluded from the labour law benefits. This pattern of exclusion reinforces social inequality among lone mothers.\(^{372}\)

Even though the percentage of lone-father families\(^{373}\) is significantly lower compared to lone-mothers, this family model struggles to combine work and childcare. The LCL parental leave system assumes that men are the providers of the family's economy and discourages them to participate in childcare.\(^{374}\) Thus, the law grants fathers an insignificant 2-day paternity leave, which is insufficient to meet the needs of lone-father families. Neglected by the legal system, these parents depend on the generosity of their employers to take time off work.\(^{375}\)


\(^{371}\) According to data collected from the 2010 census, 9% of lone mothers were unemployed compared to 4% of coupled mothers. Daniela Alicia Gorosito, “Mujeres Madres Solas de Argentina y Córdoba. Análisis Comparativo de los Censos 2001 y 2010”, working paper, (2018), Chart 12.b, at 15.

\(^{372}\) Higher income lone mothers are more likely to secure better jobs and to afford paying for childcare private services. Carina Lupica, *supra* note 356.


\(^{374}\) Eleonor Faur, *supra* note 170 at 135.

3.3.3 Lone-Mother Families in Canada

In Canada, lone mothers encounter further barriers than partnered mothers when seeking access to parental leave benefits. Particularly, the restrictive eligibility criteria and the provision of a long leave with a low compensation constrain the availability of parental leave benefits for single-mother families. The first barrier that Canadian parents encounter is the restrictive eligibility criteria. The requirement of 600 insurable hours accumulated during the previous year, limits the access for non-standards workers. Considering that lone mothers are overrepresented in non-standard jobs, they are especially disadvantaged by the prohibitive eligibility criteria. Hence, lone mothers are more likely to be excluded from maternity and parental leaves than partnered mothers.

Even when meeting the eligibility requirements, lone mothers face further barriers. The Canadian parental leave regulations under the EI Act provide a generous length of leave that is expected to be shared between two parents. This expectation results in less favorable conditions for lone parents. First, by being unable to split the leave with a partner, lone parents must choose between taking the full period of leave or a reduced one. Both options have detrimental effects. Long leaves may negatively affect lone parents’ employment and increase the risks of poverty. Conversely, shorter leaves may enhance employment opportunities but...
reduce time for child-parent attachment. In addition, lone parents are excluded from the *EI Parental Sharing Benefit*,\(^{381}\) which affects the total length of leave that they can take (figure 1). As Doucet et al. have noticed, access to this extra benefit is restricted to two-parent families, given that “the father or second parent can only qualify for the benefit if both parents qualify for and take leave benefits”\(^{382}\). Consequently, even when lone parents decide to take the full leave, they are allowed a shorter period than two-parent families.\(^{383}\)

Moreover, the Canadian parental leave system is especially costly to lone mothers.\(^{384}\) As Amilon points out, lone mothers are unable to share the costs of taking time off work with a partner. They must bear alone with the direct\(^ {385}\) and indirect\(^ {386}\) costs of taking parental leave.\(^ {387}\) Hence, the low rate of income replacement hinders lone mothers’ chances to take parental leave and conciliate reproductive and productive work, disproportionately affecting lone-mothers employed in lower-earning and non-standard jobs who generally do not have access to employer-provided top-up benefits. Statistics and quantitative research confirm that the use of parental leave benefits is significantly lower among lone parents than among coupled


\(^{382}\) _Ibid._

\(^{383}\) Judy Jou et al, _supra_ note 207 at 193.

\(^{384}\) Anna Amilon, _supra_ note 359.

\(^{385}\) Direct costs are represented by the reduction of earnings. _Ibid_ at 36.

\(^{386}\) The indirect or signaling costs are “the potential punitive ramifications” in the labour market. _Ibid_ at 36 -37.

\(^{387}\) _Ibid_ at 36.
parents and that the family’s income is a factor that influences that decision. Thus, lower-income parents show lower take-up rates.

The burdens to access parental leave benefits do not affect all lone mothers to the same extent. The literature agrees that the most vulnerable groups, those who most need support, are likely to be excluded. When lone mothers have low education levels, are Indigenous, racialized, have disabilities, or are immigrants, the probabilities to be excluded from maternity and parental leave benefits increase considerably. Consequently, unable to combine work and care, these women and their children experience a higher risk of poverty, reinforcing social inequalities across families.

Relatedly, Fiona Kelly has shown that single mothers by choice (SMC), a non-traditional family model that is growing in Canada, experience several legal challenges and have had

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390 Lindsey McKay et al., *supra* note 69.


394 Nitya Iyer, *supra* note 349.
Although Kelly does not refer to parental leave regulations, it is possible to infer that, since SMC challenges the two-parents assumption they might find higher barriers to access the same parental leave benefits compared with nuclear families. As lone parents, SMC faces the barriers described above for lone parents in general, such as the exclusion from the extra weeks of leave granted under the Parental Sharing Benefit to two-parent families. On top of that, the rhetoric of choice may be even more pervasive for these lone mothers. As Gillian Calder has noted, the rhetoric of choice and the assumption of unpaid care work as a matter of individual responsibility have influenced the debates regarding parental leave benefits in Canada and supported the implementation of restrictive eligibility requirements, among other outcomes. Given that SMC have chosen to have and raise their children alone, the rhetoric of choice will likely be deployed to detriment of these mothers preventing potential legal reforms of the parental leave regulations aimed at addressing the needs of these families. Also, the rhetoric of choice may negatively affect the decisions on possible future discrimination complaints by SMC that challenge the EI Act parental leave regulations.

395 Fiona Kelly, supra note 141 at 102.
3.3.4 Section Conclusions: Lone Parents and Parental Leave Policies

Lone mothers are one of the most vulnerable family groups. The difficulties of balancing paid work and unpaid care work put these mothers and their children at risk of poverty. Parental leave policies that are attentive to their needs may be effective to mitigate lone mothers’ difficulties. However, Argentine and Canadian parental leave laws pose significant barriers that result in the exclusion of the most vulnerable lone mothers, reinforcing gender and social inequalities. To lessen women’s poverty risks and secure equal opportunities to lone mothers, both countries should introduce parental leave benefits that meet the particular needs and challenges of this family model.

3.4 Assisted Reproductive Technologies and Multi-parents

The development of assisted reproductive technologies, socio-cultural shifts, and legal changes have made it possible that a child may have more than two parents.397 Multi-parent families are a social reality that challenges one of the bases of the ideal nuclear family, the assumption of a two-parent family unit. This family model is complex and can take different structures.398 Non-normative queer families399 illustrates this complexity. Non-normative

398 Haim has identified five multiparent structures: families emerged from assisted reproductive techniques, co-parenting, stepfamilies, open adoptions, and extended kinship care. Ibid.
399 Fiona Kelly, supra note 338.
queer families are families composed of three or more parents, yet, as Fiona Kelly has pointed out, these families may take various configurations.  

The heterogeneity that characterizes multi-parent families may hinder their legal regulation. Notwithstanding, these families have slowly begun to be legally recognized. The difference between regulation and recognition of multi-parent families has been clearly stated by Abraham Haim. According to him, “[r]ecognizing multiparents requires the state to have a more passive role than regulating multiparents, as recognition reflects the individuals' choices while regulation requires the state to act as an administrator that is constructing the family structure.”

400 Fiona Kelly mentioned three configurations of non-normative queer families including

“(1) where three or more individuals agree to co-parent a child across two households; (2) where it is agreed that a gay man (and his partner) are parents and have regular contact, but the child lives with the lesbian woman or couple; or (3) where a gay couple raises a child conceived via surrogacy, but agree that the birth.”

Ibid at 4.


402 Ibid at 428.
In the case of Argentina, the state has avoided recognizing multiparent families and the civil and commercial code limits the number of parents to a maximum of two. However, the same civil law includes assisted reproductive technologies as a type of filiation and recognizes the value of the parents’ procreational will, opening the door to the rise and recognition of multi-parent families. Consequently, in several cases, civil registers and tribunals have conferred parental status to three parents. In Canada, multiparent families have achieved some legal recognition. In the precedent A.A. v B.B, the Ontario Court of Appeal ruled that a child may have three parents. Also, Canadian multi-parent families have been recognized by the law. In 2013 the province of British Columbia passed the British


404 Código Civil y Comercial de la Nación, supra note 160 at Libro Segundo: Relaciones Familiares, Titulo V: Filiación, articulo 558 (Civil and Commercial Code, Second Book: Familial Relationships, Title V: Filiation, article 558.)

405 In Litardo’s et al opinion, denying the registration of the parental status to multiparent families and imposing them the extra burden of going through litigation to get the same recognition as other families, will constitute discrimination. Emiliano Litardo et al, “Multiple Filiacion en Argentina: Ampliando los Limites del Parentesco.” 27 Revista Boliviana de Derecho 372 at 376 online https://www.revista-rbd.com/descargas/RBD%20Num.%202027%20Completo.pdf accessed 21 January 2021.

406 Marisa Herrera, supra note 156.

407 In this precedent, the biological mother, her couple, and the biological father of the child claimed the concession of parental status to the biological mother's couple. That means that the child would have two mothers and one father. The Ontario Superior Court of Justice dismissed the application. The decision was appealed before the Ontario Court of Appeal who, recognizing the complexity of the familial institution, used its parens patriae jurisdiction and conferred parental status to the third parent. A.A. v B.B., 2007 ONCA 2 (CanLII), online <http://canlii.ca/t/1q6jh> accessed 23 March 2020.
Columbia Family Law Act\(^{408}\) which enables children conceived through assisted reproduction techniques to have more than two parents.\(^{409}\)

Despite this significant progress in the recognition of multi-parent families, Argentine and Canadian parental leave laws overlook this complex family model and limit maternity and parental leaves to lone and two-parent families. The only exception in which the parental leave system has recognized multiparent families is surrogacy. In Canada, where altruistic surrogacy is allowed,\(^{410}\) the EI Act protects surrogate mothers' recovery needs and grants them maternity leave benefits (figure 3) equal to other parents who give birth.\(^{411}\) Unlike Canada, Argentina has neither banned nor allowed surrogacy. Despite this lack of regulation, the creation of surrogacy agreements has recently increased among Argentine families, simultaneously with the claims for its legal recognition. In several recent cases, Argentine tribunals have accepted the legality of surrogacy and, relying on the parents’ procreational will, have awarded parental


\(^{409}\) Fiona Kelly has pointed out several limitations contained in the BC Family Law Act regarding the recognition and regulation of multiparent families. Fiona Kelly, supra note 338.


\(^{411}\) I have opted for using gender-neutral terms such as “parents who give birth” and “pregnant parents” aiming to address the lived experiences of transexual and bisexual pregnancy and parenthood. For a better understanding of the obstacles that the use of gendered language related to pregnancy and reproduction poses on transexual and bisexual persons, see, Amber Leventry, “Trans and Nonbinary People Can Be Pregnant Too”, Parents (October 9, 2019) online https://www.parents.com/pregnancy/my-body/pregnancy-health/trans-and-nonbinary-people-can-be-pregnant-too/ last accessed 20 January 2021.
status to the claimants. In the novel case *H.M y otro s/ Medidas Precautorias* the family’s tribunal of Lomas de Zamora, apart from confirming the legality of surrogacy, ordered to grant maternity leave benefits to the non-gestating mother based on the best interest of the child.

The growing trend in the regulation and use of assisted reproductive technologies has produced the rise of complex family models, such as multi-parent and queer non-normative families, that challenge the traditional nuclear family. These transformations in the familial institution have not been yet reflected in Argentine and Canadian parental leave laws. Both countries’ laws remain attached to a two-parent family and do not provide proper solutions for multi-parent families. In Argentina, three bills, introduced over the period 2019-2020, propose updating the Labour Contracts Law by providing special protections to employees who are undergoing assisted reproductive treatments, but none of them addresses the particular case of multi-parent families. Consequently, unless the laws introduce parental leave benefits that meet the complexity of modern families, multi-parents along with other non-traditional families will depend on the tribunals’ decisions to access these benefits.

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412 Between 2012 and 2016 were identified 14 precedents in which the claimants demanded the recognition of a family that emerged from a surrogacy arrangement. All of these claims were granted. Agustina Pérez, “Gestación por Sustitución y Licencias por Maternidad/Paternidad: La Agenda de Cuido a la Luz de la Jurisprudencia Española y la Perspectiva Argentina” (2017) 7:1 *Oñati socio-legal Ser* 205 at 214 online https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2779614 accessed 10 February 2021.

413 *Herrera, Mónica y otro/a s/Medidas Precautorias*, Lomas de Zamora, Buenos Aires, 30 December 2015, Juzgado de Familia de Lomas de Zamora № 7.

414 Fiona Kelly, *supra* note 338.
3.5 Chapter Conclusions

Family forms are becoming more diverse and complex. Legal, social, and cultural changes have reshaped the familial institution. Despite this diversity, Argentine and Canadian parental leave regulations still rely, in various ways, on assumptions of an ideal nuclear family and overlook the needs of non-traditional families. Consequently, non-traditional families encounter significant barriers to access parental leave benefits in both countries.

This study revealed that the Argentine labour law remains attached to a nuclear family model. Thus, it excludes adoptive, same-sex parents, and multi-parent families from maternity and paternity leaves. To fill the gap in the laws, Argentine courts and tribunals have recognized these families' needs and granted parental leave benefits to them. Although not being directly excluded from maternity leave, lone mothers also encounter significant barriers when trying to conciliate productive and reproductive work. The labour law, embedded within a paternalistic perspective, does not distinguish between lone and partnered mothers. However, the limitations that lone mothers face to secure formal employment hinder their access to maternity leave benefits.

In Canada, the EI parental leave system grants less generous benefits to adoptive parents and lone mothers than to nuclear families. Excluded from maternity leave, adoptive parents are unable to access paid leave before the day of the child's placement, leaving them unprotected while going through the adoption process. In the case of lone mothers, the impossibility of sharing the costs of the leave with a partner hinders their access to parental leave benefits. Moreover, attached to a two-parent assumption, the EI parental leave
regulations exclude multiparent families from the benefits. Unlike other non-traditional families, same-sex parents are granted equal benefits as different-sex parents.

All in all, Argentine and Canadian parental leave systems, embedded within a traditional nuclear family ideal, fail in addressing the complexity of the familial institution. Both countries’ laws, tailored to fit a nuclear family model, neglect non-traditional families' needs. Consequently, they reinforce inequality among different family models. In Argentine and Canadian laws, access to and the extent of parental leave benefits vary among families, resulting in the exclusion of the most vulnerable families.
Chapter 4: Non-standard Employment and Parental Leave Benefits

The “standard employment” relationship, characterized as full-time, dependent, stable, and socially protected employment, was for a long time the dominant model in Western countries’ labour markets.\textsuperscript{415} Accordingly, legal systems have constructed the standard employee as the ideal model and intended to protect it. However, over the last decades, diverse non-standard employment and other work relationships have proliferated. Part-time, temporary, agency, and self-employed workers, among others, increasingly participate in the labour markets along with the ideal full-time standard worker. Despite this transformation of the labour market, some scholars\textsuperscript{416} have argued that the legal systems remain reluctant to address the multiplicity of employment relationships, leaving non-standard workers unprotected. Against this background, this chapter calls into question the extent to which Argentine and Canadian parental leave laws have recognized and extended parental leave benefits to workers engaged in non-standard employment relationships.

The present chapter aims to carry out a detailed examination of the barriers that non-standard workers experience when trying to access to parental leave benefits in Argentina and Canada. Particularly, I focus on the experiences of part-time workers, self-employed


individuals, temporary workers, and informal workers. Also, with a feminist and intersectional perspective, I discuss the gender and social implications of the barriers that exclude non-standard workers from parental leave rights. The chapter is divided into six sections. Section one discusses the concepts of standard (SER) and non-standard employment relationships (NSER). Sections two to five investigate the extent to which the Argentine and Canadian labour laws provide inclusive access to parental leave benefits for some non-standard workers. Specifically, I discuss the obstacles that part-time, self-employed, temporary, and informal workers encounter to access parental leave rights in Argentina and Canada. I introduce a conceptualization of each of these four types of employment and an overview of its demographic composition. Finally, in section six, I summarize the findings. This chapter concludes that part-time, self-employed, temporary, and informal workers confront substantial barriers when seeking access to parental leave rights in Argentina and Canada, which reinforces gender and social inequalities.

4.1 From Standard to Non-Standard Employment Relationships

The Standard Employment Relationship (SER) is defined by Gerhard Bosch as a “stable, socially protected, dependent, full-time job . . . the basic conditions of which (working time, pay, social transfers) are regulated to a minimum level by collective agreement or by labour
and/or social security law”. After the World War II, the SER was established as the normative model of employment in Western countries. Labour laws and policies assumed the full-time, stable, dependent, and socially protected worker as the paradigm.

Nevertheless, since the mid-1970s, a new context of financial capitalism, globalization, and deregulation has resulted in the decline of the SER and the proliferation of non-standard employment relationships, NSER. Non-standard employment relationships (NSER) encompass employment arrangements that do not conform to the SER because they “lack one of the core features” or “lack the full-time or permanent character.” In other words, non-standard employment relationship is an umbrella term that includes several employment arrangements such as dependent self-employment, agency, temporary work, and part-time work, among others.


420 Katherine VW Stone & Harry Arthurs, supra note 415.

421 Judy Fudge, supra note 419 at 377 - 378.

422 Several terms have been coined to refer to these employment relationships that are replacing the SER. For instance, these employment arrangements have been called non-standard, atypical, precarious, contingent. In Canada the most used terms are non-standard and contingent. Fudge has pointed out some differences in the use of these terms. See Judy Fudge, “Beyond Vulnerable Workers: Towards a New Standard Employment Relationship” (2005) 12 CLELJ 151 at 155-160.


424 Ibid. The core features that define SER are personal subordination, bilateral relationship, open-ended relationship, full-time, and economic dependency. Ibid.
This proliferation of employment arrangements has not been reflected to the same extent in labour laws and policies, resulting in a lack of fit between labour legislation and employment relationships.\textsuperscript{425} This mismatch reinforces inequalities among workers according to their position in the labour market and excludes many workers from labour and social protections,\textsuperscript{426} among which are parental leave rights. In general, laws and policies remain fixed to a standard employment paradigm. Thus, “the closer a worker’s employment relationship conforms to the SER, the more likely is that the worker will enjoy the benefits of statutory minimum employment such as (…) maternity and parental leave.”\textsuperscript{427}

\subsection*{4.1.1 The Gender Dimension of Standard and Non-Standard Employment Relationships}

Previous literature has examined the intersection of gender and standard and non-standard employment relationships.\textsuperscript{428} Regarding the SER, Leah Vosko noted that this

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\textsuperscript{425} Judy Fudge & Leah Vosko, supra note 416 at 299.
\textsuperscript{426} Ibid.
\textsuperscript{427} Ibid at 299.

\textsuperscript{104}
employment model emerged during a historical period when female employment was unusual.\textsuperscript{429} Therefore, the SER emerged embedded with assumptions of a male breadwinner/female caregiver gender contract, gender division of labour that is similarly entrenched by the nuclear family model.\textsuperscript{430}

In contrast, the proliferation of the NSER coincided with an upward trend in female employment.\textsuperscript{431} In Argentina and Canada, women's participation in the workforce has significantly increased since the 1960s, narrowing the gender labour participation gap.\textsuperscript{432} Despite growing gender equality in the labour participation rate,\textsuperscript{433} unpaid care work has not been equitably distributed to the same extent. Over the last decades, the participation of men in reproductive work has remained at a low level, while women still take up most unpaid care

\textsuperscript{429} Judy Fudge & Leah Vosko, \textit{supra} note 416.
\textsuperscript{430} \textit{Ibid}. Leah Vosko, \textit{supra} note 428.
\textsuperscript{431} \textit{Ibid}. Mihaela Emilia Marica, \textit{supra} note 428.
\textsuperscript{433} In Argentina, the percentage of female employment rose from 22% to 27% between the 1960s and the 1980s. Catalina Wainerman, “Familia, Trabajo y Relaciones de Genero” (2013) 53:9 \textit{J Chem Inf Model} 1689 at 6. In the following decades, especially during the 1990s and 2000s, this trend was intensified while male employment dropped. During that period, female participation in the workforce rose from 43.2% in 1990 to 50.8% in 2002, while male participation fell from 81.3% to 78.3% in the same period. Carina Lupica, \textit{Trabajo Decente y Corresponsabilidad de los Cuidados en Argentina} (Santiago de Chile: ILO, 2010) online \url{https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-avana/---ilo-buenos_aires/documents/publication/wcms_bai_pub_131.pdf} accessed 4 February 2021.

work. Therefore, women perform a double role: they simultaneously do productive and reproductive work. Due to this double role, women are more likely than men to be employed in some forms of NSER, especially in part-time work.\textsuperscript{434} In the next sections, I will further analyze the gender dimensions of each of the analyzed types of NSER.

4.2 Part-time Employment

4.2.1 Conceptualization

There is no single agreed definition of part-time work, but rather it varies across jurisdictions and for legal and statistical purposes. At the international level, ILO Part-Time Work Convention No. 175\textsuperscript{435} provides a broad definition, without stating a precise number or percentage of hours. According to article 1(a) of the referred international standard, “the term part-time worker means an employed person whose normal hours of work are less than those of comparable full-time workers”.\textsuperscript{436} Besides this international definition, countries may provide a definition for part-time employment drawing on different criteria. For some countries, part-time workers are those who work fewer hours than the normal or statutory time;

\textsuperscript{434} ILO, Women in Non-standard Employment (ILO, 2017) online

\textsuperscript{435} Until date, Argentina and Canada have not ratified ILO Convention No.175.

\textsuperscript{436} Part-Time Work Convention, No. 175, ILO (1994) article 1(a) online
while others establish a “maximum [or minimum] number of working hours”\textsuperscript{437} finally, some countries conceptualize part-time work based on “a percentage of full-time hours of work”\textsuperscript{438}

Moreover, part-time work may be voluntary and involuntary depending on “whether employees freely choose such work, rather than being effectively compelled to take it up for lack of a viable alternative.”\textsuperscript{439} Linked to involuntary part-time work is time-related underemployment, which refers to those workers who would prefer to work full time but cannot secure standard employment.\textsuperscript{440} Part-time and full-time workers may also be distinguished according to pay. While most full-time workers are salaried employees, the earnings of most part-time workers are rated according to an hourly-wage basis. Hourly-waged workers usually are paid lower and experience greater job instability than their salaried counterparts.

The concurrence of multiple concepts of part-time work may be problematic. The misalignment between legal and statistical definitions may create grey areas and hinder the examination of part-time employment.\textsuperscript{441} For instance, some individuals who are classified as part-time workers by law may not be counted as such in statistical reports, and vice versa.\textsuperscript{442}

\begin{flushright}

438 Ibid.


440 Ibid at 188.

441 International Labour Organization (ILO), supra note 437 at 27.

442 Ibid.
\end{flushright}
Moreover, comparing different jurisdictions appears still more intricate. On top of the mismatch between legal and statistical concepts, the definitions of part-time work may vary across jurisdictions. Different countries may draw on diverse criteria to define part-time employment. Thus, it is difficult to find a comparator to accurately compare the incidence of part-time employment across different jurisdictions.

Against this background, it is not surprising that Argentina and Canada define part-time employment differently. In Argentina, the LCL defines part-time work based on a maximum proportion of full-time hours. According to the Argentine labour legislation, part-time workers are those who work up to two-thirds of the normally scheduled hours for full-time work.

Besides the legal definition, for statistical purposes, the National Institute of Statistics and Censuses of Argentina (INDEC), defines time-related underemployment based on a maximum number of working hours. Statistically, time-related underemployment comprises workers who work less than 35 hours per week but would prefer to work more hours. In contrast, in

444 ILO, supra note 437 at 27-28.
445 For example, if part-time workers are defined as those who work less than 30 hours per week in country A, and less than 35 hours per week in country B, it will be difficult to accurately compare the share of female part-time workers in these jurisdictions. Many workers will be considered part-time employees in country A but not in country B.
446 LCL, supra note 14 at articulo 92 ter, Artículo sustituido por art. 1º de la Ley N° 26.474 B.O. 23/01/2009. [ article 92 ter, substituted by Law No. 26.474, article 1].
447 “Población subocupada: se refiere a la subocupación por insuficiencia de horas, visible u horaria, y comprende a los ocupados que trabajan menos de 35 horas semanales por causas involuntarias y están dispuestos a trabajar más horas.” Instituto Nacional de Estadística y Censos (INDEC), “Mercado de trabajo. Tasas e indicadores socioeconómicos (EPH).” (2020) 4 28, at 26, online: http://www.iunma.edu.ar/doc/MB/lic_historia_mat_bibliografico/Fundamentos%20de%20Econom%C3%ADa%20Pol%C3%ADtica/mercado_trabajo_eph_4trim19EDC756AEAE.pdf accessed 8 February 2021.
Canada, there is no legal definition of this type of non-standard employment relationship. The EI Act does not conceptualize part-time work. However, for statistical purposes, Statistics Canada considers that part-time workers are those who work less than 30 hours per week.  

4.2.2 Who are Part-time Workers?

Worldwide, women predominate in part-time employment. According to the ILO, women comprise more than half of part-time workers. The gendered unequal distribution of unpaid care work has been identified as the main reason that leads women to work part-time. Following the global trend, in Argentina and Canada, women outnumber men in part-time employment. In Argentina, the percentage of women part-timers ranged between 47% and 53.2% in the period 2010-2019. Over the same period, in Canada, the share of women in part-time employment fluctuated in a range between 47.8% and 52.55%. Although both countries report similar rates of women in part-time work, Argentina exhibits a considerably wider gender gap in part-time employment than Canada. In Argentina, the gender gap in


449 According to ILO, women accounted for 57% of part-time workers. ILO, supra note 437 at 121.

450 ILO, supra note 437.

451 Ibid.

452 Ibid.

453 Gender gap in part-time employment, in this dissertation, refers to the average difference between the percentage of female part-time employment and male part-time employment.
part-time employment fluctuated between 24.3% and 27.2% over the period 2010-2019. Conversely, in Canada, the gender gap remained below 20% over the same period.

Although women dominate in part-time employment, their participation varies across different groups. In Argentina, income level, age, and education level are some factors that determine women's participation in part-time employment. Regarding the income level, there is a connection between poverty and time-related underemployment. Drawing on national statistics, Diaz Langou has shown that women from the two poorest quintiles made up the highest time-related underemployment rates in Argentina. Also, the same study revealed that there are important differences among age groups. Women aged 15 to 24 and 25 to 44 made up the highest rates of total and demanding underemployment. Apart from age, education affects women's participation in part-time work. In Argentina, women with lower educational attainment show higher underemployment rates than their better-educated counterparts.

455 Specifically, the gender gap in part-time employment ranged from 19.7% to the lowest point of 17.2 in 2019. Ibid.
457 Ibid at 89.
458 The percentage of total and demanding underemployment was equal for women aged 15 to 24 and 25 to 44. Particularly, these two age groups made up 15% of total underemployment and 11% of demanding underemployment in 2018. Ibid at 90 (bar chart).
459 Ibid at 90.
Based on this data, it is possible to assert that the most vulnerable women are the most likely to work part-time in Argentina.

In Canada, age, race, and education also affect the extent of women's participation in part-time employment. Regarding age, females' participation in part-time work varies across age groups, being women aged 15 to 24 who made up the highest share of part-time employment, accounting for 56.4%.\(^{460}\) In contrast, women aged 25 to 44 reached the lowest participation in part-time employment.\(^{461}\) Beyond age, some important trends in part-time employment were found for women who are immigrants, visible minorities, or Indigenous. In the case of immigrants, women are more likely than men to work part-time.\(^{462}\) Also, recent immigrant women are slightly more likely to work part-time than Canadian-born women.\(^{463}\) Concerning visible minorities,\(^{464}\) age determines the likelihood of visible minority women to


\(^{461}\) Ibid.


\(^{463}\) According to data collected in 2010, 31.1% of recent immigrant women worked part-time, compared to 30% of Canadian-born women. Ibid.

\(^{464}\) Visible minority is one of four designated groups under the Employment Equity Act. According to the Act, “members of visible minorities” means persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour”. *Employment Equity Act*, SC 1995, c 44, s.3, <http://canlii.ca/t/532r5> accessed 6 June 2020.

“The visible minority population consists mainly of the following groups: South Asian, Chinese, Black, Filipino, Latin American, Arab, Southeast Asian, West Asian, Korean and Japanese. Other visible minority groups are also included in this population, as are people belonging to multiple visible minority groups.”
work part-time. For instance, visible minority women aged 15 to 24 are more likely to be employed part-time than non-visible minority women in the same age group. Conversely, visible-minority women aged 65 and over are less likely to work part-time than women who are not a visible minority. Lastly, Indigenous women are more likely to work part-time than Indigenous men in Métis, First Nations living off reserve, and Inuit communities.

Concerning education level, statistics data reveal a small connection between part-time work and education level in Canada. In 2019, the participation rate of women with no degree and


The term visible minority has been criticized for generalizing the experiences of the myriad of ethnic groups that currently live in Canada. In this regard, the UN has warned that this term could lead to a homogenizing discourse. Also, scholars have noted that the category is outdated and does not match current trends that show that, in the near future, some ethnic groups would account for the majority in some Canadian cities. Tavia Granta & Denise Balkissoon, “Visible Minority: Is it Time for Canada to Scrap the Term?” Globe and Mail, (6 February, 2019) online https://www.theglobeandmail.com/canada/article-visible-minority-term-statscan/ accessed 8 February 2021.

465 In 2011, the share of part-time employment was 66.2% for visible minority women aged 15-24, compared to 61.1% for non-visible minority women in the same age group. Statistics Canada, supra note 464.

466 Among women aged 65 years old and over, those who were a visible minority made up 46.9%, compared to 56.7% for their non-visible minority counterparts. Ibid.


469 “The 2017 APS found that … [w]omen (25%) were more likely to work part time than men (17%).” Statistics Canada, Labour Market Experiences of Inuit: Key Findings from the 2017 Aboriginal Peoples Survey, The Daily, catalogue no. 11-001-X (Statistics Canada, 2018) online at https://www150.statcan.gc.ca/n1/daily-quotidien/181126/dq181126c-eng.htm accessed 30 June 2020
lower educational levels was slightly higher in part-time than in full-time employment. Conversely, in the same year, women with high school and higher education degrees showed marginally higher rates of full-time employment than their lower-educated counterparts.470

In both Argentina and Canada, the incidence of age, race, and education levels in the participation of women in the labour market reveals that the most vulnerable groups of women are the most likely to be employed in part-time jobs, which affects social equality. The negative impact on social equality is even bigger when considering that, in general, part-time employment is connected to lower earnings, also known as the part-time wage penalty, reduced promotion prospects, and restricted social security coverage.471

4.2.3 Part-time Employment and Access to Parental Leave Benefits

In Argentina, access to maternity and paternity leave benefits is not attached to workers’ employment history. All workers within the scope of the LCL, regardless of any previous length of service with the same or different employers, may qualify for the leave benefits. Hence, part-time and full-time workers have equal access to parental leave rights. Despite this

470 For instance, in Canada, women with no degree, certificate, or diploma represented 6.5 % and 4.2% of the total of women in part-time and full-time employment, respectively, by 2019. Over the same year, women with university degrees made up about 33% of the total of females employed part-time and roughly 40% of the total rate of women in full-time employment. For further details, see Statistics Canada, Table: 14-10-0118-0: Labour Force Characteristics by Educational Degree, Annual, online https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410011801&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.5&pickMembers%5B2%5D=4.3&pickMembers%5B3%5D=5.3&cubeTimeFrame.startYear=2016&cubeTimeFrame.endYear=2020&referencePeriods=20160101%2C20200101 accessed 2 April 2021.

equality in access, the scope of the benefits granted to part-time and full-time workers generally differ. The LCL, article 92 ter subsections 3 and 4, rules that social benefits granted to part-time workers, including economic compensations during parental leaves, will be proportional to their contributions to the system.\textsuperscript{472} Furthermore, the same provision states that the contributions to the social insurance system by part-time workers will be proportional to their working time and wages, enabling the accumulation of hours and wages with different employers.\textsuperscript{473} Given that part-time workers work fewer hours, on average they contribute less to social insurance than full-time workers. Therefore, part-time workers will likely receive less generous economic compensations during maternity and paternity leaves than their full-time counterparts, which especially constrains the options for low-income families.

In contrast, in Canada, the restrictive eligibility requirements lead to the exclusion of several part-time workers from access to parental leave rights, affecting women disproportionally. To qualify for parental leave benefits, the EI Act requires to demonstrate labour market attachment based on the accumulation of 600 insurable hours\textsuperscript{474} during the previous year.\textsuperscript{475} Consequently, a large number of part-time workers who are unable to accumulate the required hours result excluded from maternity and parental leave protections.\textsuperscript{476}

\textsuperscript{472} LCL, \textit{supra} note 14 at art. 92 ter 4.  
\textsuperscript{473} Ibid at art. 92 ter 3 and 4.  
\textsuperscript{474} Due to the COVID-19 emergency, the federal government has temporarily reduced the number of hours required to qualify for EI parental leave benefits from 600 to 120 insurable hours. This amendment of the EI eligibility requirements will be in effect from March 2020 to September 2021. Canada, \textit{supra} note 76. For a deeper analysis of this temporary amendment see Andrea Doucet et al., \textit{supra} note 76.  
\textsuperscript{475} Monica Townson & Kevin Hayes, \textit{Women and the Employment Insurance Program} (Toronto, 2007).  
\textsuperscript{476} Ibid.
The hours-based eligibility requirement disproportionally affects women, producing what Monica Townson & Kevin Hayes have called the *gender gap in coverage*.\(^{477}\) Since women work on average fewer hours than men,\(^{478}\) they are less likely to meet the required hours to qualify for parental leave benefits.\(^{479}\) Among women, statistics show that mothers who work full-time “were more than twice as likely to take paid leave as mothers who were working part time, but equally likely to take unpaid leave.”\(^{480}\) Moreover, women from vulnerable groups, who are more likely to work part-time, encounter the highest barriers to access to maternity and parental leave benefits.\(^{481}\)

The adverse effects of the EI eligibility requirements on women have been challenged as discriminatory in *Canada v Lesiuk*.\(^{482}\) In that case, Kelly Lesiuk was excluded from maternity leave benefits because, as a part-time worker, she was unable to meet the EI eligibility requirements.\(^{483}\) The Umpire\(^{484}\) agreed with the claimant and supported that the impugned

\(^{477}\) *Ibid.*


\(^{479}\) Monica Townson & Kevin Hayes, *supra* note 475.


\(^{481}\) *Ibid* at 9.


\(^{483}\) *Ibid* at paras 4 – 9.

\(^{484}\) *Ibid* at paras 10 – 13. The Umpire’s decision acknowledges that the disproportional allocation of unpaid care work on women restricts the amount of time available for paid work and explains the gender different patterns in employment.
provisions were discriminatory on the ground of sex and contrary to section 15(1) of the Canadian Charter. However, the Federal Court of Appeal overruled the Umpire’s decision and ruled that the EI eligibility requirements do not discriminate against women who are parents. According to the Court of Appeal, the respondent failed to demonstrate whether the differential treatment under the EI act amounts to discrimination. In the Court’s opinion, the EI eligibility requirements “do not create or reinforce stereotypes” of women as caregivers and do not affect their human dignity. Conversely, the Court found that the restrictions imposed by the hours-based qualifying requirements were reasonable and necessary to ensure the viability of the employment insurance scheme. Therefore, the Court of Appeal rejected that the EI hours-based eligibility requirement discriminated against women. Agreeing with Kathryn Meehan, I argue that the Federal Court of Appeal failed to recognize the gendered dimension of part-time work and its connection with the unequal distribution of caregiving responsibilities among men and women.

The recent Supreme Court of Canada's decision in Fraser v Canada may increase the chances of success of future s. 15(1) complaints pursuing the declaration of the EI parental

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485 *EI Act, supra* note 13 at ss. 6(1) and 7(2). *Canada v Lesiuk, supra* note 482 at para 2.

486 *Canada v Lesiuk, supra* note 482 at paras 49-51.

487 *Ibid* at para 45.

488 *Ibid* at paras 45 and 51.

489 *Ibid* at paras 51, 67, and 69.


leave eligibility requirements as discriminatory on the ground of gender. In *Fraser*, the Supreme Court of Canada ruled that the differential treatment provided to part-time workers who were excluded from the option of pension buy-back that was available for full-time workers disproportionally disadvantaged women with children.\(^{492}\) Unlike the Federal Court of Appeal in *Lesiuk*, in *Fraser*, Avella J. recognized the historical disadvantage experienced by women in part-time employment as well as its causal connection with the unequal gender distribution of childcare.\(^{493}\) Moreover, she rejected the “choice” argument by stating that “[t]his Court has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group.”\(^{494}\) The arguments cast in this Supreme Court decision may provide a sound foundation for future discrimination complaints against provisions that, like the EI parental leave regulations, adversely affect women in part-time employment.

In Canada, the low statutory income replacement provided during the period of parental leave is especially restrictive for part-time workers. Under the EI program, the benefit amount that parents can receive is 55\% of their average insurable weekly earnings for maternity or standard parental leave, or 33\% when opting for extended parental leave benefits.\(^{495}\) Parents in part-time employment generally earn lower wages and are less likely covered by employer-

\(^{492}\) *Ibid* at para 25 (Avella J. vote). “Unlike full-time members who work regular hours, who are suspended or who take unpaid leave, full-time RCMP members who job-share are classified as part-time workers under the Regulations and cannot, under the terms of the pension plan, obtain full-time pension credit for their service.”

\(^{493}\) *Ibid* at para 98.

\(^{494}\) *Ibid* at para 86.

\(^{495}\) Canada, Employment and Social Development, *supra* note 71.
provided top-up benefits than standard and higher-earning workers. Therefore, even when meeting the eligibility requirements, part-time workers, who are predominantly women, may find it difficult to afford the cost of taking parental leave benefits, exacerbating not only gender but also social inequalities among different workers.

4.2.4 Summary

This section has given an account of gender and social inequalities in part-time employment. Concerning gender, it has been shown that women dominate in part-time employment, globally including Argentina and Canada. Although these two countries revealed similar rates of female part-timers, the gender gap in part-time employment was considerably wider in Argentina. Moreover, among women, participation in part-time work varies across different groups, reinforcing social inequalities. Women with the lowest incomes, lower educational attainment, and racialized groups were generally more likely to be employed part-time.

Regarding the inclusiveness of access to parental leave rights for part-time workers, Argentina and Canada revealed substantial differences. In Argentina, given that the labour law does not impose eligibility requirements, part-time and full-time workers have equal access to maternity and paternity leave rights. Notwithstanding, the scope of the benefits may vary, part-

time workers are generally awarded lower economic compensations during the leave than their full-time counterparts. In contrast, the Canadian labour legislation requires to demonstrate labour market attachment through an hours-based eligibility criterion. Consequently, a large number of part-time workers, mostly women, unable to accumulate the required 600 insurable hours, result excluded from access to parental leave benefits.⁴⁹⁷

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4.3 Self-employment

4.3.1 Conceptualization

Self-employment is a highly heterogeneous working arrangement. Different self-employment arrangements exhibit significant variations in incomes, informality, and social protection, among others, that hinders their categorization. Despite this complexity, most countries rely on the self-declaration of labour status to distinguish employment from self-employment. Yet, such a dualistic approach may obscure the vulnerabilities experienced by workers who are in a grey area between paid employment and self-employment. These workers in the grey area may fall outside parental leave provisions directed to paid employment while excluded from protections aimed at self-employed persons.


501 ILO & OECD, supra note 498.

502 Ibid at 2.

503 Ibid.

The International Labour Organization (ILO) has proposed a classification that provides a valuable conceptual framework for the study and protection of self-employment.\(^505\) Initially, the *International Classification of Status in Employment (ICSE-18)*\(^506\) distinguished two main categories of employment status which are *employment for pay* and *for profit*,\(^507\) including self-employed individuals in this last category.\(^508\) Afterward, these categories were further classified by the *type of authority (ICSE-18-A)*\(^509\) and *type of economic risk (ICSE-18-R)*.\(^510\)

Another important classification of self-employment is based on whether a self-employed individual has paid employees.\(^511\) In Argentina and Canada, this differentiation is implemented for statistical purposes. In Argentina, The National Institute of Statistics and Censuses (INDEC) classifies self-employed persons in two main categories which are *patrones* and *cuentapropistas* or own-account workers. Patrones exhibit higher levels of

\(^{505}\) ILO & OECD, *supra* note 498 at 2.


\(^{508}\) ILO & OECD, *supra* note 498 at 3.


autonomy and employ at least one paid worker; whereas, cuentapropistas hold lower autonomy and do not hire paid employees. In Canada, Statistics Canada distinguishes self-employed who are “[w]orking owners of an incorporated business, farm or professional practice, or working owners of an unincorporated business, farm or professional practice.”

This last category includes self-employed persons who do not own a business. Moreover, “[s]elf-employed workers are further subdivided by those with or without paid help.”

4.3.2 Who are Self-employed Workers?

Globally, self-employed workers account for a lower proportion than paid employees. Nevertheless, recent transformations in business models and the emergence of platform work, give reasons to expect a rapid growth in this employment arrangement. From a comparative perspective, statistics reveal that self-employment is more predominant in emerging than in

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513 INDEC, supra note 512 at 9.


515 Ibid.

516 ILO & OECD, supra note 498.

517 Ibid at 4.
advanced countries. Accordingly, the incidence of this non-standard employment arrangement is greater in Argentina than in Canada.

A more detailed view reveals that the percentage of self-employed persons in Argentina is roughly 10% higher than in Canada. In the case of Argentina, the share of self-employed workers fluctuated over the period 1991-2020, reaching a peak of 31% in 1993 and falling to its lowest point, 22%, in 2012. Since 2012 the percentage of self-employed individuals has escalated and currently hovers around 26%. In Canada, the share of self-employment has remained relatively steady over the last decades, rising from 12.2% in 1976 to 15.3% in 2018. In this country, the highest self-employment rate was reached in the period between 1996 and 2000 when it made up over 17%. Although the difference in the self-employment rates of Argentina and Canada, there are some common demographic characteristics in the composition of this employment arrangement. For instance, in both countries, men outnumbered women in self-employment and this gender gap narrows for the most informal

518 Ibid.
520 Ibid.
521 Ibid.
523 Ibid.
524 In Argentina, women made up less than 40% of the total of self-employed workers. Díaz Langou et al, supra note 456 at 122.

Similarly, in Canada, the proportion of women in self-employment has increased from 26% to 38% between 1976 and 2018. Statistics Canada, supra note 522.
and precarious types of self-employment. In addition to gender, Argentina and Canada reveal similar connections between age and self-employment. In both countries, older age-groups are more likely to be self-employed than their younger counterparts.

In Argentina, the lack of statistical data about self-employment at the national level and in the rural sector precludes a thorough intersectional analysis. Conversely, the statistical information available in Canada enables such analysis. According to statistics, in Canada, immigrant individuals were more likely than non-immigrants to be self-employed. Among immigrants persons, men and non-recent immigrants showed greater participation in self-

525 Díaz Langou et al, supra note 456 at 101.


employment than women and recent-immigrants;\textsuperscript{529} however, immigrant women were “over-represented at the low end of the income range among self-employed women.”\textsuperscript{530} The prevalence of men in self-employment was also found in the case of Métis\textsuperscript{531} and Indigenous Peoples living off-reserve in Canada.\textsuperscript{532}

### 4.3.3 Self-Employment and Access to Parental Leave Benefits

The gap in social and labour protections coverage is one of the most pressing difficulties experienced by self-employed workers.\textsuperscript{533} In general, self-employed persons are excluded from labour and social protections and when included, they are granted fewer benefits than dependent workers.\textsuperscript{534} The incidence of traditional stereotypes about self-employment may explain the exclusion of these workers from social and labour protections. Historically, self-

\begin{itemize}
  \item \textsuperscript{529} \emph{Ibid} at 4 - 5.
  \item \textsuperscript{530} Judy Fudge, \emph{supra} note 525 at 214.
  \item \textsuperscript{531} “In 2017, around one in seven (14\% or 40,260) employed Métis were self-employed.” In this Indigenous community, the percentage of women in self-employment was 41\% compared to 59\% for men. Statistics Canada, \emph{Self-employment among Métis: Findings from the 2017 Aboriginal Peoples Survey}, Infographics Catalogue no. 11-627-M (Ottawa: Statistics Canada, 2008) \url{https://www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2018047-eng.htm} accessed 16 July 2020.
  \item \textsuperscript{532} “In 2017, 11\% of employed First Nations people living off reserve were self-employed. (…) The share of self-employed First Nations people with an incorporated business was higher among men than women (45\% versus 24\%).” Statistics Canada, \emph{Labour Market Experiences of First Nations people living off reserve: Key findings from the 2017 Aboriginal Peoples Survey}, The Daily, catalogue no. 11-001-X (Statistics Canada: November 26, 2018) online \url{https://www150.statcan.gc.ca/n1/daily-quotidien/181126/dq181126a-eng.htm} accessed 16 July 2020.
  \item \textsuperscript{534} ILO & OECD, \emph{supra} note 498.
\end{itemize}
employment has been associated with autonomy and ownership; however, this stereotyped image does not reflect the reality of many self-employed persons who work under precarious conditions. Concerned with the coverage gap experienced by self-employed workers across the world, ILO has urged the inclusion of self-employment within the scope of labour and social rights. Considering maternity and parental leave rights as part of labour and social protection schemes, in the following paragraphs, I assess the inclusiveness of the Argentine and Canadian parental leave systems for self-employed individuals.

In Argentina, although self-employed workers are included in the social security coverage, maternity and paternity leave rights remain restricted to formal paid employment. Consequently, roughly 50% of workers, including self-employed and informal workers, do not qualify for maternity and paternity leave benefits. Considering the restrictive access of the current system, some scholars propose switching to a universal parental leave system, which includes all parents regardless of their position in the labour market. Nevertheless, to date, the LCL has not been amended to extend parental leave rights to self-employed individuals.

535 Judy Fudge, *supra* note 525.
539 Fabián Repetto et al., *supra* note 298 at 12. Also, Delfina Schenone Sienra, *supra* note 60 at 14.
In contrast, since 2011, self-employed persons in Canada can voluntarily access to EI maternity and parental leave coverage.\footnote{Bill C-56 amended the EI Act by extending special benefits to self-employed persons. Canada, Parliament, \textit{Legislative Summary of Bill C-56: An Act to Amend the Employment Insurance Act and to make Consequential Amendments to other Acts (Fairness for the Self-Employed Act)}, by Daphne Keevil Harrold & André Léonard, Research Publications, 40th Parl, 2nd Sess (14 January 2010) \url{https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/402LS665E#a5} accessed 16 July 2020.} Due to the voluntary basis of the system, self-employed persons intending to take parental leave benefits must have opted and registered in the program at least 12 months before applying.\footnote{Canada, \textit{EI Special Benefits for Self-employed People} online \url{https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/self-employed-special-benefits.html} accessed 16 July 2020.} Also, to be eligible, they must have experienced a reduction of more than 40% of the time devoted to their business due to childbirth or caring for the newborn or adopted child, have earned at least the minimum amount for self-employment earnings\footnote{For example, in 2019 the minimum amount was $7,279. \textit{Ibid.}} during the previous 56 weeks, have paid the contributions,\footnote{Lindsey McKay et al., \textit{supra} note 69 at 6.} and have provided the expected date of birth or official date of placement.\footnote{Canada, \textit{supra} note 541.}

Although extending the EI parental leave system to self-employment was an important step toward a more inclusive coverage, it has not been as effective as expected. To date, a small number of self-employed individuals have claimed the benefits in Canada.\footnote{Jennifer Robson, \textit{supra} note 69.} The voluntary basis\footnote{Given that self-employed individuals who meet the eligibility requirements must pay into the EI system to access the leave benefits, they may opt for a personal savings model instead.} of the EI system, the fact that some workers might be unaware of this option, and the

\begin{itemize}
  \item \textit{Ibid.}
  \item Lindsey McKay et al., \textit{supra} note 69.
  \item Jennifer Robson, \textit{supra} note 69.
\end{itemize}
stringent eligibility requirements\textsuperscript{547} are factors that may explain the low take-up among self-employed workers. According to ILO, voluntary systems are less effective than mandatory systems in providing coverage, especially to the most vulnerable self-employed groups.\textsuperscript{548} Moreover, as in other non-standard employment arrangements, the stringent eligibility criteria hinder access to parental leave benefits for many self-employed workers who are unable to meet the requirements.\textsuperscript{549}

The lack of flexibility of the EI system may also prevent self-employed workers from claiming parental leave benefits.\textsuperscript{550} In Canada, the EI system grants the same length of maternity and parental leaves to paid employees and self-employed persons,\textsuperscript{551} neglecting their different needs. While long leaves may be beneficial for dependent workers, it may be undesirable for self-employed individuals,\textsuperscript{552} who usually are unable to stop running their

\textsuperscript{547} Lindsey McKay et al., supra note 69 at 551. Also, see Jennifer Robson, supra note 69 at 9.

\textsuperscript{548} ILO & OECD, supra note 498 at 14. Quebec presents an example of the effectiveness of mandatory systems. Unlike the EI federal system, Quebec Parental Insurance Plan (QPIP) includes self-employment on a mandatory basis. Consequently, in that province, a higher number of self-employed workers claim parental leave benefits than in the rest of Canada. Jennifer Robson, supra note 69 at 6.

\textsuperscript{549} Lindsey McKay et al., supra note 69 at 551. Also, see Jennifer Robson, supra note 69 at 9.

\textsuperscript{550} The Canadian Bar Association suggested introducing greater flexibility in the EI parental leave system for self-employed persons, considering that such flexibility was essential for the successful implementation of the system. The Canadian Bar Association, Improving EI Benefits by Enhancing Flexibility in the System (2011), Letter addressed to the Minister of Human Resources and Skills Development, online at https://www.cba.org/CMSPages/GetFile.aspx?guid=56edd2e4-59da-4aa7-ba6d-26e48378ceac accessed 15 July 2020.

\textsuperscript{551} The different needs of employees and self-employed persons regarding the length of maternity and parental leave may explain the differences in the number of weeks claimed. Statistics reveal that female and male self-employed individuals take significantly lower weeks than paid workers. Statistics Canada, supra note 480 at 8 - 9.

\textsuperscript{552} Anne Annink et al. have pointed out that “self-employees have different needs than employees”. Anne Annink, Laura den Dulk & Bram Steijn, “Work-family State Support for the Self-Employed across Europe” (2015) 4:2 J Entrep Public Policy 187.
business for the long term.\textsuperscript{553} A flexible system that allows self-employed workers to continue working part-time while on leave may better accommodate their needs.\textsuperscript{554} However, the current EI system penalizes this option. Under the EI scheme, self-employed persons can continue working or generating incomes while receiving EI parental leave benefits, but, in such cases, they will experience negative effects on the income compensation received. More specifically, self-employed persons who decide to continue working while on parental leave will be able to keep 50 cents of the EI benefits for every dollar earned, up to a maximum amount.\textsuperscript{555}

4.3.4 Summary

In Argentina as well as in Canada, self-employed persons still encounter significant barriers to access parental leave benefits. On the one hand, the Argentine system ties access to parental leave benefits to formal paid employment and directly excludes self-employment from its scope. On the other hand, Canada has recently extended parental leave rights to self-employed workers. However, due to the design of the EI parental leave system, self-employed persons still confront several obstacles that restrict their access to the benefits. The voluntary basis, the strict eligibility requirements, and the lack of flexibility are aspects of the EI scheme that discourage self-employed parents to claim maternity and parental leave rights in Canada.

\textsuperscript{553} The Canadian Bar Association, \textit{supra} note 550.
\textsuperscript{554} \textit{Ibid}.
\textsuperscript{555} Canada, \textit{EI Special Benefits for Self-Employed People, supra} note 541.
Drawing on the experiences of self-employed workers in Argentina and Canada, it is possible to conclude that just extending coverage to self-employment, although being an important step forward, is not enough to provide inclusive access to parental leave rights. To achieve an egalitarian parental leave system it is essential to recognize and accommodate the special needs of self-employed individuals. As long as parental leave regulations remain tied to a standard employment relationship, self-employed persons, among other non-standard workers, will continue encountering obstacles to access to parental leave benefits.

4.4 Temporary Workers

4.4.1 Conceptualization

Temporary work is a non-standard form of employment that is defined by its limited duration. Unlike standard employment, temporary work “does not allow the prospect of ongoing employment.” Besides this central feature, temporary employment is very heterogeneous and encompasses multiple subtypes. Contract or fixed term work, seasonal employment, and temporary agency are some forms of temporary work which display distinctive characteristics. Regarding the first subtype, contract employment is an employment arrangement which end depends on the compliance of a certain condition, such as reaching a

556 ILO & OECD, supra note 498 at 14.
557 Ibid.
558 Sylvia Fuller & Leah Vosko, supra note 428 at 32.
559 Ibid.
fixed date or finishing a specific task.\textsuperscript{560} Conversely, in seasonal jobs, employees work during certain months of the year,\textsuperscript{561} such as during harvest or fishing times. Lastly, temporary agency involves a triangular relationship where workers are hired by an agency to work for a client company.\textsuperscript{562}

The heterogeneity of temporary work may complicate its study. The different subtypes encompass different features, outcomes, and demographic composition.\textsuperscript{563} Moreover, temporary employment can intersect with other types of non-standard employment, mainly with self-employment and informal work, which turns the analysis even more difficult. Although these limitations, the next paragraphs attempt to shed light on the barriers and exclusion that temporary workers encounter to access to parental leave benefits in Argentina and Canada.

4.4.2 Who are Temporary Workers?

Unlike other non-standard forms of employment, the connection between gender and temporary work is unclear. Some countries report that women dominate in temporary work,

\textsuperscript{560} ILO, \textit{supra} note 437 at 22. According to the Argentine Labour Law, fixed-term contracts (contratos de plazo fijo) consist of employment arrangements that last until the expiration of the time limit, which cannot exceed 5 years. \textit{LCL, supra} note 14 at CAPITULO II: Del Contrato de Trabajo a Plazo Fijo, Artículo 93: Duración [Chapter II: Fixed-term Contracts, article 93: Duration].


\textsuperscript{562} Sylvia Fuller & Leah Vosko, \textit{supra} note 428 at 37. \textit{LCL, supra} note 14 at arts. 96 – 98.

\textsuperscript{563} Sylvia Fuller & Leah Vosko, \textit{supra} note 428 at 32.
whereas in others the exact opposite is claimed.\textsuperscript{564} In the case of Argentina, there is a slight difference in the proportion of men and women engaged in contract employment. Statistical data shows that the share of workers in contract employment has slightly fluctuated in a range between 15\% and 7\% for women and between 15\% and 10\% for men over the period 2008-2018.\textsuperscript{565} Although the limited data available about temporary agency, a 2013 study has estimated that, in Argentina, men dominate in this employment arrangement, accounting for about 75\% of temporary agency workers.\textsuperscript{566}

In Canada, the proportion of women and men in temporary employment is alike. Official statistics revealed that, in 2018, the percentage of women in temporary employment slightly exceed the share of men by 1\%.\textsuperscript{567} However, some gender differences have been found across the specific types of temporary work. According to Fuller and Vosko, men dominate in seasonal work, whereas, in contract work, which is the most stable type of temporary employment, the gender participation gap is not as significant.\textsuperscript{568}

\textsuperscript{564} ILO, \textit{supra} note 437 at 127.

\textsuperscript{565} Gala Díaz Langou et al, \textit{supra} note 456 at 116.


\textsuperscript{567} In 2018, 14\% of temporary workers were women, while 13\% were men. Statistics Canada, \textit{Temporary Employment in Canada}, The Daily, Catalogue No. 11-001-X (Statistics Canada, May, 2019) online \url{https://www150.statcan.gc.ca/n1/daily-quotidien/190514/dq190514b-eng.htm} accessed 29 July 2020.

\textsuperscript{568} Sylvia Fuller & Leah Vosko, \textit{supra} note 428.
Unlike gender, age appears to affect participation in temporary employment. In Argentina as well as in Canada, young groups made up the highest share of temporary employment. In Canada, the group aged 65 and older made up the second largest percentage of temporary workers; however, the participation of this age group was not as significant in Argentina. Regarding the intersection of gender with immigration and visible minorities status, Fuller and Vosko have shown some connections with temporary employment. According to them, women who are either recent immigrant or visible minorities are more likely to participate in the most precarious forms of temporary work.

### 4.4.3 Temporary Employment and Access to Parental Leave Benefits

In Argentina, eligibility and exclusion from maternity and paternity leaves depends on the type of temporary employment. For instance, in seasonal employment, during the season.

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569 In Argentina, the group aged 18 to 24 was the most representative in temporary work and made up 22% and 28% for women and men respectively by 2018. Gala Díaz Langou et al, *supra* note 451 at 117, Figure 51. In Canada, the group aged 15 to 24 accounted for 30.6% of temporary workers by 2019. OECD, *Temporary Employment (Indicator)*, 2020, online [https://www.oecd-ilibrary.org/employment/temporary-employment/indicator/english_75589b8a-en](https://www.oecd-ilibrary.org/employment/temporary-employment/indicator/english_75589b8a-en) accessed on 29 July 2020.

570 In Canada, the share of temporary employees aged over 65 years old was 20.6% in 2019. *Ibid*.

571 In Argentina, the share of temporary workers aged over 65 years old was 12% and 10% for men and women respectively by 2018. Gala Díaz Langou et al, *supra* note 456 at 117, Figure 51.


573 *Ibid* at 43.

574 In a relevant precedent, the Supreme Court of Rio Negro Province confirmed that even when a temporary worker has given birth before the beginning of the season, she has the right to take maternity leave benefits for the extension of the season. *Aravena, Yanina Mariela c Fruitecotores Reginenses S.A. s/ Reclamo s/ Inaplicabilidad De Ley*, No 20834/06, Superior Tribunal de Justicia de la Provincia de Río Negro [Supreme Court of Rio Negro Province], 5 February 2007.
temporary workers can access to the same maternity and paternity leave benefits as standard workers and receive income compensations. Nevertheless, once the season ends, the benefits cease for temporary employees.\textsuperscript{575} In a relevant precedent, the Supreme Court of Rio Negro Province, confirming the decision of the lower court, granted maternity leave rights, although restricted to the extension of the season, to a worker who have had given birth before the beginning of the season.\textsuperscript{576} Regarding temporary agency, temporary workers are subjected to the collective agreement applicable to the sector, but only during the period of activity. Thus, they can qualify to the same maternity and parental leave benefits as their full-year counterparts.\textsuperscript{577} Drawing on these examples, it is possible to assert that temporary workers in Argentina can access to maternity and paternity leave benefits, although restricted to the period of activity. Also, the significant overlap between temporary and informal employment in Argentina,\textsuperscript{578} suggest that many temporary workers, who are in informal employment, fall outside labour protections and result excluded from parental leave benefits.


\textsuperscript{576} Aravena, Yanina Mariela c Fruticultores Reginenses S.A., supra note 574.


In Canada, like part-time work, the hours-based eligibility requirement restricts access to parental leave benefits for many temporary workers, affecting women disproportionally.\textsuperscript{579} Given the intermittent nature of this employment arrangement, temporary workers are often unable to accumulate 600 insurable hours during the previous year. Furthermore, even when eligible, since temporary workers may have had periods of inactivity and no earnings prior to claiming parental leave benefits, these workers are likely to receive lower compensation than standard employees.\textsuperscript{580} In some cases, temporary workers are also self-employed which increases the barriers to access parental leave benefits. To avoid these restrictions and grant a more inclusive access to EI parental leave benefits for workers in non-standard employment relationships, it has been proposed to lower the entry threshold from 600 to 360 insurable hours. As a result of this modification, it is estimated that about 70\% more female temporary workers aged 20 to 39 living outside Quebec would be able to qualify for EI parental leave benefits.\textsuperscript{581}


\textsuperscript{580} Monica Townson & Kevin Hayes, supra note 475 at 22.

4.4.4 Summary

In Argentina and Canada, temporary workers face significant barriers to access parental leave benefits. In Argentina, temporary workers in formal employment are eligible to take the same parental leave benefits as non-temporary workers. However, the benefits will be restricted to the period of activity; once it ends, the benefits cease. Also, due the significant incidence of informal employment in temporary jobs, most temporary workers will be excluded from maternity and paternity leave rights under the LCL. On the other hand, in Canada, several temporary workers who are unable to accumulate the 600 insurable hours result excluded from the EI parental leave benefits. Even when eligible, temporary workers who have had periods with no earnings prior claiming the benefits will experience negative effects on the income compensation.

4.5 Informal Employment

4.5.1 Conceptualization

Across countries, the meaning of, and terms referring to, informal employment may vary.\(^{582}\) On the international level, ILO has distinguished the concepts of the informal economy, the informal sector, and informal employment. The informal economy is defined by

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opposition to the formal economy and excluding illegal activities. According to the Recommendation n°204, the informal economy “refers to all economic activities by workers and economic units that are – in law or practice – not covered or insufficiently covered by formal arrangements.”

The informal economy is further disaggregated into the informal sector and informal employment. These two dimensions are distinguished by their different observation units. On the one hand, the informal sector is an enterprise-based concept in which the observation unit is productive units. According to the ILO’s Resolution concerning Statistics of Employment in the Informal Sector, the informal sector encompasses “units engaged in the production of goods or services with the primary objective of generating employment and incomes to the persons concerned.” On the other hand, informal employment is a job-based concept in which the observation unit is jobs. Hence, informal employment consists of jobs


584 Ibid, at section 1.2.a


586 Ibid.


588 Recommendation concerning the Transition from the Informal to the Formal Economy, Recommendation No. 204, supra note 583 at para 1.
that employ individuals whose labour relationships are unregistered and “not subject to national labour legislation, income taxation, social protection or entitlement to certain employment benefits.”589 This definition of informal employment provides the conceptual framework for this section.

4.5.2 Who are Informal Workers?

Globally, informal employment constitutes a major issue. Including agriculture, informal workers comprise more than half the global workforce.590 Not surprisingly, informal employment disproportionally affects developing and emerging countries, although it is not as significant in developed economies.591 Besides inequalities among countries, the incidence of informal employment varies across occupational sectors, agriculture being the most affected.592 In the agriculture sector, about 94% of the workers are informally employed.593 The likelihood to participate in informal employment also depends on age and gender. Regarding age, young and old groups are more likely to be informally employed than core-age

589 Ibid at section 3(5).
590 OECD & ILO, supra note 582 at 16.
591 In developing and emerging economies, informal employment accounts for 70% of the labour market compared to 18% in developed economies. Ibid at 16.
592 Ibid at 16 and 29.
593 Ibid at 16 and 28-29.
groups.\textsuperscript{594} Regarding gender, worldwide, men outnumber women in informal employment,\textsuperscript{595} however, women dominate in the most precarious informal jobs,\textsuperscript{596} such as domestic work.

From a comparative perspective, available data reveals that the incidence of informal employment in Argentina is higher than in Canada, although in both countries agriculture and domestic work are regulated by law. In the case of Argentina, The World Bank has reported that informal employment, excluding agriculture, has fluctuated in a range between 46\% to roughly 50\% in the period 2008 - 2019.\textsuperscript{597} In Canada, the extension of informal employment is difficult to estimate due the scarce statistical data available. Despite this shortage in information, considering that ILO has listed Canada among the countries with the lowest share of informal employment,\textsuperscript{598} it is possible to infer that the proportion of informal workers in that country remains below 20\%.\textsuperscript{599}

A more detailed view of the incidence of informal employment in Argentina shows that own-account self-employed individuals comprise more than half of informal workers in the

\textsuperscript{595} \textit{Ibid} at 21, Box 3: \textit{Women and men in the informal economy}.
\textsuperscript{596} OECD \& ILO, supra note 582 at 134-136.
\textsuperscript{598} In a recent report, ILO has classified countries according to the share of informal employment in total employment, excluding agriculture. The five categories range from countries with the highest informal employment rate, 90\% and over, to countries with the lowest, below 20\%. Canada has been listed among countries in this last category. OECD \& ILO, supra note 582 at 27, figure 1.1.
\textsuperscript{599} ILO, supra note 594 at 16, Figure 5. Share of informal employment in total employment, including and excluding agriculture (percentages, 2016)
Moreover, as in most countries, lower income groups, younger and older groups, as well as people with lower levels of educational attainment, are the most likely to be informally employed. In Canada, the lack of statistical data about informal employment hinders a detailed analysis of its incidence. Notwithstanding, two recent studies that analyze the situation of the informal gig economy in Canada show that younger groups, part-time workers, and workers from lower income households were more likely to participate in the informal gig-economy than other groups.


601 Ibid at 33-34.


603 OIT, supra note 600 at 31. Also, see Mariana Busso, supra note 598 at 144.


605 Ibid at 6.


607 According to Jamie Woodcock & Mark Graham the term gig economy refers to

“(…) labour markets that are characterized by independent contracting that happens through, via, and on digital platforms. The kind of work that is offered is contingent: casual and non-permanent work. It may have variable hours and little job security, involve payment on a piece-work basis, and lack any options for career development.”

Regarding gender, female and male participation in informal employment varies across countries. In Argentina, more men than women are informal workers;\textsuperscript{608} however, women are more likely to be informally employed.\textsuperscript{609} In other words, fewer women than men participate in the labour market, but when they do participate, women are more likely to engage in informal employment.\textsuperscript{610} In Argentina, even though domestic work is regulated under national legislation, it is still one of the most informal occupations with female workers predominance.\textsuperscript{611} In Canada, on the other hand, men predominate in informal employment.\textsuperscript{612}

\textbf{4.5.3 Unprotected Workers: Analysis of the Exclusion of Informal Workers from Parental Leave Protections}

Informal employment is, by definition, an unprotected activity\textsuperscript{613} that is not subject to labour regulations and social protections.\textsuperscript{614} According to ILO, this gap in social protection coverage is one of the main sources of the vulnerabilities experienced by informal workers.\textsuperscript{615}

\textsuperscript{608} According to ILO, the share of men in informal employment exceeded the percentage of women by 10%. OIT, \textit{supra} note 600 at 30-31.

\textsuperscript{609} 47.3\% of female workers are informally employed, compared to 39.5\% of male workers. \textit{Ibid}.

\textsuperscript{610} Gala Díaz Langou et al, \textit{supra} note 456 at 93.

\textsuperscript{611} The share of informal employment in domestic work made up 75.7\% in 2018. \textit{Ibid} at 98-99.

\textsuperscript{612} ILO, \textit{supra} note 594 at 21 Box 3.

\textsuperscript{613} OECD & ILO, \textit{supra} note 582 at 26.

\textsuperscript{614} On top of the exclusion from formal employment-targeted protections, informal workers are often excluded from poverty-targeted social assistance. Given that poverty-targeted protections generally require demonstrating very low or no earnings, many informal workers may not qualify. ILO, \textit{supra} note 533 at 6.

\textsuperscript{615} \textit{Ibid} at 5. For instance, the lack of social protection along with the lower wages that, on average, informal workers earn, increases the risks of experiencing in-work poverty. Also, because of the gap in
Thus, aiming to bridge the gap in coverage, ILO has called upon extending social protection to informal workers identifying some priority areas.\textsuperscript{616} Maternity protection is one priority area that results especially relevant for this dissertation. Considering the vulnerability of women in informal employment, ILO has declared essential to grant them income support during pregnancy and after childbirth.\textsuperscript{617} Unless maternity protection is extended, women in informal employment will likely work until advanced pregnancy and return to work earlier, jeopardizing their own and their children’s health.\textsuperscript{618} Due to the exclusion from labour law protection, informal workers who take long periods of maternity leave could be terminated with no recourse, which adds further disincentive.

Narrowing the perspective to the inclusiveness of parental leave benefits in Argentina and Canada, it is possible to assert that informal workers are the most likely to be excluded from access to these benefits.\textsuperscript{619} On the one hand, since parental leave rights, in both countries, are provided by labour laws tied to formal employment, it is expected that informal workers will be ineligible.\textsuperscript{620} On the other hand, as informal workers are generally unable to pay social and labour protections coverage and the lack of representation by Trade Unions, informal workers are exposed to greater general and work-related risks. \textit{Ibid} at 19 – 20.

\textsuperscript{616}\textit{Ibid}.
\textsuperscript{617} \textit{Ibid} at 36.
\textsuperscript{618} \textit{Ibid}.
\textsuperscript{619} A research study has noted that about 47\% of workers in Argentina, among which a huge proportion are informal employees, are excluded from access to maternity and paternity leave benefits under the labour law. Delfina Schenone Sienra, \textit{supra} note 60 at 9. Also, Carolina Aulicino et al. have referred to the exclusion of informal workers in Argentina. Carolina Aulicino et al, \textit{supra} note 178 at 47-48.
contributions, they might be excluded from social benefits that, as in the case of the LCL and EI parental leave benefits, are based on contributions.\textsuperscript{621}

Considering the demographic differences in informal employment, the exclusion from parental leave rights appears more pervasive for some groups, reinforcing gender and social inequalities. For instance, in Argentina, given that women are more likely to be informally employed than men, they will also be more affected by the exclusion from maternity and paternity leave benefits. Similarly, lower-income persons, young and old people, people with lower educational attainment, and own-account self-employed workers report higher propensity to informal employment. Thus, these groups will be more often excluded from parental leave benefits. In Canada, the shortage of statistical data prevents an accurate estimation of the incidence of informal employment by gender and other grounds.

4.6 Final Thoughts

In Argentina and Canada, workers engaged in part-time, self-employment, temporary, and informal employment encounter significant barriers that restrict access to parental leave benefits. However, there are remarkable differences between both countries and across different employment arrangements.

In Argentina, maternity and paternity leave provisions appear to be very inclusive for part-time and temporary workers. Given that the LCL’s benefits are granted independently of any previous period of employment, part-timers enjoy equal parental leave benefits as their

\textsuperscript{621} ILO, \textit{supra} note 533 at 6.
full-time counterparts. Concerning temporary workers, although limited to the period of activity, they are also entitled to the same maternity and paternity leave benefits as standard workers. In contrast, self-employment and informal employment are worse off than other non-standard employment relationships. Excluded from the scope of the LCL, self-employed individuals and informal workers are ineligible for paternity and maternity leave benefits.

In Canada, non-standard workers encounter different, though significant, barriers. This chapter revealed that part-time and temporary workers are often unable to qualify for parental leave benefits. The stringent eligibility criteria, especially the demonstration of employment attachment through the accumulation of insurable hours, result in the exclusion of many part-time and temporary workers. As opposed to Argentina, the Canadian EI Act has extended the parental leave scheme to self-employment. Since 2011, self-employed individuals who have voluntarily opted into the EI system are eligible for maternity and parental leave benefits. Nevertheless, the voluntary character, the strict eligibility requirements, and the lack of flexibility discourage self-employed persons to take parental leave. Lastly, holding that informal employment, by its very nature, is not subject to social protection coverage, I inferred that it is likewise excluded from parental leave rights. However, further research is needed to shed light on the experience of informal workers in Canada.

Throughout this chapter, I have shown that, among non-standard workers, some demographic groups were more likely excluded from parental leave benefits than others. Regarding gender differences, women appeared to be more affected than men. As women predominated in part-time jobs, in some forms of temporary employment, and informal work, they were more often excluded from parental leave rights. Furthermore, women from some
vulnerable groups, such as women from lower-income households, with lower educational attainment, and some racialized women, were even more likely excluded than other groups of women. Therefore, the barriers that restrict access to parental leave benefits for non-standard workers reinforce gender as well as social inequalities.
Chapter 5: Conclusion

Parental leave policies have been proposed as effective tools to redress gender inequality in the family and the labour market. These policies have the potential to bring gender equity in both axes by boosting men’s participation in unpaid care work while improving women’s opportunities in the labour market. Nevertheless, I have argued that due to the important transformations experienced by families and the labour market, to effectively promote substantive equality, parental leave regulations should be sensitive to these changes and address the diversity of families and employment arrangements. Parental leave policies that continue embracing assumptions about the traditional nuclear family and the standard worker will likely exclude many parents who do not fit these ideal models, reinforcing not only gender but also social inequalities.

This thesis examined the parental leave regulations of two countries: Argentina and Canada. These countries' parental leave systems exhibit relevant differences in the scope and type of benefits granted. In general, the Canadian parental leave legislation seems to be more inclusive and progressive than the Argentine. However, throughout the chapters, this thesis demonstrated that both countries rely on similar assumptions about family and worker models which restricts access to and the scope of benefits for some parents who do not meet these expectations. Through feminist lenses, I unpacked the legal assumptions regarding the nuclear family and standard worker that continue to underpin the compared parental leave systems. I demonstrated the effects of these assumptions on the inclusiveness in access to parental leave benefits. The research question that guided this study was to what extent the parental leave
regulations in Argentina and Canada provide equal access and scope of benefits for parents in different families and employment relationships. To answer this question, the study focused on two axes: family and work.

Regarding the family axis, in Chapters 2 and 3, I demonstrated that despite the diversity of families in both countries, the nuclear family continues to be the ideal legal model in Argentine and Canadian parental leave laws. Both laws remain underpinned by assumptions about a nuclear family composed of two heterosexual parents and their biologically related children. Consequently, the diversity of families has not been reflected in the labour legislation and the specific needs of adoptive, same-sex parents, lone-parents, and multiple-parent families, among others, remain overlooked.

In Argentina, the LCL does not offer parental leave benefits for adoptive and same-sex parents. To access maternity and paternity leave benefits, these families must fill judicial complaints requesting the extension of the LCL benefits. In general, most Argentine courts and judges have understood the exclusion of these families as discriminatory and filled the gap in the labour legislation by extending parental leave benefits to adoptive and same-sex parents. Embedded on maternalistic perspectives, the Argentine law grants the same maternity leave benefits to lone and coupled mothers; however, the system overlooks the needs of male lone parents who can only take a two-day paternity leave benefit. In Canada, the total length of parental leave benefits varies across families. Excluded from maternity leave, adoptive families and male gay same-sex parents are not granted any leave benefit before the date of placement or childbirth. Lone-parent families, unable to share the benefit with a second parent, are excluded from the extra weeks provided under the Parental Sharing Benefit. In Argentina and
Canada, multi-parent families have not been recognized yet. In addition, in both countries, adoptive, LGBTQ+, lone-parents, and multi-parent families who hold lower-earning or precarious jobs may experience even greater barriers when seeking access to parental leave benefits, reinforcing social inequalities.

Moving on to the second axis, employment relationships, in chapter 4, I assessed the inclusiveness of the Argentine and Canadian parental benefits for parents in different non-standard types of employment. In the first part of the chapter, I demonstrated that the standard full-time, full-year, dependent worker is still the preferred model in the parental leave regulations of both countries. Consequently, I noted that parents who engage in non-standard forms of employment may confront significant barriers when seeking access to parental leave benefits, and some of them, as is the case of informal workers, are directly excluded from the leave benefits.

In Argentina, informal and self-employed workers, excluded from the labour law protection, are unable to access LCL maternity and paternity leave benefits. In contrast, Part-time and temporary workers can qualify for these benefits; however, in several cases part-time and temporary work overlap with informal work and self-employment, leading to the exclusion of these workers from the parental leave system. Due to the high incidence of informal employment in Argentina, many workers, mostly women and lower-income persons, are excluded from access to parental leave benefits. In Canada, on the other hand, the EI parental leave benefits have been extended to self-employed workers who can opt into the system. Nevertheless, the voluntary basis of the EI system and the restrictions to continue working while on leave, among other factors, prevent self-employed parents from claiming the benefits.
Although the incidence of informal employment is lower in Canada than in Argentina, informal workers are also excluded from access to parental leave benefits in the former country. Part-time and temporary workers may find it difficult to meet the eligibility criteria to qualify for parental leave benefits in Canada. In addition, the low rate of income replacement granted under the Canadian parental leave system disproportionally affects parents in non-standard and informal employment, who are regularly paid less and less likely to receive top-up benefits than their standard counterparts. All in all, in both countries, access to parental leave benefits varies according to the parents’ employment statuses, being those on non-standard and informal employment relationships the most likely to be excluded from access to parental leave benefits.

Throughout all the chapters, feminist and intersectional perspectives were applied revealing that the legal assumptions that underpin the Argentine and Canadian parental leave regulations have significant implications for gender and social inequality. The nuclear family and the standard worker assumptions are embedded in a male-breadwinner/female-caregiver gender order and produce significant repercussions for gender equality. Further, the attachment to an ideal standard worker led to the exclusion of several non-standard workers, who are mostly women. Considering that part-time, informal, and other non-standard types of employment are connected to lower earnings and less job security, the exclusion of these workers reinforces gender and, at the same time, social inequalities. In Argentina and Canada, women, and LGBTQ+ parents from lower socio-economic sectors are the most likely excluded from parental leave benefits.
5.1 Recommendations

Drawing on these conclusions, I suggest that the Argentine LCL and Canadian EI Act should be reformed to ensure equal access to parental leave benefits for all parents regardless of their familial organization and employment status. To effectively confer inclusive access to the benefits, the parental leave regulations of both countries should address the diversity of families and the multiplicity of employment relationships. Given the particular needs that different families and workers have, future reforms should be directed to accommodate the eligibility requirements as well as the scope of benefits to these specific needs. Although it might be difficult to address the complexity of families and employment relationships, it is important to begin advocating for a transformation of the parental leave systems that ensure inclusive access to and equal benefits for all parents. In addition to the general recommendations, I propose specific recommendations for legal reforms based on each of the analyzed axes: family and work.

5.1.1 Specific Recommendations

To promote equal access to and scope of parental leave benefits for diverse families, the following amendments are suggested. The needs of adoptive families have not been properly addressed under the Argentine and Canadian parental leave laws. In Argentina, these parents are excluded from the scope of the parental leave regulations; therefore, to fill the legal gap, future reforms should extend the scope of the LCL regulations to include adoptive families. To address the needs of adoptive parents and adopted children even before the placement day, both countries should introduce pre-placement leave benefits. Furthermore, to
effectively promote gender equality and include LGBTQ+ parents, the Argentine parental leave legislation must urgently replace gendered terms with gender-inclusive vocabulary, as the Canadian LCL has already done. In addition, to ensure equal access for lone-parent families, both countries’ parental leave systems need to be reformed. In Canada, to extend the recently introduced Parental Sharing Benefit to lone families, specific provisions directed to lone parents should be added. It can be done either by directly granting the extra weeks to lone parents or allowing them to share the leave with a non-parent caregiver, such as grandparents or another extended family member. In Argentina, considering that the two days of paternity leave available for male lone-parent families is insufficient, these parents should be granted a longer leave benefit. To begin with, the period of 90 days granted to female lone parents could be extended to males. Lastly, to include multi-parent families, both Argentine and Canadian laws should avoid limiting access to parental leave benefits for two-parent families.

The Argentine and Canadian parental leave laws also need to be reformed to ensure inclusive access for parents in different forms of non-standard and informal employment relationships. In the case of part-time and temporary employees, demonstrating employment attachment through the accumulation of insurable hours may be a highly restrictive requirement for them. Therefore, it is recommended to revise the Canadian EI parental leave legislation to progressively reduce the number of hours required to qualify. In the context of the COVID-19 pandemic, the hours threshold has been temporary reduced from 600 to 120 hours.\textsuperscript{622} This temporary amendment could serve as a precedent to impulse long-term changes

\textsuperscript{622} Canada, \textit{supra} note 76.
in the Canadian parental leave system. In Canada, self-employed persons may opt into the EI parental leave system. However, to ensure effective access, the parental leave scheme should be extended on a compulsory rather than a voluntary basis. Also, self-employed parents would benefit from a more flexible leave system that allows them to continue working part-time while on leave instead of penalizing that option. In Argentina, the scope of the LCL parental leave system remains restricted to formal paid employment; therefore, the scope of the legislation should be widened to include self-employed parents.

To grant access to parental leave benefits for informal and other non-standard workers, Argentina and Canada could introduce parental leave entitlements available for all parents on a citizenship-based eligibility criterion, rather than an employment insurance system. Some scholars, drawing on the experiences of European countries such as Germany, have proposed to implement mixed parental leave systems that combine two types of benefits. Like the Canadian EI Act and Argentine LCL, the suggested systems offer parental leave benefits according to employment-based eligibility requirements. However, countries with mixed systems also offer some universally available parental leave benefits which are granted to all parents regardless of their employment status. The introduction of this last type of entitlements could improve the inclusiveness of the Argentine and Canadian parental leave systems beyond formal employment.

623 Andrea Doucet et al., supra note 76.
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