Lawyers, Legal Mobilisation and LGBTI Populations: Explorations in Chile

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Abstract

This thesis explores the role of human rights and reformist lawyers in incipient legal mobilisation strategies, as members of lesbian, gay, bisexual, transgender and intersex (LGBTI) communities seek to advance and/or uphold their rights through the Chilean judicial system. Given the inaccessibility of the legislative arena for securing legal change, legal mobilisation strategies are increasingly being deployed by civil society actors promoting rights pertaining to sexual diversity. Drawing on legal ethnographic research, I examine the difficulties for members of these populations in securing legal representation and articulating their voice. I examine how individuals overcome barriers, such as mitigating the ‘stigma contagion’, in a highly heteronormative socio-cultural and political context, and access the necessary legal resources to mount a legal challenge. Scholarship on stigma, deviancy and identity, and social justice serves as the point of departure for studying the interaction between lawyers and claimants. In Chile in the late 2000s, legal mobilisation is emerging and consolidating as a strategy to achieve social and legal change. I analyse the social processes occurring in tandem with aforementioned legal processes. I focus specifically on the role of activist lawyers in ‘brokering’ these cases and how, as a consequence, LGBTI identities are becoming more visible in multiple public domains.
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Dedicada a mi familia en sus múltiples manifestaciones:

la biológica,

la extendida y la posmoderna...saben quienes son
# Abbreviations

1. **AADGE**
   - Agrupación de apoyo a la disforia de género
   - (Gender Dysphoria Support Group)

2. **CAJ**
   - Corporación de Asistencia Judicial
   - (Legal Aid Corporation)

3. **CLAM**
   - Centro Latinoamericano en Sexualidad y Derechos Humanos
   - (Latin American Sexuality and Human Rights Centre)

4. **CLS**
   - Critical Legal Studies

5. **CEDAW**
   - Convention on the Elimination of All Forms of Discrimination Against Women

6. **CODEPU**
   - Corporación de la Defensa y Promoción de los Derechos del Pueblo
   - (Corporation for the Promotion and Defense of the People’s Rights)

7. **CONASIDA**
   - Comisión Nacional del SIDA
   - (National AIDS Commission)

8. **DC**
   - Democracia Cristiana
   - (Christian Democratic Party)

9. **DOS**
   - División de Organizaciones Sociales
   - (Social Organisations Division)

10. **FASIC**
    - Fundación de Ayuda Social de las Iglesias Cristianas
    - (Social Aid Foundation of Christian Churches)

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1. Where the abbreviations are taken from the Chilean context I use the abbreviations as they are used in the original Spanish, I provide both English and Spanish translations however.
GAHT – Grupo de Apoyo a Hombres Trans
(Trans Male Support Group)

GRS – genital reassignment surgery

IACHR – Inter-American Commission of Human Rights

IACtHR – Inter-American Court of Human Rights

IEJ – Instituto de Estudios Judiciales
(Institute of Judicial Studies)

IOL – Institute of Linguistics

LGBTI – lesbian, gay, bisexual, transgender, intersex

LOF – Las Otras Familias
(The Other Families)

MOVILH – Movimiento de Liberación Homosexual
(Homosexual Liberation Front)

MUMS – Movimiento Unificado de Minorías Sexuales
(Unified Movement for Sexual Minorities)

NGO – Non-Governmental Organisation

OAS – Organisation of American States

OTD – Organización de Transsexuales por la Dignidad de la Diversidad
(Transsexuals for the Dignity of Diversity)

PIL – public interest litigation

PPD – Partido por la Democracia
(Democrat Party)

RN – Renovación Nacional
(National Renovation)
SML  – Servicio Médico Legal
      (Legal Medical Service)

UBA  – Universidad de Buenos Aires
      (University of Buenos Aires)

UDI  – Unión Democrática Independiente
      (Independent Democratic Union)

UDP  – Universidad Diego Portales
      (Diego Portales University)

UN   – United Nations
Glossary

**acuerdo amistoso**
- amicable agreement. This term is used within the Inter-American system of Human Rights. Governments and injured parties are initially given the opportunity to resolve the alleged right abuse by reaching an agreement acceptable to both parties.

**Alianza por Chile**
- Alliance for Chile was the centre-right ruling coalition that has been in opposition between 2000 and 2009. It has since changed to Coalición por el Cambio (Coalition for Change).

**audiencia**
- personal visit or meeting with judge in their chambers or office.

**Concertación**
- the centre-left ruling coalition that has been in government between 1990 and 2010.

**certificado de idoneidad**
- eligibility certificate. It is a document that is granted by the relevant dioceses to religious education teachers that impart classes on the Catholic religion.

**de parte de quien**
- literally ‘on behalf of whom’. It is used when communicating by phone as a means of indicating on whose say so you are phoning. Alternatively, who’s speaking? Who shall I say is calling?

**loca**
- Its literal translation is mad or crazy girl. In this context, it refers to gay men who have more outwardly feminine gestures or mannerisms.

**machismo**
- cultural system of male dominance in social relations particularly associated with Iberian and Latin American cultures.

**maricón**
- colloquial and pejorative way of referring to a gay man, similar to ‘faggot’ in English. It is also used in the feminine, maricona, to refer to lesbians.

**Mensaje Presidencial**
- speech given by incumbent President which sets out policy objectives, concerns, etc. It is equivalent to the State of Union address in the United States.
oficio — a written document produced by a judge which dictates the progress of a case. Essentially a court order used to obtain the necessary documents to be able to pass sentence on a case.

población — Chilean term for poor neighbourhood, equivalent of a favela in Brazil.

privilegio de pobreza — literally means ‘privilege of the poor’, these are subsidized legal costs which are extended to those who are eligible for legal aid due to their low economic status.

recurso de protección — a protection writ is a type of legal case presented to the Courts of Appeal in Chile when it is believed that constitutional guarantees have been violated. It has different names in different Latin American legal jurisdictions, such as amparo in Argentina.

recurso de queja — Literally translated as a ‘complaints procedure’, this is a judicial measure used to discipline judges, when it is considered that they have acted inappropriately.

toma — when a group of people occupy land or buildings in protest. Examples include students taking over University buildings to prevent the everyday running of the university, land occupations.

trans — umbrella term which includes transgender, transsexual and travesti populations.

travesti — literal translation is transvestite. It is a gendered term however, as it refers to men who cross-dress as women and not vice versa. In many cases, travestis will have often undergone some form of bodily transformation, which could be either surgical, cosmetic or hormonal. It also has a political connotation in that a number of trans women in particular, have adopted this term above the more widely used transgénnero (transgender).
Yo no tengo plata, no tengo apellido, no tengo nada, no tengo ayuda, para mi la justicia no existe

I have no money, I don’t have a surname of consequence, I don’t have anything, I don’t have help, for me justice doesn’t exist

Juliana, 28 November 2008
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As I approached the imposing façade and the colonial columns of the Chilean Supreme Court in central Santiago, milling around on the cobbles outside were two young, dark, handsome Chilean men dressed in suits. I recognised Armando Salgado and Victor Rivas from the press coverage that their case had attracted. Rolando Jiménez’s presence, as President of the Homosexual Liberation Movement (Movimiento de Liberación Homosexual, MOVILH), also gave it away. Their legal representation, in the form of the Corporación de Interés Público (Public Interest Corporation, or I-Público), had invited me to accompany the young men, as they presented their demand for reincorporation into the Chilean Police Force at the Santiago Court of Appeal. The couple had been pressurised into resigning in 2007 after the institution became aware of their sexual orientation.

I joined the young men and Rolando as they waited for Carolina, their lawyer, to arrive. I greeted Rolando in the usual Chilean way with a kiss on one cheek. I said hello to Armando and Victor, though didn’t introduce myself out of shyness. I would introduce myself later at Rolando’s insistence. As we all waited for Carolina, we were able to deduce that though all of us had had email contact with her, none of us had actually met her in person. My only reference was that she was blond. In the Chilean context, this makes people fairly instantly recognisable.

The young couple mainly talked amongst themselves in low voices. They would continue their conversations even when interrupted by the periodic calls from photographers for them to pose for the cameras. They seemed unfazed by such media attention. Despite both being in their early twenties, they held themselves well in front of this invasive media attention. They duly answered any questions thrown at them regarding their legal case in an assured and confident manner, with an ease reminiscent of a talk show host. Meanwhile, Rolando himself milled among those among the press that he knew well, as I had seen him do on previous occasions.
Carolina’s late arrival made the wait a little tense, and you could sense a slight feeling of disquiet, as she was not answering her phone. Rolando had convened the media especially to cover this couples’ presentation of their civil demand to the courts. Given that the case was being pursued in the ‘public interest’, the media was seen as an essential element to maximise empathy among the Chilean people, generate the necessary pressure, and render these ‘invisible’ battles visible. Only on entering the court did I understand his impatience at Carolina’s delay. At a rough estimate, twenty to thirty journalists had indeed come to cover the case. Civil demands, such as these, are presented at the Appeals Court before being allocated a civil court. These latter courts are housed in a modern dual tower building several blocks away.

Carolina arrived about fifteen minutes after the stipulated time. Introductions were almost non-existent in spite of their lack of personal acquaintance. There seemed to be a mutual understanding that she had arrived late and that there was a job to get on with. They swiftly hurried up the concrete steps, under the imposing columns, by-passed the security channels, to the main hallway in the Supreme Court. Here, the four individuals were faced with a barrage of camera flashes, television cameras, students’ film cameras, and microphones. I watched from the steps as I diligently complied with the court’s security measures, showing my ID and passing my bag through the metal detector. Having witnessed their swift entrance and the media entourage, once through I followed at a safe distance so as not to be caught on camera myself. Armando, Víctor, Rolando and Carolina turned towards their left and walked side by side down the hallway in a similar vein to the actors from Reservoir Dogs, only more hurriedly, to a small window around the corner where demands were presented.

The media mirrored their footsteps, moving swiftly backwards as the four advanced, all the while, cameras flashed and film rolled. Despite the length of the queue, the clerk attended to them immediately through a small glass window in the wall. The media clearly took precedence and no objections were raised from the on-looking queue. The attention of the cameras was firmly fixed on them as Carolina, Armando and Víctor, in an exaggerated manner and purposefully facing the cameras, concluded the necessary
formalities as required by the clerk. They posed for several more shots before being engulfed by the media, with cameras and microphones thrust in their faces. The questioning continued for a good fifteen to twenty minutes. After a while Carolina was able to escape to the side and we chatted. She admitted her unease at the media 'circus' though she was learning to embrace it as part of her new job. Rolando finally drew the event to a close given that Victor had to return to work. As the media started to disperse, Rolando introduced me formally to the couple, explaining what my research was about and that I was interested in interviewing them. I briefly introduced myself and we arranged a time and place to meet. I later learnt that their ease in front of the cameras was the result of almost two years' exposure. According to them, the twenty to thirty or so reporters that had greeted them at the court "was nothing" in comparison to past encounters. Their pursuit of justice had ultimately forced them to endure a very public 'coming out'.

In October 2007 Armando and Victor had been forced to resign from the Chilean Police Force (carabineros) on the basis of their sexual orientation. Having secured legal representation after a number of failed attempts, they were now seeking compensation for the 'moral' and 'economic' harm caused by the Institution's actions, in addition to reincorporation into the institution. It was the first time that such victims had dared to speak out publicly against the institution (for discrimination on the basis of sexual orientation). Though it seems, from numerous sources of anecdotal evidence and unnamed cases, that they were far from being the first. Lacking any legal basis, but contravening informal institutional practice where hyper-masculinised behaviour is the norm, they were pressured into leaving. Their superiors threatened to phone their families to inform them of their sexual orientation if they did not admit wrongdoing and resign. They signed the papers.
Chapter One: Introduction

1.1 Introduction to the Thesis

Rights gains for members of lesbian, gay, bisexual, transgender and intersex (LGBTI) populations in Chile have been highly contentious since the emergence of activist groups in the early 1990s, following the transition to democracy. LGBTI activists have struggled to have their grievances incorporated into the political agenda, and associations of sexual orientation and gender identity with human rights have often been rejected among many sectors. This is indicative of the extent of stigmatisation of physical and symbolic manifestations of the non-heteronormative in Chilean elite politics and society. The permeation of religious doctrine into what constitutes the ‘moral’ agenda has been salient in marginalising members of LGBTI populations socially and politically. This has ultimately reinforced the need for diverse social movement tactics in attempting to achieve social and legal change. The inaccessibility of the legislative arena led me to explore the possibilities for rights advance within the judicial arena. The research question ‘To what extent is legal mobilisation occurring in relation to LGBTI rights in Chile?’ was posed with low expectations of being able to observe advances in this arena.

During my fieldwork, conducted between September 2008 and July 2009, it became apparent that legal mobilisation strategies were indeed being pursued by emergent, and loosely associated, collectives of individuals and civil society actors. Given the restrictions on accessing legal resources, due to financial considerations and the difficulties in finding individuals willing to challenge the stigmatisation discourses, much of the litigation was being pursued in the public interest. ‘Lawyers, Legal Mobilisation and LGBTI Populations: Explorations in Chile’ explores the role of reformist, or human rights lawyers in mediating incipient legal mobilisation strategies embarked on by members of Chile’s LGBTI populations in the late 2000s. Implicit in public interest litigation is the need to maximise the impact of such cases. As a consequence, the previously very private domains of LGBTI identities are moving into multiple public domains.
Chapter 1: Introduction

I draw on legal mobilisation and social justice literature to examine these processes in Chile. The thesis is also concerned with the importance of meaning-making through interaction as I focus particularly on the outcomes of such interaction. I explore how the dominant discourses which have served to marginalise LGBTI populations in the public realm, have impacted upon both sets of groups engaging in legal action. I then analyse the processes through which such discourses are being challenged. These groups refer to the legal advocates sponsoring cases that deal with LGBTI rights, and those individuals embarking on legal action. By drawing on symbolic interactionist work, I explore how those seeking legal redress from below are influenced by their interaction with their lawyers, and vice versa. Symbolic interactionist scholars such as Blumer (1969), Goffman (1963) and Plummer (1995, 1996) have all addressed either stigma or deviancy in relation to identity. I draw on their work to comprehend how their interaction is influenced by the socio-cultural, religious, political and judicial contexts and what challenges are mounted as a result of this interaction. Blumer argues that meaning does not come from the 'intrinsic makeup of the thing' but from a 'process of interaction between people' (1969: 4). I argue that the outcomes of such interaction are influencing more diverse depictions of sexual and gender identities in the Chilean public domain. I further contend that the central role of the lawyers in directing the course of such action has been fundamental achieving said outcomes.

1.2 Thesis Organisation

I draw the reader's attention to the rather unconventional organisation of the thesis. Chapter Two details the social, cultural and political contexts which have influenced and constrained LGBTI activism and rights gains in Chile. This is driven by both the constraints in accessing relevant literature, and the importance of context in guiding this research. I therefore explore and develop the literature, which informs the theoretical approach in the empirical chapters, Chapters Five, Six and Seven.

Chapter Three details the epistemological underpinnings of the research, and how I operationalised the fieldwork. I employed ethnographic methods in legal domains in order to more fully comprehend the institutional and organisational spheres in which this research is located. This approach also facilitated access to the vulnerable and elite
populations who participated in this research. In view of the methods deployed and the participating populations, I pay considerable attention to the reflexive processes that have become an integral part of conducting and completing the thesis.

In Chapter Four, I introduce the protagonists of the legal cases that I was able to observe and study closely during fieldwork conducted between September 2008 and July 2009. It enables the reader to more readily identify the individuals who I refer to throughout the thesis, and provides an insight into their battles. This chapter therefore adds additional context, especially in relation to the legal system, and simultaneously introduces some of the empirical data.

The first of the three empirical chapters, Chapter Five, discusses the factors necessary for those embarking on legal action to articulate their voices. I draw on Gloppen’s (2006) framework for social justice to explore the barriers which need to be overcome, and which resources need to be mobilised, for legal action to occur. I return to these resources and barriers throughout the thesis. In this chapter, I focus on how lesbian, gay, trans and intersex individuals challenge the dominant stigmatising discourses that have marginalised them from mainstream Chilean society by openly adopting lesbian or trans identities. I link this to how rights awareness becomes a resource that these individuals are able to draw on. I therefore explore the parallel processes through which individuals begin to assume identities as a gay or intersex person, and to consider themselves as bearers of rights, which are necessary to enable them to undertake legal action.

Chapter Six examines how members of LGBTI communities are able to access legal resources. I return to Gloppen’s framework on articulating voice and explore how individuals are able to secure legal representation. Limited financial resources available to claimants have meant that most have relied on pro bono representation. As overcoming the ‘stigma contagion’ has certainly played a considerable role in lawyers’ willingness to take on cases, human rights lawyers have taken the lead in challenging such omissions. As a consequence, human rights lawyers have contested the cases through public interest litigation strategies. The concept of acting to further the ‘public good’ is driven by
Chapter 1: Introduction

commits to deepen notions of human rights, democracy and citizenship. This has ultimately facilitated and encouraged members of LGBTI members to contest their cases in the public domain, shifting away from the private in which they had previously remained.

Chapter Seven explores the ‘brokerage’ role adopted by lawyers in mediating these cases in more depth. In seeking to maximise the impact of these cases undertaken in ‘public interest’, lawyers have been instrumental in expanding associative capacity by incorporating other civil society actors into the process. As a consequence, I argue that LGBTI identities are emerging in an increasing number of public domains. This is heightened by public interest litigators’ concern in using the media as a means of maximising the impact of the case. I further argue that case selection processes are also impacting on the depictions that are actually emerging in these public domains.

The Conclusion draws together the thesis. It explores how overcoming the different barriers and mobilising the various resources that Gloppen (2006) sets out in her framework interlink and overlap to impact upon constructions of diverse and emerging LGBTI identities into the Chilean public domain. I therefore focus on the indirect outcomes of the legal mobilisation process (McCann, 1994) by exploring the social processes which occur simultaneously to the legal process. The inter-related nature of these processes, essentially forms the basis of the analysis in this thesis. I conclude that the outcomes of the interaction that occurs between the shifting individual to collective actors involved in these mobilisation processes is impacting upon meaning-making for those actors concerned. I contend that meanings are shifting not just in relation to those actors, but also further afield given the nature of public interest litigation. In this final chapter I therefore return to the literature on social justice and interactionism and examine the outcomes of the interactional processes among the actors involved in seeking to uphold or advance LGBTI rights in Chile.

The Afterword reflects on advances that occurred after fieldwork had been concluded. They relate both to a changing political environment and the state’s need to respond to
the Inter-American Commission of Human Rights (IACHR) and now potentially to the Inter-American Court. The first elected right wing coalition government since democratisation in 1989, almost immediately after having assumed power, had to respond to IACHR recommendations on a case relating to violation of human rights on the basis of sexual orientation. The case is that of Karen Atala, which I introduce in Chapter Four. In quite timely fashion, this followed an electoral campaign where for the first time LGBTI issues were discussed, and symbolically supported, by all candidates including the incoming President, Sebastián Piñera.

1.3 Me and My Research

I finish this Introduction with a very personal note on how I came to study legal mobilisation in relation to LGBTI rights. This leads into my discussion in Chapter Two of the socio-cultural, political and historical context, and its impact upon achieving said rights gains. This thesis is very much the product of a Latin American scholar doing doctoral research in a Social Sciences department, as evidenced in my concern for methods and ethics, and the notable interdisciplinary nature of the thesis. As a consequence of the diverse readership that I am writing for, I must cover a middle ground between sociologically-informed Socio-Legal Studies and Latin American Studies. I also have the task of introducing Latin American scholarship to sexuality scholarship, and sexuality scholarship to Latin Americanists.

The concern for human rights, citizenship and the exercise of democracy, which drives this piece of research, is very much a product of personal experience. As a languages undergraduate from the University of Liverpool, I arrived in Chile for the first time in the mid-1990s. Augusto Pinochet had left power only six years earlier. In contrast to neighbouring Argentina, where the transition from dictatorship to democracy came about by collapse (Abregú, 2008; Domingo, 2004; Smulovitz, 2002), the ‘pacted’ transition evident in Chile meant that Pinochet’s hold on power did not dissipate with the advent of democratic rule (Agüero, 2008). He called a referendum as to whether he should continue ruling in 1988, but the mobilised ‘No’ meant that he was forced to concede power. Prior to leaving office he ensured that constitutional safeguards left in place would limit the actions of the newly elected government, such as in the passing of progressive legislation.
These constitutional safeguards have been referred to as ‘authoritarian enclaves’ (Garretón, 1995). They include an electoral system that has fostered a climate of consensus politics between the two opposing coalitions, the centre-left Concertación, and the centre-right Alianza por Chile (Alliance for Chile), and the inclusion of nine nominated (not voted for) senators in the upper chamber of Congress. This meant that the Senatorial vote was effectively swayed to the right. General Pinochet also remained Head of the Armed Forces. Those who had suffered at the hands of the military dictatorship were prevented from seeking justice and pursuing legal action by the amnesty law which had been passed. The additional ever-heavy political presence of the former ruler also played an important symbolic and practical role in vetoing the pursuit of such action.

This was the Chile I arrived in one winter’s morning in August 1996. I remember the bleakness of the grey sky being mirrored in the faces, and in the grey, black and dark blue uniform-like dress that Chilean tube-riders sported that same August afternoon. I was unprepared for this lack of colour and vivacity, but more so for the heavy atmosphere that lingered in the air. It was not until I started attending classes several weeks later at a very left wing university campus that I began to have a greater understanding of what the bleakness, that I had perceived on arriving, might be partly attributed to. It was here, in the Universidad de Chile’s Facultad de Ciencias Sociales y Humanidades (University of Chile’s Social Sciences and Humanities Faculty), that human rights really took on meaning for me through experiences recounted by friends. This was heightened by the more consuming idealism present among eighteen and nineteen year old university students.

2 The right wing coalition was named Alianza por Chile until 2009, when it changed its name to Coalición por el Cambio (Coalition for Change) in the run up to the 2009 elections. Since 1989, it has also operated under different names, but it has comprised two parties, Renovación Nacional (National Renovation, RN) and the Unión Demócrata Independiente (Independent Democratic Union, UDI). In 1989, for example, this coalition was called Democracia y Progreso (Democracy and Progress). See Macaulay (2006) for a discussion of Chilean political parties and their ideological and historical roots, independent of their coalitional roles.

3 Three were designated by the Supreme Court, four by the National Security Council, Pinochet himself became a Senador Vitalicio (Senator for Life) after his tenure as Head of the Armed Forces ended, as did former President Eduardo Frei Ruiz-Tagle. This position was reserved for former Presidents that had served six-year Presidential terms. The first Concertación President, Patricio Aylwin served only a four-year term. Also see Pastor (2004) for a comprehensive study on the authoritarian enclaves present in the 1980 Constitution.
students. My incredulity at the culture of impunity that prevented the pursuit of justice was all the more pronounced in view of the arrogance with which the former ruler retained status and power. I was also able to observe how those same frustrations were played out among the friends that I made during that first year in Chile. The impotence that they felt and the lack of avenues for them to channel their frustrations were all poignant. Students, only thinly disguised by home-made *capuchas* (literally it translates as a ‘hood’, but it also refers any to face mask used), would launch stones at *guanacos* (water cannons).\(^4\) The sheer disparity in power and resources was startling, as the green armoured men hid behind their riot shields, fired tear gas and squirted torrents of chemically-laced water at the angry and frustrated students. As I detail later in Chapter Three, these characterisations of the ‘state’ and the ‘system’ remained ever present as these equally abstract individuals, dressed in a manner similar to teenage mutant ninja turtles, came to represent the repressive, backward-looking democracy being experienced in Chile, where the voices of the minority would not be heard.

When I heard the news of Pinochet’s arrest in London in 1998, little did I suspect that ten years later I would be returning to Chile to study the judiciary, and to explore its potential as a driving force in democratic deepening. Around that time, in the late 1990s, a scandal emerged following the publication Alejandra Matus’ book *El Libro Negro de la Justicia Chilena* (The Black Book of Chilean Justice). She exposed and heavily critiqued judicial power structures and legal cultural practices within the Chilean judiciary. To avoid the Supreme Court injunction placed on her and arrest, she went into self-imposed exile and was granted political asylum in the United States.\(^5\) The publication was duly censored and removed from sale one day after being launched. It was later only available on the black market in Chile. The author was able to return to Chile in 2001 after intervention

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\(^4\) The guanaco is an animal, similar to a llama, which is known for its capacity to spit. As one friend put it ‘Como estos animalillos escupen bastante - en cantidad y en fuerza, hábiles en el arte del escupismo - el carro represivo tomó ese mote’ (As those animals spit a lot – in quantity and force, and are skilled in the art of spitting – that repressive van was given that nickname.) I have included the original Spanish due to the particularly expressive language used here, in order to maximise meaning for Spanish speakers.

from the executive and the passing of a freedom of expression law. But her exile is illustrative of the power of the judiciary, its fear of critique, and the questionable freedom of expression operating at the time that I was first studying and working in Chile.  

It wasn’t until 1998, by which time I was working as an English teacher, that I started to make friends in the gay community in Chile. An instant rapport with one student led to exchanges of tales of gay nightclubs in Portugal (my experiences) and stories of dealing with social control mechanisms (his experiences). We were equally shocked and intrigued by each other’s narratives. We spent a lot of time together. I got to know more about the realities of being gay in Chile in the late 1990s, and started frequenting the gay club and bar scene in Santiago, one of the minimal spaces where self-expression came more freely for them.

Arriving at the judiciary as a topic for study ultimately emerged from my interest in my friends’ inability to exercise any rights. Back in 1998, it was illegal for gay men to engage in same-sex sexual relations. My friends would never consider walking down the street holding hands back then, as other friends of mine were able to do in Portugal (though not in all spaces admittedly). They were also deterred from doing so as police would crack down on public displays of affection by applying vagrancy laws and public decency codes all too willingly. I was one of the few people that they were ‘out’ to, often even ahead of family members. My interest in institutions and citizenship was later consolidated under Dr. Rachel Sieder’s guidance at the Institute of Latin American Studies, London. During research that I conducted in 2004, I became aware of how the legislative impasse severely curtailed the possibilities for advancing a rights-based  

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6 A freedom of expression act was passed in 2001 during the Lagos government. Coincidentally, in 2001 the Inter-American Court of Human Rights (IACtHR) presided over its first case on freedom of expression, eventually ruling against the Chilean state. In 1997, the Supreme Court banned the viewing of the film ‘The Last Temptation of Christ’ in Chile. Juan Pablo Olmedo contested the case through the Inter-American system and won. See ‘Case “The Last Temptation of Christ” (Olmedo Bustos et al. vs Chile)’ http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf (accessed 15 August 2010).

7 Across Latin America, vagrancy laws and public decency codes have been frequently applied to curtail behaviour not consistent with heterosexual norms, such as same-sex interaction that might include hand-holding, or cross-dressing. Transgender populations have been particularly affected by these ordinances as they most visibly transgress standardised dress codes. Penal codes 373 and 374 have been mostly applied in the Chilean case and have yet to be repealed. See Dides, Márquez, Guajardo and Casas (2007) for a brief introduction to these ordinances, or for a more comprehensive study, see the annual MOVILH reports.
agenda for lesbian, gay and transgender individuals in Chile (Miles, 2004). I expand on this impasse later in the next chapter. Considering those constraints, I turned my attention turned to exploring possibilities within the judiciary, albeit with little expectation.

I do not shy away from the fact that this project started out as a very personal and political endeavour (Hammersley and Atkinson, 1995; Hirsch, 2002; Starr and Goodale, 2002). My passion for this project has not faltered throughout, but that passion has morphed, diversified and matured. I am able to distinguish the personal and political from the academic. I have acquired mechanisms and created channels to express both of these.8 What is set before you is the politically-influenced, yet academic, outcome of the research. In the next chapter I introduce the broader social and political context which resonates with this very personal account of how I came to study LGBTI rights in Chile. I draw on existing literature where possible, but where that is absent given the nature of the research subject, I also refer back to my respondents' reflections in setting out the scene for the reader.

8 I have spoken with transgender activist groups about doing collaborative work with them to produce reports from the research findings that are relevant for their activism. Similarly, I have spoken with the Centro de Derechos Humanos (Human Rights Centre) at the Universidad Diego Portales and I-Público regarding similar initiatives to satisfy my more personal and political objectives.
Chapter Two: Locating My Research

2.1 Introduction
This chapter introduces the socio-cultural, political and historical contexts that have impacted upon Chilean LGBTI movement emergence and consolidation since democratisation in 1990. I contrast the relative lack of legal advance in Chile with the broader Latin American context that has recently witnessed a rapid evolution in policy, legislation, and judicial rulings that have upheld and advanced same-sex and gender identity rights. This most notably culminated in the approval of same-sex marriage in Argentina, in July 2010.9 I explore the lack of political opportunities within the Chilean political institutional sphere and how that relates to recent historical events. The institutional climate cannot be dissociated from the historical context, especially regarding the impacts of dictatorial rule, the transition to democracy and democratic deepening and the language of human rights. In addition, I examine how the ‘cultural’ is played out politically by focusing on the weight of the Catholic Church in this arena. I bring the chapter to a close after discussing the judiciary’s potential as a viable alternative for achieving rights gains, as civil society organisations push for social and legal change in relation to gender, disability and indigenous rights. I pay particular attention to the role of reformist and human rights lawyers and how they frame these struggles within a human rights and citizenship paradigm.

2.2 Contextualising the Research in a Literature Void
By ‘void’, I am referring to the distinct lack of research on lesbian, gay, bisexual, transgender and intersex rights in Chile, which requires me to contextualise the research socially, culturally and politically. However, it is also invaluable given the diverse readership and offers a more considered reflection of the factors that influenced the personal motivations that have driven this study as I mention in Chapter One. Studies of a literary or cultural genre (Lemebel, 1996, 1998, 2001; Palaversich, 2002; Sutherland, 2007;)

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9 Across Latin America, much of this legislation was initially secured at state level. The first of its kind was a same-sex civil union bill approved in December 2002. Then states in Mexico and Brazil also followed suit. National level legislation was first approved in Uruguay.
2002, 2009), which emerged in the late 1990s and 2000s, have tended to dominate the literature on LGBTI issues. Most of the scholarship with more sociological or political grounding has thus far has come from the activist core itself (Guajardo, 2002, 2004; Parada, 2002; Robles, 2000, 2008; Ruiz, 2002). In some cases this scholarship is the product of seminars on matters relating to sexual diversity,\textsuperscript{10} and the discussion is therefore somewhat brief. The most notable contribution to LGBTI politics is Victor Hugo Robles’ (2008) history of the gay movement in Chile. Robles’ work published in 2008 is a revised version of his undergraduate thesis written in 2000. His comprehensive study is both a social and political commentary on diverse events that have shaped the movement even prior to democratisation. He deals with attempts at mobilisation even during the dictatorship and ends with Karen Atala’s case. This case, which is dealt with in this thesis, relates to the case of a lesbian mother who was denied the custody of her three children by the Chilean Supreme Court in May 2004.

Guajardo (2004) also provides a brief overview of the movement in the *Harvard Review of Latin America*,\textsuperscript{11} as does Robles (1998). Edited collections by Motta and Sáez (2008) and Dides, Márquez, Guajardo and Casas (2007) include some evaluations of LGBTI rights. The first collection presents a more legal perspective and covers the whole of Latin America. It includes references to two emblematic cases in Chile, Karen’s case and the ‘Divine’ case. The Divine case, which I refer to later in the chapter, relates to a gay disco that burned down in 1993 killing sixteen party-goers. As the outcome of the investigation was not known until 2010, seventeen years after the blaze occurred, it became another emblematic case of failed justice. The second collection does dedicate a chapter to sexual diversity and it begins with the rather sombre assertion that

The study into sexual diversity in Chile departs from a negative standpoint. In other words, it deals with dissident identities which diverge from the hegemonic.

\textsuperscript{10} At the time of writing, this term was most commonly applied in the field and was used to encompass all rights pertaining to members of LGBTI communities. There has been a significant shift in the terminology used since the movement emerged in the 1990s. Prior to this term, the term sexual minority rights was used, for example. I therefore have directly translated what was most currently used in the field in Chile in 2011.

\textsuperscript{11} Both authors make reference to the ‘homosexual’, and while both deal with the broader LGBT communities, the titles themselves suggest a gay-centric approach. This is a reflection of the gay male dominance within the broader community (Guajardo, 2004). However, it must be noted that Robles (2000, 2008) is a highly independent activist who traverses the wider LGBTI community and has no official affiliation to one particular group or organisation.
Most study has therefore focused on the rejection and discrimination that these groups are subjected to (2007: 52).

Corrales and Pecheny (2010) recently brought together scholarship on politics and sexual diversity in Latin America in an edited collection, which is also notable for the very limited scholarly attention paid to Chile. Tim Frasca’s (2010) contribution to the edited collection is a short, descriptive account of the distancing of the gay movement from HIV activism. Elsewhere in the region, investigation into such areas seems to be evolving at a faster pace, for example, Colombia Diversa (2005), and Cabal, Roa and Lemaitre (2001), and a number of publications available through the Centro Latinoamericano en Sexualidad y Derechos Humanos (Latin American Center on Sexuality and Human Rights, CLAM). CLAM is playing an important role in facilitating studies on sexuality across the Latin American region, which is not only concerned with giving more academic coverage to the issue, but also to increasing the possibilities for comparative study. This also seems true in the Argentine case, Bazán (2004), Petracci and Pecheny (2007), are just a couple of examples. A conference on social movements in Latin America held in Universidad Mar del Plata in Argentina, in September 2008 programmed a whole day to deal with LGBTI issues. Many of those presenters studied together at the Queer Studies Department at the Universidad de Buenos Aires (University of Buenos Aires, UBA). Chile has no such department, but courses that contemplate sexual diversity, at least from a cultural perspective, are emerging at the Universidad de Chile. My aim here is to draw attention to the fact that academic scholarship has remained the reserve of the LGBTI activist core in Chile. This is not to belittle that scholarship, but on the contrary, points to the lack of attention paid within wider academic circles in Chile. CLAM did sponsor and publish the first survey carried out on LGBTI populations at the 2007 Gay Pride march in Santiago, whose findings I refer to

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13 See www.clam.org.br.
later in the chapter (Barrientos et al., 2008). This followed similar initiatives in Buenos Aires and São Paulo.

I should note, however, that workshops organised by LGBTI activists and University-organised symposia are on the increase in Chile. The conference *Sexo, Gênero y Democracia* (Sex, Gender and Democracy) was held at the *Universidad Diego Portales* (Diego Portales University, UDP) in November 2008, and in July 2009, the *Universidad de Chile* hosted the *Justicia, Gênero y Sexualidad* (Justice, Gender and Sexuality) Conference. However, gender rights, such as reproductive rights still dominate within the broader sexual rights\(^\text{15}\) paradigm in the Chilean case (Casas, 2008; Dides, Márquez, Guajardo and Casas, 2007; Valdés and Guajarado, 2007). Valdés and Guajarado dedicate one and a half pages to homosexuality and the authors note that

> In the Chilean case, recent studies in the social sciences have examined male homosexuality, yet almost no attention has been paid to lesbian sexual identities (2007: 53).

Human rights reports have also been a means addressing LGBTI rights issues. The UDP’s annual human rights publication has been the most active in dealing such matters since 2005. I was invited to contribute to the publication in 2009, and previously gender experts had usually written the chapter. This presents yet another indication of the lack of academic attention paid to the subject matter in Chile. There are indications that scholarship is growing out from the activist core into wider civil society and academic circles. The chapter in Dides, Márquez, Guajardo and Casas (2007) is an overview of the major themes, major groups and existing research into sexual diversity. It amalgamates government research, civil society and social movement reports, and importantly, recognises the marginalised groups within the more mainstream, such as trans groups.\(^\text{16}\)

\(^{15}\) The term sexual rights has emerged from the international community exploring matters of human rights and different aspects of sexuality which encompass sexual and reproductive rights for women, sexual violence against women, child abuse, HIV/AIDS and LGBTI rights issues. This term is seen as more universal and inclusive to unite different advocacy groups seeking advance rights based around different aspects of sexuality. See International Council on Human Rights Policy (2009: 7-10).

\(^{16}\) Here I use the shortened term *trans*, which encompasses transgender, transsexual and *travesti* (the literal translation of which is transvestite). Though the majority of those who I had personal contact with self-identify as transgender or transsexual, the term, *travesti*, is also used for political reasons by some. This is particularly notable in Argentina. The shortened form ‘trans’ is also used in Latin America as it is in Europe and North America.
Chapter 2: Locating My Research

These developments whilst very positive still leave a void in the academic side of the debate as Barrientos et al. also recognise the lack of research into LGBTI populations (2008: 13). They similarly argue that

...the strength and specificity of the discrimination that sexual minority groups face [in Chile] is an extremely relevant phenomenon. It is necessary to carry out research in this area in order to create public policy which can lead to a more just and democratic country (2008: 13).

Therefore, in order to maximise my understanding of the broader context, I purposely carried out interviews with political elites, high-ranking civil servants and non-activist members of civil society to counter this lack of relevant literature to draw on. The context set out in this chapter therefore illustrates how the research question was driven by said context. It explores the conditions under which LGBTI movements been operating and how have those impacted upon goals and strategies for those targeting legal and social change in relation to sexual orientation and gender identity rights. Given the diverse readership of the thesis, I assume no prior knowledge of said contexts in the Chilean case.

2.3 The LGBTI Movement in Chile: Emergence and Consolidation

The Chilean LGBTI movement emerged relatively recently when compared with northern hemisphere organising dating back to the 1960s and 1970s (Adam, Duyvendak and Krouwel, 1999). In this respect, it resonates with other Latin American cases, where the dissipation of dictatorial regimes facilitated the emergence of new forms of political expression able to consolidate in the post-authoritarian era (Alvarez, Dagnino and Escobar, 1998; Richards, 2004). Social movement literature on political opportunities (McAdam et al., 1996) argues that perceived ‘opportunities’ which arise in the political institutional arena facilitate movement emergence and consolidation (McAdam, 1999). The tentative emergence of LGBTI groups was therefore facilitated by the political opportunities afforded by the transition from authoritarian to democratic rule in 1989, the ability to build on those movements that opposed the dictatorship, such as strong human rights and women’s movement, and the very language of human rights that came into popular usage which has subsequently been used as a unifying symbol for post-dictatorship mobilisation (Brown, 2002; Miles, 2004; Richards, 2004).
Though Robles (2008) documents isolated demonstrations and incipient, but largely clandestine, political organisation engaged in by gays, lesbians and transgendered individuals prior to the early 1990s, the repression experienced under Pinochet was not conducive to movement construction per se. The first public act undertaken by the newly formed MOVILH dates back to March 1992, where they joined the march to commemorate the *Rettig*\(^1\) Report (the product of the Chilean truth commission’s investigation into the rights abuses committed during the dictatorship). Robles recalls that,

> The homosexuals, unlike their fellow heterosexual demonstrators who exposed their faces, were walking at the end of the march with their faces masked to avoid stigmatisation. They were dressed in black in mourning for those victims of the dictatorship and carried a banner which read: *De nuestros hermanos caídos: Movimiento de Liberación Homosexual* (For our fallen brothers: Homosexual Liberation Front) (2008: 9).

As in other Latin American countries, masks were used to safeguard against reprisals for participating in such action (Quiroga, 2000). This serves as an important metaphor for the many individuals who, even in the Chilean society of the late 2000s, are subject to social control mechanisms that lead them to conceal their sexual orientation and gender identity.\(^1\)\(^8\) I enter into the debates on stigma and deviancy in relation to identity in more depth in Chapter Five. I draw on symbolic interactionist works of scholars such as Goffman (1963), who explores how individuals manage stigma in everyday interaction, and more recently, Ken Plummer, who pays particular attention to homosexual identities and the process of ‘accomplishing’ identity (1995, 1996). The other important outcome of this public act was that they not only aligned their cause to victims of the dictatorship, but also posited it within the human rights paradigm, thus recognising its unifying potential to address broader historical patterns of exclusion (Brown, 2002; Miles, 2004; Robles, 2008).

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\(^1\) The ‘Rettig’ report was named after Raúl Rettig, the chairman of the *Informe Nacional de la Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission Report) which investigated and documented the human rights violations committed during the dictatorship. See http://www.ddhh.gov.cl/ddhh_rettig.html (accessed 3 January 2011).

\(^8\) During a conversation with a Spanish friend in Malaga in June 2010, she recounted how a Chilean friend of hers living in Spain did not want to return to Chile given that he felt that he would be unable to live as a openly gay man there.
Since its inception in the early 1990s, this emergent predominantly gay male organising sought to effect social and legal change, as Valdés and Guajardo (2007) indicate in the previous section. The first decade of activism in Chile was dominated by two umbrella organisations: MOVILH and Movimiento Unificado de Minorias Sexuales (The Unified Movement for Sexual Minorities, MUMS). It wasn’t until the late 1990s and early 2000s that the movement achieved a greater level of consolidation and diversification. From the mid-2000s there has been a proliferation of groups which now encompasses male and female transgender and transsexual groups,19 lesbian feminist collectives,20 and religious and University-based associations21 which are no longer confined to Santiago, but are also active in Rancagua, Concepción, Talca and Valparaíso. Dides, Márquez, Guajardo and Casas (2007) start to recognise this expansion, as does Robles (2008).

Activist numbers, however, remain severely limited. One MOVILH activist refers to the lack of human resources available to the organisation, noting that, ‘There are only a few of us in MOVILH, there are seven of us who are working permanently...Mind you, those seven have achieved a lot of things’ (Mariana, 19 June 2009). Trans activist, Lukas Berredo, also lamented the difficulties in often having to work alone to ensure the organisation continued operating when we spoke on my return to the field in April 2010. Another trans male group, Argupación de Apoyo a la Disforia de Género (Gender Dysphoria Support Group, AADGE) was also run by just two people initially, and was later reduced to one. Though volunteers also work on a temporary basis, the activist core remains minimal. Claudia, a transsexual whose case I discuss in the Chapter Four, expressed her disillusionment with LGBTI activism given the difficulties in mobilising people in significant numbers. Below she expresses her frustration at being one of only a handful of people willing to protest publicly. She describes one instance when MOVILH...

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19 These include Grupo de Apoyo a Hombres Trans (Trans Male Support Group, GAHT), Organización de Transsexuales por la Dignidad de la Diversidad (Transsexuals for the Dignity of Diversity, OTD), Agrupación de Apoyo a la Disforia de Género (AADGE) and Sindicato Amanda Jofre (Amanda Jofre Syndicate), and the Sindicato de Trabajadoras Independientes Transgéneras Afroditas (Afrodita Syndicate of Independent Transgender Workers).

20 Such as Las Moiras, Las Perlas, and Las Mafaldas.

21 At a gay pride event held in June 2009 a Mormon-based support group had a stand and the Coordinadora Universitaria de la Disidencia Sexual (University Committee on Sexual Dissidence, CUDS) is active among the student community.
organised a protest outside the far right wing party, *Unión Democrática Independiente* (Independent Democratic Union, UDI)’s head office in central Santiago.

It’s like when we went to the UDI headquarters. There were five of us, just five of us. I mean that just isn’t right. If there had been 100, 200, 500 people in front of the UDI headquarters, then that changes things...It’s a way of applying pressure ...And when we went to Valpo [Valparaíso] there were only 10 of us...I’ve been to a few demonstrations now with MOVILH, and you realise that it’s always you going. But why don’t the others show their faces? Why is it just you that is risking being hit with a baton, or being physically threatened? You know that if you go on a protest you expose yourself to all that...So you get bored of always showing up, that it’s always you, you, you (8 April 2009).

The movement has not yet been able to build a cohesive agenda as groups suffer fragmentation caused largely by personal and ideological divisions. Claudia again expresses her concern at this fragmentation and its consequences, as she remarks ‘I think that in Chile minority groups need to unite more. They need to stop fighting. They need to be more unified, there needs to be more strength among the minority groups’ (8 April 2009). Such a lack of unification is not specific to the Chilean movement by any means, as Bernstein, Marshall and Barclay note

We use the broad term “LGBT” movement when referring to the panoply of organizations and activists that are seeking to improve the lot of lesbians, gay men, bisexuals, and transgendered people. Yet, references to a “lesbian, gay, bisexual and transgender (LGBT) movement have often been a case of wishful thinking or a hopeful gesture toward inclusivity for a movement in which there have been numerous divisions among these various subgroups (e.g Bernstein, 2002; Seidman, 1993; Vaid, 1995). Bisexuals and transgendered individuals in particular have often been excluded from the movement or have been hidden from view during political campaigns (e.g Bernstein, 1997; Currah, Juang and Minter, 2006; Randolph, 2001). The LGBT movement is also composed of numerous organizations that differ starkly in terms of strategies and goals (2009: 2).

As these authors suggest, this fragmentation has facilitated a diversification of strategies that range from raising cultural awareness, to pursuing political and legal activism, to providing support for members of LGBTI communities. The extent to which these different agendas are mobilised does seem to depend upon the ability to mobilise human and financial resources and symbolic and cultural capital (in relation to accessing political and judicial institutions for example). The difficulty in mobilising resources is
seemingly most acute in the case of transgender women. As Annick Prieur notes in her study on trans populations in Mexico,

...in addition to being relatively deprived of economic and cultural capital, the majority of my informants are homosexual men who are particularly deprived of symbolic capital, since they have traded their male honour for a life as recognizable, feminine homosexuals. They live their lives as feminine men in a society where masculinity really counts, where it is a value of utmost social importance (1998: 6).

Since Prieur’s work was published, there has been a shift in how the majority of trans women self-identify. Many now consider themselves to be transgender, as opposed to homosexual men dressing as women. However, the ‘trading of male honour’ is still relevant in the challenges that they present to traditional gender roles. The boundaries for ‘accomplishing’ identity (Plummer, 1996: 66), therefore, are particularly fluid in the case of trans women, which further complicates their ability to create a cohesive political agenda. In addition, several respondents reiterated Prieur’s findings in relation to symbolic and cultural capital in Chile. Whereas trans women were seen to descend this capital scale when they adopted female identities over their legal male identities (either partially or wholly), trans men ascended that scale when they adopted male identities over their legal female ones. In the case of trans women, the intersections of class and gender greatly exacerbate their marginalisation from society. Trans activist, Silvia Parada, personally reflects on such marginalisation in the Chilean context.

During this process [of transitioning from one gender to another], we basically challenge all of those structures which link us to the institutions that regulate us, all of the time. And as it is these structures that discriminate against us, so we abandon them at the same time as they reject us (2002: 123).

In Chilean activism more generally, there has been a shift away from the more concentrated efforts to secure legal change, as evidenced in the mobilisations in the 1990s which were intent on achieving the decriminalisation of sodomy, towards the pursuit of more diverse strategies emerging in the 2000s (Robles, 2008). The complexities of securing legislative change through the Chilean Chamber of Deputies and Senate have also influenced the direction of movement strategies. MOVILH President, Rolando Jiménez, indicates his awareness of these difficulties when the gay movement began to organise initially. He recounts that ‘We always knew that the changes that we wanted to
achieve were part of long term strategies. We knew that from the first day, or at least, I did personally’ (18 November 2008). I explore these challenges in more detail below.

2.4 Legal Frameworks and LGBTI rights across Latin America

The Chilean legislature has proven to be particularly hostile to change vis-à-vis sexual diversity (Miles, 2004; Robles, 2008; Universidad Diego Portales, 2007, 2008, 2009). This has also been noted more generally in relation to ‘moral’ issues being contested that touch upon issues pertaining to the ‘family’ which may contravene Catholic doctrine (Blofield, 2001; Htun, 2003; Vaggione, 2008; Vidal, 2002). Divorce was only legalised in 2004, abortion is illegal, and debates surrounding procreation and the right to life were ignited in the controversy over the morning after pill in 2008. For lesbians and trans populations there are currently no legal protections from discrimination on the basis of gender identity or sexual orientation, neither are there any provisions for same-sex couples regarding inheritance, health, or housing, and transgender and transsexual individuals are not contemplated in the law. The only legislation to be approved regarding issues of sexual orientation or gender identity was the repeal of the penal code that had criminalised sodomy for consenting male adults in July 1999. It was among the last countries in the continent to do so. Nicaragua took the unusual step of recriminalising sodomy in 1992 (Kampwirth, 1998) to be repealed in 2008, and Panama also decriminalised it through Presidential decree in 2008. Belize has yet to reform this law (Ottosson, 2009: 8-14). Not all Latin American countries had such laws post-independence.

This situation diverges significantly with trends occurring continent-wide at the end of the 2000s as LGBTI rights are advancing through new legislation, judicial review processes and new constitutions. Since 2002, when the Civil Union Act was passed in Buenos Aires, legislation has been advancing at a rapid pace. In July 2010, Argentina had only just legalised same-sex marriage at national level. By August 2010, Mexico’s Supreme Court had also ruled in favour of same-sex marriage. The Ecuadorian constitutional rewrite approved in September 2008 via a national referendum offers protections pertaining to hate crimes (Article 81), and recognises alternative family structures and the rights of same-sex couples (Articles 67 and 68) (Cordero, 2009). In
December 2007, Uruguay approved the continent’s first national civil union bill and in September 2009 it became the first country to allow same-sex couples to adopt. In October that same year, it also became the first nation to approve a gender recognition bill for transgender and transsexual individuals, following the example set in Mexico City. Until this time, and with the exception of Uruguay, legislation was passed at state level in federal countries such as Argentina, Mexico and Brazil (Miles, 2009). Corrales suggests this is a product of the predominantly urban nature of LGBTI activism especially in Latin America’s larger cities (2009), but political opportunities are also more accessible in federal versus centralised governments (Kriesi, 2008; Miles, 2004). The Argentine case has become the first where federal political initiatives have been later adopted in national legislation.

Where effecting legislative change has been considered closed to debate, such as in the case of Colombia (Albarracín, 2009; Sánchez, 2009), constitutional courts have actively protected or advanced rights, as in the case of Costa Rica (Wilson, 2007). At an international conference how LGBTI rights were experienced across the globe, convened by UCLA in March 2009, advances in Latin America were duly celebrated in opposition to the complex and conservative arenas of the US, Africa and much of the Caribbean. Chile was however at the conservative end of the Latin American scale. The one area where Chile was a front-runner was in its jurisprudence on gender recognition, as judges have historically preferred to equate gender identity with genitalia. This is a trend that has also been recognised historically in Sharpe’s (2002) scholarship on common law systems in the United Kingdom and Australia. In 2007, activist Andrés Rivera was allowed to change his name and gender on his identity documents to match those of his adopted identity without undergoing genital reassignment surgery (GRS). I detail this case and other similar cases in the Chapter Four. However, in terms of passing legislation, Chile’s national bi-cameral structure is a closed, centralised system of government with far fewer points of access than the open, decentralised federal systems (Kriesi, 2008) operating in countries such as Mexico, Brazil and Argentina. The moral conservatism, which is particularly deep-seated among the political elite in Chile, has played a significant role in accentuating what is also a closed system.
2.5 Chile: A Case of Thwarted Political Opportunities

Though I intimated previously that the transition to democracy was among the political opportunities that facilitated movement emergence, below I explore how the lack of political opportunities in the post-transition period has created a largely hostile and inaccessible environment to advance LGBTI rights. This includes elite and political party structures and the more informal institutions that are in operation. From the fall of the dictatorship in 1989 until the end of 2009, the Chilean population repeatedly elected the left wing coalition, the *Concertación*, over the right-wing coalition, *Alianza*. This changed when the right wing coalition won the 2009 elections and assumed power in 2010. Given that the fieldwork for this thesis was conducted under *Concertación* rule in 2008 and 2009, I refer to the political situation that predominated at that time. In the Afterword I explain the legal and political developments, which occurred after I had concluded fieldwork and completed my analysis for the thesis.

As mentioned in Chapter One, General Pinochet’s power did not dissipate with his withdrawal from the Presidential office. His institutionalising of several ‘authoritarian enclaves’ (Garreton, 1995) prior to ceding power meant that he was able to determine the terms of the transition. His outgoing government implemented a series of constitutional constraints that were then imposed on the incoming democratic government. These included a bi-nominal electoral system and the appointment of nine senators, both of which skewed representation. The structure of the electoral system has meant that governing coalitions have enjoyed only a slim majority over the opposition and in the upper chamber, the additional quota of senators effectively skewed the vote to the right. The ability to secure legislative change has been further debilitated by the high quorums needed, especially where constitutional reform is concerned. ‘Consensus’ politics has thus become a feature of the Chilean political institutional climate inherited from dictatorial rule (Walker, 2003). Pushing for progressive legislative change has therefore been especially problematic for those groups lacking majority political support. The

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22 This was replaced by the *Coalición por el Cambio* (Coalition for Change) in 2009 to contest the elections that year.
23 These Senators comprised ex-members of the Armed Forces, the Supreme Court, a University Rector and a former Minister, in addition to the former President, Eduardo Frei.
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LGBTI movement would certainly fall into this category. Therefore, when public policy objectives cover ‘moral’ issues, as they do in this case, the challenge becomes even bigger (Walker, 2003). Walker, a politician himself, argues that as a first point of entry for legislative proposals, the different committees would purposefully avoid debating controversial issues where possible. Such ‘moral’ issues as raised through LGBTI rights issues would certainly be considered controversial.

Though my focus explores the legislature’s relationship with LGBTI mobilisation and rights gains, the same obstacles are relevant for other marginalised groups seeking change through institutional means. A Chilean amnesty activist importantly reminds us that

> Latin American societies are not liberal. Their democracies remain, in part, very oligarchic, and also, very tutelary and very...restricted in terms of individual rights, and in relation to accessing the justice system and achieving equality...I think that for the majority of the population in Latin America, inequality is a natural state (10 July 2009).

His words resonate with scholars studying citizenship in Latin America (Agüero and Stark, 1998; Caldeira, 2000; Holston, 2009). Below I look at how that inequality is played out in relation to sexual orientation and gender identity more concretely. The anti-discrimination bill currently being debated in the Senate illustrates Walker’s previous point nicely in how the chambers deal with controversial issues. The bill was presented to Congress in March 2005 and aims to prevent discrimination on the basis of a number of criteria, which include disability, ethnicity, gender and sexual orientation. It remains unapproved however.²⁴ The principal obstacles to its advance through both chambers have been the discussions surrounding the inclusion of the clauses preventing discrimination on the basis of gender and sexual orientation. The Director of the División de Organizaciones Sociales (Social Organisations Division, DOS) between 2006 and 2010, sociologist Fransisco Estévez, who was involved in trying to ensure that the bill made it through Congress, noted that

²⁴ In July 2010 it was not considered an ‘urgent’ measure by the executive. In the Chilean system, the President has the opportunity to declare ‘urgent’ any bill that he or she wishes to push up the agenda for debate. In the instance of the anti-discrimination bill, this bill has been declared ‘urgent’ on a number of occasions, but to little effect. See Universidad Diego Portales (2009, 2010) for a discussion of this. To view its passage through Congress, see No. Boletín 3815-07 www.senado.cl.
...in relation to the legislative process, I can tell you that the law that we are supporting is a legislative proposal that is currently being debated in the Senate. It is still in the Constitution, Legislation and Justice Committee, and it covers three main points. First, in Chile, that it is illegal to discriminate arbitrarily. This is covered in the Constitution, but not to great effect. It says that you cannot act in an arbitrary manner, but the Constitution does not state the reasons or motives for which you cannot act in an arbitrary manner. The legislative proposal, in contrast, does state all those reasons, and they include sexual orientation. It is precisely the categories of sexual orientation and gender that are questioned by the Church factions.

The sector linked to the Evangelical Church believes that homosexuality is a sin...and so they cannot support a law that respects sexual diversity because that means supporting something sinful, and on the other hand, the Catholic Church is questioning the law because it argues that it will facilitate more legislation being passed; adoption by same-sex couples, gay marriage, or same-sex unions, etc, even though this law does not cover that. They think that if this law is passed, that the rest will follow more quickly (9 July 2009).

Though the debates might have matured somewhat from the discussions held around the repeal of the sodomy law in the late 1990s (Miles, 2004), the hostility surrounding the approval of such changes remains. Though an increasing number of proposals that serve to protect or uphold issues of sexual diversity have been presented to the legislature, their success in getting through parliamentary committees is limited. Legislative proposals presented to Congress have multiplied and diversified, from seeking to repeal public decency codes and vagrancy laws (UDP, 2008: 455) to numerous projects that deal with same-sex civil unions or protections for same-sex couples. Fransisco Estevez summarises how those that adhere to the Catholic faith view sexual orientation and gender identity as follows

...to them what is ‘natural’ is that men and women represent the different sexes, and that each should have a different sexual identity and gender identity...the deconstruction of this cultural way of seeing things isn’t tolerated. So there is a link between the rejection of sexual orientation, and what is categorised as ‘natural’. And the natural order of things can’t be turned on its head...(9 July 2009).

One politician who has been active in advocating such rights since the 1990s, Partido por la Democracia (Party for Democracy, PPD) deputy, María Antonieta Sáa, has noted that

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25 See No. Boletín 6735-07, 5774-18, 5623-07, 3283-18 through www.camara.cl for the different proposals that have been presented to Congress.
right wing militant organising has taken place at committee level in the late 2000s. It is here that legislative proposals are discussed initially, prior to entering the Chamber of Deputies for wider debate. She draws our attention to the effects of such organising citing the example of the Family Committee.

Here there are conservative sectors operating...The family committee in the Chamber of Deputies...was a progressive entity, and a place where we could approve progressive proposals. Today, however, it has been hijacked by the conservative sectors...The committees in Chile comprise thirteen deputies, and in the majority of them we have seven representatives, and the opposition have six. One of the most conservative individuals among all the conservatives, José Antonio Caste, an UDI deputy took up one of the opposition’s seats...and the only Opus Dei DC (Christian Democrat) deputy is also there. I don’t think it’s happened by chance...So none of our projects are going to be approved by the committee, because they have the majority...The difference with the past is that now they have organised...I also presented the 373 [to repeal public decency codes] and they rejected it, the same conservatives, but this time in the Constitution Committee (6 July 2009).

She is hinting that within the formal settings of the committees, that ‘informal institutions’ are operating simultaneously within the legislature. Gretchen Helmke and Steven Levitsky refer to the ‘informal rules of the game’ as informal institutions. They argue that they are central to understanding how Latin American institutions work, as ‘rules and procedures that are created, communicated, and enforced outside the officially sanctioned channels, they are often as important as the official channels in structuring “the rules of the game”’ (2006: 1). That the Right has considered it necessary to become more organised to combat any advance in this area might also be symptomatic of the increased political support that the LGBTI movement has garnered. It should be noted that legislation does not always advance in a linear manner (Couso, 2008) as Douglas Sanders (1996) suggests in his framework for same-sex rights advance. He details three stages for same-sex rights advance; decriminalisation of sodomy, anti-discrimination legislation, and partnership rights. This framework, conceived of when many countries were still pursuing stage one, implies a level of linearity.

In contrast, Javier Couso (2008) draws our attention to the lack of linearity in the Chilean case by referring to debates around contraception, abortion, and the right to life in the
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dispute over the morning-after-pill in the late 2000s. In 2008, the Constitutional Court overturned legislation passed by congress that had permitted the distribution of the morning-after-pill by local councils.26 Couso argued that the debates held by the constituent assembly, convened to write the 1980 Constitution, were more progressive when on these gender-related issues than the debates held in the Constitutional Court in 2008. When Nicaragua recriminalised sodomy in 1992 under the conservative Chamorro government, it also reversed any progression in relation to same-sex relations in favour of consolidating a morally conservative political agenda (Kampwirth, 1998). Chilean historian, Emma de Ramón, similarly noted how abortion was permitted under Allende’s rule, but was later prohibited under the Pinochet government (22 October 2008). The law on therapeutic abortion was repealed in 1989 (Casas, 2008). Sarat and Scheingold draw on Himmelstein’s work (1990) and conclude that ‘the right has taken its cues from the left – constructing its own culturesof victimization and resistance as well as its own social movements...against abortion rights, and so on – and deploying them legally and politically’ (2006: 7).

Since 2004, when I first did fieldwork, there has been a marked increase in the political support for lesbian, gay, transgender and intersex rights, from the individual level to broader support at the level of political parties. For example, Democracia Cristiano (Christian Democrat, DC) deputy, Gabriel Silber, who had supported a civil union bill during the Bachelet government, refers below to the changing perspectives within the main party in the Concertación coalition,

To put it into perspective, it’s not a priority to discuss the civil union proposal within the DC. However, you could say that there is a greater acceptance towards those of us that support it, more than rejection. It’s also important to take that into consideration. Because before I would have been considered a pariah within my party for suggesting and supporting this (14 July 2009).

However, he did remark on the generational differences in ideology and acceptance of sexual diversity noting that the more traditional Senators from that party certainly had

different ideals regarding sexual diversity than the younger DC members of Congress. The Senate therefore seems to present more of an obstacle to legislation than the Chamber of Deputies. But overall, legislative proposals dealing with issues pertaining to sexual diversity have been more readily presented and supported in the latter part of the 2000s (MOVILH, 2008, 2009, 2010b). The last two Presidents have briefly addressed LGBTI rights in their Mensaje Presidencial (presidential speeches equivalent to the State of Union address in the United States). Though such changes may provide only verbal and symbolic support as opposed to more practical and concrete legislative advances, they are indicative of a less hostile political climate. In 2006, Chile’s first incoming female President, Michelle Bachelet was the first President to refer to the need to protect ‘sexual minorities’ in her Presidential acceptance speech (Universidad Diego Portales, 2007: 290), and in 2010, current President Sebastián Piñera alluded to the need to invoke anti-discrimination measures, as noted below.

A society with real opportunities means that everyone can, with talent and strength, achieve his or her personal goals. A society that really does provide a safety net, so that when someone stumbles or falls, s/he will not be alone or abandoned. A society with solid values means that we must respect and protect life, its dignity and its human rights, we must not discriminate against anyone on the basis of their ethnic origin, economic status, physical appearance, religious beliefs or sexual preference. This also means that we must respect and promote the family...honesty, justice, fraternity and peace.27

The passing reference to sexual orientation leaves the pledge of support very open to ambiguity. Further evidence of the divergence between political discourse and practice, and a source of scepticism for the LGBTI activist community, was Michele Bachelet’s failure to get even close to complying with her pledges made regarding same-sex civil unions. Informal institutional practices did not act alone in impeding change in the legislature; the President also failed to engage in direct dialogue with members of these communities despite repeated attempts by activists to instigate a meeting. In interviews carried out in April 2010, as a follow up to my initial fieldwork, activists reflected on the inaccessibility of the Bachelet government, dashed hopes and disillusion. The editor of

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the lesbian print edition and e-magazine *Rompiendo el Silencio* (Breaking the Silence), Erika Montecinos, reflected that

I think it’s paradoxical because we were all enthused that we had a female President... We thought that because she was a woman, she would have more affinity with these issues perhaps. However, there was a lot of pressure from the Right, much more than during previous governments relating to issues that touched on sexual diversity, or abortion, for example... I don’t know whether to say that there was more pressure, but it was notable that... there was an attempt not to touch upon certain matters that could bother the Church or create conflict. So the President focused on social issues... It wasn’t a government that was ground-breaking in anything, it was more accommodating than anything else (30 April 2010).

I explore the current executive’s response in more detail in the Afterword given that the analysis presented here was undertaken in the context of the Bachelet government and her *Concertación* predecessors. I do, however, include some recent comments made by the President of *Renovación Nacional*, Carlos Larraín when interviewed on television regarding same sex civil partnerships, as an indication of the perceptions held among the Chilean Right and to illustrate the type of opposition that would have been faced by the ruling coalition when governing. Mr. Larraín effectively equated homosexuality with bestiality and paedophilia when interviewed on the programme *Tolerancia Zero*, which aired on 30 May 2010.

Why do we have to support the gay community? If we do, then we also have to support those groups that have anomalous relations with children, or those that support euthanasia... from what I have heard, there are all sorts. I understand that there are also people that like having relations with animals. There are studies on that, it’s called bestiality. So I don’t think that a country’s policies should have to consider differing sexual options (as quoted Universidad Diego Portales, 2010: 275-276).

Though his remarks were immediately repudiated by more progressive members of the party, such as deputies Karla Rubilar and Cristián Monckeberg, and he later rescinded them, his words are indicative of the views of elite right-wing politicians.28

Overall, overt hostility to advancing LGBTI rights among sectors of the right and the Church, and the presence of informal institutions that complicate the passage of progressive proposals through the committees and legislature, exist in parallel to emergent political discourses that support a rights-agenda in relation to sexual diversity, at least symbolically. Though executive discourse may favor change, it is not necessarily reflected in congressional dynamics occurring at lower levels, as Deputy Sáa notes within the family commission. She concludes that ‘Here, we are prisoners of a conservative elite’ (6 July 2009). However, shifts in political discussion of same-sex unions that were ignited during the 2009 electoral campaigns help raise the platform for public debate and challenge visibility that shrouds matters of sexual diversity.

2.6 Cultural Approaches to Social Movements

This discussion of the political environment illustrates how the cultural environment impacts upon the possibilities for collective action (Williams, 2008: 91) and limits the arenas in which activists are able to seek change. In the Chilean case there is a close relationship between the structural impediments to achieving change outlined in the political opportunities literature, such as coalitional consensus politics, and the cultural factors that influence elite perceptions of sexual diversity. Here I refer principally to Catholic doctrine, though Evangelist influences have also emerged in the mid- to late-2000s. The presence of Catholic thought and activism pervades the legislative structures, as Fransisco Estévez and María Antonieta Sáa note above. Similarly, Claudia recalls a television debate from 2009 as a means of illustrating the Catholic Church’s official position regarding sexual orientation and gender identity,

Rolando was on the tele the other day with the Bishop of Santiago. He was saying that homosexuals and trans, that we were abnormal, that we went against nature. Can you believe it? (8 April 2009).

Achieving socio-cultural change is therefore a principal objective of lesbian, gay and transgender advocacy groups in Chile, especially given its salience within institutional arenas. However, the cultural element can also be explored in relation to the internal dimensions of movement culture (Williams, 1995). The focus on culture and social movement activism centres on the use of symbols, language, discourse and identity as a means of mobilising and/or motivating potential actors, as Brown (2002) noted in the Argentine gay movement in the mid-1990s. Williams points to how this emerged from the interactionist tradition as

Scholars in this tradition have been particularly interested in the interpersonal processes through which people understand what they are doing and how they find the ideational, moral and emotional resources to keep doing it (2008: 93).

Given the difficulty in mobilising such discourses and language in any concrete manner within political institutional climates, I explore how members of LGBTI populations have been willing to deploy these through the legal system. This has meant challenging the institutional arena, but it also questions the extent to which such discourses and symbols can be used to mobilise members of these ‘invisible’ populations more generally.

2.8 Social change...legal change?

Measuring social change is clearly highly complex and among the 55 respondents who contributed to this piece of work in some form or other, there were conflicting opinions regarding levels of social advance for these populations. Activists and politicians well versed in the subject matter held more positive views regarding social change. Yet in other circles, interviewees were much more circumspect about the actual gains made, not least the protagonists of the cases that I discuss in Chapter Four. These are the cases around which I base the analysis of this thesis which. Some indicators of change are cited by Robles (2008), who celebrates the advent of gay characters in mainstream soap operas. Furthermore, public opinion polls now more readily cover sexual orientation and media coverage is more expansive in this area and more measured in tone than previously. The commercial gay scene is becoming more consolidated through a barrio gay (gay neighbourhood) in central Santiago where designer shops, hairdressers and cafés attract both a gay and heterosexual middle class clientele. That said, MOVILH President reminds us, ‘the costs of coming out, especially in some areas remain high, or there is

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still widespread fear that they are high' (18 November 2008). One report conducted by the Comisión Nacional del SIDA (National Aids Commission, CONASIDA) in 2000 reported that only 99.2% of respondents identified as heterosexual.

The prevalence of social sanctions in Chilean society is still manifest through the discriminatory practices to which such individuals are subject to. The study carried out by CLAM revealed that of 411 participants interviewed at the 2007 Gay Pride march in Santiago, that 80.3% had been subject to discrimination and 84.4% subject to aggression (2008: 37). This compares to 70% of those questioned in Rio de Janeiro in 2004 and 72.1% in São Paulo in 2005 using the same framework (2008: 38). Yet they are also indicative of how the lack of legal advance continues to impact on the social. Discrimination has been documented in schools, through the expulsion of pupils engaging in same-sex relationships and in the workplace where people have been fired for being lesbian or transgender. Individuals often face (often self-imposed) social isolation, or are victims of violent attacks or harassment yet lack recourse to legal protections (MOVILH, 2007, 2008, 2009, 2010; MUMS, 2007; Universidad Diego Portales, 2006, 2007, 2008, 2009, 2010). Bianca Vidal, founding member of the Sindicato Amando Jofre (Amanda Jofre Syndicate), points to the complexity of achieving social change, even if legal change were to occur.

If we had a gender recognition law many things would change...But stigma and discrimination, that will take years to change...It would give them [the trans women] more rights however (13 July 2009).

The same social sanctions which operate in the family sphere, the workplace and educational establishments also extend into institutional arenas. Despite the concerns raised here by Bianca, there is a consensus among members of LGBTI communities, which is also reflected in the reports produced by the movements, that the types of abuse and discrimination that members of these populations are subjected to now are less severe than in the past (MOVILH, 2008, 2009, 2010). As another trans activist, Krischna Sotelo indicates,

I would say that in the last 10 years of struggle there have been a number of advances, in that, the persecutions that the girls are subjected to have diminished significantly. Police violence has diminished by about 80%...but a lot of things
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still mean that trans people are unable to fully exercise their citizenship rights. I can’t conform with that. And me, as a heterosexual, professional woman, I should not have to intervene between an institution and an organisation that represents a group of people who suffer rights violations, but unfortunately that’s how it is...(30 June 2009).

Here she also draws our attention to her role as an activist in mediating with the state on behalf of the organisation ‘as a heterosexual, professional woman’. The conditions presented above reflect the difficulties for trans populations to negotiate the capital differences that Annick Prieur (1998, cited previously) outlines and how that actually plays out here in relation to engaging with power structures. Krischna’s other point about the decrease in violent crime directed at trans populations is reflected in other reports, yet they simultaneously note a rise in discriminatory acts being reported overall (Barrientos et al., 2008). It is, however, believed that individuals are now more willing to report cases of discrimination (Barrientos et al., 2008).

It is precisely the structural inequalities that contribute to such levels of marginalisation that Gloppen questions in her definition of social transformation. She defines social transformation as

...the altering of structured inequalities and power relations in society in ways that reduce the weight of morally irrelevant circumstances, such as socio-economic status/class, gender, race, religion or sexual orientation (2006: 37-8).

Francisco Estévez, prior to working as Head of the DOS, headed an NGO called Fundación Ideas. It was an organisation which sought to raise the issue of discrimination among the Chilean population from the late 1990s. They were also the first organisation to start collecting data on perceptions and discrimination in relation to gender, ethnicity, disability, and sexual orientation. As regards the latter, he recalls,

Discrimination on the basis of sexual orientation is very high...it is difficult to talk of percentages, but I would say that 20% of the population openly and admittedly discriminates in this area. In other words, they are prepared to admit this verbally. What happens in practice is something else...When the first study was carried out, around 50% or 60% openly and admittedly declared themselves to be homophobic...there is a difference between what one says and what one does. But that advance is due to a number of things: 1. The work and struggle of the organisations that represent sexual minorities 2. A more open stance of television towards these issues which then brings them to the masses...There is
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still a high level of discrimination. But what I want to say is that homophobia in Chile, culturally speaking, isn’t rising, it’s falling (9 July 2009).

The World Values Survey reported similar figures. They noted that complete opposition to homosexuals had fallen to 35.1% in 2000, falling from 75.7% in 1990. Here Fransisco highlights the complex and contradictory nature of social change, which is also reflected in the CLAM statistics which show high incidences of discrimination faced by LGBTI people. He acknowledges that homophobia is still prevalent, as Bianca notes earlier, but he draws our attention to how people are less overtly homophobic. Krischna also notes a less violent level of hostility directed at the trans women populations. However, below he reiterates the difficulties in attaining legal change to accompany the social change, as he continues

So discrimination on the basis of sexual orientation starts to fall, but this only occurs among the population, it doesn’t occur in the spaces where decisions are taken, in those spaces where power is concentrated. There, homophobia is well entrenched (30 June 2009).

I remind the reader that in his role working for the government he was very active in promoting the anti-discrimination law within Congress, hence he had insider knowledge on the matter. Given this impasse politically, in the next section I explore the judicial context in its capacity to facilitate legal change.

2.9 Overcoming the Political Impasse, The Judiciary as Alternative?
Contesting LGBTI rights clearly falls within broader global, and indeed regional, processes (O’Donnell, 2005). Paternotte and Kollman (2010) have explored the policy convergence in relation to same-sex civil unions across the European Union in an attempt to explain the rapid advance in such legislation across the zone, in a similar way that has since occurred in Latin America in the late 2000s. However, the peculiarity of the Chilean case requires us not to dismiss the domestic context. MOVILH President, Rolando Jiménez, recognises that global processes have played a role in achieving change within Chile but that it constitutes just one factor influencing change.

We have achieved social change...social and cultural change. There has been a significant shift qualitatively in how society sees sexual diversity, but that’s a product of our effort...it’s not down to political will, nor to the political parties,
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it’s partly related to globalisation, partly due to our communicational strategy…the demonstrations that we organise and to our agenda (27 April 2010).

Rolando places the onus here on their activism and the domestic realm more than on the effects of global processes. I would also argue that the peculiarities of the Chilean political system, for example in its extreme political moral conservatism upheld through a skewed electoral system present a very different scenario from the Left-oriented governments elected across Latin America, such as Ecuador and Uruguay, or where federal structures also facilitate state-level activist strategies such as in Mexico, Brazil and Argentina. Chile’s ‘outlier’ (Landman, 2008: 87) status in this instance, lends itself to be the object of such study. The Chilean government has resisted global processes in the past, for example, when it showed its reluctance to pass a divorce law. Only in 2004 could couples divorce legally. Scholars argued that the lack of a divorce law certainly did not mirror the social reality (Blofield, 2001; Hutn, 2003). Chile has often been hailed as the economic success of the region and is considered ‘exceptional’ in its historical and political stability (with the exception of dictatorial rule) (Hilbink, 2003). However, those lacking political representation are frequently questioning the extent to which democratic deepening has occurred. Fransisco Estévez, reflects on the limits of collective action from below within Chile,

My analysis is that there is a lot of social capital, there are many organisations, but civil society organisations are weak, there is an influence, but they do not define the agenda…in relation to sexual identities it’s a similar situation, they are important, but you cannot say that it is a strong movement that has political and social influence in society (9 July 2009).

To what extent therefore does the judiciary provide an alternative arena to address rights issues? Can it be considered a vehicle through which to pursue rights gains for members of LGBTI communities? In relation to LGBTI organising, Bernstein, Marshall and Barclay argue that in spite of the fact that ‘legal reform by itself is unlikely to provide effective remedies for deep-seated structural oppression’ that, ‘concepts enshrined in legal institutions such as rights, equality and justice, represent persuasive and powerful symbols for movements for social change’ (2009: 1).
One case which has been significant for the LGBTI movement in Chile, is the ‘Divine’ discotheque case. In September 1993, sixteen individuals perished in a fire in a gay nightclub in Valparaíso. Though an investigation was carried out by the presiding judge, the case was concluded without a resolution only six months later (MOVILH, 2002). This has therefore been very symbolic for the LGBTI movement in signalling the inability of members of LGBTI populations to access justice (Robles, 2000, 2008). Despite activism since 1994 to have the case reopened, this only occurred in 2003. This process was greatly facilitated by MOVILH’s ability to secure legal representation (MOVILH, 2004), which they had been unable to do previously.

The reopening of the case was also dependent upon the judge deeming it legally relevant to do so (Judge Latham, 14 July 2009). In 2009, Judge Juana Latham finally resolved that the fire had been caused by an electrical fault. As the back door had been locked, the only means of escape was through the front door, which was the very area where the fire has started (MOVILH, 2010a). However, given the time lapse between the initial case proceedings and the final ruling, no prosecutions could be brought against the proprietors of the disco. The resolution was therefore more symbolic. As, over the years, the case had come to represent an apathetic judiciary and political class that was not concerned with justice under such circumstances. It was also indicative of a judiciary that was very inactive generally in pursuing causes relating to human rights. This example did not make the judiciary the natural point of departure for investigating and pursuing LGBTI rights gains therefore. According to one respondent, César, who had worked extensively with the judiciary as a Police Investigations Officer, ‘We’ve got a court that is extremely homophobic’ (14 May 2009). These sentiments seemed commonplace among the respondents.

The shift in emphasis from political to judicial arenas has been facilitated by judicial reform and adherence to the rule of law that form part of a broader agenda for pursuing democratic deepening in post-transition Latin American countries (Domingo, 2004). In the 2000s particularly, scholarly attention has turned towards exploring the ‘expansion of judicial power’ (Tate and Vallinder, 1995), conceptualised as ‘judicialisation’.
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Latin America (Contesse and Lovera, 2008; Domingo, 2004; Sieder, Schjolden, Angell, 2005; Smulovitz, 2004). The consolidation of these processes at international level has been facilitated by greater activism and influence of courts such as the International Criminal Court and the Inter-American Commission and Court of Human Rights. As ex-President of the IACtHR, Cecilia Medina notes

The court has significantly increased its influence in the region, one of its main achievements has been the that several countries now incorporate the jurisprudence into domestic law. Argentina does, as does Costa Rica, Colombia, and even Peru, and Paraguay is attempting to do the same (17 June 2009).

2.10 Civil Society and Human Rights

One major legacy of the dictatorship was the advent of the human rights movement, which, according to Roberto Garretón (2008), actually began in the first few days of the golpe (coup d'etat). Since democratisation it has proliferated into more diverse social movement activism (Richards, 2004). These initial movements provided the tools, such as legal and human rights discourse, which have since been deployed as unifying symbols across the spectrum for minority groups (Brown, 2002). Despite minimal expectations as regards outcomes, the latter groups continue to pursue legal strategies as a means of advancing those objectives.

Actors are using the language of human rights and citizenship as a means of drawing attention to the unequal practice of citizenship and the uneven application of constitutional rights guarantees and are endeavouring to expand notions of human rights. Historically, in Chile human rights have been solely associated with abuses committed under the dictatorship. This situation is being challenged by legal reformers, such as Cecilia Medina, a founding member of the Universidad de Chile's Human Rights Centre. She relates why she considered it necessary to set up the centre.

My idea of the centre, at least mine, came about in 1990 when I returned from exile. But I was never able to convince anyone to do it...Since I returned from exile I thought that what Chile needed was a focus on human rights, but not those associated to the past, but human rights as they should be...My idea was to try and de-ideologise human rights, see them as part of international law and to show how important they were for democracy. If we were to have a fully-functioning, long-lasting democracy, we would have to respect and protect human rights. That was my idea behind the centre (17 June 2009).
One judge spoke of how she had been influenced by the dictatorship and how it had impacted on her decision to study law and later become a judge,

I studied law in the University of Chile and have been qualified for about fifteen years or so...I'm of the generation that lived through the dictatorship, we fought for the reconstruction of democracy, we went on protests, we went on strike, and we worked hard so that this country could be rebuilt democratically...(June 2009).

Even during the dictatorship, therefore, lawyers have been driving forces in attempting to uphold human rights and advance democracy. As central players in the legal process, activist networks of lawyers have emerged to instigate and promote legal action in conjunction with NGOs and social movements in order to put into effect legal mobilisation strategies. Domingo, in her work on judicialisation, points to the wider tendency to use litigation to advance social change,

With regard to societal factors, the judicialization of politics follows from changing attitudes towards the law and the use of the legal system. Again, urbanization and modernization have largely driven the expansion in litigation and recourse to the courts for dispute resolution. Even in societies where the judicial systems have a poor public image, the growth in litigation has been significant. In addition to resolving private disputes, the courts can provide a formal channel for advancing rights and contesting government policies and decisions. Thus in the face of the democratic deficit of representative government, the law and invocation of the law through judicial institutions can become an instrument of civil society empowerment (2004: 109).

However, it does seem that overall legal opportunities (Lutz and Sikkink, 2000) are expanding, albeit very tentatively within the Chilean judiciary. Judicial reform has forced an opening in the judiciary to incorporate ‘new’ generations of judges, though concrete research as to the effectiveness of this ‘new’ generation of judges is limited at present. The process is now less abstract, more personal, and faster as oral hearings replace written processes. This aspect is less relevant for this thesis, but speaks to trends occurring more broadly, as most of the cases dealt with here either fall within the civil courts, which currently retains the written process, or the Appeals Courts for constitutional guarantees (recurso de protección). Interestingly, a number of respondents reported the family courts to be the most progressive within the system, certainly pointing
to an area for exploration. The language of human rights is becoming more broadly entrenched and is diversifying away from previous associations solely with past abuses, albeit slowly in some sectors. Legal and other actors are trying to maximise resources to try and mobilise the law in pursuit of change.

2.11 Conclusion

Across Latin America there has been a policy convergence (Patternote and Kollman, 2010) in legislation pertaining to LGBTI rights gains, which include same-sex marriage and adoption in Uruguay and Argentina, and gender identity rights in Uruguay and Mexico City. These processes took place predominantly during and soon after the fieldwork conducted for this thesis. The Chilean legislature, however, has historically proven itself to shy away from legislating on the ‘moral’ agenda which may encompass gender and reproductive rights (Blofield, 2001; Dides, Márquez, Guajardo and Casas, 2007; Htun, 2003) and LGBTI rights such as anti-discrimination law or same-sex partnership rights. The political and symbolic weight of the Catholic Church has weighed heavily against those aiming to advance such rights. Furthermore, structural features of the two legislative chambers also reduce the opportunities for minority groups seeking legal change through political channels. However, given the diversity of movement strategies, certain LGBTI organisations have also begun to target the judiciary as a means of effecting change from below. Such strategies are often pursued in conjunction with reformist lawyers who are intent on challenging the content of democracy and citizenship and on amplifying the application of human rights in the Chilean context. Given that this research is ultimately driven by concerns for democracy, human rights and democratic deepening, I deal with the critical approaches adopted to study the ‘institutional’ arena in the next chapter. I consider how the methods used to conduct this research interlink with the epistemological. The sensitive nature of this research has meant that the reflexive has also played a central role throughout the research process. I also discuss this in depth in the next chapter.
Chapter Three: Methods: Reflexive and Critical Approaches

3.1 Introduction
Given the very personal and political motivations that have influenced my research, as set out in Chapter One, in this chapter I discuss the epistemological underpinnings of the work and how those are reflected in the methods that were used. I then expand on how the legal ethnographic methods were actually operationalised in the field and how the diverse components of the ethnographic work contributed to the research process. The subsequent discussion deals with the considerable ethical implications of the research and what that encompasses in terms of potential harms, informed consent, relations in the field and linguistic considerations. Given the cross-cultural nature of the research and the vulnerable and elite participants, I pay considerable attention to these issues. The chapter draws to a close by detailing the analytical process and reflecting upon my leaving the field. Initial fieldwork was conducted between September 2008 and July 2009, but I also returned to the field briefly in April 2010.

The inherently political nature of the research and the extreme levels of invisibility that societal conditioning and deviancy discourses have placed upon LGBTI populations certainly informed my decision to employ ethnographic methods. Participant observation, in-depth interviews and documents all served as important means of collecting data as a means of elucidating the social processes occurring as individuals sought to embark on legal mobilisation strategies in Chile in the late 2000s. This decision was therefore guided by the research questions in light of the context set out in Chapter Two. However, the concern for collecting ‘rich’ data is also guided by the interpretive, feminist and critical epistemologies that inform this research. These reflect my concern for meaning-making and process occurring at the individual level, yet recognise their relationship within broader institutional structures. The sensitive nature of the research, the predominant focus on ‘researching down’, the exploration of the ‘juridical field’ inaccessible to outsiders (Bourdieu, 1987), and the complexity of accessing cases in the given context all reaffirmed the importance of the methods used. Clearly, conducting legal ethnographic
fieldwork in foreign climes, in an area where power structures are implicit (Starr and Goodale, 2002), and are heightened by my engagement with ‘vulnerable’ populations, raise numerous considerations regarding ethics, access and language. I therefore pay considerable attention to ethical issues arising from the field and subject matter, to reflexivity and relations in the field, in addition to exploring matters relating to language and translation. I begin with an exploration of the epistemological positions that influence my work.

3.2 Epistemology

3.2i Amalgamating Epistemologies

The initial research question posed, ‘To what extent is there a process of legal mobilisation occurring in relation to lesbian, gay, bisexual, transgender and intersex rights in the Chilean legal system?’ is inevitably driven by political considerations, questions of power differentials experienced by disenfranchised populations, and more practically, by issues of institutional access. As with much research, this thesis is not influenced just by one epistemological position. It draws on and combines perspectives from critical, interpretivist and feminist traditions. I do not consider these to be antithetical to each other, but often overlapping and complementary.

This research is ultimately concerned with dominant power structures and how these are exercised and reproduced through dominant discourses, such as the Supreme Court ruling that denied Karen Atala the custody of her three children on the basis of her sexual orientation. Such a ruling serves to reaffirm the dominance of heterosexuality in relation to motherhood. In adopting a critical standpoint, I argue that this research cannot be divorced from the broader structural and historical processes that have reproduced power structures in Chile. The overall analysis does, however, centre more on the ‘micro’, rather than the ‘macro’, where I draw extensively on the latter epistemological positions mentioned. Feminist influences are particularly influential in considering ethical implications, maximising reflexivity, eliciting the subjective experiences of LGBTI individuals, and considering the nature of researcher-researched relations in the field (Hirsch, 2002). The focus on the micro level and the rich data collected through
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participant observation and in-depth interviews lends itself to interpretivist analysis in studying meaning-making and process for those involved in pursuing rights and justice through the legal system. Here, more specifically, symbolic interactionist influences are notable.

I begin by addressing the critical element as I locate the research within the broader political, cultural and historical context. I then expand on the influence of the latter two epistemologies. Given the possible tensions arising from aligning the critical and the interpretive (Travers, 2010), I address this here. Though they constitute a broad collective, critical legal scholars (who include those advocating for LGBTI rights change), according to Jiří Přibáň, are unified by

...the political dimension of the critique of the legal system and doctrine which predominantly draws on the notions of radical democracy and social justice (2002: 120).

The political nature of this research is concerned with how the restrictions on accessing the justice system are mitigated by members of LGBTI communities. These shortcomings are not just intrinsic to the judiciary and its associated structures, but are also characteristic of the broader political context where elite-led policies fail to address these populations’ needs. Elite adherence to morally conservative legislative politics and prevailing Catholic discourses have further conditioned patterns of marginalisation for these populations in Chile, and twenty years of democratic rule has failed to deliver legal change for those whose gender identity and sexual orientation differs from heterosexual norms. I examine how access to the justice system is contingent upon the ability of members of LGBTI populations to access resources and render them workable, and explore the salient role that public interest litigators take in that process. These latter strategists are themselves inherently political in nature (Sarat and Scheingold, 1998, 2001, 2006). I question how prevailing discourses are produced through the legal institutions and professions and are subsequently challenged. I do so by looking at understanding meanings, symbols and interaction between service users (members of LGBTI communities), and their representatives (lawyers), paying particular attention to
how identities are constructed, and how deviancy and stigmatising discourses are both mitigated and reproduced.

Přibáň further notes that the ‘primary target of the critical method is the political neutrality and objectivism of the Western liberal rule of law’ (Přibáň, 2002: 120). The Supreme Court ruling in Karen’s case seems to contravene the principles of neutrality and objectivism. Conversely, the seemingly more subjective nature of the judges’ moral beliefs comes to the fore. Its advance through the Inter-American system of Human Rights also seems to reaffirm this perspective, as I detail further in the Afterword. To some extent this research can be located within the dominant structures, as the aforementioned claims for justice ultimately seek to expand notions of rights and citizenship within the existing legal structures and system of rule of law. Clearly a more fundamental questioning, or rejection, of the system, would be favoured by queer theoretical approaches or radical political standpoints (Phelan, 1997; Stychin, 1995). However, locating these debates within the very systems which have largely sidelined such issues to date, as this thesis shows, has consequences both internally and externally to the judiciary. As the literature on legal mobilisation suggests, indirect outcomes of litigation strategies are often far more wide reaching (McCann, 1994).

Within the broad critical studies movement (Přibáň, 2002; Travers, 2010), my work is located within what Altman denotes the ‘moderate’ (1990: 18-21) strand of the critical legal studies movement, which prefers to critically evaluate and use the rights and rule of law doctrine for the purposes of social, legal and political transformation. While criticising the liberal premise of law’s political neutrality, this moderate approach admits that a legal framework does constrain the state and avoids political arbitrariness. The rule of law...can still contribute to the democratic culture and be used for the purpose of political and social transformation (Přibáň, 2002: 124; 1997).

This resonates with social movement objectives in Chile that seek social and political transformation. Given the different trajectories of western democracies, at which these criticisms have been directed predominantly, Chile’s recent political history and its emergence post-dictatorship presents the rule of law in a somewhat different light. Whilst
the rule of law cannot be idealised either in this context, it has served as a political tool and a standard for governments to work towards. Though pressure has been exerted from the international community to ensure a more efficiently functioning rule of law in many Latin American countries (Dezalay and Bryant, 2002; Domingo and Sieder, 2001; Sikkink, 2005), it has also been questioned from below. This research is therefore concerned with the latter.

Altman argues that

The moderate strand of CLS [Critical Legal Studies] rejects the deconstructionist position on meaning and the view that law and social reality have no objective structure. It holds instead that words do have a settled core of meaning but that the interpretations required to render legal decisions are inescapably responsive to the individual's moral and political beliefs (1990: 19).

I aim to examine the extent to which legal professionals, ranging from legal scholars to practising lawyers and presiding judges, are able to address rights issues affecting the marginalised within Chilean society. Bourdieu's focus on the reproduction of legal culture and the existence of a 'juridical field' (1987) is largely upheld by Chilean scholars in that formalism and conservatism are indeed reproduced internally within the judicial institutional and legal educational structures (González, 2002, 2003; Hilbink, 2007) and this was confirmed by those judges who addressed the issue during interviews. Indeed, the focus here is on lawyers acting in opposition to classical, formalistic teaching and those constituting the 'deviant strain within the legal profession' (Sarat and Scheingold, 1998: 1), or whose social conscience breaks the mould within the hierarchy. Bourdieu contemplates the broader structural forces or 'fields' (1987) operating internally within the institution as a whole, which he describes as,

...the existence of an entire social universe (what I will term the "juridical field"), which is in practice relatively independent of external determinations and pressures. But this universe cannot be neglected if we wish to understand the social significance of the law, for it is within this universe that juridical authority is produced and exercised. The social practices of the law are in fact the product of the functioning of a "field" whose specific logic is determined by two factors: on the one hand, by the specific power relations which give it its structure and which order the competitive struggles (or, more precisely, the conflicts over competence) that occur within it; and on the other hand, by the internal logic of
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juridical functioning which constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions (1987: 816).

I am concerned with marginal actors within the legal professional classes, such as human rights lawyers or those with an interest in social justice who are purposefully seeking to challenge the reproduction of such internal institutional cultures. This focus calls for analysis at the micro level, or exploring how the micro operates with the macro, hence the application of an interpretivist, yet critical framework.

As I mentioned in Chapter One, Herbert Blumer contends that meaning does not come from the ‘intrinsic nature of the thing’ but from a ‘process of interaction between people’ (1969: 4). These ‘agentic’ interactions are ultimately influenced by ‘structures’ as historically, culturally or religiously and politically constituted, as Bourdieu indicates above in relation to the judicial arena. In other words, both agency and structure are considered within the analysis. Though interaction and meaning are studied and analysed in depth, they are done so in consideration of the political, historical and cultural influences operating. I explore the symbolic interactionist tradition in more depth below.

3.2ii Interpretivism

Max Travers (2002, 2010) has actively applied symbolic interactionism in order to understand law as a social phenomenon when investigating the ‘micro’ level of society: how individuals think about, or make use of, law in particular situations (Travers, 2010: 116). He also draws our attention to the importance of using an interpretive framework in relation to identity (2002), noting that

...symbolic interactionists have often been interested in the nature of different perspectives within these social worlds. They are often particularly interested in how identities are formed and changed through interaction with other people (2010: 119).

This thesis therefore explores how interaction through the legal process impacts upon how and where members of LGBTI populations construct their identities as such. For example, I explore the role of lawyers involved in the legal mobilisation process and how their actions and decision-making processes ultimately influence the different spheres in
which people are beginning to openly identify as lesbian or transgender, whereas previously those identities might have been solely confined to the private realm.

Like scholars such as Goffman (1963) and Plummer (1995, 1996), Travers (2002) also draws on Herbert Blumer’s work citing the main principles guiding symbolic interactionist work,

The first premise is that human beings act toward things on the basis of the meanings that the things have for them...The second premise is that the meaning of such things is derived from, or arises out of, the social interaction that one has with one’s fellows. The third premise is that these meanings are handled in, and modified through, an interpretative process used by the person in dealing with the things he encounters (1969: 2).

John Kitsuse applies this to homosexual individuals and the difficulties that they face when mitigating social relations as they do not adhere to prevailing notions of sex roles. He therefore intimates how this impinges upon individuals in adopting homosexual identities as they endeavour to avoid being labelled ‘deviant’. He notes that

In the sociological and anthropological literature, homosexual behavior and the societal reactions to it are conceptualized within the framework of ascribed sex statuses and the socialization of individuals to those statuses. The ascription of sex statuses is presumed to provide a complex of culturally prescribed roles and behaviors which individuals are expected to learn and perform. Homosexual roles and behaviors are conceived to be “inappropriate” to the individual’s ascribed sex status, and thus, theoretically they are defined as deviant (1964: 89).

Though he is writing in relation to 1960s United States, this seems to ring true in the case of Chile in the late 2000s. One amnesty activist argues that assuming an openly gay identity has been severely curtailed by Catholic influences that affect social action given that

…the important thing is appearance, not how one is. So it is important that things remain in the private sphere, it doesn’t matter how many families you have, it doesn’t matter what you do, the important thing is to save face…and in that sense that has always been an almost insurmountable wall to being openly gay [in Chile] (10 July 2009).

In this thesis I explore some of the processes through which these deviancy discourses are being challenged by actions on an individual and collective basis. As Becker notes in his
work on deviancy, 'deviance is not a quality of the act of the person commits but rather a consequence of the application by others of rules and sanctions to an offender' (1963: 9).

How are these sanctions being overcome, therefore, as gay, lesbian and transgender individuals openly adopt these identities? The private and public debate has been a central feature of feminist thought and activism and later explored by scholars working on sexual orientation and gender identity (Lutjens, 1995; Richardson, 2000; Stychin, 1995; Taylor, 1995). Below I detail in more depth how feminist thought has shaped this research and my practice.

3.2iii Enter Feminism

Feminist epistemological influences are what draw together this possible divergence between the critical and the interpretive, and the micro and the macro. Given the breadth of these positions, I will clarify further the impact of feminist positioning on my research, and indeed, on me as the researcher. Both critical and feminist epistemologies question power structures and how they are reproduced. Both are thus inherently political. The emphasis placed on researching down, in order to elicit how these phenomena are experienced from below, supports an interpretivist approach to the research and analysis.

Politically influential in anti-dictatorship mobilisations and new social movements in the democratic era (Dore and Molyneux, 2000; Molyneux and Lazar, 2003; Richards, 2004), feminisms in this context have pressed for an increased consideration of the complexities of politics, power and change (Lutjens, 1995: 5). More akin to second wave feminism, Latin American feminism brought the private and the domestic into the public arena (Taylor, 1995: 138) and promoted women as 'active subjects' in social change (Arizpe, 1990: xvi). It further contested citizenship as pertaining to white, middle and upper class males, and consequently has paved the way for identity-based rights claims (Richards, 2004; Stephen, 2001). Gender struggles across Latin America are still very much concerned with the institutionalisation of gender subordination. Within the Chilean legal realm, one example of the lack of attention paid to gender is its absence from the curriculum in university law departments as reported by most scholars I spoke with.
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Classes on gender have, however, been incorporated into judges’ training programmes. These courses, however, are optional, not obligatory. Interest in gender issues is, therefore, selective. By extension, with gender being sufficiently marginalised within the mainstream, LGBTI realities and experiences remain even more so as I have indicated in Chapters Two and Three. My focus on those marginalised within Chilean society and judicial structures, my interest in eliciting their own perceptions and understandings of their situation (Fontana, 2001), my ability to reflect upon my role as a researcher, the relations established in the field and the blurring of the boundaries between politics and scholarship (Hirsch, 2002) all have their roots in feminist research.

From a feminist and critical stance therefore, I explore how existing power structures are challenged from within. Stephen (2001) argues that the extensive and prolonged exclusion of the majority from institutional life requires activists to present their challenges in a way which is legible to state actors. She contends that ‘demands must stem from a coherent social location understandable to those who are the audience for them’ (2001: 54). Movements seemingly have little choice in approaching the state initially using terms that the state will understand therefore.

Feminist epistemologies have also influenced the design and operational stages of the research. Being reflexive in this research process is all the more important given the nature of the research setting, its location at the crossroads of numerous power structures, the vulnerability of participants, and my position in relation to them. The capital imbalances that Annick Prieur (1998) refers to, which are inherent in these exchanges, can certainly not be ignored. However, these are mitigated through my knowledge of Chilean society, cultural practice and codes and through extensive prior engagement with LGBTI populations in Chile. I explore this in more detail in the ethics section.

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30 Training programmes for judges began with the Instituto de Estudios Judiciales (Institute for Judicial Studies, IEJ) and have been expanded more formally through the Academia Judicial (Judicial Academy). This body was created in 1994 to provide judges with more standardised training. Prospective judges must now be selected for training in order to become a judge. See www.iej.cl and www.academiajudicial.cl, (accessed 4 January 2011).
3.3 Contemplating Methods

3.3i Ethnography of the Legal Kind

A wealth of ethnographic work covers the sociology of deviance (Humphreys, 1970; Whyte, 1955), institutions (Atkinson, 2006; Goffman, 1991), stigma (Goffman, 1963), the legal realm (Merry, 2006; Nader, 2002; Pierce, 1995a), and transgender populations (Kulick, 1998; Prieur, 1998). This work, however, falls within the legal ethnographic field (Hirsch, 2002; Goodale, 2002; Merry, 2006; Starr and Collier, 1989). I now consider how the aforementioned epistemological influences impacted upon the process of conducting ethnographic research. Though I drew principally on observation and in-depth interviews to collect data, a more rounded approach also took into consideration court reports, observations made in meetings between lawyers and claimants (or potential claimants), informal conversations with respondents, telephone and email correspondence with respondents, visits to courts, attendance at LGBTI ‘pride’ events, and spending time in a university law school. I drew on legal ethnographic methods guided by the feminist and interpretive emphasis on generating ‘rich’ data to understand social process and subjective experience (Fontana, 2001; Pierce, 1995a). Participant observation was therefore integral to this research. Hammersley and Atkinson loosely define ethnography as

referring primarily to a particular method or set of methods. In its most characteristic form it involves the ethnographer participating, overtly or covertly, in people’s daily lives for an extended period of time, watching what happens, listening to what is said, asking questions – in fact, collecting whatever data are available to throw light on the issues that are the focus of the research (1995: 1).

This last sentence resonates particularly with my approach to data collection. As my research is located within what Bourdieu (1987) refers to as the ‘juridical field’, I needed to maximise my understandings of legal culture, as assimilated and practiced by Chilean lawyers, judges and court clerks. I did not have the problem of having to make the ‘familiar strange’ (Delamont and Atkinson, 1995: 7), but quite the opposite problem. The Chilean legal system is frequently characterised as particularly formalist, corporatist, conservative and hierarchical (Correa Sutil, 2008; Hilbink, 2007). As an outsider, ethnographic methods therefore provided more contextualised and comprehensive
understandings of processes occurring in this specific cultural setting than interviews alone would have done. For example, I learnt a considerable amount through informal conversations with lawyers and a judge and by actively observing the processes in the courts as they proceeded. David Nelken’s work on legal culture notes that ‘their culture may be imbued with knowledge of insider culture, that the outside researcher might not have’ (2000: 8).

Given the nature of the research field therefore, combining interviews and participant observation enabled me ‘to uncover a deeper level of information in order to capture meaning, process, and context’ (Landman, 2008: 21) and to gain a deeper grasp of ‘the importance of power relationships and historical contextualization in understanding legal and social change’ (Starr and Collier, 1989: 5). As Burawoy et al. also note,

Participant observation...aims for the subjective interpretation of social situations...It was designed to elucidate social processes in bounded communities or negotiated order in institutions (2000: 1).

This thesis examines lawyers’ agency through their interaction and decision-making, and their role as social agents in representing litigants from below. As in Starr and Collier’s edited collection, I also explore law’s enabling potential, and how ‘People and groups use legal rules to accomplish particular ends, even if such uses often have unintended consequences’ (1989: 12). This is particularly relevant for examining the processes of operationalising legal action for members of LGBTI populations within a predominantly gendered and heterosexual environment. Laura Nader’s ethnographic work on litigation and social change indicates how these methods are appropriate for studying non-powerful subjects within the legal system ‘to challenge the assumption that the law originates only with the powerful’ (2002: 7). Indeed, these methods were salient in exploring how new relationships were emerging between the less powerful and the law.

This approach enabled me to observe first-hand how transgender individuals negotiated the dissonance between their adopted and legal identities. Witnessing the discomfort

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31 All respondents noted that the composition of the judiciary in relation to gender was fairly equitable. However, the higher echelons of the judiciary did not reflect this trend and was male dominated. Gendered here refers to the outlook of the institution more broadly perceived.
inherent in having to negotiate one's identity in such a way, and the mechanisms used to
minimise that discomfort, provided a completely different insight than if it had only been
relayed to me by the individual concerned in an interview. I was able to see personally
the complexity of how trans individuals managed their identity publicly in formal
settings. I witnessed a handful of such incidents, but for those concerned, negotiating
such formal situations in Chilean everyday life is extremely repetitive and a constant
source of consternation.

3.3ii Fieldnotes

I recorded observations, such as that mentioned above, in fieldnotes. In this section I
detail the role that they took in this research process. Hammersley and Atkinson describe
fieldnotes as consisting

...of relatively concrete descriptions of social processes in their contexts. The aim
is to capture these in their integrity, noting their various features and properties,
though what is recorded will clearly depend on some general sense of what is
relevant to the foreshadowed research problems...Indeed, the main purpose is to
identify and develop what seem to be the most appropriate categories (1995: 175).

Following Hammersley and Atkinson's advice (1995:176), and in a similar manner to
Prieur (1998: 14), notes were written up as close to the event as was conceivably possible
to maximise my recollection of the events or conversations. On most occasions, I would
make brief notes as soon as possible after an event or conversation, and would later use
these as prompts to write more detailed notes. My mobile phone became a useful tool to
write down prompts if I could not easily access pen and paper. On rare occasions I would
perhaps take time out from observing or interacting to write down conversations or
incidents that I considered too important not to record in the moment. But predominantly,
these were recorded after the event to reduce any disruption to "natural" participation'
(Hammersley and Atkinson, 1995: 177). As initial analysis was undertaken and new
themes began to emerge, these were incorporated in greater depth in the fieldnotes. For
example, when having lunch with my lawyer friends, I would pay more attention to the
details of the conversation, as I realised the central role that their involvement would play
in my analysis. The fieldnotes were predominantly used to draw out the emergent themes
that were later used as a line of enquiry in the interviews that followed to explore those themes more fully.

3.3iii Interviews

The bulk of data analysed came from interviews conducted with a wide spectrum of respondents involved in the legal process. These enabled me to elicit personal perceptions and experiences in more detail. These semi-structured, in-depth interviews drew upon Rubin and Rubin’s (2005) ‘responsive interviewing’ framework and comprised three main groups of participants: members of LGBTI communities undertaking legal action, activists, academics, lawyers and human rights advocates associated with civil society organisations and social movements, and finally, members of political and judicial elites. I conducted ten interviews with LGBTI activists, and of those ten, three were also claimants undertaking legal action. I differentiate them from those claimants that also engaged in activism on a more temporary basis. For example, of the twelve claimants that I spoke with, six had been involved in some degree of activism as a consequence of the discrimination that they had suffered. There was also a degree of overlap with legal professionals. Of the twenty-three lawyers interviewed, seven worked as academics for their main employment. Two had also worked as judges, and nine were practising lawyers who worked privately or for an NGO, but they exercised the profession on a day-to-day basis. Four were students involved in cases sponsored by the UDP. I interviewed three other legal scholars from other ideological backgrounds to further comprehend the diverse perspectives that made up the legal professional classes. Additionally, I spoke to eight judges and five members of the political classes. Of this latter group, all were from the then governing centre-left coalition, the Concertación. Of the eight judges, five had been involved in cases dealing with LGBTI rights issues, and three had not. They were from different hierarchical positions covering the Supreme Court to lower provincial courts. In this section, I expand on how I applied Rubin and Rubin’s interview framework before exploring how it was put into practice in the field. Note that I discuss issues of access and consent later in the chapter.

32 In the case of transgender and transsexual participants, they were usually active prior to obtaining their gender recognition, whilst those contesting cases of discrimination became involved usually while the case was being disputed.
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Rubin and Rubin's 'responsive interviewing' framework informed how I conducted and analysed the interviews given the importance of choosing interviewees who are knowledgeable about the research problem, listening carefully to what they tell you, and asking additional questions about their answers until you really understand them...the researcher is responding to and then asking further questions about what he or she hears from the interviewees rather than relying on predetermined questions (2005: vii).

The authors argue that this framework is suited to examining social and political processes as it enables the researcher to explore depth and complexity whilst simultaneously contextualising these factors (2005: 1-3). From a feminist perspective, it is necessary to comprehend individuals' decision-making processes in undertaking legal action by eliciting their own perspectives (Fontana, 2001). This framework is attractive as it requires instruments to be flexible and evolving, allowing initial themes and concepts that emerge during early-stage interviews and observations to be incorporated into latter-stage interviews. As the research progressed and preliminary analysis was carried out, the instruments were modified accordingly (Rubin and Rubin, 2005).

3.3iv Interviewing the 'Vulnerable'

In a context where very few people who identify as lesbian, gay or transgender are able or willing to present legal challenges within an institution seen as hostile to such realities, I would contend that members of these populations can be considered 'vulnerable' (Kong et al., 2001; Lee, 1993; Valentine et al., 2001). The circumstances of the cases that I detail in the next chapter seem to reinforce the fact that their legal status (or lack of status) constitutes the very nature of their vulnerability. Stychin has indeed questioned whether contesting such cases in the public arena serves to accentuate this vulnerability or mitigate it (1995: 148). The interviews therefore drew out individual reasons for pursuing legal action, perceptions of this process and, where relevant, reflections on the outcomes. The inherently political yet delicate nature of the research, my personal connection to the topic, and the relatively small field of participants also meant that interpersonal relations often featured significantly in my interaction with respondents, consistent with feminist epistemology.
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Being immersed in the research setting certainly facilitated interviewing ‘vulnerable’ participants. I spent considerable time in the field to extend my networks within the LGBTI activist and non-activist communities as much as possible, usually through informal means. Attending parties or activist-led initiatives were particularly relevant in the initial stages of fieldwork as I used existing relationships to build others. When Madriz researched Latina women in New York, she noted that impersonal recruitment did not work due to mistrust and cultural factors (1998: 4). Building up my credibility through this process was an important step, not just to secure access, but also to be more comfortable with the line of questioning that I wished to pursue. It also helped in building rapport, which became an integral part of the interview process (Madriz, 1998; Ryen, 2001).

My relationship with Karen Atala is useful to highlight the importance of taking time in the field and building up both rapport and trust. We had friends in common, we had met briefly in the past, I had spoken to a number of people involved in her case, I had spoken with her partner, yet I was very aware of the highly sensitive nature of the case. I acted with extreme caution. The first meeting served as a pretext to collect documents as she did more of the talking and questioning. Though this first encounter occurred in November 2008, I did not interview her more formally until May 2009. In between, we had both attended a conference in Los Angeles, along with other activist acquaintances and colleagues. This was to be an important bonding experience that allowed a more relaxed interaction, away from Chilean territory, with her enthusiasm for activism and for travel, and a large contingent of Latin Americans to socialise with collectively. From then on, the relationship took on another dynamic. Trust had been built and though she remained cautious, and was one of the few who asked to see the transcript, she was still very open and frank during the interview. This was perhaps the most complex case in which to build a rapport, partly due to Karen’s reluctance to be interviewed, and partly to my own reticence in pushing the agenda. Building rapport with the other participants was generally an easy and seemingly unforced process. I am still in contact with a considerable number of them.
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As Barbour and Kitzinger (1999) note, researchers who engage in research on minority groups are often more self-aware and sensitive to such issues. With insights into realities of gay and trans friends from the mid-1990s, I was able to draw more generally on my understandings of the complexities of negotiating everyday life as someone whose gender identity or sexual orientation differs from the 'norm'. I was mindful of the cautions raised by those who have conducted research on LGBTI populations, such as Kong et al. (2001), urging us to be aware of the pathologising, stigmatising, and medicalising discourses that have historically characterised research on such populations. Similarly, Smith (1994) alerts us to avoiding reproducing patterns of domination and repression by outsider researchers. The feminist scholar bell hooks has highlighted the importance of language in reproducing domination. She notes that

> Within any situation of colonization, of domination, the oppressed, the exploited develop various styles of relating, talking one way to another, talking another way to those who have power to oppress and dominate, talking in a way that allows one to be understood by someone who does not know your way of speaking, your language (1989: 15).

My time in the field prior to undertaking research helped me to negotiate the necessary linguistic codes appropriately.

All interviews lasted at least one hour, usually two, which suggests that respondents were at ease when being interviewed. As most interviewees were now taking cases in the public eye, they were more accustomed to talking about their situation than they might otherwise have been, and also did so in a very articulate manner. I would use the thematic interview schedule set out in Appendix 1 as a prompt. Given the thematic approach, the order of questioning varied, as the respondent was left to follow his or her own line of thought and where necessary explore new avenues. As the fieldwork progressed, new themes would be incorporated. For example, in the initial interviews, I touched upon the role of the lawyer as mediator and began to explore this more fully in later interviews when I became more aware of the centrality of this role. Fortunately many of the initial interviews were conducted with activists as opposed to claimants, and so I do not feel as though there were missed opportunities for data collection. Only in one case did I sense
that one of the interviewees was tense. He later admitted that it was because he was put off by the digital recorder. He was the only one who had seemed fazed by it, as I recorded all of these interviews. Marcelo and I had had conversations prior to and following that interview and these had been much more fluid. In the elite interviews discussed in the following section, recording and questions of anonymity were more contested and variable. In Appendices 2 and 3, I outline the themes touched upon with lawyers and members of civil society organisations and social movements. Here, I pay more attention to researching ‘hard to reach’ groups.

3.3v Elite Interviews

The analysis in this thesis centres on perspectives elicited from below and from those operating at meso level such as the civil society actors. However, interviewing political and judicial elites provided insight into these institutional contexts, such as their gendered or sexualised nature (Nader, 2002). These interviews increased my understandings of such institutional workings, and elicited perceptions of them, of informal practices, and regarding the populations being studied. As Berry (2002) and Dexter (1970) indicate, researchers use elite interviews to understand policy-making and institutional workings and to extract information from insiders to state institutions. This seems especially relevant in the judicial context, particularly when studying ‘hidden’ issues. Furthermore, interviewing those from different ideological and professional backgrounds broadened my understanding of the field. These elite interviews comprised members of the political and judicial classes.

As I had left interviews with political elites largely until the latter stages of the fieldwork, they were perhaps not as extensive as I had first hoped. I had failed to factor in pre-election campaigning for the December elections. Some of those advocating LGBTI rights politically, whom I wished to interview, became involved in some innovative political manoeuvring. Politicians such as Marco Enriquez-Ominami and the Senator Carlos Ominami both decided to run as candidates independently of their parties in a move to shake up the somewhat stagnant coalitional government set up, the former for President, the latter, for Senator. This meant that they were unavailable for interview. My
approach to elite interviews was to maximise my understanding of the institutional fields which was perhaps not in line with some feminist approaches to such interviews.

Kezar (2003) views elite interviews as potentially transformative in that they can be used to challenge respondents' personal beliefs. I wanted to explore the prevalence of dominant discourses regarding LGBTI individuals, to comprehend further how moral conservatism was upheld legally and politically. I also wanted to elicit elite perceptions as to how social change was perceived in relation to public opinion on these matters. In contrast to Kezar, in my role as a researcher I was concerned with eliciting perceptions, thus I took an interpretivist approach to understanding meaning over critical questioning. Interviews were open-ended given that

Elites especially...do not like being put in the straightjacket of close-ended questions. They prefer to articulate their views, explaining why they think what they think (Aberbach and Rockman, 2002: 674).

Most interviewees indeed did like to elaborate on the points and would talk quite extensively. Only one was brief in his responses.

I also realised that I had failed to push the boundaries radically through questioning, as I reflected on how I had internalised my lived experience in Chile in the 1990s. I expand on this in section 3.5 on Ethics. However, even raising these issues within such circles was challenging in itself given their almost 'taboo' status. When I interviewed Maria Antonieta Sáa in July 2004, she remarked that politicians had been nervous when lobbied by gay activists back in the 1990s during the debates on the repeal of the sodomy law. She put this down to them not having had contact with openly gay men before. In some cases, therefore, my questioning might well have prompted further reflection at the individual level. I had a long, informal conversation with one judge whose discomfort at dealing with the issue was very apparent. This was not only evident during the conversation, but he reported having discussed the matter extensively with his friends in relation to the case he was due to rule on, as he found it extremely complex. He noted that such issues had previously not been of concern for him. During our conversation, if I pushed too far in trying to elicit personal perceptions or to challenge those, his expression
suggested that he uncomfortable and he would also change the tone of his voice which I took as an indication of being more defensive. I then followed a less pressing line of questioning, both to be more fruitful and so as not to cause my respondent discomfort. Other interviews with judges generally explored judicial responses to and perceptions of LGBTI rights within the judiciary, or centred on the particular case that they were dealing with.

Pierce (2002) interviewed members of the Australian judiciary and reported difficulties in eliciting personal perceptions from judges at times. Two of the eight interviews I conducted with judges were the longest of all the interviews. The ‘informal’ conversation lasted four hours, whilst another taped interview lasted three hours. Though I spoke to a small cross-section of judges, mostly considered to be ‘progressive’, I did elicit more personal opinions from the judges. Pierce’s experience of judges being reluctant to give expansive answers due to their ‘mechanistic model of judicial decision making’ (2002: 132) did not therefore ring true here. Those who refused to be interviewed when approached might well have considered such an interview to be unnecessary for those very reasons. However, this might be just informed speculation. Recent studies conducted in Chile indicate that judges are amenable to being interviewed (Collins, 2005; Hillbink, 2007; Huneeus, 2006). But scholars report that the quality and depth of data varies, especially when eliciting more open responses (Huneeus, 2006; Hilbink, 2007). Both Huneeus (2006) and Pierce (2002) recognised the importance of granting anonymity to collect richer data. Again, I conducted these interviews towards the end of the research, with one exception. My knowledge and comprehension of the workings of the Chilean legal system had grown exponentially by then, which gave me more confidence when interviewing as I had a broader platform to draw on during questioning. Case files and sentences were instrumental in increasing my knowledge of legal terminology, legal process, case construction and outcomes. I discuss these in more detail below.

3.3vi The Role of Documents
In ethnography documents present an additional means of studying process and meaning. This is particularly relevant in studying the ‘juridical field’. I came to the judiciary with very little prior knowledge of its workings, and I left the field with substantial
knowledge. Documents were also important in highlighting the mediatory role played by lawyers, which I examine in this thesis. Though I drew mostly on legal documents, such as court reports and rulings, I also referred to newspaper articles and social movement and civil society organisational reports. Both the production and consumption of court reports and case files were important in this instance. The study of legal cases is clearly an instance where ‘the production and use of documents are an integral feature of everyday life’ (Hammersley and Atkinson, 1995: 159). In an institutional framework similar to that studied here, Hammersley and Atkinson refer to the importance of documents in the scientific realm, noting that

One cannot address the complex social realities of scientific work and the production of scientific knowledge without paying serious attention to how and why scientific papers are written (1995: 166).

Prior (2003) also considers documents to be both cultural and consumer products which provide more than just content, and that ‘documents are essentially social products. They are constructed in accordance with rules, they express a structure, they are nestled within a specific discourse’ (2003: 12-3).

They are thus institutionally contingent. As legal cultural products, they provide insights into the different mechanisms and conventions through which legal culture is reproduced. When I was first handed an almost completed case file petitioning for transgender recognition, the law student flicked through the documents apace. The file was interspersed with oficios. At this stage, I had no idea that an oficio was effectively an order from the judge directing the progression of the case. Here, they were usually used to request the relevant reports by the Registro Civil (Registry Office) or the Servicio Médico Legal (Legal Medical Service, SML), which were necessary for the judge to rule on the case. They were small, light-greenish coloured pieces of paper with 1990s-style word processing used to direct the next step in the case. Alejandra quotes from one of the oficios from her intersex petition for gender recognition below,

You are ordered to undergo a medical examination in order to determine whether or not your physical appearance and your psychological-sex concord with the name and sex registered on your birth certificate (26 November 2008).
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It was not until I had accompanied students to the various courts (on several occasions), and individuals on various errands associated with the case, that I came to understand what these actually were. This is just one example of how documents are means of reproducing legal culture. Documents are created within the informally or formally imposed guidelines which are set out by the judiciary and they perform a specific function. They therefore become a means of reproducing formalism, reaffirming the need for legal expertise, and securing the mediatory role played by lawyers. They were useful in indicating how lawyers played out their intermediary role both within the judiciary and in representing their clients. I was particularly interested in how lawyers were able to convey the complex realities and associated rights issues of their LGBTI clients, to judges far removed from such barely visible realities. Case files also gave me an insight into expertise, and lawyers’ general lack of expertise in this area.

The transgender petitions for gender recognition illustrate this well as they were written and presented by a number of different lawyers or groups of lawyers. On one occasion, a lawyer used a petition drafted by a member of the activist/support group GAHT without changing it. The activist concerned had only studied law for a year and had done so in Brazil, but he drew on petitions obtained from other transgender groups and individuals. Overall these petitions differed in content, approach, background detail, though largely converged in relation to legal arguments. They revealed different levels of lawyers’ understanding of these realities, and also portrayed such realities very differently. For example, some were more mechanical in how they presented the difficulties of living as a trans person with an ID card that conflicted with their gender identity, while others presented a more in-depth and emotional case. Clearly, the aforementioned lawyer’s interest or expertise was significantly lacking. In order to counter this general lack of understanding of the issue, some individuals would approach court personnel and judges to explain in person the difficulties of living as a transsexual or transgender person in Chile, as Andrés explains below,

We have tried to approach the system in our own way...we started by sensitising the court clerk, who is the one who receives the case file initially. From there to the judge. I asked for a meeting with her, I explained what transsexualism was. I arrived in my suit and tie. I was invited in and I was treated as a gentleman the
whole time. When I told her that I was actually a woman, the court clerk didn’t believe me (19 October 2008).

The idea was that if court personnel were exposed to such realities and personally met such individuals, they might be more likely to sympathise with the cause. They hoped that this might facilitate the case’s passage through the court. This strategy did require a certain level of insider knowledge of the court’s informal workings and of the personnel’s ideologies. Note that the civil court judges presiding over these cases deal predominantly with inheritance cases, or property and banking matters. Consequently, there needs to be enough information upon which to base a decision yet also efficiently present the client’s reality and make a coherent legal argument that a civil judge would read and comprehend.33

Overall, court reports became an important platform from which to study the mediatory role of lawyers. From a sociological perspective, these reports give an insight into how knowledge is conveyed within legal contexts. By comparing the various transgender petitions, I was able to gain insights into knowledge transfer, legal expertise and to increase my comprehension of the issue. In addition, I could follow the steps taken in the judicial process and at whose behest. They were very useful therefore to ‘suggest potential lines of enquiry and ‘foreshadowed problems’’ (Hammersley and Atkinson, 1995: 160).

The consumption (Prior, 2003) of both court reports and sentences, as outcomes of these legal processes, by different actors such as lawyers, the media and the general public, invariably means that different interpretations of the same case or ruling inevitably emerge. Comparing the judicial sentence to media coverage and social movement interpretations of them provides an indication of how these are translated by activists, the media, or policy makers. Translating legal terminology into more comprehensible language for a wider population to understand is just one example of how documents are

33 Note that though the Chilean legal system is undergoing a gradual reform from an inquisitorial to adversarial system placing greater emphasis on oral, as opposed to written methods of judicial adjudication, the cases dealt with in this instance are mostly written and relate to the old system. The civil courts have yet to undergo reform.
processed between state institutions and society, and then disseminated. How, and into what domains, are the associated notions of rights (or lack of) then assimilated? I would contend that translating and disseminating judicial sentences is much more comprehensive within the largely virtual LGBTI media, than in the national print and televised media. There has been a significant rise in the latter however, pertaining to such cases, as mentioned in the previous chapter. Both court reports and sentences (as part of the legal process) also perform roles within social processes. They indicated foreshadowed themes brought into the analysis and data collection, such as the intermediary role played by lawyers. Implicit in this discussion is the continual and processual nature of analysis.

3.4 Access

3.4i Negotiating Access from Below

Negotiating access to the myriad of individuals, documents and situations covered in this research from marginalised female transgendered populations to judicial and political elites, I could not adopt a ‘one formula’ approach. Access here refers not just to individuals, but also to cases. The latter usually preceded the former. Once I found out about a case, I endeavoured to access those involved including the claimants, lawyers, associated activists (where relevant), and in some instances, judges. To facilitate this process I was able to draw on personal contacts that date back to 1996. My immersion in the field also permitted a more fluid relationship with participants and more flexibility in securing access. In effect, a snowball-type sampling scenario was deployed, yet it was targeted to reach the aforementioned populations. This practice seems particularly effective in a context where clientelism and patronage are part of the informal institutions operating at political and societal levels. The actual means of establishing contact with informants ranged from emails, to personal visits, formal letters and phone calls, to informal or coincidental meetings.

Preliminary explorations in the field confirmed suspicions that the number of cases I would be able to access would indeed be low. Accessing the cases themselves was problematic as societal conditioning has rendered lesbian, gay and intersex identities largely invisible through associations with deviancy and stigmatising discourses. This has both prevented people from taking legal action and impeded access to cases. I often learnt about cases through word of mouth or informal conversations with lawyers, students, or activists. Sampling cases and individuals was, consequently, not an option. Below I reflect on one such case that I came across unexpectedly back in November 2008,

I was returning the case files that I had just photocopied to the secretary of the clinics\textsuperscript{35} at Diego Portales (University). They were the transgender petitions for gender recognition that the University was sponsoring. I'd never met the secretary before as prior to that my contact had been limited to the students taking the cases. On returning the file, I explained who I was and what it was I was returning. Whilst I was explaining this to her, I could see that a student standing just to my right had started to pay attention to what I was saying. A short, dark-haired, very smiley-faced girl named Marcela interjected after I had finished talking to the secretary. It turns out that she was also working on a similar case, though with an intersex person. She asked to see the file, and then we continued talking about her case and my research. Though she had been aware that these transgender petitions were being contested through the courts, she had had no contact with the other students taking the cases. She had, herself, come across some logistical difficulties. Her case was being sponsored by the clinic which dealt with civil cases, as the individual had not wanted to make her case public. The transgender petitions were being sponsored by the public interest clinic.\textsuperscript{36} After a twenty minute (or so) chat we resolved that I would put her in touch with the other students, and she actively encouraged me to get in touch with her client. She thought that she would be more than happy to speak to me. Such was her enthusiasm that she even phoned her on my behalf that very afternoon so that we could arrange a meeting.

At the time I was struck by the distinct lack of information sharing among students regarding their cases. This included how they approached and argued the cases and their

\textsuperscript{35} 'Clinics' refer to the legal clinics that law students participate in as part of their training. In the fourth or fifth year of undergraduate study, they must do a minimum of six months’ work experience in the clinics. They choose between clinics which focus on different aspects of law, such as family law, labour law or environmental law, and then work on cases in this area. The idea is that they learn practical aspects of the profession and the day-to-day management of cases. This work experience usually lasts only six-months and the students therefore rotate and inherit cases from former students, in addition to taking on new cases.

\textsuperscript{36} The public interest clinic, as the name suggests, takes cases that the students and teachers consider to be important to the public debate in Chile. They often take controversial cases, or deal with issues that have not been considered previously. At the UDP, this clinic lasts for one year unlike the other clinics.
experience of court responses. This was especially interesting given the highly complex nature of the cases. Ironically, I eventually became the point of contact between two sets of students from the same law department, both working in clinics on similar cases, and all because of fortuitous timing. On another occasion at the same university, I was conversing with a couple of students, and one of the academics introduced me to a former student of hers. Her words were: ‘She’s also got a case’ (Lidia Casas, 19 November 2008), meaning that she had a case would interest me. Again, we exchanged numbers and I interviewed her. She was also working on an intersex petition for gender recognition. These ‘coincidental’ meetings are indicative of how problematic it was to locate cases, and how important the word of mouth and opportunism were in the field. This is also indicative of the disparate nature of the LGBTI movement and the difficulties it has in mobilising legal resources. The bulk of the cases detailed in the following chapter were accessed either through the legal teams, the associated LGBTI groups, or through a personal contact. Access to these cases that were not part of public interest litigation strategies were important in highlighting the complexity of undertaking legal action to assert one’s rights was greatly influenced by societal conditioning and the associated stigma and deviancy discourses.

Overall accessing interviewees was certainly related to broader Chilean social relations, which it was mostly necessary to replicate Chilean social practices. As contacts frequently emerge from ‘who you know’, social relations are clientelistic to a certain extent. Though I did make use of personal contacts to access other respondents, I targeted specific respondents whom I was interested in talking to. Using the ‘personal touch’ was very effective in maximising the response rate. This involved naming a person known to that particular informant that I was trying to access. All of these communities were small, by that I refer to the legal activist communities and the LGBTI communities principally. As one human rights lawyer indicates,

This is always going to be a quantitatively small field of work...those that engage in legal activism have a job, and do that work on the side, etc...and here [Universidad Diego Portales] we have generated some space [to do this work] but our capacity to absorb others is limited (26 November 2008).
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The judicial arena was the most expansive, however, it was still compact enough that access was facilitated by the small nature of the communities. It was relatively simple to find someone that was in touch with the target person. Finding the contact with the most ‘credence’ close to that person, and using their name as the title in the email, proved the most effective. This worked with activists, academics, lawyers and judges. The more prominent and well considered the named person was, the more rapid the response. However, where people were contacted directly with no prior knowledge, there was also a high response rate. If the direct contact approach failed, then I would resort to finding a mutual contact I could use as leverage. The small nature of these communities definitely seemed to facilitate my ability to secure the most relevant interviewees.

On the odd occasion, opportunism was crucial to gaining access. Researching in a highly centralised country also helped. Approximately one third of Chile’s population lives in Santiago, yet its centre is relatively small in size, and lawyers tend to live in certain areas. One day these factors combined. As I was walking down the street, having dropped my daughter off at nursery, I came across the (now ex-) President of the Inter-American Court of Human Rights. I had already emailed her to no avail, and buoyed by the confidence of the field, I politely stopped her in the street to introduce myself. I had recently seen her presiding over some Court hearings that had been held in Santiago in late April 2009. Fortunately, she recalled the email but had not replied as the Law Department she worked in was in a toma.³⁷ That impromptu meeting secured me her home phone number and an assurance of an interview. It was an opportunity that I might not have seized had it arisen earlier in the research. By then, I was more confident in myself, my knowledge and had more fully adopted Chilean codes. This served to mitigate any ‘British reserve’ possibly present in the earlier stages of fieldwork.

For the most part, I contacted people via email, but also used phone calls, personal visits, and letters to reach judges. Letters were written on Cardiff University-headed paper to heighten formality and to reaffirm my institutional affiliation. Meetings were usually held

³⁷ A toma is when university students occupy faculty buildings or departments in protest. From 29 April 2009, the students began protesting after the Dean of the Faculty was accused of plagiarism. See http://24horas.cl/videos.aspx?id=3556&tipo=27 (accessed 4 January 2011).
within a week of asking, as Chileans live more on a day-to-day basis and extensive forward planning is therefore rare. I would often contact someone and would be invited for interview the next day, for example. Where interviews were arranged further in advance, there was a higher incidence of no-show, especially among LGBTI respondents. This made it necessary to phone prior to each meeting, to confirm, as frequently ‘something turned up’. I learnt this after having had a couple of ‘no shows’.

Gauging the necessary level of formality when requesting interviews and information via email was one area which overlapped with the language considerations of the fieldwork. Email exchanges were essentially evolving, in that forms of addressing respondents changed in accordance with how relationships developed in the field. Rarely was there a uniform way of addressing the same person over time. I therefore had to become adept at starting, and particularly, ending emails. Whereas initially, you might sign off ‘Saludos cordiales’ (Yours Sincerely), that might then change to ‘Saludos’ (Regards), or the more informal ‘Muchos saludos’ (Best Wishes)\textsuperscript{38} even prior to the interview. I would follow the respondent’s lead as regards a lessening of formality. After the interview, that formality would usually lessen again. Where rapport had been greater during the interview, addressing the respondent became even more colloquial, for example, emails might end with ‘abrazo’ (literally – a hug, but can also mean yours or best wishes, but is certainly less formal), to ‘besos’ (kisses) or ‘cariños’ (with affection). In the majority of cases, the degree of informality increased over time. In some cases, perhaps three or four cases, they remained formal, and only in one instance, did the tone move from informal to more formal. I had initially met a lawyer working on one of the cases I was looking at. He was highly enthusiastic during that meeting and asked me to email him, which I duly did. The first email was very informal, ending with ‘abrazo’, and was equally enthusiastic in tone. However, when I followed this up to secure an interview, the tone of the emails had changed considerably, having become more formal in tone, and ending in the more formal ‘Saludos’. This had been an area of language that I had not had to negotiate so extensively in the past, yet was helpful as a guide to researcher-respondent relations.

\textsuperscript{38} These are approximate translations.
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3.4ii Elite Access

To some extent John Johnson’s (1975) claim that ‘the one thing that is needed to ensure success is a detailed theoretical understanding of the social organization of the setting one is attempting to enter’ (as quoted Lee, 1993: 121) rings true in accessing members of the judiciary. His methodology implies a physical presence in that setting. Whilst I had informal access to the physical setting, I was more concerned with ‘social access’ (Cassell, 1988: 94). Lawyers were instrumental in broadening my ‘social access’ by introducing me to the physical setting and to the informal practices operating in the diverse court settings. I used less targeted snowball sampling to access judges from the upper echelons of the judiciary. Here I had to rely more on my gatekeepers’ personal contacts than on my own contacts. Where I used the names of contacts already interviewed to secure subsequent interviews in a similar manner to Pierce who conducted interviews with Australian judges (2002: 134). I did, however, target lower court judges who were presiding over the cases I was studying. By the time I came to interview those, I was able to negotiate the physical space of the civil courts in Santiago. I knew who to ask for and how to do so. This meant being firm and forthright with the request. I also knew how to dress. Had I not visited the courts on a number of occasions with different students and lawyers, I would not have had this localised knowledge, product of the physical presence that Johnson mentions above.

Navigating the Chilean judiciary required the most diverse approaches to securing interviews, though it was by no means inaccessible. As this interview data was not central to this analysis, I pursued these respondents with less fervour (and time). Yet I included the process here as it contrasts significantly with the ease with which I secured interviews with political elites. Insider knowledge was very valuable. I questioned students, lawyers, court clerks and academics as how best to approach the situation. I learnt early on that each court had its own informal institutions (Helmke and Levitsky, 2006) operating. These might include protocol among court clerks, judges’ hours, or rules for attending lawyers and public. Consequently, had the research not incorporated a more ethnographic element, I think that the access that I enjoyed would have been somewhat reduced. As I

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could not apply my experiences of interviewing Chilean political elites in 2004 in this context, the process therefore seemed to reaffirm its particular institutional nature.

The different approaches that lawyers recommended provide an indication of how informal institutions operate. Lawyers working in Santiago’s civil courts suggested approaching the judges directly, the same advice was given to accessing appeals court judges. When I mentioned this strategy to a criminal lawyer in Valparaiso, she laughed and replied that some judges would not even see lawyers in private, let alone agree to be interviewed by someone from outside the judiciary. She recommended that I organise the interview in advance, especially as in the reformed criminal justice system cases were now heard orally. In practical terms this meant that judges were no longer in their offices deliberating over written cases, they were in court hearings. Asking for an audiencia (personal visit or receiving someone in the judge’s chamber) therefore became more complex. In the civil courts, the protocol for requesting an audiencia varied between courts. The best course of action was to approach the court personnel for advice.

Requests to be interviewed would not be commonplace for judges and I think this acted in my favour, as did my ‘outsider’ status. As David Nelken notes ‘insiders in a society may find it useful to draw on the presence of an ‘outside observer’ who is deemed for that reason to be more objective’ (2000a: 12). One Chilean legal scholar actually encouraged me to make the most of my ‘outsider’ status and Cardiff University institutional affiliation as he believed that they would be more likely to contribute to research that they thought would be published outside Chile.

When I approached lower court judges working on cases that I was interested in talking about, I either sent, or personally delivered letters to introduce myself and the research. Appendices 4 and 5 provide example letters, as some were case-specific and others more generic in their introduction. In response to the letters sent I received two phones calls to organise an interview. In one instance, the judge phoned himself, in the other, it was the judge’s secretary. I approached four judges directly, and of those, one refused outright, another made repeated excuses and the other two were willing to be interviewed. I have
to note that it must have been quite an unexpected request for them to have received. Another judge who was on sick leave also contacted me to organise a phone interview. To access judges working in the upper courts, I used email. I would use the technique of naming a person known to the judge to maximise response rates. If I did not get a response, I would follow up with a personal visit. I interviewed two appeals court judges and a retired Supreme Court judge. I would have happily followed up with more such interviews, but my time in the field was coming to an end and swine flu was looming in Santiago in July 2009.

Accessing political elites was generally more straightforward. In 2004, I had learnt that obtaining personal mobile phone numbers was crucial. I would use gatekeepers to achieve this. However, you would need to have obtained the phone number from a sufficiently credible source so that when you explained de parte de quien (on whose say so) you were phoning, you would be granted an interview. I spoke to one researcher at a prestigious Chilean university who had been trying to access political elites via their institutional email, but to no avail. In fact, when I phoned two politicians who were unavailable at the time, they both returned the missed calls. Though not my priority respondents for this research, I would have liked to obtain a couple more interviews with politicians. However, timing for the elections played a role in this, as did my confidence levels. Phoning a politician to ask for an interview is slightly daunting, especially when in your non-native (albeit fluent) language and when you wish to talk about social issues that are highly contentious in Chilean society. The contentious nature of this issue therefore rendered the ethical implications of this research very relevant. Below I explore the ethical implications of doing so.

3.5 Ethics

3.5i Ethics and Reflexivity

Ethical considerations were indeed numerous throughout this research but I was able to draw on my knowledge of Chilean social and cultural practices as I had lived, studied and worked there for extended periods during the 1990s. Conducting legal ethnographic research in foreign climes where power structures are implicit, and simultaneously
engaging with 'vulnerable' populations, gave ample scope for reflecting on my role, conduct and field-relations. I begin this section by exploring the complexity and fluidity of my insider-outsider status given the diverse interview and the field settings. I argue that my knowledge of the field pre-2008 facilitated my ability to mobilise the relevant social and cultural codes according to the need to research 'up' or 'down'. Though the ethics associated with this research are considerable, I focus on the most pertinent areas for discussion. I conclude by considering the role of western ethical procedures and their implementation in foreign climes and fall somewhere between the 'radical' and the 'traditionalist' (Ferdinand et al., 2007: 520) positions.

From a postmodernist-influenced feminist perspective my age, family status, gender, education background, sexuality, ideology, nationality and class were all potential single or cumulative sources of power differentials, most notably when engaging with claimants. In Memar’s House, Mexico City: On Transvestites, Queens and Machos Annick Prieur (1998) comprehensively summarises the capital imbalances between herself and those she is researching given her European nationality, ethnicity and class status.

When the asymmetry between researcher and informants regarding cultural and economic capital is as strong as it was indeed in this case, there is always a danger that the research relationship becomes a sort of symbolic violence (Bourdieu, 1996): the informants may feel objectified and judged by a person who represents the dominant categories of their society...Bourdieu (1996) recommends that the researcher should already know the informant or have common acquaintances, and that they preferably also should have some traits in common that makes it possible somehow to change the objectifying you and we, to create a situation where the two may try to reach an understanding together (1998: 16).

On these occasions where power differentials were most apparent, and I was dealing with the most vulnerable and marginalised among the participants, I was careful to deploy the necessary personal and geographic codes that would serve to re-'brand' me from being a 'foreign researcher' to 'Nico’s', or 'Pablo’s friend' who had spent time living in 'La Pintana'. By mentioning this area, I dissociated myself from the wealthy areas that they might instantaneously associate me with. A couple of interviewees presumed that I lived

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39 La Pintana is a southern district of Santiago. Santiago is a city that is highly divided geographically along class lines. La Pintana is one of the furthest districts from the city centre. It is frequently associated with delinquency, poverty, drugs and violence and designated a ‘no-go’ area by many Santiago city dwellers.
in Providencia (at least)\textsuperscript{40} as I was a foreigner. Few expected me to have lived in La Pintana or the other poorer neighbourhoods that I had spent time in. This presumption was especially common among lawyers. As a foreigner I actually was able to somewhat transcend these barriers and use insider knowledge to do so. Being immersed in the field also enabled me to build relations with those in a more vulnerable position at a slower pace. I would often meet people on a couple of occasions before then asking to interview them more formally. Or numerous phone calls or emails would be exchanged prior to the interview taking place. Through these processes initial queries or doubts could be dispelled and rapport built.

When researching up and researching down I would draw on the cultural references or personal contacts that would gain you the most respect with that individual. I already had extensive knowledge of the internal politics of the LGBTI movement, so as to know which personal references were viable and which not. I acknowledge, however, that this was easier when researching down as my cultural references were much more extensive within non-elite populations, as I explain later on. Researching up was perhaps more problematic, as I had spent most of my time in Chile in more marginal areas. Working as an English teacher in the later 1990s had however exposed me more to the middle and upper middle classes, but I had yet to fully embrace this side of Chilean life. Mixing with lawyers was useful to fill this gap in my fuller integration into such circles, and it became a stepping-stone to facilitate elite interviews and to broaden my self-imposed limitations from past associations. Below I explore in more detail how I drew on different identity characteristics and social and cultural markers when in the field.

3.5ii The Flexibility of Social and Cultural Codes
This notion of using social and cultural capital in a flexible manner was also very significant when researching up. Nationality seemed to play an important role here. One

\textsuperscript{40} Providencia is an upper-middle class area. It is the closest of the barrio alto (the rich areas) to the centre. After that there are Las Condes, Lo Barnachea, Vitacura. My reference to ‘at least’ is that that was the least affluent of all the aforementioned areas, and so it was presumed that if I was not living there, I would be in another of the affluent areas.
amnesty activist refers below to the relationship between nationality and ethnicity as he perceives it,

...within the oligarchic structures there is a ‘pigmentocracy’, the whiter you are, the more European you look, and I mean northern European, the more power you have, and you do actually have power (10 July 2009).

When contacting potential participants when researching up I actively sought to present myself as a UK-based doctoral student, effectively highlighting my ‘North European’ status. I would also name the closest person to the interviewee that I knew who had the most legitimacy and social capital from their perspective. As an outsider I also seemed to be able to transcend the sharp divisions that are apparent in Chilean society such as gender, class and ideology. Whilst it is easy to guess someone’s class from where they live in Santiago, for example, I could not be pigeon-holed in the same way. From a feminist and critical standpoint, this clearly does not question hierarchies and their reproduction (Kezar, 2003), but instead reaffirms it. But, securing access took precedence given that I favour a more moderate approach to the critique. To question existing structures from within, I needed to be able to access those operating within those structures. I was also careful in how I presented the material as I pre-empted potential hostility that following a line of questioning relating to LGBTI rights issues might elicit. The cases that I detail in the next chapter provide an indication of how that may be so. For example, Karen Atala suffered discrimination on the basis of her sexual orientation at the hands of the Chilean Supreme Court. Judges from lower down the hierarchy might not therefore be forthcoming in being questioned regarding such a question. I had read political debates for previous research on the repeal of sodomy debates. These gave important insights into perceptions of Catholic-influenced beliefs (Miles, 2004). One right-wing, Catholic-educated respondent interviewed for this research admitted that he had considered gay men to be *depravado* (depraved or degenerate) (30 June 2009) before getting personally involved with cases advocating LGBTI rights. Similarly, the Supreme Court judge interviewed also referred to how such issues marginalised within the judiciary.
In addition to also being antithetical to feminist ethics and personal politics and practice, it does not come naturally to me to actively exercise power and emphasise my social and cultural capital attributes. I favour observation and being able to merge into the background. Whilst I became more adept at emphasising these attributes through written or spoken communication as the fieldwork continued, achieving this through personal interaction still proved complicated.

It wasn't until a senior member of the law department at the Universidad de Chile brought up the subject that I realised the importance of role-playing in the field and its interface with power. The expectations of acting within one's rank, class, profession, and mobilising the associated social and cultural codes are often a given in interpersonal relations in Chile. At times, I had to deploy such codes to access certain areas or people. I saw this more clearly when that academic lamented the fact that with certain people the only way to gain their respect was to be ‘bruto’, in effect, ‘rude’ to them. This occurred to me in the Supreme Court library. The senior librarian had given me a desk to work at, a computer and printer to use, the option to stay for as long as I wanted. When she was out at lunch the printer ran out of paper. I asked the lady at the next desk where I could get paper. She told me to ask at the front desk. When I asked for paper, with my ‘Excuse me, do you think that you could possibly pass me some paper please….’ approach, I was greeted with a number of questions, a highly dismissive look suggestive of ‘who was I to ask such a thing’ and a very reluctant handful of paper. In light of her comments, I am sure that had I demanded the paper in a manner more fitting to my institutional affiliations and my academic position, my reception would have been a whole lot more positive. Spanish operates by using more command form ‘Give me some paper’ and might or might not be accompanied by a please or thank you. My excessive, British-influenced use of ‘please’ and ‘thank you’ does not necessarily translate well in all circumstances.

Though adopting such an attitude was not necessary in every situation. I needed to conduct myself in a way that did not come naturally when seeking interviews with judges, and engaging with court clerks, when conducting some of the interviews
themselves, though very rarely. It wasn’t just the suit wearing, but the upright posture to go with it that was as equally as uncomfortable. Sometimes this outward presentation was for the gatekeepers, such as court clerks, than for the interviewees themselves. These are lessons that will indeed serve me well for future research.

3.5ii Internalising Insider Status in Outsider Arenas

The other problem that I encountered when researching up was how I had internalised experiences from my period living in Chile in the 1990s and had carried them into Chile in 2008. This became particularly apparent when reflecting on the elite interviews conducted with judges. My initial insertion into Chilean society was itself essentially politicised. As I mention in Chapter One, the University of Liverpool had links with the state-run Universidad de Chile. We were to choose courses run by the Philosophy and Humanities department. Bear in mind that the Pinochet dictatorship had finished barely six years earlier and tensions therefore ran high for the politically aware students that frequented this school. They had experienced curfews, police and military repression, and knew of disappeared friends and relatives and exiles, all of which was in their recent past. I chose two history courses and spent a year in this faculty, attending marches, inhaling tear gas, listening to political ballads and my colleagues’ political debates, reading declassified CIA documents on Chile, and being greeted daily by a mural of Che Guevara that adorned the faculty walls in the days before he was adopted as a commercial symbol in western societies. I also spent the second half of that year myself living in the poblaciones, in one often stereotyped as one of the worst in Santiago, La Pintana. Having hailed from my naïve, white, middle class background, never having dreamt of such atrocities, it was a sharp learning curve that I actively embraced given my interest in humanity and my middle class social conscience.

My interest in human rights was now firmly entrenched. It was during these years that I internalised those very divisions based on class, ideology, geography and ethnicity principally that I was witnessing through my friends’ realities. Such divisions remain a

41 In Chilean Spanish, the poor urban peripheral areas are referred to as poblaciones. They are the equivalent of the favelas in Brazil, for example. English translations might include shanty town, poor neighbourhood, but are perhaps somewhat limited.
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feature of Chilean society to date, as evidenced in the data collected. Almost all interviewees made reference to Chile’s multiple divisions in society and how they were deployed. As Claudia notes,

...but Chile is a country where discrimination is rife, they discriminate against you if you are short, if you are fat, thin, if your surname is Huayacán [of Mapuche origin]\(^\text{42}\), if you are indigenous, or you have a dark complexion, or if you are black...for loads of things, it’s not just against sexual minorities, in general, Chileans discriminate (8 April 2009).

The research for this project took place in 2008 and 2009, by which time the socio-cultural context had opened slightly and political correctness was emerging where it had been considerably absent. Alfredo, a prominent human rights lawyer comments on this shift towards political correctness in Chile,

...today everyone wants to come across as respecting rights, even the institutions, however conservative they may be. They don’t want to be seen as committing arbitrary nor discriminatory acts, and nobody, especially an institution wants to be seen as discriminating on the basis of sexual orientation (2 June 2009).

However, I remained largely attached to my past histories, the most entrenched came from that initial integration. Whilst my best friend had moved from the poblaciones to the burgeoning central hub of what is becoming an increasingly dynamic city, and adopted a lifestyle akin to the middle classes, now a university lecturer, his ability to start challenging those historical barriers were stronger than my own. In the same way that I had internalised these divisions, I had also internalised the realities of my gay friends that dated back to 1998.

When I began interviewing members of the political and judicial elites, I noted how I had begun to reproduce actions and learned processes from that initial time spent in Chile. I found it very difficult to raise the issue of LGBTI rights with those who I knew or presumed to be conservative. I was curtailing my own line of questioning as I had internalised those divisions that I had experienced when living in Chile previously. Furthermore, I had missed much of the modernisation process that had occurred in the years that I had been away and not experienced such changes first hand. As a

\(^{42}\) The Mapuche population is the largest indigenous population in Chile.
consequence, I realised that I was in effect replicating limits that I had established in the late 1990s, in other words, a decade earlier. By now my gay friends’ realities had changed considerably since the mid-1990s. The sodomy was repealed in 1999, a gay ‘ghetto’ has emerged in central Santiago, and hand-holding, especially among younger same-sex couples is a much more common feature than ever before on the streets of Santiago. In relation to internalising past experiences, I apparently was not alone, however. One activist informed me that older generations of gay men were not aware of the social change that had occurred in relation to LGBTI rights. But I would also argue that the power dynamics associated with researching elites (Kezar, 2003) did play a role in this lack of extensive probing.

My concerns on pressing the issue of LGBTI rights very forcefully when interviewing judges were not wholly misplaced. Other legal scholars suggested a subtle approach to raising the subject matter when requesting an interview. They indicated that I should be brief in my introductory letter as to the nature of my study, and to focus on the gender aspect, broadly defined. Had I conducted more interviews with the judicial elite, I would have slowly introduced a more critical line of questioning on the subject matter. These interviews, however, provide the basis for a return to the field to explore matters in more depth.

3.5iv The Potential Harms of Researching Down
Perhaps of most ethical concern, however, is the potential for harm when interviewing members of LGBTI populations. Ferdinand et al. consider that ‘Ethical guidelines are considered necessary as a way of regulating what the researcher can, cannot, or should not do in certain areas of research’ (2007: 520). Given the political, and hence, critical nature of the research, possible tensions arise between the research objectives versus how they may impact upon research participants. Of most concern are the potential harms that lesbians or transgendered people may be subject to by participating in this research. Valentine et al. argue that ‘research with sexual minorities is particularly sensitive because of the specific laws which frame (or until recently have framed) homosexuality’ (2001: 119). Though sodomy between consenting males over the age of 18 was decriminalised in July 1999, other legal statutes still remain. Across Latin America,
public decency codes have historically been applied by police, in order to curtail overtly non-gender or non-heterosexual conforming behaviour (Parchuc, 2008). It is precisely such legal conditions governing LGBTI individuals that I question in this study. Feminist and critical perspectives enable me to examine how members of LGBTI communities are addressing those very vulnerabilities (hooks, 1989).

However, transgender scholars such as Namaste (2000) and Wilchins (2004) question the extent to which this research actually benefits the target population. Similar concerns were raised by Argentine transgender activist, Marcela Romero, at a conference in Los Angeles in March 2009. She reiterated the importance of transgender agency in mitigating their situation and rejected the need to be represented by ‘suited individuals’ permanently. Though her reference might have been taken to mean the lawyers present at the conference, it seemed more of a generic reference to academics, politicians, and legal advocates.

I aimed to reduce potential harms by communicating with participants as to how their needs meet mine. The notion of informed consent can be used to minimise potential harms. Yet ethics committees’ guidelines are ‘ideal standards’ that are not always sufficiently malleable for the messy nature of research, especially in non-western contexts. Rejecting form filling, I approached informed consent in a more processual (and verbal) manner in keeping with the feminist-influenced research process. This process did not just begin and end with the interview. I did not just provide a brief synopsis of my research and its aims, and ask respondents to complete the necessary forms prior to recording the interview. But I viewed it as a continual process which carried on even after I left the field and which was facilitated by the relations established in the field.

Depending on the respondent, I had either previously discussed my aims and objectives, or this was done at the beginning of the interview. Most interviews were recorded, except for one activist and three judges, where notes were taken instead. One judge agreed only to an informal conversation where no notes were taken until after the meeting. At the end of the interview, I would ask for consent to use quotes in the thesis, if they wanted a copy
of the transcription, and whether they wanted to be contacted should I wish to quote them, as did Rasmussen (2006). I had only two requests for transcripts and the recipients made no comments on them. One judge and one lawyer asked to be contacted if I decide to reference them. For this thesis, this has only been necessary with the lawyer. Where I have considered the excerpts used to be politically and personally sensitive, I have contacted respondents for their responses. For example, I have written a paper (Miles, forthcoming) that deals extensively with Karen Atala’s case, so I sent her a copy to revise. When I spoke to her personally when I returned to the field, her response was: ‘Put whatever you want. You can’t do any more harm to me than has already been done’ (Karen, April 2010).

Returning to the field in April 2010 was important in the process of consent, as I was able to reengage personally with my respondents and confirm that they were happy for me to use their quotes. It was more fitting to do this in person as opposed to via email. The very personal nature of exchanges and of that data collected merited such an approach. As verbal communication is a central element of social interaction in Chile, I used this as the basis for obtaining consent as opposed to relying on the more conventional form-filling.

As I largely analyse public interest litigation cases, I was mostly dealing with claimants and activists who were already ‘out’. The political and public nature of the cases therefore presented problems for assuring anonymity. Most individuals participated in the research on the premise that it was another means of rendering the case visible, which directly contrasts with the principles of maintaining anonymity. My research does not pose any risk to exposure above that which is taken voluntarily, for example, in relation to ‘outing’. However, those claimants who were already ‘out’ were consulted on whether they wished to remain anonymous or not. Rasmussen (2006) interviewed LGBTI individuals in the Australian and US education systems and reported that only one participant wished to remain anonymous. The openly political stance of the majority of activists interviewed was also not consistent with them seeking anonymity. Like Rasmussen (2006), Michelle Owen (2000) found in her study on queer community activists in Canada that
...almost every participant I interviewed did not care about anonymity. In fact, some activists specifically did not want their names left out...In hindsight this only makes sense...Queer political activists are few enough in number in this province that it would be difficult to disguise their identities...Secondly, given that I was speaking to “out,” high-profile activists in many cases, there is no reason that they would not want credit for the work they have done (Owen, 2000: 56).

As many of the claimants I interviewed also engaged in activism (either temporary or long term) most participants in my research wished to be recognised. There was more reticence among transgender individuals who had transitioned and were now living in their adopted gender role to be recognised. In these cases, I use pseudonyms throughout to maintain anonymity. Nespor (2000) argues that several conditions can complicate the anonymity process. These include researching in small communities (Hopkins, 1993), in specific locations and doing extended fieldwork. Nespor argues that identities are more easily recognisable as a consequence (2000: 547-8). These factors all resonate with my research setting and participants and are exacerbated by the public nature of most cases studied. However, individuals from these small communities would potentially be recognisable only to their counterparts when anonymised. Where possible I have anonymised quotes, but where they are case-specific and achieving anonymity is impossible, I have recognised the person.

3.5v Mitigating the Political

Starr and Goodale point to the general messiness associated with conducting legal ethnographic research, noting that

Ethnographic research tends to produce knowledge that is deeply intertwined with local power structures. This meant that legal ethnographers often find themselves confronting difficult problems, the political, legal, and methodological aspects of which are impossible to untangle (2002: 2-3).

This messiness and complexity was certainly evidenced in the small and fragmented Chilean LGBTI movement, which led to a severe lack of information sharing among groups. The transgender petitions for gender recognition illustrate this most effectively. This lack of dialogue was also extended to the lawyers representing both individuals and activists. By July 2009 I had come across a (relatively) significant amount of
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jurisprudence and case files which had often not been circulated across the LGBTI movement due to activists' personal antagonisms and lawyers' roles as protagonists. As I had access to many cases, I became a middle person in mediating the process of document sharing, with all the practical, ethical and political implications that implied as regards the role of the researcher and sharing highly sensitive data. It raises many questions as to what the researcher should be doing with data in their hands as Ferdinand et al. (2007) suggest. Indeed, I had to be very considered when negotiating these exchanges and not act on my impulse to immediately offer such potentially useful data to others. For example, as lawyers were using different strategies and following different steps to achieve gender recognition, some dialogue regarding these processes would have been beneficial to all concerned. In some cases, I instigated this dialogue.

In Chapter One I openly admit the political and personal motivations behind this research stemming from my preoccupation for my friends' lack of rights protections and their need to deny, conceal, apologise for their sexual orientation or gender identity in their daily interaction. But what started out as an inherently political project in essence, became very much less so over the course of the research. I think that the changing focus of this thesis to exploring the roles of lawyers is testament to that shift. As Hammersley and Atkinson suggest,

It is worth noting that to deny that research should be directed towards political goals is not to suggest that researchers could, or should, abandon their political convictions. It is to insist that as researchers their primary goal must always be to produce knowledge, and that they should try to minimize any distortion of their findings by their political convictions or their practical interests (1995: 21).

Other factors mediated my 'activist' versus academic interests and also contributed to that shift. I had initially intended to explore the legal mobilisation process from below and from above, by eliciting judges' perceptions. This enabled me to gather data from different ends of the scale in the Chilean judicial system. Interviews with judges provided insights into their decision-making processes and on possibilities for LGBTI rights advance. A long conversation with one judge pointed to the complexity of decision-making for a 'new' judge. Working in a hierarchical system where his future was dependent upon securing votes from senior colleagues, he felt that he could not act
independently. When I spoke to him he was due to pass sentence on an intersex petition for recognition. This case contrasted greatly with the banking and inheritance issues he usually dealt with. He had a dilemma. He was trying to consider all possible scenarios of the outcome of his ruling, for example, whether marriage or children could possibly become an issue, and whether or not this complied with Chilean law. Until that point I had only been exposed to the perspective ‘from below’, of an intersex person petitioning for her adopted name and gender to be recognised legally. I had previously only focussed on the immense complications associated with her precarious situation and her inability to study, seek employment and ‘be a normal woman’ (Juliana, 28 November 2008). Though my natural affiliation was with the claimants, having witnessed the sense of responsibility that the judge took felt in making such a decision, my understandings became more nuanced and less one-sided. The monolithic institution that was the judiciary, until then perceived as a series of imposing buildings, sometimes hostile or dismissive staff, and disinterested judges, began to take on human form. The ease with which I also accessed these judges and their frankness in their responses to me again served to counter my perceptions of inaccessibility of the judicial realm. Though that data was not analysed in this thesis, I intend to build on it and analyse it at a later date.

Politics also infiltrated my role as a researcher within the highly personalist and fragmented Chilean LGBTI movement. Though I initially drew on friendship networks operating within the ‘movement’, I was not immune to people trying to involve me in the ferocious internal politics. My research was never confined to my friendship circles and I engaged with actors from as many different groups as possible to be as ‘objective’ as possible as an onlooker and interviewer. Friends sometimes urged me to justify interviewing certain members of the activist community, or wanted me to make judgements on those individuals. During these exchanges and justifications I began to realise more fully the implications of my role as a researcher and the complexities associated with that role, as I could not assimilate their personal relations or antagonisms within the LGBTI activist community. I had to think quickly on my feet to deflect these challenges, which were often well disguised, in order to retain my credibility. One friend often encouraged me to speak badly of a fellow activist that I also worked with. Had I
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done so, I would have severely compromised my position in numerous ways, as I knew that word spread very quickly among activists.

As Sudhir Venkatesh (2008) openly confesses in his long-term ethnographic work on gangs in Chicago, the ability to marry political objectives with sound academic research becomes an unobtainable ‘ideal’. His initial intention to produce a piece of work that could ‘help’ the community he was working with came to a halt when he began the intellectual endeavour. However, given the lack of research on LGBTI rights issues in Chile, this is a welcome contribution to the field and I am buoyed by the policy relevance of the research. I was offered the opportunity to channel my political work through other publications and reports, some of which have already been published (Universidad Diego Portales, 2009, 2010)4 and other will be compiled in conjunction with activists and lawyers in future projects.

3.5vi Leaving the Field

Fieldwork was intense and intensive given the political and sensitive nature of the research, the vulnerability of those taking legal action, the small research field and the personal relations established. I was simultaneously consolidating old relations and establishing new ones, some of which will have longevity, while others were more transitory. Initially I was not entirely aware how complex these relations could be. Though I was reflexive throughout the period of data collection, taking some distance from the field was invaluable in being able to evaluate these relations more objectively. I left the field in July 2009 and was undecided as to when I would be returning to Chile. I had been given a tentative offer of work to coincide with writing up the PhD that I was seriously considering. The work did not materialise, but I knew that I had to return to the field anyway. I needed to determine and define relations in some cases, begin closure in others, and accomplish my objectives as regards seeking informed consent on a continual basis. This I preferred to do in person where possible.

4 In these human rights publications, the author of each chapter is recognised in the Introduction only.
Gender, and at times, sexuality, seemed to play a significant role in the relations established during fieldwork. Many interviews or interactions had ended with offers of dinner, coffee, parties, or more outings. I was a foreign woman, with a smile on my face, buoying egos or demonstrating interest where indifference usually prevailed, myself buoyed by the research highs, in predominantly male environs. Reminiscent of Don Kulick and Margaret Willson’s (1995) edited collection *Taboo*, field relations were interspersed with the need to manage the gendered and sexualised aspect of relations with diverse participants. How did I politely turn down an invitation to dinner at a judge’s house? How did I respond when asked by a trans man if I had ever considered having a relationship with ‘someone like me’? How did I deal with the very keen interest displayed by a lesbian gatekeeper? These latter cases were made more complex due to the physicality present in Chilean interaction. People greet each other with kisses, not handshakes or polite nods of the head, and they are generally more tactile. I am very comfortable with this, but it makes the barriers harder to discern when possible advances are made. It also makes such scenarios more difficult to negotiate than in the UK where interaction is generally less physical. Sudhir Venkatesh (2008) refers to the attractiveness of the researcher’s interest in individuals through his relations with J.T. He observes how J.T.’s ego is buoyed by his interest in him. I would argue that this also happened during my fieldwork as exemplified above. These scenarios required careful management so as to maintain relations yet maintain my integrity. Venkatesh’s work deals with these questions extensively and very frankly and discusses the subtlety of power and field relations. His honesty in reporting his ignorance, his naivety and his appreciation of relations in the field as a process also served as an important reference point as I came to conclude the fieldwork for this piece of work. I had established good and involved relations with Marcelo as I followed his petition for gender recognition. We had been in touch since I had left the field but there was a need to meet up and just talk as friends without the research being the reason for meeting up. While I had been back in the UK he had been granted his name and gender change. When we met up when I returned to the field in April it was his turn to question me. He actually told me that he wanted to ask the questions. He wanted to find out about my personal life and understand my own
background a little more. It was in some sense addressing the issue of reciprocity. I was more than happy to answer all of his questions.

3.6 Language
Considering that I did not conduct the research in my native language, I clarify the practical, conceptual and cultural issues associated with translating and researching through the medium of Spanish (Bermann and Wood, 2005; Venuti, 2004). As Spanish is a gendered language, these issues are extremely relevant when dealing with language, sexuality and gender (Cameron and Kulick, 2006). In section 3.5ii I discuss how I deployed cultural codes according to circumstance, this was also applicable for linguistic codes. I deal with the practical aspects and cultural implications of studying gender identity and sexual orientation in a Spanish-speaking country.

3.6i The Practicalities of Foreign Language Usage
Technically, my (Chilean) Spanish was not a major barrier to data collection. I was awarded a distinction in spoken Spanish at undergraduate level, have an Institute of Linguistics (IOL) diploma in interpreting, and have worked as an interpreter and translator. Immersion into legal cultural arenas made it necessary to gain an understanding of legal terminology. Gaining such an understanding helped me see how legal cultural norms were reproduced (Bourdieu, 1987) as indicated in Section 3.2i, but also how to apply them in the field and maximise my credibility when interviewing legal professionals. By the end of the fieldwork most respondents presumed that I was a lawyer.

It was not always completely straightforward, however. In Section 3.4i on access, I refer to the difficulties in gauging levels of formality when requesting interviews and/or information. This has both linguistic and cultural relevance. From a language point of view, initially I had to seek help from friends in asking how I would address elites, for example, by email. As I exchanged emails with judges, academics and members of the political classes, I needed to be aware of the appropriate language to use. Earlier I give examples of difficulties in starting and ending emails and note the decreasing formality as the relationship developed. This also applied to how I addressed respondents. Spanish has
two ways of addressing ‘you’, the formal *usted* form and *tú* (you – the informal singular form). Initially, I usually opted for the more formal form and awaited the response. If they responded using *tú*, then I would follow suit. As I conclude in the previous section, this has served as an important lesson in communicating with wider Chilean publics than I am used to.

I wrote fieldnotes mainly in English, but they were interspersed with Spanish where certain ideas, phrases or concepts did not translate well or when I was thinking in Spanish. All interviews, except one, were conducted in Spanish. Ironically, I had written the interview schedules in English and I translated them contemporaneously. On very few occasions, for example, when I was quite tired, did I do otherwise. I conducted one interview in English at the respondent’s request, as he had lived in the United Kingdom and wanted to practice his English. In all cases, except the aforementioned, I transcribed into the original Spanish and analysed the data in its Spanish form, though I coded in English.

3.6ii Language and Meaning

Oliveira reflects on the difficulties in representing meaning when translating the spoken word into a written format through transcription, and how this process becomes more complex when translated into another language (2001: 118). In other words, she refers to the loss of meaning that can occur when translating spoken Chilean Spanish into written English. As Patai (1988) notes, this ‘distortion’ is ultimately unavoidable. Given that this thesis was submitted to an English-medium faculty, it was necessary to translate the excerpts of data included in the text. Here I have tried to provide as faithful a translation as possible of the ideas presented to me by the respondent. For me, translating meaning takes precedence over word for word translation (Venuti, 2004), which is especially important as my analysis looks at meaning-making.
The most complex translations were the extracts from legal texts, as the legal language that I have acquired is very context-specific and Chilean-centric.\textsuperscript{44} I am therefore not as adept in English legal terminology despite having a legal interpreting diploma. Such vocabulary is built up over time, as I realised through the fieldwork. On occasions in this thesis I retain the original Spanish and provide an explanation of the term when I feel that a direct translation of the word does not accurately reflect the idea in Spanish. The glossary also introduces these terms for the reader's reference in recognition of the context specificity of certain terms. If, during interviews, I was unsure of words or meaning, I would clarify this at that time. I did not have to seek additional clarification once I had completed the transcriptions as the references and names that I was not familiar with did not interfere with the analysis.

Comprehending cultural nuances and the linguistic role of language was clearly facilitated by five years spent living in Chile since 1996. Bermann and Wood (2005) explore the historical and contextual nature of language. They focus particularly on how it is used as a system of power and how this had been applied national identity construction,

Language is not a neutral element. Consciously, it performs feats of appropriation and exclusion, supported by a dialectic of otherness. Creating and relying upon notions of cultural difference, groups underscore out 'we', our identity and our solidarity...we create solidarity by excluding, marginalizing, if not vilifying and making enemies of, groups identified, as other (2005: 4).

The analysis here deals with those classified as 'other', as they fail to conform to dominant heterosexual and gender identity norms, and those who work with them. Cameron and Kulick contend that 'language plays a crucial role in shaping human sexuality and in meditating its various expressions' (2006: 1). My interpretivist approach to analysis pays close attention to how sexual orientation and gender identity are portrayed by third parties, and how they are experienced and understood on a personal level and within broader social contexts. Both data and data collection underscored the complexities of studying those characterised as 'other'.

\textsuperscript{44} For example, the \textit{recurso de protección} [protection writ] that I refer to in the previous chapter is named differently according to the country. In Argentina, it is called \textit{amparo}, for example. See Sieder, Schjolden and Angell (2005).
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3.6iii Gendered Language in the LGBTI Context

One of the most important interfaces of language, meaning and context is how gender in the Spanish language is played out among LGBTI populations. Born into gender-neutral English, using gendered adjectives and pronouns can be at once problematic, yet very significant when researching topics where gender and gender identity are often blurred, very complex and highly subjective. For many years I have had friends within the gay community in Chile and that circle of friends has expanded since then, not least through the research process. Part of the problem is that some gay male friends refer to themselves in the feminine form and others in the masculine. Those closest to me generally use the former. Using the feminine form in this way is usually only reserved for close friends however. If used by others it can be considered an insult. The term *loca* is a good example. It literally means crazy or mad girl, but in this context it usually refers to gay men who present more outwardly feminine gestures. It is often a self-appropriated term, though can be pejorative when misused. Evidently, many gay men do not identify as such, therefore referring to someone in the feminine form or as a *loca* would be considered very offensive. During previous fieldwork carried out in Argentina I once misused the feminine form with the friend of an activist that I was about to interview. In Chile, I almost always used the feminine form with my friends, often in irony, to such an extent that it had almost become second nature. The man’s facial expressions instantly informed me of my grave mistake. So I quickly apologised for my poor Spanish and use of pronouns. It was an early and important lesson, though it clearly had a personal cost for that individual.

Gendered language and pronouns are particularly important for trans people. Andrés expressed his surprise and admiration for the judge who had ruled in his favour in his dispute with Rancagua University over discrimination.

> Well, he is so respectful in the way that he refers to me in the sentence, as he refers to me as Andrés Rivera Duarte, yet the legal name that I had at the time was feminine. It was really very respectful...all the references he makes are in masculine (19 October 2008).

Andrés refers here to the masculine pronouns and adjectives that the judge used at a time when Andrés’ legal identity was still feminine. Conversely, Marcelo lamented the fact

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that his parents still referred to him in the feminine form despite the fact that he had been living as a man for a number of years. He did recognise that his physical distance from his family had complicated the process of his family being able to adjust to his new identity and therefore address him accordingly. Gendered use of language also provided an indication of how comprehensively lawyers’ understood and empathised with the cases they were taking.

3.7 Transcription and Analysis

The ‘responsive interviewing’ model detailed in section 3.3iii views the interview and analysis processes as operating simultaneously. Interviews are both targeted according to the interviewee and are evolutionary. As concepts and themes evolve during the overall research process these become incorporated into the latter-stage interviews. Preliminary analysis is therefore incorporated into the later stages of fieldwork (Rubin and Rubin, 2005: 202). I used early-stage interviews to identify emergent themes and concepts, clarify these concepts and undertake initial coding processes. This provided a more solid structure for the mid- to late-stage interviews. The simultaneous nature of the interviewing, transcription and coding processes meant that as the data were being produced, preliminary interpretative work was also being carried out and being fed back into that process. I could therefore examine the issues that emerged repeatedly in more depth and later test those factors that did not emerge and explore issues that were ignored or sidelined.

More rigorous coding was applied once all interviews and transcripts had been completed. They were examined for more complex and more subtle themes, concepts, and interrelationships. At this later stage, concepts had to be clarified with more care to ensure that meanings were not distorted (Rubin and Rubin, 2005). I then read the texts in greater depth to apply the final coding labels. Once the transcripts were coded, separate files were created for each code, concept, theme and topical event. For example, when coding motivations from below, some emergent themes were determination, personal to collective, urgency/time, rights awareness/learning and expectations justice. I could therefore summarise each one more thoroughly and explore any subtler meanings that had not emerged initially. I then began to explore the relationships between codes. For
example I had a whole list of codes under the heading 'resources', but what was most interesting was the relationships between the codes. I also used other methods to explore these links. Lining my bedroom wall is a very large whiteboard. Codes were written down here and this provided a central thinking space where different thoughts, theoretical and methodological considerations were reflected on. Written in the centre of the board was the notion of LGBTI identities as a process (Plummer, 1996), which was next to the theme/code ‘rights awareness/learning’. The actual physical proximity of the two on the board helped me to link them together. I would also write down thoughts in notebooks carried with me at all times which were incorporated onto the board. Sometimes clarity about the links did not emerge in that physical place, but may have been triggered from an unrelated observation, comment or action, hence the use of notebooks. The writing process also aided my interlinking codes and processes, as did engaging with existing theory. As I was writing, the different perspectives would take on another dimension and relationships would become clearer or linked in other ways. Similarly, when engaging with theory, the timely reading of Plummer’s work allowed me to re-read it from a different perspective and think about my data accordingly.

Furthermore, in areas where codes overlapped, this provided the basis upon which to explore links and patterns between concepts and themes, etc. The culmination of the processes of sorting, refining, and linking these stages as they were building up allowed me to start to draw conclusions linking the emergent data with the initial literature base that acted as a starting point for the research itself as I started to attempt to answer those initial research questions. Whilst the process just described suggests a highly systematic process, it was indeed a complex, and at times, messy process. This process was most definitely facilitated, however, by the decision to undertake the interviewing, transcribing and preliminary coding simultaneously. It allowed me to take a fresh look at the data each time and raise questions not previously considered and made the latter stages of the analysis more manageable.

Although generally an inductive approach to theory was used, however, I did also engage with existing theory. Though informed by grounded theoretical approaches (Glaser and
Chapter 3: Methods

Strauss, 1967; Charmaz, 2006), my theory building emerged from a combination of continual data analysis and its drawing on existing theory, as I believe that theory cannot be created in complete isolation from the pre-existing literature. Such literature guides the initial research and often provides the basis for initial concepts discussed with informants, then used as part of the structure one deploys to reach conclusions. For example, Siri Gloppen’s (2006) framework sets out a number of factors considered necessary to engage in social justice litigation for those not usually able to access resources. She contemplates factors that facilitate legal action and the barriers also complicating the process. These served as a starting point for questioning and consideration when in the field and subsequently moulded the data collection and analytical process from the outset, though began to take on their own form within the field.

3.8 Conclusion
In this chapter I have explored how the epistemological and methodological underpinnings of this research were reflected in how the ethnographic research was operationalised. The expansive nature of the practicalities of carrying out research on vulnerable populations in a foreign setting required an in-depth discussion. Indeed, I could have expanded further. However, I focus on the most salient features that arose both from the research design and fieldwork stages to clarify these processes for the reader. This piece of work is essentially driven by ‘moderately’ critical understandings of institutional power relations as it seeks to explore the roles of activists, claimants and lawyers in negotiating access to the Chilean justice system. Feminist influences were particularly relevant in informing how I conducted the study and on being constantly reflexive when dealing with overkill, or experiencing how gender and sexuality played out during interaction in the field, or negotiating access. Before presenting the analysis in Chapters Five, Six and Seven, I first introduce the cases (and the protagonists of those cases) that formed the basis of my analysis in the following chapter.
Chapter Four: Introducing the Cases

4.1 Introduction

This chapter introduces the key cases and their protagonists who formed the basis of the analysis set out in the following chapters. I present them here to enhance the reader’s understanding of both context and analysis. As I have already indicated in Chapter Two, the prevailing socio-cultural and political constraints meant that I could only access a handful of cases to study in depth. The court cases that I became involved in studying, as both legal and social processes, were being contested when fieldwork was carried out between September 2008 and July 2009. Each case was at a different stage at the time fieldwork was undertaken. Two had been presented to the Inter-American Commission of Human Rights. Below I introduce Karen, Sandra, César, Andrés, Víctor, Armando, Claudia, Juliana, Juana, Kathy, Alison, Romina, Karin, Emmanuel and Mauricio and indicate at what stage of the process the cases were when I entered the field.

During the fieldwork, I became aware of the significant resource limitations which curtailed the possibilities for members of LGBTI populations to embark on a legal course of action to uphold or advance their rights. My research question was sufficiently flexible to allow me to explore the possibilities for legal mobilisation in a broad sense. Therefore, I was not restricted in the cases that I could examine. For example, they were not confined to one area of law, nor to one LGBTI-rights related issue. Most cases, however, were civil cases, such as the transgender petitions for gender recognition or attempts to have one’s constitutional rights upheld after having suffered discrimination. But the disparity in the legality of the case is not the issue under consideration, rather I focus on the social processes that occur simultaneously with the legal process. The cases set out below act as a precursor to the analysis, yet serve as a bridge between the context and the analysis.
Chapter 4: Introducing the Cases

4.2 Karen Atala

Karen Atala is a judge in her mid-forties. After graduating from arguably the best law school in the country, the Universidad de Chile, she exercised the profession in Villarrica before moving to Santiago. Karen was thrust into the public arena when, in May 2004, the Chilean Supreme Court denied her custody of her three young children as her sexual orientation was deemed harmful to their development. The judges argued that Karen’s decision to cohabit with her same-sex partner could potentially expose her children to discrimination by their peers or within the broader community. Against this background, the Supreme Court took extraordinary measures. It overturned the two lower court rulings, from 2002 and 2003 respectively, that had initially ruled in Karen’s favour, and awarded custody to the father. The judges also argued that ‘by taking the decision to make her homosexual condition public, as any person is free to do in relation to his or her personal rights... she has put her own interests above those of the children’. This was the first case relating to LGBTI rights to become subject to such media attention. It did not just gain recognition domestically, but also across Latin America, Europe and the US. In November 2004, a group of lawyers representing different civil society organisations took Karen’s case to the IACHR arguing that Karen’s and her daughters’ human rights had been violated. When fieldwork began in September 2008, the IACHR had recently agreed to pursue their legal investigation into the case. Unable to reach an agreement with the Chilean state, it continued through the system. In September

45 In contrast to the other cases, I use Karen’s surname here given that her case is often referred to as the ‘Atala case’ locally. I do the same with Andrés also because of the political nature of his activism and the importance of recognition.

46 A small town in the South of Chile, in the ninth region.

47 A recurso de queja, a disciplinary measure used when it is deemed that judges have acted inappropriately, was filed by Karen’s ex-husband’s legal team and was accepted by the Supreme Court. This measure is very rarely used, and it has been argued that it was misused in this instance. In fact, none of the lower court judges ever faced any proceedings for having supposedly acted inappropriately.


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2010. Karen’s case became the first to be filed by the Commission to the Court for a hearing on the basis of sexual orientation. I only deal with the case up to the point it was at when I left the field in 2009. However, in the Afterword, I consider the implications of where Karen’s case is in January 2011.

As Karen’s case dates back to 2002 if we consider the domestic court battles, numerous actors have actually been involved in her case. I therefore interviewed as many lawyers working on the case as possible, and other actors who were instrumental in participating in the case in other ways. I also interviewed Karen and her partner, a well-known historian, Emma de Ramón.

4.3 Sandra

Sandra is a teacher in her mid-forties who lives in the south of Santiago. She had taught religious education for over twenty-five years when, in 2007, she was prohibited from continuing to give classes by the local religious authorities presiding over the San Bernardo district of Santiago. She was also discriminated against in the workplace, but not by the school authorities. The Vicar responsible for education in San Bernardo revoked Sandra’s certificado de idoneidad (eligibility certificate) in August 2007 (Universidad Diego Portales, 2008: 444), which meant she was no longer able to give religious education classes. An eligibility certificate is a document that all religious education teachers require in order to give classes and are awarded by the local religious authorities at their discretion. In April 2007, Sandra was summoned by the Bishop of San Bernardo, and the aforementioned Vicar, René Colinier, and she was questioned about her sexual orientation and co-habitation with her same-sex partner. She was warned if she wanted to continue teaching that she had to ‘immediately bring her homosexual life to an end’ and ‘undergo psychiatric treatment in order to significantly transform her private life’. She refused to follow their orders and so had her certificate revoked.

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Chapter 4: Introducing the Cases

She presented a recurso de protección (protection writ) to uphold her constitutional rights in 2007 to the San Miguel Court of Appeal\textsuperscript{53} supported by MOVILH and human rights lawyer, Alfredo Morgado, who worked on a pro bono basis. The writ argued that her right to freely engage in employment and her right to privacy had been violated. In November 2007 the Court of Appeal ruled that

\begin{quote}
\ldots the relevant legislation in this matter allows the corresponding religious body to grant and revoke said authorisation according to its own religious, moral and philosophical principles. This will only apply when they do not interfere with matters of the state\ldots Considered from another perspective, it would mean interfering in religious groups and not respecting their norms, and this is not what the Decree under consideration is designed to establish.\textsuperscript{54}
\end{quote}

On appeal, the Supreme Court upheld that decision in April 2008. So despite the separation between church and state since 1925, this ruling privileges canon law over constitutional law, yet in theory no law should be considered above constitutional law. In December 2008, Sandra’s lawyer presented the case to the IACHR.\textsuperscript{55} Though I only interviewed her on one occasion, we had numerous email and phone exchanges given that we tried to meet several times prior to our final meeting. I spoke to two lawyers who had worked on the case and to MOVILH President, Rolando Jiménez.

4.4 Claudia

Claudia is university-educated, is in her late twenties, and lives in the Santiago district of Independencia. In 2008 she was discriminated against on the basis of her gender identity. She was repeatedly refused a permit to work as a street vendor by her local mayor. Claudia had applied on several occasions to obtain a work permit, but as they are granted by local councils the mayor has the discretion as to who is granted a permit. She claims that she was discriminated against on the basis of her gender identity, as she identifies as transsexual. Claudia sought advice from MOVILH on the matter, and together they confronted the mayor in June 2008. The mayor was recorded as saying

\begin{quote}
I’ll give that faggot a permit only if I want to. I don’t think it is right that a man should dress up in women’s clothing… The guy is homosexual and he wants to be
\end{quote}

\textsuperscript{53} San Miguel is a southern district in Santiago. Santiago has two Courts of Appeal. One is based in central Santiago and the other is in San Miguel which is towards the south of the city.

\textsuperscript{54} \textit{Recurso} 238/2007, resolution 53591, 27 November, 2007, San Miguel Court of Appeal.

a street vendor. So, I said ‘Okay, but you have got to dress properly’. If he’s wearing trousers, there’s no problem. I’ve got no issues if he dresses like a man. Anything else seems like a bad example for the children and everyone else.\(^\text{56}\)

These statements, and others that were even more discriminatory, were included in the case file presented by Claudia’s lawyer, along with a DVD showing the incident that had been caught on film by the Chilean media for the judges’ deliberation.\(^\text{57}\) On 7 July 2008, Claudia presented a \textit{recurso de protección} (a protection writ) in conjunction with MOVILH and the UDP’s public interest litigation clinic arguing that her constitutional rights to equality, a private life, and the freedom to engage in economic activity had been violated. When first presented, as is common with many such writs it was rejected. However, when the case was presented again on 17 July 2008, it was accepted. Domingo, UDP lawyer and academic, notes below the difficulty in getting protection writs accepted, especially in relation to the notion of discrimination.

The \textit{recurso} is a bit limited in that sense. For the \textit{recurso} to be accepted by the court, an illegal or arbitrary act must have occurred...so discrimination could have been committed in an arbitrary manner, as in the second instance, but judges tend to link both criteria. In other words, a person may act illegally, but at the same time arbitrarily or in a discriminatory manner. It is very unlikely that a judge would accept the \textit{recurso} in that case (1 December 2008).

These writs are dealt with in the Courts of Appeal, not the lower courts, and are supposed to be resolved quickly. It was finally heard on 4 November 2008, and on 18 November the Santiago Court of Appeal rejected the \textit{recurso}. The ruling stated that though the mayor had made derogatory comments towards Claudia, there was no evidence to suggest that he had denied Claudia a permit on the basis of her gender identity (Universidad Diego Portales, 2009: 302-303). It also stated that no formal application for a permit had been made. The legal team, made up of students and academics, appealed the ruling, but it was upheld by the Supreme Court in January 2009. As the court hearing

\(^{56}\) \textit{Diario La Cuarta}, 7 June 2007, as quoted in case 4393-2008.

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coincided with my fieldwork, the litigating lawyer invited me to attend, which I did as a member of the public, along with the law students working on the case. I interviewed three lawyers working on the case as well as Claudia.

4.5 Andrés Rivera

Andrés Rivera is President of *Organización de transexuales por al Dignidad de la Diversidad* (Transsexual Organisation for Dignity in Diversity, OTD) and has been involved in trans activism in Chile since 2004. He is university-educated, has worked in education and local government and now dedicates most if his time to trans activism. He lives with his wife and family in Rancagua. The two court cases that Andrés contested were actually concluded in 2007, before I entered the field. I introduce them here because of their importance in setting precedents, and as precursors to subsequent legal action by a number of other trans people. The most relevant case here is the petition for gender recognition. It is important because for the first time a trans person’s adopted name and gender were recognised by the courts, though gender reassignment surgery (GRS) had not been performed. As José, one trans activist noted, as far as it can be established, Chilean jurisprudence from the 1980s and 1990s shows that gender recognition had only previously been granted once GRS had been undertaken (1 April 2009). Sharpe’s (2002) comprehensive study on UK, US and Australian jurisprudence found that granting gender identity had been dependent upon genitalia. This highlights the importance of this case. Andrés was also the first Chilean transsexual man to ‘come out’ publicly in the process. As a consequence, numerous petitions have been presented along these lines. I also include his case in the analysis as it was the case which drew me to the possibility of studying incipient legal mobilisation strategies in Chile. Prior to his case, my expectations that LGBTI populations could achieve any favourable rulings, or even that the Chilean courts would accept such cases for consideration had been shrouded by Karen’s treatment by the Supreme Court.

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58 Note that OTD is a Rancagua-based organisation, which is indicative of the de-centralisation and diversification of the LGBTI movement. OTD currently has consultative status within the Organisation of American States (OAS) and much of his work includes lobbying at international level. Rancagua is the capital of Chile sixth region, O’Higgins.

Chapter 4: Introducing the Cases

What do I mean by gender recognition and transgender petitions for recognition? Legally, the latter constitutes a voluntary petition which is presented to the civil courts with the aim of modifying transgender and transsexual people’s gender and name from what they were assigned legally at birth, to coincide with their adopted identity. By gender recognition I therefore refer to the process of seeking legal recognition of one’s adopted name and gender identity. Of particular importance in this case is being given the opportunity to have an ID card (and consequently birth certificate) that recognises the individual’s adopted identity. ID cards are central in Chilean everyday interaction to access services, employment, education and health. Consequently, where gender identity diverges from that presented on the ID card, the result is often institutional and social exclusion. As there is currently no existing legislation covering transgender identity lawyers rely on exploiting a gap in the law. They apply Law 13.744, which allows individuals to change their name when it is considered that it causes ‘harm’ or ‘ridicule’ (Universidad Diego Portales, 2008: 453-455). As it was not created with transgender people in mind, they simultaneously apply Law 4.808 (Article 31) designates that an individual’s name should coincide with their gender.

In the other case, Andrés contested and won a work-based discrimination case on the basis of his gender identity, again in 2007. The judge ruled that Universidad de Rancagua had discriminated against him and awarded compensation. It was thought to be the first ruling of its kind in the country in recognising discrimination on the basis of gender identity. I first interviewed Andrés back in October 2008, and we subsequently had numerous encounters, email exchanges and presented together at a conference in Los Angeles in March 2009. I also interviewed his lawyer, the presiding judge in the discrimination case, and others who have since followed the same legal path who I introduce below. Prior to finding out about Andrés’ case in 2007 through the Internet, my expectations that any favourable rulings for LGBTI populations could be reached, or

60 Published in the Diario Oficial, 22 September 1970.
61 Case 92-771/C.V
even that cases were actually being presented, had been shrouded by Karen’s treatment by the Supreme Court.

4.6 Emmanuel

Emmanuel was part of the founding group that later became OTD, along with Andrés. He is a music teacher, is in his early thirties, and lives with his partner in the South of Chile. Emmanuel also presented a petition for gender recognition, and the same lawyer represented the case in the same court, despite the fact that Emmanuel lived several hours’ drive from Rancagua. The court again ruled in favour of Emmanuel even though he had not undergone GRS. Instead, the ruling privileged the psychological report over biological factors, 'the report by the Mental Health and Psychiatric Unit – Rancagua Hospital concludes that he shows a balanced personality, he identifies as male and shows adequate capacity for rational behaviour'. The same judge actually ruled on two similar cases on the same day, granting both the same status. I spoke only to Emmanuel.

Emmanuel’s case is another important contribution to Chilean jurisprudence on transgender identity rights. It was important not only in terms of consolidating legal action, but also in the associated steps that occur for the case to be processed. Andrés’ case and legal process had essentially served as a prototype for subsequent petitions taken by OTD and later, by other splinter groups such as AADGE and GAHT. Once the initial petition is presented to the courts, the judge requests a series of reports through the aforementioned oficios. These include a report from the registry office’s legal department on their perspective on the legality of the matter, a psychological and/or psychiatric report, and a physical report. In this respect, Andrés paved the way for others to follow a similar path. He found psychologists and psychiatrists with the expertise to provide reports on transsexuality. He was the first to be subjected to the highly degrading physical exam and was therefore able to denounce the practice, question its necessity and prepare those who were following suit for what lay ahead. Emmanuel’s case was an indication that the channels that Andrés had managed to open, were then accessible to those that followed. I only had one face-to-face meeting with Emmanuel because he lived

62 Case V-150-2006.
some six hours by bus from Santiago where I was conducting most of my research. But we had email contact before and after the meeting and still exchange emails to this date. I also tried to interview the judge that had made the rulings, but she was on sick leave.

4.7 Juana, Karin, Kathy, Alison and Romina

On 27 June 2007, these five trans women, presented similar petitions to those presented by Andrés and Emmanuel. They differed in that they were (trans) women who had not undergone GRS, not (trans) men. The group had been brought together by MOVILH and were represented by lawyers from the UDP’s public interest litigation. Juana had a long history in trans activism dating back to the late 1990s, but has since managed to get work with her local council. Karin similarly had been active with MOVILH for eight years and worked in an internet café. Alison and Kathy both lived in the more rural outskirts of Santiago. Alison had a hairdressing salon and Kathy worked on an informal basis, though sometimes with Alison. Romina was the only one that I had no contact with. Their ages spanned from the early twenties to the forties and they had differing levels of education. In contrast to the other interviewees who were middle class, they all came from Santiago’s peripheral areas, which are considered working class areas. Most had left full time education having assumed a transgender identity in their teenage years and therefore had faced social and/or institutional exclusion as a consequence. Job opportunities were largely non-existent for female trans populations and most had engaged in prostitution at some point. The excerpt below taken from the petition presented to the courts points to the way in which social exclusion has become more institutionalised.

...as a transsexual person having a male name yet identifying as a woman and being socially recognised as a woman. Yet on her ID card her name appears in the masculine form which creates constant problems to access all services, such as banks, health services, including voting because people discriminate against her because she has two identities...personally she identifies only as a woman.63

Six petitions were initially presented in June 2007. However, the UDP’s lawyers deemed one individual to be too young to proceed, so the law students continued with the five mentioned above. All were processed through Santiago’s civil courts. I accessed cases more from a legal perspective than a personal one as I had accessed all the paperwork,

accompanied students to the courts, and was updated regularly on their progress. I also interviewed two of the presiding judges. My personal engagement was less. I saw Karin on numerous occasions through her activism and interviewed her, I accompanied another to the SML and had email or phone contact with another. For these cases I had a lot of contact with the lawyers however. When I entered the field these cases were in their latter stages. One case was dropped when one individual failed to appear for the psychological exam on two occasions, and the rulings returned in all cases were negative between November 2008 and June 2009. On appeal, only one case was given a favourable verdict. In June 2009, the Santiago Court of Appeal granted Alison her name change only, not her gender change. When I returned to the field in 2010, the public interest litigation clinic was going to process the cases again.

4.8 Juliana

Juliana is in her mid-twenties, is university-educated, and was working as a paramedic when I first entered the field. On my return in April 2010 she had resumed her university studies. In March 2008 she also presented a petition for gender recognition but her case differed in that she is intersex.64 The same legal principles and arguments were applied as in the transgender petitions and the case was also sponsored by the UDP. However, it was processed by the clinic dealing with civil and family cases, not by the public interest litigation clinic due to the extremely sensitive nature of the case. It also differed in the medical exams that were required for the judge to make a ruling. Her case was concluded just after I had left the field in July 2009 when the judge granted her name and gender change. She showed me her ID card when I re-visited her in April 2010. I met Juliana fairly early on in her case. After I interviewed her we stayed in touch by phone, email and I also accompanied her to the courts and hospital when she needed to get the relevant medical exams. I also spoke to her lawyer on numerous occasions and the judge presiding over the case.

4.9 Armando and Victor

The reader should already be somewhat familiar this case that I introduced in the Preface. These two men are still both in their early- to mid-twenties, and were transferred to

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64 I do not cite her case directly here so as to protect her identity.
Santiago from different cities in the south when they joined the Police Force (Carabineros). They were subjected to discrimination in the work place on the basis of their sexual orientation in May 2007. After a number of attempts to secure legal representation and having explored internal mechanisms for reincorporation, they finally presented a civil demand for reincorporation into the institution and claiming compensation for harm caused. The case was represented legally by I-público in conjunction with MOVILH and was presented in May 2009.

I attended court when the case was first presented by the couple, their lawyer and MOVILH and later interviewed the couples. I also spoke to a number of lawyers from the legal advocacy organisation regarding that case and others on both a formal and informal basis.

4.10 César

César served as a Police Investigations Officer for over fifteen years, he lives with his family in Santiago. His case resonates with Armando and Víctor’s, as he was also relieved from his duties as a police officer, though from the investigations branch, in 2006 on the basis of his sexual orientation. In May 2009, in conjunction with MOVILH, lawyers from I-público presented a civil case demanding that he be reincorporated into the institution and receive compensation for harms caused by the institution’s actions. Prior to this he had pursued numerous internal and external channels in his attempt to seek justice, however, these proved ineffective. In the excerpt below he recalls the day that he was questioned by his superiors prior to being removed from the institution.

Internal affairs called me into the office. They are the ones that police the police. It is a group that investigates its own staff. The first thing the guy does is throw a file full of gay pornography on the table. I counter-interrogate him and ask, ‘Where are you going with this?’. He replied, ‘We know about you. In fact, we transferred you from Antofagasta to Santiago because we know that you are homosexual.’ I replied, ‘That’s my problem. I don’t know what that has to do with the institution?’ (14 May 2009).

They had been investigating him since 2004. This practice was not isolated to this case either. Corporación Humanas (Humanas Organisation) had also represented a client who had been investigated as they had suspected her of engaging in same-sex sexual
relations. I spoke to César, his lawyers, and MOVILH President, Rolando Jiménez about the case. As I was in Chile at the time the case was presented, I was able to witness the media attention that the case received, both in print form and on television.

4.11 Mauricio and Other Cases

There were a number of other cases that I also had knowledge of or involvement with. Marcelo’s was a case that I had extensive knowledge of and involvement with. He presented a petition for gender recognition in May 2009 in conjunction with GAHT but paid for privately. He wanted the process to be concluded as quickly as possible and having already tried to secure legal representation on a pro bono basis, he was concerned to have a resolution as quickly as possible. Around that time he was also seeking to take his former employers to court for discrimination on the basis of his gender identity. I therefore had quite extensive email, phone and personal contact during my stay in the field and even afterwards. Just after I left the field GAHT secured legal representation for its cases with the Universidad de Chile’s legal clinics.

Another OTD splinter group, AADGE had also been supporting and presenting cases for name and name and gender petitions at first on their own, and later in conjunction with the Human Rights Office affiliated to the Corporación de Asistencia Jurídica (Legal Aid Corporation). They were undertaking seven or eight cases when I was conducting fieldwork. I spoke to the Centre’s manager and a number of different lawyers working on the cases. The President of AADGE, Javier, had extensive legal knowledge and had applied that to present two protection writs to obtain GRS. He was successful in one of those cases. I only interviewed the President regarding the cases that he had presented and no other individuals. This was in part due to the fact that he represented individuals that did not live in Santiago, but Chile’s fifth region and even further afield as much of his activism was done in virtual space.

65 Though in this instance it was in the normal police force (carabineros) not the investigations branch. The case mentioned here was contested in the IACHR but was not made public. It was eventually resolved quietly between the police force and the individual concerned.

4. 12 Conclusion

Each of the cases set out in this chapter draw our attention to the different forms of discrimination that members of LGBTI populations are subjected to. The frequency with which these are a result of institutionally-based practices also draws our attention to the heightened difficulty in contesting such cases given the power imbalances inherent in individual challenges to institutions such as the Church, the Police Force and the judiciary. Being among the first to openly challenge these institutions and their discriminatory practices towards sexual orientation and gender identity adds to the considerable determination and strength of character to challenge what was inherently private in the public domain. Though I draw together both cases pertaining to sexual orientation and gender identity, what unifies the cases is their subjection to stigmatisation as they fail to conform to the norms of what constitutes the somewhat rigid gendered and sexual roles in Chile. In the following chapter I explore how these individuals not only move into the public domain, but explore how they themselves begin to adopt identities which fully acknowledge and incorporate their sexual orientation and gender identity, where this had previously not been the case and how they begin to consider themselves as bearers of rights as lesbians, gay men, trans or intersex people.
Chapter Five: Consolidating Rights and Identity Awareness:
Overcoming Barriers and Mobilising Resources

5.1 Introduction
In this chapter, I begin to explore the factors that have facilitated or restricted members of LGBTI populations in engaging in legal mobilisation strategies in Chile in the late 2000s. I draw on literature that encompasses legal mobilisation and social justice. Informed by this, I examine the possibilities for mobilising the necessary resources to undertake legal action, and to overcome the barriers that have complicated the pursuit of such goals. This chapter focuses on the individuals embarking on legal action (to uphold or advance their rights) and the processes through which they begin to ‘articulate voice’ (Gloppen, 2006: 45). I discuss how they begin the challenge the moral orthodoxy by openly assuming lesbian, gay and trans identities as they simultaneously undertake legal action. In many instances, the processes of assuming such identities in the public domain have occurred in tandem with their growing rights awareness as a gay, trans or lesbian person. But not only are such individuals moving from invisible to visible spheres as they contest their cases, they are also embarking on personal journeys in relation to their sexual or gender identity. I argue that this process of ‘accomplishing’ identity (Plummer, 1996: 66) has been facilitated by the legal process itself, as individuals seeking rights redress engage with those civil society actors also pursuing legal mobilisation strategies, such as LGBTI activists and reformist lawyers.

I explore the parallel processes of these individuals as they begin to more fully adopt, or ‘accomplish’, LGBTI identities, and how they also begin to consider themselves as bearers of rights. I contend that the mediatory role played by legal representatives has been particularly influential in mobilising the necessary resources and expanding associative capacity among individuals, LGBTI organisations and civil society actors in order for legal challenges to be presented. I argue that through the interactional processes of the actors involved in the legal process, meaning-making is impacting on all parties.
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As a consequence, notions of identity, rights, stigma and deviancy are shifting. Limited access to legal resources has meant that individuals seeking redress are encouraged, over time, to engage in public interest litigation strategies. As the term suggests, these are cases that the lawyers perceive to be of benefit to wider society (González, 2002, 2003; Sarat and Scheingold, 1998, 2001, 2006). In the Chilean context, such legal reformers are often seeking to advance the principles of democracy and the rule of law. In so doing, they aim to extend notions and practice of rights and citizenship, which have been historically exclusive, as opposed to inclusive (Agüero and Stark, 1998; Jelin and Hershberg, 1996; González, 2002, 2003; Universidad Diego Portales, 2005, 2006, 2007, 2008, 2009, 2010). This politically-motivated litigation, therefore, aims to challenge notions of citizenship in relation to sexual orientation and gender identity (Bell and Binne, 2000; Richardson, 2000; Stychin, 1995) into the Chilean public, political and judicial domains.

I contend that those individuals introduced in Chapter Four constitute a first wave of lesbian, gay, trans and intersex individuals willing and able to undertake legal action, and to do so publicly. Sandra’s case raises questions both about the ability of lesbians to exercise their profession within educational settings and the Catholic Church’s role in education. Armando and Victor challenge the Police Force on its policies towards gay policemen. Others before them either failed to mount such a challenge or did so privately. Helena Olea notes that Corporación Humanas have taken on cases ‘dealing with teachers, students, policewomen investigated for [lesbianism], and Karen’s case which deals with lesbian motherhood’, yet that ‘we need a victim who is prepared to give a fight [in public]’ (7 April 2009). She lamented the fact that a number of clients had accepted compensation in return for not pursuing the case further, and thus keeping it out of the ‘public’ realm. This suited those as yet unable to recognise their sexual orientation publicly.

Here I examine how gay, trans and intersex individuals overcome deviancy discourses to openly adopt identities encompassing their sexual orientation or gender identity. In discussing sexual and gender identities, I refer to the symbolic interactionist work of
Chapter 5: Consolidating Rights Awareness

Goffman (1963) and Plummer (1996) on social interaction and stigma. Travers’ (2002) work also informs this work as he discusses the application of symbolic interaction in the legal realm. This is important as I consider the social processes that are occurring in tandem with the legal process. I do so by linking in Siri Gloppen’s framework for social justice. I focus on the first of the four stages that she introduces, which she refers to as ‘articulating voice’ (2006: 45). This first stage details the resources needed for disenfranchised populations to undertake legal action. In this chapter, I focus on the categories of rights awareness and motivations and explore them in relation to LGBTI identities. Before introducing Gloppen’s approach to studying social justice comparatively, I introduce the legal mobilisation literature. In the latter stages of the chapter, I expand on the processes of identity and rights awareness that those individuals embarking on legal action are experiencing in Chile in the late 2000s. I argue that they are a product of the meaning-making that occurs as a consequence of the interaction between the diverse actors involved in the legal mobilisation process.

5.2 Introducing Legal Mobilisation

Definitions of legal mobilisation are indeed broad, yet most consider ‘how the law can be an effective instrument for social and political change’ (Manfredi, 2004: 10). The term generally refers to the process through which law is mobilised through litigation. I clarify this because what constitutes ‘legal’ can be interpreted in many different ways, be it related to institutions, elites or norms (McCann, 2004: 507). Legal mobilisation scholars (Manfredi, 2004; McCann, 1994, 2004, 2006) have predominantly drawn on Frances Zemans’ (1983) work which contends that ‘the law is mobilized when a desire or want is translated into a demand as an assertion of one’s rights’ and recognises it as ‘invoking legal norms as a form of political activity’ (1983: 700, 690). Epp (1998) maintains that sustained litigation can lead to a ‘rights revolution’ and Lawrence has explored its application to ‘influence the course of judicial policy development to achieve a particular policy goal’ (1990: 40). Objectives and outcomes of legal mobilisation strategies are therefore diverse and context-contingent. Studies of judicialisation (Contesse and Lovera, 2008; Couso, 2005; Domingo, 2004; Sieder, Schjolden and Angell, 2005; Shapiro and Stone Sweet, 2002; Smulovitz, 2005; Tate and Vallinder, 1995) have built on the legal
mobilisation literature to explore the relationships between law and politics in more depth. They pay particular attention to the role of judicial politics as translated into the legislative arena as a means of effecting policy change. The Chilean studies (Couso, 2005; Contesse and Lovera, 2008), however, concur that Chile has been a case of failed judicialisation in relation to effecting policy change. MOVILH President, Rolando Jiménez also draws the same conclusions,

...the qualitative and quantitative evidence from the Chilean courts is that, effectively, there aren’t the same possibilities here as there are in the Colombian system, or the Brazilian, or the Argentine in courts actually recognising rights which then pre-empt a change in the law. In Chile, there are no such possibilities, but we still believe that we have to carry on presenting cases (18 November 2008).

Contesse and Lovera do draw our attention to the importance of the ‘indirect’ outcomes of presenting legal challenges. Both McCann (1991, 1994) and Galanter (1974, 1983) have explored these ‘indirect’ effects of legal action or mobilisation. Galanter (1974) argued that we should pay attention to the ‘radiating’ or ‘centrifugal’ effects of courts and court action. McCann (1994) then synthesises this work and notes the potential for both ‘direct’ and ‘indirect’ effects of legal action. The direct effects refer to securing favourable outcomes from the judiciary or winning ‘short-term remedial relief for victims of injustice’ (McCann, 10). The indirect effects are those that occur as a result of the mobilisation process itself which ‘can matter for building a movement, generating public support for new rights claims, and providing leverage to supplement other political tactics’ (McCann, 1994: 10). Manfredi also contends that ‘the mobilization of rights discourse by marginalized groups...can be a source of empowerment that facilitates long-term improvement in their disadvantaged status’ (2004: 12). Similarly, Sandra Levitsky summarises the potential benefits of litigation for social movements below.

...legal mobilization strategies can benefit social movements in a number of important ways: Litigation can raise expectations, spark indignation and hope, and stimulate a rights consciousness among movement constituents and supporters; it can help legitimize a movement’s goals and values, publicize the movement’s causes, and provide leverage in bargaining with powerful elites (2006: 147).
Mayra Feddersen, lawyer and academic at the UDP, remarked during an unrecorded conversation that although they might only rarely achieve favourable rulings in the courts, the actual process of undertaking legal action had a number of ‘indirect’ benefits. She illustrated her point by drawing my attention to the transgender petitions for recognition. Judges had requested physical examinations to be carried out by the SML (7 November 2008). Andrés details below the very degrading nature of these exams conducted by doctors without any policies or regulations in place to guide them,

In the SML we are subjected to the worst possible treatment...the doctor makes you take all of your clothes off before getting onto a gynecologists’ chair. This was done in front of one of the administrative staff. I didn’t know at the time that she was part of the administrative staff, I only found that out later. She wasn’t even a nurse or an auxiliary nurse, she was a secretary who was taking photos...[very explicit detail removed] of my genital area...They then used a speculum to see if I was a virgin or not. In other words, I have to be a virgin if I want to change my gender and become male. Now they don’t use the speculum, but they still do all the rest. They then give you a certificate with your legal name [feminine] on, saying that you have had a maestectomy, a hysterectomy and that detail your male physical traits, such as bodily hair, and that you look masculine. But you can see that just by looking at me. I don’t need to take off my clothes for that to be seen. Or they can look at my medical certificates which detail the operations that I have had (17 October 2008).

Mayra and Rolando Jimenez, MOVILH President, met with the Director of the SML, Dr. Patricio Bustos, to question these practices and to attempt to secure some consistency and reduce the extremely demeaning nature of these physical examinations. They also elicited a response by letter from Dr. Bustos, which concluded that they aimed to ‘provide dignified treatment equally to all persons who undergo examinations in our establishment’ (Letter, 15 May 2008). Though later applicants such as Karin and Mauricio did not seem to think that anything had changed in the SML practices, Mayra argues that the UDP and MOVILH were able to draw attention to this practice more
publicly. As a consequence, both the process and the practice became more visible to those considering undertaking this legal action. This challenge also indicated to the SML that such practices were unacceptable and serves as an initial instance of attempting to instigate change.

Though McCann (1994) argues that legal mobilisation processes are closely linked to social movement construction and development, in the Chilean context, these processes are reliant upon the individual with the grievance being willing and able to pursue redress through the courts. During the course of the fieldwork, I took a broad definition of legal mobilisation as a means of upholding or advancing rights, more often than not when it was conducted in conjunction with social movement actors. While the process begins with the individual grievance, it does not remain an individual process. Seeking and securing legal representation as I examine in the next chapter, requires the pooling of collective resources. Agency also shifts from the individual to the collective (Engel, 2001). The interaction that occurs as a consequence of the pooling of collective resources, has served to maximise rights and identity awareness. In the following section, I introduce the resources and barriers that comprise Siri Gloppen’s framework for social justice (2006).

5.3 A Framework for ‘Articulating Voice’ through Litigation

Siri Gloppen’s framework for exploring the roles of courts in social transformation, disaggregates the litigation process into four stages: victims’ voice, court responsiveness, judges’ capability and compliance/implementation (2006: 42). The first stage relates to the facilitative mechanisms enabling such litigation to be pursued, whilst also evaluating the barriers to such action being taken. The author notes:

The first stage of the litigation process is the articulation of rights claims by, or on behalf of victims of social rights violations, and the voicing of claims into the legal system. The factors affecting whether, how frequently, and how forcefully, social rights claims are voiced differ in nature – some are related to the institutional structure of the legal system, others concern the social and political

67 ‘Servicio Médico Legal garantiza examánes sexológicos dignos a personas transexuales’
context, while yet others concern the resources available to poor people (2006: 45).

Table 1: The Main Components of the Litigation Process
Reproduced from Figure 2.1: The Main Components of the Litigation Process (Gloppen, 2006: 42)

Gloppen’s framework points to both the need to secure resources and overcome potential barriers in order to engage in legal action. Of relevance here is the socio-cultural context and how pervasive it is in reaffirming dominant sexual and gendered discourses, not just within the legal realm, but more broadly.
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Table 2: Factors Affecting Litigants Voice – Resources to Articulate and Mobilise
Reproduced from Figure 2.3: Factors Affecting Litigants Voice (Gloppen, 2006: 45)

Table 3: Factors Affecting Litigants Voice – Barriers to Access
Reproduced from Figure 2.3: Factors Affecting Litigants Voice (Gloppen, 2006: 45)
In this chapter, I tackle both motivation and rights awareness. I examine how motivational barriers are overcome as individuals begin to challenge deviancy and stigmatising discourses in relation to identity. They gradually move from exclusively private spheres when recognising their sexual orientation or gender identity, into multiple public spheres, as the legal process evolves and their awareness of rights becomes more entrenched. There is an overlap with other factors detailed here by Gloppen, such as associational capacity. These processes of assuming identity and rights awareness do not emerge in a vacuum, and are ultimately the result of collective action. The relationships between these different factors emerge as the thesis develops. For example, in the following chapters, I detail the impact of lawyers on case selection, in facilitating claimants being involved in public interest litigation strategies as members of LGBTI communities endeavour to access legal resources. Before doing so, below I draw together Gloppen’s work with social movement literature on resource mobilisation, and I revisit LGBTI activism in Chile introducing its relationship to social change, visibility and counter movements and how the latter are visible within judicial arenas. I then draw together my analysis of processes of overcoming deviancy and stigmatising discourses through individuals adopting lesbian, transgender and gay identities more fully in different domains and their appropriation of rights discourses.

5.4 Exploring Resource Mobilisation

Resources form a central part of Gloppen’s framework on social rights litigation. The ability to engage in legal mobilisation therefore draws on some aspects of resource mobilisation theory. Edwards and McCarthy (2008) consider both the importance of context and associative capacity when considering how movements are able to mobilise resources. They note that ‘in order to be available for use, resources must be present in both a specific socio-historical and accessible to potential collective actors’ (2008:118). Despite the fact that ‘the enforcement of laws depends on individual citizens to initiate the legal process’ (Zemans, 1983: 690), in order for legal action to occur, there must be a collective pooling of resources, as the multiple actors necessary to carry out such litigation must come together.
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The socio-economic status of many respondents in this study meant that they were devoid of the financial means to engage in legal action of their own accord. Though many came from middle and upper lower classes, their financial resources had been severely debilitated through being subjected to work-based discrimination, thus reducing their capacity to hire a lawyer. Those introduced in Chapter Four were, therefore, reliant upon the convergence of collective resources. I return to the financial motivations for maximising collective action in more depth in Chapter Six when I examine how legal resources are secured. However, the importance of the collective agency is relevant here as I focus on interaction and the outcomes of interaction.

Perhaps the discussion of context which Edwards and McCarthy (2008) refer to is more relevant in this chapter, especially in the way this relates to ‘moral’ resources. Moral resources essentially operate in opposition to the LGBTI movement, given that ‘moral legitimacy is perhaps the most valuable resource religious organizations bestow on movement actors’ (2008: 123). The task of countering this ‘moral legitimacy’ has therefore been a major component of LGBTI objectives in achieving social change. A major component of sensitising the Chilean population to lesbian, gay and transgender realities has been the process of constructing them as ‘normal’ or ‘non-deviant’ citizens.

As Francisco Estévez notes in Section 2.5 of this thesis, non-normative manifestations of sexual or gender identity contravene religious constructions of what is ‘natural’ (Robles, 2008; Vaggione, 2008) He notes, particularly, how the political dominance is also reaffirmed through social sanctions. The prevalence of social sanctions is reiterated in the scholarship on same-sex relations, identities and how they are adopted in the public realms across Latin America (Kulick, 1998; Prieur, 1998; Schifter, 1998).

5.5 Sexuality, Stigma and Society in Latin America

Scholars working on sexuality in Latin America since the mid-1990s have, for the most part, have given an insight into the same-sex sexual practices and the dissonance of these practices with identity (Carrier, 1995; Lancaster, 1992). They point to the importance of how socio-historical constructions play out in social interaction. The following quote demonstrates the complexities of adopting gay identities even when individuals engage in
same-sex male sexual practices. It seems to imply a level of conformity to societal norms as individuals are unwilling to outwardly adopt non-heteronormative identities, yet engage in non-heteronormative sexual acts. There seems to be an underlying need to conform to *machismo*\(^6\) and to those norms established in line with Catholicism.

Several studies concluded that constructions of identity did not relate directly to sexual practice. For example, of those men engaging in same sex relations in Mexico, Costa Rica and Brazil, few actually adopted a gay identity *per se* (Carrier, 1995; Green, 1999; Parker, 1991; Schifter, 1998). Joseph Carrier’s extensive ethnographic work, conducted in Mexico over a thirty year period, revealed that men engaging in such practices dissociated themselves from gay identities by adopting an ‘active’ *macho* sexual role, which contrasted to the ‘homosexual’, ‘passive’ and ‘effeminate’ recipient. Green notes similar characterisations in Brazil, noting that ‘sexual “passivity” ascribes to him the socially inferior status of the “woman”’ (1999: 94). The recipient is therefore the only participant who is stigmatised. Green also draws upon Richard G. Parker’s anthropological work,

> The physical reality of the body itself thus divides the sexual universe in two. Perceived anatomical differences begin to be transformed, through language, into the hierarchically related categories of socially and culturally defined gender: into the classes of *masculino* (masculine) and *feminino* (feminine)...Building upon the perception of anatomical difference, it is this distinction between activity and passivity the most clearly structures Brazilian notions of masculinity and femininity and that has traditionally served as the organizing principle for a much wider world of sexual classifications in day-to-day Brazilian life (Parker, 1991: 41, as quoted, Green, 1999: 95).

In his study of male prostitution in Costa Rica, Jacobo Schifter (1998) also noted that the majority of the participants identified as heterosexual despite engaging in male homosexual prostitution. They often maintained heterosexual partners at the same time as

\(^6\) Here I take a broad definition of the term in how it relates to the relationship between stereotypical male roles and how they intersect with power (male dominance) more broadly. These intersect with notions of ‘hegemonic masculinity’ (Connell, 1995). Note that a growing body of scholarship, such as Matthew Gutmann’s (2006) *The Meanings of Macho: Being a Man in Mexico City*, is beginning to deconstruct the concept and explore the multiple and diverse manifestations of what he argues has historically been overly homogenised in its understanding and application.
they engaged in same-sex sexual practices, justifying their actions through financial gains.

At the time Carrier's research was conducted, 'gay' identities *per se* might well not have been openly accessible within the public domain, especially within the rural areas he studied. Therefore it would have also been less likely that those he observed would have used such terms anyway. Furthermore, given the non-native nationalities of the researchers, their perceptions of sexual identity would vary considerably from those of the populations under study. However, his description of the lack of congruence between sexual practice versus sexual identity presents an indication of the pervasive nature of macho behaviour. Such observations resonate also with Connell's (1995) work on masculinities and her discussion of the multiple hierarchies within what constitutes the 'masculine'. Brown has noted the shift from sexuality being defined by gender role to later being dependent on 'the anatomical sex of the object of one's desire; thus anyone having intercourse with a member of the same sex, regardless of gender roles, is defined as a homosexual' (1999: 118).

Though this scholarship may well date back to the 1990s, I would argue that it still resonates in the Chilean context. Those who fail to conform to the dominant notions of gender and sexuality in their expressions of identity recognise the stigmatisation that they are subject to. Juliana relays that she was subjected to 'taunts, mocking, being hit, attacks at school...they started to call me the boy-girl, and would just laugh at me' (28 November 2008), with a tone of voice that suggests these were regular occurrences that someone in her position had to accept. Bianca, as a trans woman, reaffirms how these hierarchies are relevant for the trans female populations,

...the problem is that trans women stand out more, they are more visible, it is more shocking for society [than trans men], in this capitalist, *machista* society where they reward masculinity, they reward men...(13 July 2009).

Such examples are just a number of many that were repeated during this and previous fieldwork and are indicative of the difficulties for individuals to openly adopt a non-normative sexual or gender identity. As I mentioned in Chapter Three, I explore deviancy
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(Rubington and Weinberg, 1996), stigma (Goffman, 1963) and identity (Plummer, 1996) here from an interactionist perspective. As Rubington and Weinberg note,

the interactionist perspective focuses on...how people typify one another; how they relate to one another on the basis of these typifications; and the consequences of these social processes (1996: 1).

In other words,

Homosexuality cannot be understood in isolation from the reactions of a society which potentially stigmatizes it...the features of homosexuality...found in this society do not simply emerge from same-sex experiences: rather they flow from the social contexts in which they are located (Plummer, 1996: 65).

Plummer argues that adopting a homosexual identity is therefore a 'process', and an 'ongoing accomplishment' (1996: 66). Here, I would contend that for many of the respondents who contributed to this research, this was the case in relation to their LGBTI identities. I would argue that their identities as lesbian, gay, bisexual, transgender, transsexual and intersex individuals are indeed in flux, and are contingent upon social setting. Below Emmanuel recounts how he dealt with his students, as he was teaching when he began to transition,

So I said to the kids, ‘Look, everyone has their own style, like the those who are into hip hop, or rappers, well, I have my own style too’. I also seized my chance to tell them to call me Manu. It’s nothing like the name that I had before, and they all asked me ‘Why?’. I said, ‘because it’s my stage name’...Then I started to take the hormones and when I arrived in March, my voice had already started to change. So, they asked me what had happened. I had to tell them that I had chronic laryngitis (15 May 2009).

He was faced with students who had known him as a woman and who were witnessing him transitioning into a man. He discusses just one of those social arenas in which he constructs a ‘temporary’ identity for himself as a means of adapting to that social space. These coping mechanisms enable him to exist within it both without being subject to too much hostility, and allow him to keep his job. Note that he still wants to ensure that he does not create an identity which fully recognises his transsexual status, he chooses a mid-point which has sufficient ambiguity and locates him somewhere between ‘passing’

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69 I remind the reader that the longer summer holidays are in January and February as Chile is a southern hemisphere country.
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and ‘transgressing’ (Roen, 2002; Wilchins, 2004). In transgender scholarship, passing is seen as reaffirming hierarchies of gender by conforming to the male-female binary and ultimately reproducing that through sex change surgery. Transgression, on the other hand, refers to those who actively seek to challenge said binaries and construct themselves outside of that binary.

Plummer asserts that ‘the interactional concern is with viewing homosexuality as a process emerging through interactive encounters in an intersubjective world. His concern rests with processes, reactions, and subjective realities’ (1996: 65). Hird also draws on Mead’s, and later, Goffman’s assertions that the self exists in relation to society and that it is continually being renegotiated through social action (2002: 586). However, in the Chilean context as in others, both micro-level and macro-level interactions are conditioned largely by the prevailing social and cultural context. This therefore clearly has an impact upon members of LGBTI populations in both engaging in everyday social action, in addition to doing so through the judicial realm.

5.6 Reconsidering LGBTI Activism and Visibility in Chile

As both legal mobilisation and resources are context-contingent, I briefly refer back to the conditions mentioned in the Chapter Two regarding LGBTI movement emergence and offer an appreciation of LGBTI identities in Chile in the late 2000s. The movement has served as the principal mechanism through which predominantly gay identities have emerged within the public domain since its emergence in 1992 (Guajardo, 2004; Robles, 2008). LGBTI groups have sought the dual objectives of achieving social and legal change, they have therefore been a central means through which individuals are able to embark on legal action in both practical and symbolic terms. In the first instance, they have endeavoured to counter the prevalence of the invisibility that shrouded LGBTI identities and to bring them into the public domain, so that others are more easily able to identify as lesbian, gay or transsexual. Secondly, their appropriation of rights and citizenship discourses serve in part to encourage members of these communities to consider themselves as subjects of rights, as individuals identifying as intersex, transgender or bisexual. As Gloppen (2006) sets out in her framework, motivational
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factors are one of the barriers to be overcome if individuals are able to articulate their voice.

Though these tools and resources were available to those aware of LGBTI movement, the highly centralised, fragmented and personalised nature of the movement also impacted on resource availability. The strength of opposing counter movements such as Catholic-affiliated pro-life or pro-family groups such as *Red por la Vida y la Familia* (Life and Family Network)\(^7\) raises questions regarding the impact of LGBTI movements in broader social contexts. Certainly the data indicates that awareness around LGBTI identities was varied, and around rights issues was limited among those who were not politically active, a group from which the majority of my respondents hailed. This was reaffirmed by the fact that the data revealed that these very legal processes were in their incipient stages. From a legal perspective, informants such as Alejandra, who is a lawyer and an outsider to the LGBTI community in Chile, contends ‘the gay issue here is still very closed’ (26 November 2009).

Many respondents from both legal and activist communities made frequent references to the ‘invisibility’ surrounding LGBTI issues, and the notable heightened ‘invisibility’ of bisexual, transgender, transsexual and intersex members within these communities. Andrés Rivera, President of the OTD maintains that

> the problem is that transsexuals are invisible among the invisible populations, we are like the sub-minority within the minority groups (19 October 2008).

Another respondent, Juliana, was profoundly affected by her inability to seek support or affinity with other intersex individuals through the mainstream LGBT\(^7\) groups. Though she recognised how issues non-conformity to gender roles meant that she had many issues in common with her transgender and transsexual counterparts, she recalled her isolation and inability to ‘share’ experiences with others after getting in touch with a

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\(^7\) See [www.redprovida.com](http://www.redprovida.com). Blofield (2001) explores the role of Right-wing interest groups which adopt a very Catholic view on reproductive issues and contraception. See refers to *Chileunido, Fundación María Ayuda, Hacer Familia* and *Porvenir de Chile* as being influential among the conservative Right-wing sectors.

\(^7\) I purposely absent the ‘I’ from the acronym in a metaphorical sense.
numbers of such organisations (28 November 2008, 23 April 2009). Invisibility levels extend not only from society, but are also present within the movements themselves, as Andrés indicates above. Below I examine how such invisibility in both societal and activist spheres are conditioned by the dominance of the Catholic Church’s concept of what constitutes the ‘natural order’ in relation to sexual and gender roles. I do so by drawing on Edwards and McCarthy’s (2008) notion of ‘moral legitimacy’ and explore how the protagonists introduced in Chapter Four are beginning to contest that.

5. 6 Countering Moral Legitimacy
In their study of resource mobilisation, Edward’s and McCarthy (2008) introduce the notion of ‘moral’ resources. They argue that ‘moral legitimacy is perhaps the most valuable resource religious organisations bestow on movement actors’ (2008: 123). These ‘moral’ resources therefore act in opposition to the rights gains being sought here by members of LGBTI populations. Fransisco Vidal argues below that the Catholic Church’s adherence to these values constructed historically still play out in Chile today.

...in Leviticus (18, 22 and 21, 14) homosexuality is categorically prohibited...in El Cantar de los Cantares sex is alluded to as a creative and pleasant experience, but it is restricted only to procreation. During the 12th and 13th centuries, as the Church is consolidating its power, moral puritanism begins to prevail. This considers celibacy and chastity to be central values in sexual matters. During the 19th century, the Church takes a scientific approach...[and] in adopting a negative attitude towards sexuality...homosexuality is pathologised, and women are seen as incapable of being sexually active (Vidal, 2002: 27-28).

Francisco Vidal argues that social change in relation to sexuality is proscribed by the political weight of the alliance between the Catholic Church and the political Right which is manifest in the difficulties in passing a divorce law, in the legal wrangling to sell emergency contraception, in censuring AIDS campaigns...As a consequence, social change around sexuality has been reserved only for certain sectors of the population, especially among those from the higher socio-economic classes...(Vidal and Donoso, 2002: 15-16).

The task of countering this ‘moral legitimacy’ has therefore been a major component of ‘sensitising’ the Chilean population to lesbian, gay and transgender realities and constructing them as ‘normal’ or ‘non-deviant’ citizens. In so doing, this implies challenging the notions that sexuality is only related to procreation and to debunk associations of homosexuality with sin or as a pathology. This processes discussed later
in the chapter look at how this moral legitimacy is being challenged through these incipient legal mobilisation strategies. The most concrete example of this is Sandra’s case, as it presents a direct challenge to the very moral legitimacy of the Catholic Church through legal channels. By asking the courts to recognise that her constitutional rights have been violated by the actions of members of the Catholic hierarchy, her case raises question about the role the Church should play in determining sexual orientation as a barrier to teaching. Her case is a clear indication of the church’s influence within Chilean society and within the judiciary. The inability of the judicial hierarchy, both Appeals and Supreme Court justices, to challenge the moral authority of the church in this instance, and the legality of its actions, has meant that the case has been presented to the Inter-American Court of Human Rights. I expand on judicial responses to such matters thus far as an indication of how moral discourses have permeated the judicial structures through which these individuals are seeking change.

5.7 Moral Conservatism in the Judiciary

As Sandra’s case implies, at first sight, the judiciary paradoxically offers few prospects for upholding or advancing LGBTI rights. Supreme Court and Court of Appeal rulings in such matters have generated accusations of homophobia from activist circles (Robles, 2008). The controversial Supreme Court ruling from Karen Atala’s case in 2004 gave an indication of the pervasive power of the Catholic Church and the embedded constructions that have emerged as a consequence. The ruling denied Karen the custody of her three children on the basis of her sexual orientation. However, it did so on the basis that the children could be subject to discrimination by their peers as a result of their mother’s cohabitation with another woman. They argued that

embarking on co-habitation with her homosexual partner...places the minors in a state of vulnerability in relation to their social circles, clearly their exceptional family circumstances differ considerably from that of their peers and those in their immediate environs, thus exposing them to be subjected to isolation and discrimination which will affect their personal development...\(^{72}\)

\(^{72}\) Supreme Court ruling, Santiago, 31 May 2004. Paragraph 15.
In relation to broader LGBTI rights struggles, Karen herself lamented the outcome of the case as she recognised its potential negative impact upon the possibilities for constructing alternative familial structures in Chile.

I felt profoundly guilty that a precedent had been set...even though it wasn’t my fault, but...the fact that the Supreme Court has said that my way of life, my form of living, my family make-up, was abnormal, that it wasn’t valued socially, I said to myself, this isn’t right (17 June 2009).

Karen therefore recognises that non-heterosexual expressions of sexuality are being stigmatised and thus impel such individuals to remain within the private domain (Richardson, 2000; Stychin, 1995). Again, referring back to Sandra’s case, the direct impact of Catholic power and its imposition of its ‘moral legitimacy’ (Edwards and McCarthy, 2008), is evidenced in the ruling itself as noted in Chapter Four. When her eligibility certificate was revoked on the basis of her sexual orientation, the presiding judges argued that the Church had not acted in an arbitrary nor illegal manner and that it was effectively out of their jurisdiction. It ruled that
decree no. 924 relates to the norms contained in articles 803, 804, 805 and 806 of the Canon Law Code in that this legal body consecrates the Catholic Church and its authorities to set the directives necessary for the dissemination of the Catholic faith, as much in its content as in the eligibility of those in charge of teaching the religious doctrine...73

As noted in Section 4.3, constitutional law here has been superseded by canon law and Church’s authority in relation to presiding over the moral agenda remains unchallenged.74 Such examples seem to indicate that the judicial hierarchy therefore seems to present a hostile environment for upholding LGBTI rights in Chile, and yet another arena where conservative ideals are maintained in relation to sexual orientation and gender identity and the associations with stigma and deviancy consequently upheld. Indeed when questioned about the possibility of advancing minority rights through the courts, in relation to sexual diversity rights, one Supreme Court judge noted that

74 There is a great deal of contention among legal scholars as to the position of International Law in relation to Chilean Constitutional Law. The different interpretations of the Constitution range from those that believe that International Law takes precedence over Chilean Law to those that believe the contrary. In practice, most of my respondents from legal professional circles reported that the application of International Law was virtually non-existent in Chilean jurisprudence. However, in theory, there should be no conflict when considering Canon Law and Constitutional Law, with the latter presiding over the former.
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As I see the topic of minority rights pursued through the courts, these topics all have their own complexity. We don’t have precedents precisely because these are minority rights which are not being dealt with...we don’t have any examples of how to solve these issues because they are new...As they are always new issues, the first responses [from the judiciary] on these matters are likely to be misplaced...What I am trying to say is that often the juridical questions that are posed fail because they are not based in law...they might be understandable or reasonable demands, but not based in law...I think that we can explain the lack of solutions to such problems in this way. But I think that generally we are incapable, something which is notorious in all judiciaries in the region, of giving judicial responses to matters that have not been dealt with previously. And that is related to judges' training, and lawyers' training... (13 July 2009).

Whilst this is a general appreciation of the difficulty in dealing with minority group rights, it helps illustrate the difficulties for the judiciary in receiving 'new' issues to be dealt with. Both Karen’s and Sandra’s illustrate how that has been played out in practice and indicate how the 'normal' is constructed as heterosexual. As upholding their rights has not been possible within the domestic realm, both cases are now being contested in the Inter-American Commission and Court of Human Rights.

As the Chilean judiciary is an inherently hierarchical, top down institution, the effects of such rulings have implications internally. The lower court judge who relayed his angst regarding independent decision-making and securing work remarked during an unrecorded conversation that as competition for work is fierce, newly qualified judges are dependent upon senior votes to advance or even to keep your position (Miguel, 28 April 2009). He therefore felt compelled as an early career judge to keep his superiors happy, and make himself ‘votable’. Seemingly, being ‘votable’ meant being prudent when it came to controversial rulings (Miguel, 28 April 2009). The case he was to rule on was indeed controversial, and he was undecided as to how to rule. This was both due to the unique nature of the case, and the indirect pressure felt from above. The pull of the juridical field (Bourdieu, 1987) and internal informal institutions that play out in the Chilean judiciary seem to be at work here in serving to reinforce hierarchy, decision-making and legal interpretation. In this instance, such interpretations reinforce the heterosexual status quo. Juan, a former judge remarked, when asked about the possibilities for upholding rights on the basis of sexual orientation,
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In sexual minorities, no, I would say that no, no the judges are absolutely prejudiced and they try to bluff saying that they stand for sexual minorities, but I don’t think so (2 December 2008).\textsuperscript{55}

Evidence is emerging to uphold Huneeus’ (2006) and Hilbink’s (2007) contentions that the new generations of judges are playing an instrumental role in deconstructing the judiciary as a monolithic actor. UDP lawyer, Domingo, also concedes that

I think there is a change…an important generational one, despite the fact that you see that some areas are advancing, especially the more universal and less complex issues of freedom of expression, access to information…matters that do not provoke so much dissidence, but it is important to note that things are advancing…(2 December 2008).

One judge, Laura, when interviewed also remarked that more progressive interpretations of the law are appearing, for example, in relation to gender, such as domestic violence (Laura, 14 July 2009). Andrés Rivera’s two favourable rulings both attest to more progressive spaces existing. The discrimination case is particularly important in how it deals with gender identity in how respectful it was of his identity. When I interviewed the judge who ruled on that case, he was very well versed on gender and minority rights more generally.

However this contrasted with the majority of data collected which revealed that elite sectors within the judiciary still privilege notions of gender and sexuality that fall within limited patriarchal and heterosexual conceptions as espoused through Catholic teachings. The hierarchical nature of institutions such as the judiciary heighten and encourage the pervasiveness of such thought through the ways in which the ‘juridical field’ (Bourdieu, 1987) operates, from the top down. Top down conceptions continue to dominate and serve to render these populations invisible in many circumstances, even in spite of advances in political discourse in some sectors and a growing acceptance in the media and more favourable public opinion (Funk, 2006).

\textsuperscript{55} This interview was conducted in English.
Yet despite this seemingly hostile environment, members of LGBTI communities are willing to embark on legal courses of action to uphold their rights, such as the predominantly civil rights dealt with in this thesis. Lack of accessibility to legislative channels for minority rights, and lawyers' and social movement agendas in pressuring for change, have meant that all avenues are pursued in achieving such change. The court battles studied for this thesis clearly fall within that rubric, as examples of where legal and social battles coincide. The pervasive nature of constructions of heterosexuality and gender roles have severely curtailed these individuals' ability to construct alternative notions of sexual orientation or gender identity without being subject to stigma and treated as deviant, let alone being considered bearers of rights. The following section explores how individuals that participated in this research are beginning to challenge those dominant discourses as they start to adopt gay, transgender, lesbian and intersex identities in different domains and begin to challenge the prevailing elite and Catholic-endorsed ‘moral legitimacy’.

5. 8 Assuming Identity, Gaining Rights Awareness
Throughout this thesis two principal issues resurface which link the legal and the social: the ability to assume identity as an LGBTI person; and raising awareness of LGBTI people as bearers of rights among both targeted communities and the general population more broadly. During the course of this research, it became apparent that, in the Chilean context, these two processes are inextricably linked. In order for an individual to identify as lesbian, gay or bisexual, they must first be aware of the existence of such identities. Then the decision whether or not to assume such an identity is another matter.

Throughout my fieldwork it became apparent that awareness surrounding LGBTI identities varied considerably among respondents, as did the extent to which individuals had adopted or assumed an identity as a transgender, intersex or gay person. What did emerge from the data was that having suffered discrimination on the basis of sexual orientation or gender identity, or mounting a case to advance rights, such as gender recognition through the courts, created the opportunity for reflection on one’s identity that perhaps had not been an issue prior to that. Therefore, through different mechanisms,
such awareness was aroused or became more profound. Victor and Armando became aware of the existence of LGBTI rights advocacy groups as a consequence of their pursuit of justice. They had not known that they existed previously (2 June 2009). Others gained a greater understanding of the different identities that comprised the LGBTI movement though greater engagement with such groups, as César indicated during the conversation that followed our interview (14 May 2009). In order for these individuals to perceive that an injustice has been committed on the basis of their gender identity or sexual orientation, they must be first be aware of their identity as a lesbian or trans person, but also have enough knowledge of their rights.

Furthermore, knowledge of rights was very varied. Learning processes became integral to the legal challenges themselves, as respondents often sought to remedy their situation through internal institutional mechanisms. I detail how César, Víctor and Armando and Mauricio pursue alternatives to official legal action in the first instance in Section 5.11. In the case of transgender petitions for recognition, respondents became more adept at presenting cases. Lukas was able to draw on the examples already presented to create his own file, and Karen undertook postgraduate studies in gender, as she indicates earlier, to understand the reasons she was discriminated against (17 June 2009). Furthermore, as the legal processes proceeded, their identities as lesbian or trans people also became more entrenched. Identities were largely consolidated at the personal, individual level before they were assumed within the public sphere.

These processes of assuming an LGBTI identity and gaining awareness of LGBTI rights often occurred as parallel processes in the individual’s pursuit of rights recognition. I argue that the combination of these parallel processes ultimately enabled them to undertake their legal challenges within the public realm. This was done in conjunction with reformist lawyers insistent upon generating public and political debate as a means of furthering the public interest. From the cases studied, I argue that this first wave of members of LGBTI communities are emerging publicly to seek retribution for the injustices they faced. Referring back to Gloppen’s framework, I draw on the ‘awareness’ resource. In this instance, it is explored in relation to both identity awareness and rights.
awareness. Though I maintain that these processes occur simultaneously, I disaggregate the analysis into two sections, dealing firstly with identity awareness and latterly with rights awareness.

In exploring the conditions that have facilitated or restricted members of LGBTI populations in embarking on a legal course of action, I begin by examining the processes by which individuals assume an identity based on their sexual orientation and/or gender identity, as they face more exposure to such identities in the public domain and overcome the dominant discourses discussed previously that served to stigmatise such individuals and construct them as deviant. I also explore the processual nature of adopting a homosexual identity as Plummer notes (1996). For many of the respondents who contributed to this research, I would argue that their identities as lesbian, gay, bisexual, transgender, transsexual and intersex individuals are indeed in flux, and are contingent upon social setting. Plummer reasserts that ‘the interactional concern is with viewing homosexuality as a process emerging through interactive encounters in an intersubjective world. His [Plummer’s] concern rests with processes, reactions, and subjective realities’ (1996: 65). Hird also draws on Mead’s, and later, Goffman’s assertions that the self exists in relation to society and that it is continually being renegotiated through social action (2002: 586). Activist Marco Ruiz makes a similar assertion in relation to identity, referring to sexual identities in Chile more specifically,

In the individual processes, people tend to ask themselves questions such as ‘Who am I? or ‘What am I?’ These questions can be explained through two concrete situations: recognising oneself as equal to others, or as excluded by others. In that case, the identity process is one which is achieved through the process of comparing (2002: 71).

5.9 LGBTI identities: Awareness

In this instance, the data revealed that the ability or desire to assume a gay or lesbian or intersex identity was to some extent determined by what examples of such identities were actually present in the public domain. Those openly identifying as gay, lesbian or transgender have been predominantly activists. Over the past couple of years, however, public figures from the art and media worlds have ‘come out’, and activists such as Robles (2008: 189-192) have celebrated the inclusion of gay characters in popular
television soap operas. Politician Maria Antonieta Sáa, also referred to elements of social change that were occurring vis-à-vis LGBTI public identities.

Look, I think that it's civil society that has in some respects made its opinion apparent, basically through surveys, so we have a progressive society here in Chile, you see that in the youth, the Internet, in songs...even on the television there have been soap operas with gay characters on, anyway, there have been messages of tolerance and respect from society (6 July 2009).

In spite of these advances, respondents indicated that invisibility surrounding these populations remained extensive. While individuals may have been aware of their sexual preferences or gender orientation, they did not necessarily attribute a name to it, or assume an identity under that umbrella either. Below Armando acknowledges his and Víctor's lack of awareness of the existence of activist groups prior to deciding to embark on legal action. From the tone of voice with which these words were uttered, the implication seemed to be that they did not refer to themselves as gay previously.

A - We had no idea that MOVILH existed, we didn't know what it was

P – You didn't know about any gay groups?

A – We were involved in this case, but we didn't know anything about the gay world, we just knew that we were gay because we were together (Armando, 2 June 2009).

His tone also suggested that 'gay' had not been a word that had been part of their vocabulary. The trans male respondents who I spoke to recounted how they had only recently begun to assume such identities due to their lack of awareness of the existence of such identities. Close engagement with both activists and non-activists indicated that, prior to a programme aired in 2003 on Chilean television, awareness on trans male identities had indeed been lacking. Emmanuel remarks below that,

I saw a programme on tv...on that programme it was the first time that I saw cases of male-to-female transsexualism, they showed Andres' case...and after that programme it was the first time that I realized that I wasn't guilty for having been born this way...I wrote to the programme to get his contact details...I got in touch with Andres, and I went to see him in Rancagua, and I met someone like me, because you know that half the time you feel as though you are the only person that feels like this (Emmanuel, 15 May 2009).
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Though Emmanuel had indeed recognised his difference, he was not able to fully articulate it. Mauricio recalls how his girlfriend took the initiative after seeing the same programme:

My girlfriend took me,...she saw the documentary on Andres on television, then she saw another report in the paper, she wrote him an email and he got in touch and so we went to a meeting (26 May 2009).

The interest that the programme roused following Andrés’ initial appearance on it in 2003 provided the platform for the emergence of the first known male transgender/transsexual group to form. This then became the channel through which its members began to assume a trans male identity. They started the female-to-male transitioning processes, which included obtaining psychological and psychiatric reports confirming their transsexual status, beginning hormone treatments and/or undergoing surgical interventions. These processes preceded seeking legal recognition for the adopted name and gender. Such were the social sanctions regarding acceptance of non-gender conforming or non-heterosexual identities that Andrés’ identity was hidden during his first appearance on television. Emmanuel remembers that ‘they showed Andrés’ case, but on that occasion his identity was hidden, they showed him talking, they showed his body but not his face’ (15 May 2009).

The complexity of assuming such identities, not least given the lack of awareness of their very existence, meant that many had assumed alternative pseudo-lesbian identities. As Andrés indicates below, this served as a means of protection and self-preservation,

We frequently live under an assumed as lesbian women identity as a means of protecting ourselves, I would much rather say that I was lesbian than say that I was a man, because otherwise your whole world will fall on you, lesbians don’t have their worlds fall on them...(19 October 2008).

Subsequent appearances on other programmes such as \textit{Vida} (Life) and \textit{Animal Nocturno} (Night Owl) have also served to generate more awareness surrounding trans male identities and have encouraged more people contact OTD. Andrés indicated that television programmes had had more direct impact than any other medium, such as the
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Internet, in raising awareness and increasing membership of the organisation. He notes that

...about three months ago I appeared on a tv programme. I usually appear on medical programmes, I'd never wanted to appear on those sensationalist programmes. But my wife and I analysed the situation and concluded that there was still a segment of the population that we had not yet reached. Not all young people watch medical programmes. And among those programmes who had expressed an interest in interviewing me, was Animal Nocturno (Night Owl). It's a very widely watched programme. In fact, after it aired, 7 transsexual people got in touch with me. It was then that we realised that effectively, there were a lot of people that we hadn't reached. So obviously, I am going to have to appear on tv again (19 October 2008).

Individuals who were therefore in a similar position then sought solace, support and understanding through OTD after having seen the programme. Another activist, Carolina, commented during a conversation that when new people arrive and introduce themselves to the group, what strikes her most is their disbelief at finding people the same as them (19 November 2008).

As a consequence of careful targeting of media programmes, OTD has enjoyed a fairly rapid rise in its membership. Andrés recounts that with each appearance on television more people contact him, and that most have been reached via television programmes than through other means, such as the Internet or other forms of media reporting.

In 2005 there were five of us when we started, now 31 are participating, I don't know how many more there are, and that’s just in this region...I never thought that there would be so many of us when we started this, but 31 is a very high number (19 October 2008).

Such examples attest to the only recent possibilities for trans male organising within Chile, and prior to 2003, the lack of such identities in the public domain. These examples illustrate the complexities of assuming identity that emerged as a result of the combination of conforming to society's norms. In the case of trans men, it means hiding behind a lesbian identity. It is also clear that the media has been an essential mechanism through which to raise awareness of sexual orientation and gender identity and testimony has proved to be one of the most effective tools to date in appealing to numerous and varied audiences, from political to judicial and general.
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Having the tools or resources to assume an identity as a gay or transgender person is therefore essential in order for people to be able to then construct themselves as such in a range of domains. This includes being able to go through the legal process to achieve recognition as a member of the opposite sex, in the case of transgender and transsexual petitions for recognition. The first issue, therefore, is having access to such identities through a variety of means. The next challenge is to be able to recognise oneself as trans or gay, which implies a significant processual shift at the personal level, prior to emerging as such at the public level. In the following section I discuss how individuals assume such identities and overcome discourses of stigma and deviancy.

5. 10 Stigma and Assuming Identity

I introduce this section by drawing on César’s case. Firstly, and by his own admission, he has not always identified as gay. Second, he gives quite a good analysis of how Chileans view homosexuality. Having been married and had a child, he argues that ‘this thing of being gay came to me later’ (14 May 2009). Yet the extract below indicates the social perceptions around gay identities in Chile in the late 2000s. He informs us how he does not fit that profile.

I’m gay, I’ve got a partner, and I like men. But people don’t believe me, because for them, the concept of a homosexual is something else. It’s walking around with a handbag, dressing as a woman, that’s the idea they have…they are just some of the things that we have to get over in this Chilean culture (14 May 2009).

When analysing stigma and social identity, Erving Goffman notes its relation to the social setting, ‘Society establishes the means of categorizing persons and…social settings establish the categories of persons likely to be encountered there…’ (1963: 11-12). He continues that stigma is perceived through interaction when ‘not all undesirable attributes are at issue, but only those which are incongruous with our stereotype of what a given type of individual should be’ (1963: 13). He defines stigma more directly as ‘an attribute that is deeply discrediting’ or ‘an undesired differentness from what we had anticipated’ (1963: 13, 15), which is not possessed by the ‘normals’. As I argue above, what is ‘normal’ has been constructed along the lines of Catholic Church doctrine and upheld socio-politically by a conservative elite, as María Antonieta Sáa informed us in Chapter
Two. In Goffman’s words, both gender identity and sexual orientation constitute ‘deeply discrediting attributes’ (1963: 13).

As Karen Atala noted in her address to the Inter-American Commission of Human Rights in Washington on 7 March, 2006, it is on the basis of her ‘undesirable attribute’ of sexual orientation, that she is denied the custody of her children,

I am a woman, I am the granddaughter of Palestinian immigrants, therefore, I have Semitic blood, I trained as a lawyer, I am a judge by trade, I am a mother and I am a lesbian. I am all of these things, and many more things define me in my essence and... as a human being. However, one of the many things that define me was considered prejudicial to my ability to raise next to my bosom my three small children. That characteristic related to my sexual orientation.76

As Karen’s case attests, engaging in social interaction as an openly gay or trans person can be extremely costly. It is of little surprise to me that respondents revealed that their LGBTI identities often remained undisclosed in the majority of social interaction. The distinction between the public and private in relation to sexual or gender identity for many of these individuals in practice usually meant that sexual identity or practice was kept to a very intimate sphere. At times, this did not move beyond the individual level or that of the dyad. Even within kinship networks, such as the extended family, gay or transsexual identities may remain private or unacknowledged. There was a mix among the protagonists here between those who had not come out to their families, and those that had. As a consequence, notions of what constituted the ‘private’ realm were very limited. And on the other hand, the public realm could even be taken to mean coming out to the immediate family. During many years of engaging with Chilean gay populations, many have spoken with me of the fact that whilst it may be known or suspected that they are gay within the family, it is never openly acknowledged. For example, my friend, Emilio, would arrive with ‘his friend’ to family dinners or parties. While this was socially accepted, this was only the case when left unspoken. Alternatively on other social occasions, he would introduce ‘his cousin’ to his friends or colleagues.

76 As quoted in Robles (2008: 193).
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In order for individuals to be able to reveal their sexual orientation to others, they must have also accepted it themselves. In some instances, the process of assuming an LGBTI identity, even on a personal level, had not been fully consolidated. Although César admits that he had been engaging in homosexual relations, he had difficulty accepting himself as gay. In the initial stages after having been forced to resign from his post in Police Investigations, he reports that

...whilst all this is going on, I go to see a psychologist and a psychiatrist to accept myself, because at first I felt that I was to blame, I asked myself, what’s wrong with me, why am I like this?...with the psychologist and the psychiatrist, in the end I understood that I had done nothing wrong...when they fire me, that’s when I begin to accept myself (14 May 2009).

Karen’s lawyer also notes that her acceptance of her sexual orientation increased over time and that she later came to have greater conviction in her lesbianism than when they initially met. He notes,

I break down Karen’s case into a number of stages, which relate directly to her, and the manner in which she assumes her condition, and empowers herself through her condition...after two years of litigation, Karen at that time had assumed her condition with much greater clarity...she had also started her learning process through postgraduate studies, studying gender, and she was much stronger in her conviction (Eduardo, 22 May 2009).

Whilst Karen was ‘outed’ and had no control over the management of her identity within public realms, what both instances reaffirm are Plummer’s notion of identity as process. In order for individuals to reveal their sexual orientation or gender identity through social interaction, it was necessary to have assumed such an identity personally. In César’s case, for example, he did not even reveal his sexual orientation to his family until he decided to go public with the case. He had previously been married and had sought professional help to be able to accept himself as a gay man. He said that being homosexual had only come to him later in life, that he had been clearly heterosexual previously. Víctor’s mother only found out after he had appeared in the news.

A number of the legal cases presented here deal work-based discrimination. Víctor and Armando were pressured into resigning from the police force on the basis of their sexual orientation, César maintains that he was fired because he was gay, Sandra was not
allowed to continue working as a religious education teacher again as she was a lesbian, and Claudia was not given a permit to work as a street seller on the basis of her gender identity. It is not surprising, therefore, that individuals generally did not reveal their sexual orientation or gender identity within the workplace, for the reasons that Karen notes below.

There’s no legislation that protects you from losing your job on the basis of sexual orientation, so, in this country, it’s suicide to come out as a lesbian, unless you are a millionaire, or you have your own business, and even then you could lose clients, so the costs are very high of what you risk losing (17 June 2009).

Indeed, of the cases mentioned above, only Claudia publicly revealed her gender identity. This is due to the fact that trans women cannot effectively hide their gender identity as can be done in relation to sexual orientation. In the other instances, the individuals did not reveal their sexual orientation, but the institutions that they worked for found out through other means. Victor and Armando reiterated how information pertaining to their sexual orientation was reserved for only the closest of colleagues,

V - I had a best friend...he knew about me, he always knew

P - so there were a couple of people that knew within the institution?

V - Yes, two of my friends in my squadron, but no-one knew in his [Armando’s] squadron (2 June 2009)

Or indeed, as César indicates, he did not reveal this information even to the family, ‘Well, actually, no-one in my family knew [about my being gay], I was married at one stage, and my ex didn’t know either’ (14 May 2009).

In the case of transsexuals undergoing transition that were interviewed, they often moved away from family members in order to do so. The extent to which the family was aware or involved in the case varied from complete rejection to more supportive responses. Emmanuel explains his family’s response below.

Unfortunately, I couldn’t have my family close by, so I came to study in Chilán to get away from my family, because I knew that if I stayed there, I’d never be able to get on with my life, so it was strategic, knowing that something complicated was coming...
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When my family found out about me, all hell broke lose, all my family are Christians, they are believers, but they’re evangelical, so they’re very narrow-minded...my older brother said that I would go to hell if I didn’t change, my mother wanted to talk to me, she gave me books to read, she said, if you’re homosexual, blahblahblah (15 May 2009).

Levels of acknowledgement and acceptance also varied from case to case. Andrés recalled how Michel appeared in the *Vida* (Life) television programme alongside his mother, which shows that she supports him fully. Andrés refers to the importance of that case in sensitising others,

...what helped us in that programme was the testimony of a mother. It’s amazing how helpful it was to sensitise people having a woman talk about transsexualism, and that that woman was the mother of a transsexual...that mother had a great impact on them [people he had come into contact with] (19 October 2008).

Mauricio recounts that while his family have been supportive, they are not fully aware of what such process entailed as he indicates below,

I want to be with my family, I need to talk to them, being far away, I can’t really talk to them, and it’s harder for them to adapt. They still refer to me in the feminine sometimes. I need to be with them so that they get used to the idea...(26 May 2009).

The examples given above attest to the contextual nature of identity, and how, in relation to gender and sexual orientation, it fluctuates accordingly. The ability to construct an LGBTI identity is severely curtailed in many instances. The strength of deviancy discourses pervade family structures, and thus severely impact upon these individuals ability to accept themselves on a personal level. The decision to then construct their identities within the public domain, as these individuals eventually do, is far from straightforward given prevailing socio-cultural and political conditions. Constantly throughout the research, those I spoke to would moderate their behaviour, their dress, their language, gestures and greetings in accordance with the situation and, where necessary, to mitigate their ‘discrediting attributes’ (Goffman, 1963: 13). In the cases studied for this research, there was a shift in the social arenas in which those defending or

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77 Spanish is a gendered language. Pronouns and adjectives are feminised when referring to a female, and vice versa for a male. This clearly impacts upon transgender and transsexual individuals in Spanish-speaking countries.
wishing to advance their rights through the courts were interacting having assumed an LGBTI identity, moving often from very private realms to very public ones. Before examining more fully the decision-making processes leading these individuals to assume an intersex, transgender, lesbian or gay identity publicly, I explore the processes of rights awareness and the growing sense of justice that emerged among respondents. I argue that processes of legal learning and rights consciousness contribute to the decisions to undertake the court action in a public realm.

5.11 Rights Awareness

In order for legal action to be embarked upon, there needs to be sufficient awareness of identity and an associated awareness or notion of rights and/or sense of injustice. I argue that this awareness of rights or sense of justice is also a process. Or, in the instances where it is immediate, it becomes more profound, as legal learnings expand. Determination and empowerment also become apparent. The initial motivations that perhaps acted as push factors to encourage an individual to undertake legal action, whether it was through legal channels initially or not, begin to morph with other factors. Other processes occur that engage the individual deeper in the case. Respondents often reported the shift from the individual perspective to the collective as regards perceptions of injustice more generally. Engaging with politically active and legally literate activists and pro bono lawyers and the act of presenting legal arguments to courts all contributed to this process. Sandra Levitsky’s work on litigation and LGBTI rights in Chicago noted the importance of

...the role of legal rights in fostering a sense of pride and self-confidence in one’s sexual identity. Many activists believed that the most effective way of achieving social change on issues relating to sexual orientation is to “come out” (2006: 152).

In her work, she therefore also briefly touches upon the intersection between rights awareness and coming out.

Gloppen argues that her framework for social rights litigation is also applicable to other marginalised groups. She notes that for the legal process to even begin, ‘potential litigants should be aware of their rights, the right violation and the possibility for redress through the courts’ (Gloppen, 2006: 46). I disaggregate this into two sections, awareness
of rights issues and perceptions of being able to access the courts. The current lack of legislation protecting citizens, among them LGBTI populations, from discrimination, together with historic cultures of impunity for abuses committed by the state, means that there is a certain feeling that it is futile to pursue such claims. The lack of protections and the repetitive nature of discrimination on the basis of sexual orientation or gender identity have meant that many have become resigned to the state’s inaction vis-à-vis such abuses. This is most acute among female transgender populations. However, Mauricio, a trans male also seemed to initially resign himself to the situation. He was not initially thinking about contesting his case when his contract was not renewed. When I asked if his intention had been to pursue legal action from the time that the incident occurred, he replied

No, not at the moment that it happened, no. When it happened, I said, well I have to look at the positive things I got out of it [the job], I knew this was going to happen really, it’s better to go with your head held high (26 May 2009).

His immediate response was to accept the fact that he would not be able to keep his job given that he was transitioning. It was not until he was encouraged to embark on legal action by a civil servant that he actually considered this within a rights remit.

I spoke with someone at the Work Inspectorate and I told him about the case and he said, you have to take legal action, that is discrimination, clearly it is a case of discrimination, it’s not right, and if I were you, I would claim for the five years, not just for this year, it’s not right/just because people should be judged on their work, not on their orientation...(26 May 2009).

Emmanuel also indicates the extent to which he would not be able to keep his job due to the fact that he had decided to transition from female-to-male.

So towards the end of 2006 I decided to talk to the School Headmistress to explain my situation to her. I wanted to tell her that I was going to start my legal process and that I was saving to have my operations. So I went and spoke to her. At that time, I didn’t have a permanent contract, it was renewed on a yearly basis. And well, I thought, if it’s renewed, then great, if it’s not, I would only find out in March. But I knew that there was no way that they would renew it (15 May 2009).

The complexity of transitioning gender is a time of extreme vulnerability and instability. Dealing with legal issues may therefore not be one’s priority at such times. However, as identity then becomes more consolidated, so does the sense of determination and of
justice. Emmanuel personally resolved that ‘I am going to fight for this thing [his transition and legal status], I am going to carry on. Even though I might not have much at the moment’ (15 May 2009).

I have noted how Karen, Mauricio, Emmanuel and others have moved from victims to perceived bearers of rights. They are shifting from being subject to discrimination, or perceived injustice, to demanding justice and rights. In all instances, this was accompanied by a very strong sense of determination, especially among those interviewees who were in the latter stages of the court cases. Below Víctor details how he was motivated to seek answers to the discrimination that he and his partner, Armando, had suffered.

We had found out ourselves that what they had fired us for from the police force was not covered in the their rules...we came to Santiago, we got hold of the rules and we studied them (2 June 2009).

The reticence that Mauricio showed in undertaking legal action was not apparent in Víctor and Armando’s case. They perceived that an injustice had occurred which needed to be rectified almost immediately, they did not resolve just to accept their situation. In this case and in César’s, they explored mediation or internal institutional mechanisms to seek redress for the perceived discriminatory act prior to seeking redress through the courts. Both Víctor and César indicate below,

We requested to be reinstated...on our own without any help from lawyers...we presented the requests and we could see that nothing was working ...we had sent letters to get reinstated...we were exploring possibilities with the Police Subsecretary...we sent letters asking for a meeting with the Director of the Police Force, which never happened, we didn’t meet the Director, but another General...(Víctor, 2 June 2009).

The first thing I do is ask for an interview with the Subsecretary of Investigations, which is the most political body that we have in the institution...and I present all the facts...and I ask for a meeting, a meeting which is never granted (César, 14 May 2009).

Similarly, Mauricio’s case went through the mediation process established for labour disputes. When the employer failed to claim responsibility he began to search for legal representation. MOVILH also acted on Sandra’s behalf to try and get her reinstated. All
such attempts were eventually futile. However, on a more personal level, they served as learning processes and also seemed to strengthen their resolve to achieve some sense of justice. In the next section, I expand on the notion that rights become more entrenched at the individual level, which then enables these individuals to take on the challenge as a representative of the collective.

5. Rights as a ‘given’

The stigmatized individual tends to hold the same beliefs about identity that we do; this is a pivotal fact. His deepest feelings about what he is may be a sense of being a ‘normal’ person, a human being like anyone else, a person, therefore, who deserves a fair chance and a fair break (Goffman, 1963: 17).

Sandra’s words express these sentiments in that she says that she has been condemned for loving. She does not see loving as being a crime. Such were the strength of her feelings on this occasion that they encouraged her to go public with the case in a more spontaneous way, despite the fact that she had been pursuing means of legal redress prior to this in conjunction with MOVILH. She notes

I think that any person who defends their rights, who hasn’t committed a crime, who hasn’t killed anyone, who hasn’t cheated on anyone, who has just loved, that’s different, you can’t condemn someone for loving, and that’s when I started my fight, and one day I went to one reporter, and he said to me, ‘are you going to show your face?’ and I said ‘yes, show me, show me’ and from that day forward they started to call me, and that’s how I started (4 July 2009).

Goffman’s assertions here resonate with some respondents who ultimately came to view their legal claims as ‘just’ and ‘logical’. Juliana, an intersex person who was petitioning for gender recognition, also expressed her frustration at the judge’s delay in ruling on her case in similar terms, as she would often refer to the injustice of her situation. She believed that it was her right to be granted gender recognition as she was a woman and had biological proof of that and wondered why the judge could not see that as plainly as she could (Informal conversation, 23 April 2009). She repeated this sentiment on numerous occasions. I spoke to the judge presiding over this case, and when he met Juliana, he recalled being bothered by her stance, given that she had seemingly also manifested such sentiments to him. He had been irritated by the fact that she considered gender recognition her right and had perceived not having it as an affront. He believed
that she should wait for the legal outcome just like everyone else whose case was being processed in the legal system, he did not consider her urgency to be more valid than other cases he was working on, and that justice in the Chilean legal system was slow (Miguel, informal conversation, 28 April 2009).

On more than one occasion the initial motivation related directly to the financial repercussions of having been subjected to discrimination in the workplace. Sandra notes below that

I had to pursue the legal channels because I was going to be jobless, because they cut off my wings and because of that I said to myself that I have to hold on to something, because I am 45 years old...at that age in Chile, you can’t find work, it’s not easy, that’s what I had a degree in, what else was I going to work in? I have to defend myself, I can’t accept that for having a different sexual orientation they are cutting my wings like this (4 July 2009).

Given that a number of respondents were subject to work-based discrimination, and the precariousness of their situations as a consequence, financial reasons were mentioned during data collection, but not as the principal reason, for taking legal action. César below relates the importance of the financial role he plays as provider for his son.

I told him [Rolando], you have to understand that this is not just a fight that I am giving for me. You see, I have a son, and my son deserves a future. Everything that I was doing, working and all that, I was doing for him. It was to give him a future. But they stopped me, and they didn’t stop me because of anything that I have done, but because they wanted to. So, I have to fight. Unfortunately I am of an age that it is very hard to start from zero...I’m also not going to give 18 years of my life for nothing...(14 May 2009).

Both César and Sandra share the same fears of being able to start again after having worked for many years for the same institutions. This sentiment coupled with the necessity to survive and provide meant that the financial implications of the perceived injustice have indeed been a significant motivating factor. Important in both of these cases is also their symbolic relevance in the challenges that they present to institutionalised homophobia.
Chapter 5: Consolidating Rights Awareness

5.13 Individual to Collective Rights
Respondents were unanimous in stating that their cases were no longer about pursuing personal justice, but that they were adamant that their battles were to serve the wider collective good. In different ways they expressed their concern that no others should endure the discriminatory practices that had befallen them. Indeed such beliefs are coherent with someone deciding to pursue a course of legal action in the public interest (Levistky, 2006; Sarat and Scheingold, 1998, 2001, 2006). But these claims were also made as the individual’s sense of justice and legal learnings had become more profound.

César insisted that

I don’t want anyone else to go through what I went through...it’s no longer personal, I think there is a cause and you have to soldier on, and maybe what we are doing today, for all that youth...you’re giving them legal possibilities, the law can give them protection, the protection that they deserve, the same as those whose race is different, or for disabled people (14 May 2009).

After the defeat by 3-2 in the Supreme Court in May 2004, which left Karen Atala without the custody of her three children, she decided to take the case to the Inter-American Commission and Court of Human Rights. In contemplating that decision she remarks on how she came to realise the political and symbolic implications of the case and the potential for rights gains at a wider level,

Then I started to realise that the dynamics were different, for that reason, the case stopped being personal and it became a politically emblematic case, because the time it takes to denounce, or for a case to be concluded against a state, sometimes it can take up to 10 or 14 years, by then my daughters will have come of age...so for that reason, it’s symbolic, and most of all to obtain what they call in law, measures of no repetition (mecanismo de no repetición), which means that it can never happen again to people in a similar situation, and that’s what I aim to achieve, that this never happens again (17 June 2009).

One trans activist, Mariana, also spoke of the need to

I sometimes question what I am doing, but in the end I don’t know if it’s going to work out for me, but it will help others, the future generations, they’re going to reap the benefits...and if you don’t do it, who will?...because I don’t think that they [the government] want to actively change things, I feel as though it’s the pressure that we put on them (19 June 2009).

Such sentiments were expressed across the board, from those that were active politically to those that preferred to concentrate on their own case. Notions of advancing the
collective good emanating from both the activist and the legal reformist sectors working to bring these legal mobilisation processes into being seem to be impacting on the individuals’ perceptions of the collective good also.

5.14 Legal Learnings
This sense of empowerment also seemed to stem somewhat from my respondents’ increased knowledge of rights in relation to LGBTI issues. Drawing on discourses of human rights and citizenship, such vocabulary starts to enter the discussion much more than when the initial discriminatory act occurred. Engaging with social movement and civil society activists and advocates clearly exposes these individuals to environments where rights are a central feature. Though some claimants were also activists, the majority were not.

When the case was taken up, in the year 2004, I didn’t know the issues affecting sexual minorities either...we were all ignorant, we were all new to this you know, I wouldn’t have been able to give you an extensive list of the sexual minority rights because I didn’t know them either...I had to do a Masters in Gender Studies to understand what had happened to me and why it had happened (17 June 2009).

César also indicates below how he applied his knowledge of the law, having worked in the Police Investigations Division. However, his attempt to seek justice through the internal mechanisms clearly did not prove to be fruitful.

at the beginning, I tried to go through the conventional route that they had taught me, and which the law is supposed to facilitate you. But none of those worked, all doors closed in front of me. They either wouldn’t agree to have a meeting with me, or they would just respond (14 May 2009).

Although César had rights awareness as a tool at his disposal, and he was aware of the channels that he had to pursue in order to achieve justice, these were clearly closed to him. As a consequence, he had to become versed in alternative means of seeking rights redress. This effectively meant that he had to engage with MOVILH, an organisation which specialised in LGBTI rights issues, in order for him to pursue such a strategy. As such, having such tools meant that these individuals were more aware of their rights, were more articulate in voicing such rights, and were more confident and determined in doing so. As Gloppen notes, it is central to litigation being undertaken that a perceived injustice has occurred. This legal knowledge and awareness therefore becomes a resource
that is channelled through the social movements and legal representatives. I would also argue that it serves to help overcome the barriers of fear and distrust that Gloppen (2006) notes as impacting on motivation. For example, this new rights-informed platform from which individuals are acting serves as a means of countering the dominant discourses of moral legitimacy as mentioned throughout the thesis so far, not only within the judiciary, but also in broader social circles. The convergence of rights awareness and identity awareness seem to have empowered these individuals to such an extent that they are then willing to undertake their cases in the public domain. I introduce this below and then explore it more fully in the next chapter, given that I argue that access to legal resources also impacts on individuals' decisions to engage in public interest litigation strategies.

5.15 Going Public: Gay, Lesbian and Trans Identities in the Public Arena

Family is one of the main barriers influencing individuals’ decisions as to whether or not to take their cases public. If we refer back to Lee’s (1993) concern for stigma by association, or the ‘stigma contagion’ (Kirby and Corzine, 1981) and Goffman’s ‘discrediting’ characteristics (1963), Juliana details below how she refused to go public so for the same reason,

I’d like to make it public...but there are so many people that it would affect, people that are supporting me, my family, my boyfriend, this job, I’d lose everything. I know that I’d win something too by doing it [going public], but what I’d lose is more important that what I’d gain. I’d rather keep what I’ve got and do it quietly...I know that if I did it, it would bring consequences, so I prefer to leave it as it is (28 November 2008).

Victor reflects on his decision to make his case public, even before his family was aware of his relationship. He wanted to use the media to pressurise the police force into reinstate his partner and himself in the institution after they had been forced to resign on the basis of their sexual orientation.

Sometimes I regret it [having gone public], for all that my mother suffered, because my mother didn’t know, no-one in my family knew, they all found out via the television, sometimes, I think, what are we going to do about this?, but we just have to carry on, that’s all, my mother now talks to me a bit, but she’s never accepted my relationship, I don’t talk to her about it, and she doesn’t talk to me about it either (2 June 2009).
In 2009, as I was leaving the field, Juliana was in contact with the media to do a programme on her situation. I even received a phone call as the producer of the tv programme who were trying to get in touch with Juliana’s lawyer. They could not get hold of her, they were enquiring if I knew of her whereabouts. Juliana’s lawyer told me that the journalists wanted to interview her for the programme that they were making on Juliana. I would argue that desperation and urgency played a role in this decision. Juliana also claimed that in making her case public, the programme would bankroll her operation. This occurred in the making of another programme, *Vida*, on transsexual realities. One participant had a mastectomy paid for and another was to have his lawyers’ fees paid to complete the legal petition for name and gender recognition (Emmanuel, 15 May 2009).

Except in the case of the gay couple forced to resign from the police, the decision to go public and assume one’s identity as a gay or lesbian person, was a decision that was made once the legal process had already begun, or long after the actual discriminatory act had occurred as in Sandra’s and César’s cases. In Karen’s case, the opposing legal team made her case public. In the ensuing period, however, her battle has become internationalised. Her lesbian identity, and the discrimination that she faced on that basis, has since become the subject of debate at regional and international levels, which I detail further in the Afterword. In contrast, Sandra made an active decision to come out. She recalls part of the process below in both deciding to come out and how that might impact upon her family. She explains the extent of the stigmatisation process in how it is not just a personal phenomenon, but how it extends to those associated with the individual.

Well, it came out in public, at first I didn’t want to appear publicly, but then I asked myself why I had to hide away from the world…I talked to my family, not so much for me, as for my family, you have a family behind you…I’ve got a sister who’s a headteacher, so obviously, I had to ask, because they don’t just discriminate against you, but they also discriminate against your family…my family said that I had to make the decision, that I had to weigh up the losses versus the gains…and I went one day to one television station and they asked me if I was going to show my face, and I said, yes, show my face (4 July 2009).

Similarly, César recognised that he needed to maximise the exposure of the case given that he had had a number of problems in securing responses from the institution initially,
and then finding and securing a lawyer. He considered that making the case public was part of the political nature of the case, but again, his first thoughts prior to going public are of his family. Before actually facing the media and openly recognising his sexual orientation, and the fact that he was discriminated against on that basis, he first has to come out to his family. Until that moment he had not spoken of this to them, it was the nature of the legal case which encouraged him to do so ultimately.

I knew, just as Rolando had said, that this had to go public, so, before it does come out, I have to go to my family and explain everything to them...for my mum it was a relief, because she never understood why they had sacked me ...I then explained that they fired me because I was gay (14 May 2009).

César clarifies below how in deciding to go public, there is a convergence of rights awareness, identity awareness, determination and collective sense of justice, among many other factors.

...so basically it meant publicly recognising my condition [or coming out]...to make this happen, and fight for it as we have done until now (14 May 2009).

Even the language he uses here, suggests that he has not fully assumed his identity and obtained a full awareness of rights in relation to his sexual orientation, given his use of the word ‘condition’. Thus the continual process of assuming identity, as argued by Plummer (1996), is still ongoing in this case. César refers below to some of the factors that he has had to overcome in so doing.

I think that I have already assumed the cost [of going public], I mean, having to go in the metro and the little boy who points me out and says, ‘there’s that guy from the tele’ and the old woman who says or thinks, ‘oh, yes, there goes the little faggot’...I’ve already accepted that. The one who has had a really bad time of it has been my wife [now ex-wife], she’s had a rough time (14 May 2009).

His decision to come out publicly in order to enhance his chances in the legal battle meant that he consulted his family prior to embarking on that course of action. His resolve to seek justice was already strong. He had exhausted internal mechanisms for reincorporation into the institution and then presented a protection writ arguing that his constitutional rights had been violated. In neither instance were his petitions heard. His case dates back to January 2006, but it was not formally presented to the courts until May 2009, when it was sponsored by I-Público. The slow process of legal change also
therefore provides opportunities for small advances in social change to be incorporated into the legal battle. Having worked as a police investigations officer for many years, César’s notions of rights and justice were already fairly entrenched, however, this expansion into LGBTI rights issues presented a new arena for him. His engagement and activism with MOVILH and his resolve for justice have not waned as he seeks all possible avenues to achieve his goal. Further, Sandra Pavez’s decision to undertake her case in the public domain was by no means an immediate one, and in a similar manner to César, she consulted her family prior to doing so. I discuss the relationship between going public and legal resources in the next chapter in more detail.

5.16 Conclusion

I argue that since 2004, a first wave of members of LGBTI communities has emerged as rights bearers in the public domain as a handful of claimants have embarked on incipient processes of legal mobilisation. I refer here to those who are pursuing civil rights gains as lesbian, or gay or transgender people through the Chilean justice system. Though I recognise that they may not the first such people to bring court action, they are the first to do so publicly. In referring back to Gloppen’s (2006) framework, the data revealed a slight easing of barriers affecting motivation in that after having suffered grievances and been subjected to discrimination, or through increased interaction with social movements, claimants endeavoured to advance rights, often assuming identity more fully and beginning to challenge prevalent discourses that considered them to be ‘deviant’ and overcoming these ‘deeply discrediting’ attributes. The legal process and different stages and arenas through which individuals contest their rights are ultimately lengthy, and may take a couple of years or longer to resolve. During this time, notions of rights and justice evolve and become more entrenched and consolidated, at the same time that identity on the basis of sexual orientation and gender identity also does. The dual processes of assuming an identity as a gay or transgendered person in diverse and public domains, in a shift away from varied private domains, and the growing awareness of rights often occur in a parallel manner.
Chapter 5: Consolidating Rights Awareness

The intersection of these factors with the possibilities of mobilising legal resources are explored more fully in the next chapter. The decision to ‘go public’ with the case often emerges as a consequence of scarcity of legal resources, predominantly in relation to accessing legal representation. The restrictions placed on LGBTI movements increasing their associative capacity within the legal professional classes has meant that links have primarily been formed with reformist lawyers who are interested in pursuing a human rights and citizenship agenda, as part of a broader concern with democratic deepening, in a country where democratic rule has been established for only twenty years since the fall of a repressive dictatorial regime. The enduring legacy of this dictatorship has also impinged upon the quality of democracy in Chile, and lawyers intent on advancing the democratic agenda within political, legal and social circles have utilised public interest litigation as a means of publicly exposing systematic abuses of rights or inability to exercise citizenship rights (González, 2003). Social movement actors also wishing to broaden the same agendas have often acted as mediators for individuals needing legal representation, and consequently have formed links with those lawyers most willing to undertake such cases; namely those involved in or interested in human rights advance.

The next chapter examines how legal resources are secured and mobilised predominantly in relation to legal professional services, looking at how discourses of deviancy are overcome within these circles and how that impacts upon LGBTI rights gains pursued via legal channels.
Chapter 6: Mobilising Legal Resources: Securing Legal Representatives

I received a phone call from Lukas. He was trying to find a lawyer to represent his friend who wanted to present a petition for gender recognition. He didn’t want to waste any time. He wanted it in a matter of days. ‘Penny, as you know so many lawyers, do you know anyone that can take on Mauricio’s case?’ I already knew that they had been trying to find a lawyer to represent Mauricio. All of a sudden there seemed to be an awful lot of urgency. This wasn’t the first time that I had sensed that urgency. With the other cases that I had come across, there was a sense of desperation to feel ‘normal’, to be able to do ‘normal’ things, to be able to work and overcome the barrier that was carrying an ID card that didn’t match your physical appearance or gender in any way, shape or form. But Mauricio’s main concern was getting a job. He said that he’d waited long enough, that he couldn’t wait another two months for another organisation to decide whether or not they would actually take the case on on a pro bono basis. He was even willing to pay someone because he didn’t want to have to go through that again. The last time that he had approached an organisation, they had debated whether or not they could take it for over two months only to decide that they couldn’t take the case. The reason they gave was that because he had a degree he did not qualify for the ‘privilegio de pobreza’. The fact that he had just lost his job because he was transitioning from female to male was not taken into consideration. Seemingly, the fact that he also had an ID card incongruent with his gender identity was not taken into consideration either. We had had a long chat over lunch a couple of weeks earlier, when the organisation was still debating whether or not they would take it.

78 If you are able to prove your lack of economic status you qualify to have the basic court costs covered, such as the costs of court orders, etc. These can only be obtained through those using the Legal Aid Corporation, University-run clinics or civil society organisations. According to Nadia, lawyers acting privately are not able to apply for this benefit even if they are doing so on a pro bono basis.
I racked my brains to think of who could or would take it. I knew that the UDP were not able to take on any more cases, and that they were deferring cases to Nelson Caucoto at the Human Rights branch of the Legal Aid Corporation. Mauricio had already tried there and was concerned with the 'time' factor. I had to be very open with Lukas and say that I really wasn’t sure that I would be able to find anyone, but that I would do my best. I was aware how hard it would be. There were so few places to try and as these cases had already been taken on by other organisations, this reduced the novelty or controversial element of the cases that might appeal to certain organisations among those taking on legal cases of this kind. I knew that other organisations would not necessarily want to take on cases that were already being contested. I was also concerned that he got decent representation. One of the main issues that concerned me during the fieldwork was the way these cases were represented by the lawyers themselves. I wondered how on earth a judge, who had no knowledge even of the existence of trans men or interest (highly unlikely) in their realities, could pass sentence on a case with so little information presented. I had read several case files and in some cases the information was very limited. Civil court judges were used to looking at inheritance or banking claims, for example, a far cry from the complexity of what was the reality of Chilean transsexuals and transgender individuals.

I tried a friend of mine. He’d already told me to get in touch if I came across any potential cases during the course of the research. I wasn’t surprised when he said that it wasn’t what he was looking for. He was looking for something new to present. I approached a now-qualified former graduate that I knew. She had more experience than others in that she taken on a case and was interested in cases dealing with sexual diversity. If she did charge them, it would only be a token minimal cost. I emailed her. A day later I got another phone call from Lukas. He informed me that he was already looking for a private lawyer, because Mauricio was really desperate, and no longer cared if he had to pay. I got back in touch with Alejandra. By the time I got a response from her and her friend, Lukas and Mauricio had already found a lawyer. It was someone from the Internet. They had just done a random Google search, and had gone to meet a few lawyers. They spoke to about four before they decided on one. This particular
lawyer unsurprisingly had never done it before and was charging around 300,000 pesos (not a small sum of money). He was the cheapest that they had found and he had openly admitted that he had not done it before. One lawyer they spoke to claimed that she had done this many times before! Mauricio and Lukas, knowing that such petitions were highly uncommon distrusted her immediately...I was worried. Within a matter of days Mauricio had randomly chosen a lawyer to take on a complex case that he had not taken before, and as they rightly assessed, who was only interested in the financial gain. I wasn't the only one who had been worried about this desperation. Emmanuel had said that he had felt that same desperation when he was going through the simultaneous corporeal transitions and legal battles. His advice for those now experiencing those same processes was not to take rash decisions. The clinching deal with this lawyer was that for the same amount he had agreed to take it to the Appeals Court and Supreme Court if they were not successful in the first instance.

I spoke to one of the lawyers that worked with the organisation that had taken two months to decide whether or not to take the case. She said that they had not been willing to take on this type of cases.

6.1 Introduction

While Chapter Five explored the processes of rights and identity awareness as resources for mobilising legally, the example above presents some of the issues at stake when claimants attempt to access the necessary legal resources, principally legal professional representation. I previously argued in Chapter 5 that the ability to 'come out' and embark on litigation in the public domain is related to a combination of factors. These include the individuals' awareness of their own identity as a gay or transgender person, their growing awareness of rights, their desire for justice, and their willingness to challenge the dominant stigmatising socio-cultural and political climate. However, other factors related to the availability of legal resources also contributed to individuals' decisions to embark on this course of action. In this chapter I discuss how individuals overcome barriers to accessing legal resources. I also explore how the limitations on accessing legal resources have impacted upon individuals' decisions to undertake legal action in the public domain.
If we refer back to Gloppen’s (2006) framework as set out in Chapter Five, legal resources include the ability to negotiate the legal institutional realm and secure legal representation. Financial resources are implicitly necessary to present a case judicially. Mauricio’s case above exemplifies some of the barriers faced in trying to find a lawyer willing to take on his case. I both examine the more straightforward issues of overcoming the practical impediments of undertaking legal action, such as securing human and financial resources, and the cultural barriers. This refers to how lawyers themselves deal with sexual orientation and gender identity and are willing to challenge the moral orthodoxy and stigma by association.

I begin this chapter by returning to Gloppen’s framework on articulating voice in social litigation processes (2006: 45) and to the literature on resource mobilisation and examine their relevance for mobilising legal resources. I then explore the financial impediments to securing lawyers at both individual and collective levels. In the majority of cases it has been necessary to secure pro bono or legal aid services, which means that cases are often defended by human rights lawyers. This therefore often posits the challenges within a human rights paradigm, as those able and willing to defend sexual orientation and gender identity, have agendas consistent with democratic deepening and expanding concepts of human rights. However, even lawyers acting to advance such agendas need to challenge and overcome the ‘moral legitimacy’ (Edwards and McCarthy, 2008: 123) prevalent within this largely conservative and formalistic profession (Pérez-Perdomo, 2006a). I therefore turn to the cultural aspect and examine how discourses of deviancy and stigma have reduced the possibilities for associations between claimants and lawyers. Lawyers’ fear of stigmatisation through association cases has been a major barrier preventing them from taking on such cases. Those willing to undertake such legal battles are therefore generally human rights lawyers and academics. In overcoming the barriers to access, ‘public interest’ or ‘strategic’ litigation has become a principal mechanism through which such cases have been presented. It is through such strategies that associative capacity has also been strengthened.
6.2 Revisiting Voice Articulation and Resource Mobilisation

Once individuals are sufficiently aware of their identity and decide to undertake court action, legal action becomes more of a collective enterprise. As William A. Gamson notes ‘mobilization is a process of increasing readiness to act collectively’ (as quoted Edwards and McCarthy, 2008: 116). Gloppen considers this building up ‘associative capacity’ (2006: 45) to be a resource. She also anticipates that social litigation is reliant upon legal aid or pro bono legal representation, as potential claimants are ultimately devoid of the necessary financial resources to hire private legal counsel. Though the framework was ultimately conceived of to explore social rights litigation, it is also applicable in instances where ‘the social distance between judges and ordinary people [is] particularly wide’ (2006: 36).

Edwards and McCarthy’s assertion that resource mobilisation is required to overcome ‘prevailing patterns of resource inequality’ (2008: 118) in order to achieve social change is explored here as members of LGBTI populations seek legal representation. In the previous chapter I explored how claimants challenge stigmatising and deviancy discourses. This is manifest as they begin to overcome the socio-cultural barriers, and embrace and assert their identities and rights as transsexuals or lesbians within multiple private and public realms as they agree to engage in public interest litigation strategies. These processes are complex for those individuals concerned, given the associations of their identities with stigma and deviancy. In Section 6.9, I discuss how that complexity is translated for Chilean legal professionals when representing gay, transgender or intersex clients. In representing such clients, these lawyers are required to negotiate the ‘stigma contagion’ (Kirby and Corzine, 1981) and challenge those same dominant stigmatising discourses. This occurs within a highly insular profession that has demonstrated little interest in cultivating or accepting alternative discourses or practices that might help expand its remit to protect the rights of the marginalised, especially those whose gender identity or sexual orientation does not conform to the norm. This chapter therefore also discusses the outcomes of interaction between claimants and lawyers. The focus is more weighted towards lawyers’ willingness and ability to challenge moral orthodoxy within both the legal realm and broader society in defending such causes.


Chapter 6: Mobilising Legal Resources

6.3 Overcoming the Financial Restrictions

Securing legal representation is not only advisable, in view of the nature of the Chilean justice system and its legal culture, but is also a legal requirement in the majority of cases. Having recourse to legal expertise therefore becomes a prerequisite for pursuing court action and posits the lawyer at the centre of such approaches. Presenting a case without a lawyer is only actually legally possible in the case of *recursos de protección* (protection writs), which are designed to uphold constitutional rights guarantees. Claudia’s and Sandra’s cases are examples of protection writs. However, one legal scholar and lawyer working at the *Universidad Diego Portales* acknowledged that

...it is possible to present a protection writ without recourse to a lawyer, supposedly. But if you aren’t a lawyer, it’s basically impossible. There’s no way that you’ll win. Lawyers only win on rare occasions, so if you aren’t a lawyer, then [no way] (1 December 2008).

In cases that defend or promote non-normative sexual orientation or gender identity, as the examples set out in Chapters Four and Five indicate, winning is already a distant goal. Domingo therefore argues that without a lawyer well versed in legal cultural practice and terminology, winning is practically an impossibility. Social theorists, such as Bourdieu (1987) and Weber (see Cotterrell, 1984), show that the legal culture is inaccessible to outsiders, which in turn heighten the need for their engagement within the legal process. This seems particularly relevant in the Chilean case where the legal system has been characterised as a very corporatist institution. While it is considered to be independent, it has a strong internal ‘legal’ culture (Correa Sutil, 2008; Couso, 2005). As securing legal representation is therefore a prerequisite to be able to mobilise legally in Chile, below I address how the protagonists introduced in Chapter Four went about achieving this.

Gloppen draws our attention to the importance of the availability of legal resources such as pro bono or legal aid as a necessary factor for social litigation to occur (2006: 45). In the majority of the cases discussed in Chapter Four, claimants did not have sufficient financial resources to hire a lawyer privately and so had to rely on other options. Claimants’ economic capital was further depleted in those cases where they were subjected to work-based discrimination. Claudia, César and Armando and Víctor all suffered from this kind of discrimination. Sandra was relocated within her institution as...
opposed to being removed from her duties altogether. Armando and Víctor recount when they were looking for a lawyer to represent them in attempting to be reinstated in the Police Force that,

The thing is that we were looking for a lawyer that wouldn’t charge us. We were not good [financially]. A woman who lives near us took us and told us that she knew of some lawyers (2 June 2009).

Even if they had not lost their jobs, their wages, as recently graduated policemen, would have been very modest anyway and certainly not enough to hire a lawyer privately. The financial costs of taking legal action are such, that even Karen, who works as a judge and is considered to earn a decent wage compared to Chilean national averages, would have been unable to afford to pay for her legal defence. Her lawyer remarks that

I understood that a judge, independent of the fact that she earned a decent wage in proportion to average wage earnings in the country, she was not going to be able to afford to hire a lawyer...with the necessary expertise (Eduardo, 22 May 2009).

Karen’s case illustrates the severe economic limitations placed on individuals wanting to secure legal representation of their own accord. If a judge from the professional classes does not have sufficient economic capital to be able to hire the necessary services, it bodes less well for those members of the LGBTI community with reduced financial resources. For the most marginalised, such as members of the female transgender population, the economic constraints are particularly acute. Their exclusion from the labour market is largely due to employers’ unwillingness to hire transgender individuals. One activist below gives an indication of such difficulties when she describes how, as a trans woman, she looked for work followed by a hidden camera.

We did an experiment with Channel 7, though it’s never been shown on television. They filmed me looking for work with a hidden camera. We went into all the places that were looking for a ‘señorita’ (young lady/female staff). I went in and said that I had all the necessary experience for the job to those who were doing the interviewing. We must have been to at least 50 places over 2 days. I left I don’t know how many CVs and no-one phoned. We left the CVs with the names in masculine form and with the photo on [in female form]. We then went back to confront the people and they said, ‘No, no, we don’t discriminate against anyone.’ As soon as I left, they would laugh and say ‘ah, the faggot wants a job’. The man

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79 This might typically include work such as waitressing or as a shop assistant. Notices such as ‘Se requiere señorita’ (waitress/shop assistant required) might hang in windows. The literal translation means young lady, or young unmarried lady to be more specific.
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with the hidden camera would stay behind after I left to film this (Mariana, 19 June 2009).

As another trans activist notes, their marginality is further increased by the fact that 'because they are unable to get a job, the only way that they can generate income is through sexual commerce' (Krischna, 30 June 2009). Not only does this create a scenario of extreme economic instability and personal vulnerability, it also heightens the associations with deviancy and stigma. They are doubly affected by the fact that their gender identities do not conform to the desired norm, which when aggregated to their involvement in prostitution, an illegal activity in Chile, only heightens and perpetuates the extent of their marginalisation.

This lack of economic status also impacts on their ability to achieve a favourable outcome in petitions for gender recognition. Historically, gender reassignment surgery has usually been considered a prerequisite for being granted the change to name and gender on identity cards and the birth certificate. As Mariana comments 'I am being discriminated against on two counts, because they are discriminating against me for being poor. I haven’t got the money to have an operation [sex reassignment surgery]' (19 June 2009). The other basis for discrimination that she refers to was on the basis of her gender identity. Presenting a case for gender recognition without gender reassignment surgery significantly reduces the possibilities for achieving favourable outcomes, as I indicate later in Chapter Seven and elsewhere (Miles, 2011). This is especially so for female trans populations who have not undergone such surgery. Of the cases I looked at, Mauricio, Andrés and Emmanuel all achieved gender and name recognition having transitioned from female to male without undergoing GRS. Of the five cases presented by MOVILH and the UDP, only one trans woman achieved name change. Andrés estimated that ‘for the girls... economically it costs around 3.5 million pesos’ (19 October 2008). To provide an indication of the significance of that sum, a minimum monthly wage is around 170,000 pesos. For those marginalised from the labour market therefore, this sum is not easily accessible. Juliana also laments the financial outlay that she has to endure in order to proceed with her legal case to get her adopted gender recognised, ‘as this illness is not covered by any health plan, we have to pay for all of the operations and examinations
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ourselves’. In the case of intersex people, medical and surgical interventions can be multiple (Cabral, 2009; Greenberg, 1999). Juliana notes that this rings true in her case ‘we hermaphrodites have to prove through lots of medical examinations that what is happening to us is real’ (28 November 2008). The individual financial outlays are therefore even more considerable in such instances.

But even where an individual’s economic status is not so insecure, as in Karen’s case, the costs that she would have incurred, had she not secured representation on a pro bono basis, would have been insurmountable. The custody battle was contested over a period of three years in domestic courts and has been contested for the last seven years in the Inter-American system. Financial costs rise further when we consider the implications of travel and so forth in the latter instance. Gloppen’s (2006) work is therefore equally applicable here in that many individuals from these communities require legal aid or pro bono representation. Even though the principal actors that feature in this research are predominantly from middle class backgrounds, albeit at the lower ends at times, they still had to rely on lawyers giving their services without charge. It should be noted that such limitations are not just confined to LGBTI populations, but are part of broader trends that resonate with other disenfranchised groups. Former judge Juan Guzmán notes

...for example, today there is no money for the lawyers to help minorities in the defence of their human rights, this is what happens to the indigenous (2 December 2008).\(^8^0\)

Given the dearth of financial resources held individually to hire a lawyer, below I detail the possible avenues that respondents were able pursue to achieve representation.

6.4 Legal Representation: Who, Where, How...

Where financial resources are insufficient to hire a lawyer privately, as in the instance of social litigation, pro bono or legal aid become principal resources through which people are able to access the justice system and articulate their voice (Gloppen, 2006). In this section, I detail the different sources that individuals turned to in their pursuit of justice. These include civil society organisations, legal advocacy groups and University-based

\(^8^0\) This interview was conducted in English.

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legal clinics. As Mauricio’s case illustrates, seeking pro bono representation was often a timely, chaotic and disheartening process in itself.

The first point of departure for those wanting to take legal action is the state-run Corporación de Asistencia Judicial (Legal Aid Corporation, CAJ). It is intended to provide access to all. Though this institution is intended to universalise access to the justice system, its structure, lack of resources and staffing potential complicate its use and potential for rights redress. As the UDP annual human rights report notes in its evaluation of access to justice in Chile,

> Though our legal system does conform to international and constitutional standards by providing legal aid lawyers and legal aid corporations, and exempting the poor from covering court costs, they have proven to be insufficient in both quality and quantity. Especially worrying is that the legal aid corporations, which provide the bulk of free legal representation in the country, have an insufficient budget...and it is manned principally by law graduates doing their work experience (Universidad Diego Portales, 2008: 175).

As one of those graduates confirmed,

> The Corporation defends those people who are unable to pay for a lawyer. The cases are processed by recent graduates...[as a law graduate] you are obliged to work for six months (Alejandra, 26 November 2009).

The implications of this situation are particularly worrying for those wishing to contest cases on the basis of gender identity or sexual orientation. This is especially relevant given the perceived need for quality legal representation to contest emergent and controversial themes being presented to the judiciary. The Supreme Court ruling in Karen’s case referenced in Chapter Five, and Karen’s lawyer’s indication of the need for the ‘necessary expertise’ when fighting such causes suggest that the above scenario is inadequate for achieving favourable outcomes. This tension between quality and quantity (or availability) of legal representation therefore becomes an important but potentially contentious issue. One human rights lawyer also reflected on the issue of the quality of representation in this government institution, making particular reference to the Human Rights Office affiliated to the institution.

> That is a big topic...the quality of the defence, especially when you are taking cases against an institution, or against members of an institution, such as the
Police Force, or the Army, it's very difficult, because...I pass on cases to Nelson and Hugo, who are hugely competent lawyers, but many of the cases that they receive they can't actually take on themselves. Most often, recent graduates who work with them take the cases, and they do what they can. But the Corporación deals with much more than just moral issues, it deals with citizens rights, or violations of constitutional rights, these graduates are having to deal with many different types of cases, and so, the quality diminishes (Alfredo, 19 June 2009).

Respondents who had sought legal representation through this means for unrelated issues had also expressed their immense frustration at the inadequacies of the service provided. They recalled feeling little hope regarding their cases as recently graduated students were the ones who processed the cases. They rotated on a six monthly basis and were obliged to undertake this work in order to qualify as lawyers. Cecilia informed me during an informal conversation that though she was resigned to the fact that the quality of counsel was acutely inadequate, she was also aware that no other options existed (20 November 2008).

Within legal aid provision in Chile, of most relevance is the Human Rights Office affiliated to CAJ, which was established in the mid-1990s.

Nelson Caucoto is a human rights lawyer, from the time of Pinochet. He worked in CODEPU,\textsuperscript{81} the Vicariate,\textsuperscript{82} FASIC,\textsuperscript{83} then he formed the Human Rights Office within the Legal Aid Corporation, and in that office, they don't only take cases relating to the past, but they also take cases of political violence, refugees...they have tried to broaden the remit a bit. But, it's a small office, with very limited resources...(Nicolás, 26 November 2008).

This small office that defends human rights cases is located in central Santiago, yet it takes on cases from all over a country that spans some five thousand kilometres in length. It works from a severely limited resource base, and is an institution, like many others, that is accessed by word-of-mouth only. The office has a broad remit for what it considers to be human rights, which remains rare in the Chilean context. As Nelson himself noted,

\textsuperscript{81} Corporación de la Defensa y Promoción de los Derechos del Pueblo (Corporation for the Promotion and Defense of the People's Rights).
\textsuperscript{82} La Vicaría de la Solidaridad (Vicariate of Solidarity).
\textsuperscript{83} Fundación de Ayuda Social de las Iglesias Cristianas (Social Aid Foundation of Christian Churches).
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Human rights are universal, and here that belief is put into practice. So outside [in the waiting area] you might have a young man that has been hit by the police and you might also have a policeman waiting to be seen for another case. That’s the paradox (6 April 2009).

One of the graduates working there also remarked that ‘according to Don Nelson, human rights are human rights’ (Cristián, 6 April 2009), meaning that they were not limited to dictatorship-related abuses only. Despite being very open to accepting cases of all kinds, he recognised the limitations of the service that the office provided and the number of cases that the office was actually able to take on. But he also refers to the lack of awareness regarding the office’s existence, which also hampers people’s ability to access the resource. So even where there is disposition in taking on cases to defend rights on the basis of sexual orientation or gender identity, accessing this resource is not necessarily straightforward.

Not many people know about us, they don’t know what we do. There are many authorities that don’t even know that we exist...and if they were to put up a notice in the courts to advertise that there was an office that dealt with these sorts of cases, we would never be able to cope. You can see the conditions we are working under...it would be great to have 100 graduates working here, but there’s no room...nor the material conditions for it...(Nelson Caucoto, 6 April 2009).

Resources were indeed scarce in this second floor office that counted on three qualified and experienced lawyers, up to thirty recent law graduates, and a couple of administrative staff. In a room measuring maybe six metres by four, Don Nelson occupied the first desk in a corner on the left as you entered the room. His desk was piled high in case files and the wall behind him was replete from floor to ceiling with more of the same. His secretary sat opposite. The desk itself was also invisible under the extraordinary amount of piles of paper. The large wooden table at the centre of the room and a small alcove accommodating two small tables housed the students and their clients. Due to limitations on space, students rotated their attendance. Students would be almost sitting on top of each other trying to attend to their clients, all crammed into this small space. Students worked standing up, with laptops on their laps, or wherever they could find an inch of space. Case files covered the walls of the office and any shelving. There were no apparent filing systems in place, and the office had only two old computers to cover this
workload. Potential clients would wait patiently on the mix-match of acrylic furniture that aligned the corridor walls to be attended by Don Nelson in person, having often been referred to the office through word of mouth.

The President of AADGE, a transsexual organisation, provided me with an example of how their work differentiated from that of the more mainstream legal aid provision. He recounted that he had approached the Legal Aid Corporation in San Vicente de Tagua Tagua, located in Chile’s sixth region, the O’Higgins region. He wanted to present a transgender petition for name and gender recognition but was refused representation. Conversely, when he approached the human rights office run by Don Nelson a year or two later, with six or seven such petitions of members affiliated to his organisation, they were taken on without question. The geographical dimension of this case is also relevant given that the President of AADGE has since moved to Santiago from the sixth region. More importantly, his organisation represents clients from across the country. He therefore acts as the mediator in this case. This organisation was a largely web-based one and their interaction was facilitated by what Stephen Whittle refers to as the ‘trans-cyberian mail way’ (1998). He refers here to the importance of such technology in aiding communication and processes of self-identification among trans populations. In this instance it also facilitated the pursuit of legal redress. The President of AADGE had actually written the petitions himself, as he has extensive knowledge of the legal arena. However, as he was not actually a qualified lawyer, he needed recourse to the human rights office to actually process the cases judicially. This again reaffirms the centrality of the lawyer’s role in this process, but also highlights how access to legal resources is conditioned by geographical factors.

Nelson himself also informed me that in the past he had defended abused female trans populations, and that only recently he had been approached by a trans man who had been

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84 When I returned in April 2010, the computers had been updated at least and the furniture in the corridor had become a bit more grandiose. Yet the physical space and capacity for graduate intake had not increased.

85 The President did not wish to have our conversation recorded, which is why I have not quoted him directly but have explained what he said in the text.
dismissed from his job due to the fact that he was transitioning from one gender to another. This case turned out to be Mauricio’s, as he was sourcing potential avenues for accessing lawyers. During conversations with the graduates, I learnt of another case of discrimination in the work place on the basis of sexual orientation, which had been presented to the IACHR, as domestic courts had failed to even address the case. It was a recurso de protección, which had been rejected twice by the Santiago Court of Appeal. Due to the inundation of claims being presented to the Commission, they were still awaiting a response as to the case’s viability within the system. I attempted to interview this individual but his lawyer was unable to locate him. Given the length of legal cases, the extensive rotation of graduates and the changing circumstances of individuals’ lives, such loss of contact between client and lawyer is common. Again, this points to the precarious nature of legal representation for the most vulnerable. Don Nelson himself referred to the office as the ‘very last recourse’ (6 April 2009) for those that could not secure legal representation elsewhere. Víctor and Armando, Claudia, Juliana and Mauricio all reported having passed through this office at some stage. All secured alternative support elsewhere, however.

Following the transgender petitions for gender recognition presented in June 2007, the lawyer and academic responsible for the UDP’s public interest clinic directed any interested parties to this office. This was due to the limitations of the UDP’s resources and its political agenda. The aims of the clinic are to maximise case impact, which cover a wide range of human rights issues. These include migrants, indigenous, gender, civil, constitutional rights among others. The other criteria to fulfil is that the cases be of interest to the students and teachers alike (Mayra, 7 November 2008). As it is the only public interest clinic of its kind in the country, as Véronica and Nicolás note later in the chapter, the competition to represent different human rights issues and causes is fierce. The majority of the cases introduced in Chapter Four were defended by university-based legal aid clinics, legal advocacy organisations, NGOs, or occasionally, by lawyers.

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86 All protection writs are presented to the Sala I (Court Room 1) in the Santiago Court of Appeal. As in Claudia’s case, if rejected in the first instance, you can appeal. But appeals are dealt with by the same Sala. In this instance, unlike in Claudia’s case, they rejected it twice.
87 This interview was not recorded in audio format. I took notes as we spoke.
involved in private practice. Sometimes there was an amalgamation of different combinations. An independent lawyer working on a pro bono basis has represented Sandra. He is, however, a well-known human rights lawyer who actively contests his cases publicly. Karen's representation has comprised private lawyers and legal activists affiliated to several civil society organisations. Claudia and the six trans women petitioning for gender recognition have only ever been represented by the UDP's public interest clinic. Víctor and Armando and César had pursued a number of different avenues before both finally being represented by I-Público, a legal advocacy group specialising in public interest litigation.

One academic explains the role of the majority the university legal aid clinics, 'what the university does is provide a welfare service and provides access to the justice system for those that can't afford it' (Nicolás, 26 November 2008). These are multi-functional given that they are first and foremost a means by which students learn to apply the law that they have learned to actual cases. It provides an important forum through which they become aware of how to negotiate multiple legal arenas, and are an introduction to the informal institutions operating within the law (Mabel, 10 April 2010). Nicolás continues, 'in the university context, legal intervention...is not really legal activism’ (26 November 2008).

However, the most relevant university-based clinic which features in this research, was the 'public interest clinic' based at the UDP. In contrast to providing ‘welfare’, it is dedicated to taking on controversial and ‘test’ cases. Felipe González, describes their objectives below.

The work of public interest litigation clinics in intended to impact on a number of levels which include, among others, the potential transformation of legal education, modifying judges’, lawyers’ and politicians’ behaviour and that of other social actors involved in protecting human rights and other public matters. It also encourages new forms of engagement, of participation and of monitoring by and with civil society actors in matters public interest (2003: 7).

I expand on what is meant by public interest litigation later in the chapter. The aforementioned clinic has been particularly active in pursuing cases pertaining to sexual orientation and gender identity, and prior to that it was a pioneer in representing clients
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with HIV needing to access drugs (Contesse and Lovera, 2008). The UDP’s commitment to broadening the human rights agenda is also apparent through its institutionalisation of this work through the creation of a Human Rights Centre affiliated to its Law Department. The annual human rights report that they publish (Universidad Diego Portales, 2004, 2005, 2006, 2007, 2008, 2009, 2010) has played a central role in that process. In these reports they address human rights in relation to disability, gender, children, indigenous populations, migrants, and sexual diversity among other issues. These interests are reflected in the cases that the clinic pursues. But again, these cases are student-led, which can impinge somewhat on the quality of representation available. As Sofia recalls when Karen’s case file was being compiled back in 2004, ‘I remember that when we were putting together Karen’s case file to present to the Commission [IACHR], the students worked on the case, but the draft was not very good at all’ (May 2009).

The need to rely on services obtained on a pro bono basis does have its complications. Respondents reported a feeling of impotence in that they felt beholden to the lawyers, and felt unable to force the agenda as they were not paying clients. Mauricio recalls below that

Lukas [from GAHT] started out trying to secure pro bono, but they took a long time to respond. ‘Let us have a look at it, see if anyone is interested’ [they said]...it took a few months...I think he took it in January, then as it is the judicial holidays in February. They said ‘we’ll look at it in March’. March came, then April. They then decide that I am not considered to be ‘vulnerable’ enough, because I have a degree...So rather than pay them, I preferred to look for a lawyer on my own. Otherwise it would have seemed like they were doing me a favour. Because if it had been taken through the Foundation it would have seemed like they were doing me a favour. So if I had to pay, I would rather pay and have the purchasing power of a normal client...So we rejected the possibility [of taking it through pro bono], as I preferred to look for lawyer on my own (26 May 2009).

Prior to being dismissed from his job for transitioning from female to male, Mauricio had a good job. As he had predicted that he might well lose his job he had been able to prepare for this eventuality. He was therefore just about able to afford to hire a private lawyer (within reason). He spoke both of his urgency to start the legal process and his desire to be able to influence the progression of a case as a paying customer. Note that the Foundation did not consider his position as a transsexual recently dismissed from his job
as ‘vulnerable’. This suggests a more class-based notion of vulnerability. But, again, as many of the protagonists in Chapter Four are essentially from the middle classes, they might well have also been denied representation through this Foundation on similar grounds.

Such circumstances also point to the lack of resources held by such civil society organisations, such that they need to put in place strict boundaries regarding what they are able to take on. Large work-loads or multiple job roles may have also slowed down the pace of work, as Mauricio indicates above. The everyday ins and outs of cases are complicated when there is a change in personnel, as occurs in both university-based clinics and the Human Rights Office at the Corporación de Asistencia Judicial. Students rotate on a six-monthly or yearly basis. There is also more precariousness when students or recent graduates who are learning the trade, are in charge of processing the cases. Alejandra recalls that when she was working for the public interest clinic at the Universidad Diego Portales that ‘one girl lost a case because she missed a deadline’ (26 November 2008).

The example given below expresses some of the impotence that these individuals faced having to rely on externally-financed or pro bono legal representation. Víctor commented that one of the lawyers that they had been assigned through MOVILH one day decided he could not continue with the case.

One day he just said to us, ‘You know what, I have a lot of work, and I am no longer able to carry on with your case’. And he just dropped the case, after two years, he dropped the case (2 June 2009).

In a tone of voice that seemed to convey a certain amount of disbelief coupled with frustration and disappointment, they concluded that he had over-reached himself and that they had suffered as a consequence. They were particularly concerned with having lost valuable time. The case was later taken up by another organisation, the I-Público. In contrast to the experience with the first lawyer, they were impressed by the efficiency of this organisation and the rate with which their case was presented to the courts, which they maintained had occurred within a matter of months.
Legal advocacy organisations such as the Fundación Pro Bono (Pro Bono Foundation), Fundación Pro Aceso (Pro Access Foundation), Corporación Humanas (Humanas Corporation) and Vicaría de la Solidaridad (Vicariate of Solidarity), among others have all sponsored cases in different areas, covering rights relating to access to information, gender, disability, or past human rights abuses. Of these organisations, Humanas has been the one organisation active in this area, as Helena Olea notes, ‘we have dealt with cases of teachers, students, policewomen investigated for sexual orientation and lesbian motherhood with Karen’s case’ (7 April 2009).

The overarching theme that unites these legal spaces is the interest in advancing democracy, and more notably, in expanding the human rights agenda. These civil society organisations and individuals are interested in diversifying notions of human rights in Chile away from the ‘old’ paradigm. Felipe González recalls a seminar held in Santiago in October 1999 which challenged the ‘old’ with the ‘new’.

...in a seminar organised by the Ford Foundation some time ago in Santiago, some NGOs advocating women’s rights spoke of how long it had taken them to ‘install’...gender rights as human rights. This lack of such a conceptualisation had been reflected in for many years in the formation of NGOs. On the one hand, there were ‘organisations advocating for women’s rights’ and on the other hand, ‘organisations defending human rights’ (2002: 10).

This has since been taken up by the UDP and is reflected in the different cases processed through these organisations. However, demand for such services far outweighs the supply, given that the ‘new’ agenda encompasses human rights considered in relation to gender, disability, ethnicity, migrant status and race, in addition to sexual diversity. Cases are therefore subjected to careful selection processes and depend on institutional agendas. As Helena Olea of Humanas notes, ‘we try to establish annual themes/problems to deal with. In other words, we say that we would like such and such a case...or we are going to try and do this or that’ (7 April 2009). Similarly Fundación Pro Bono ‘has priority areas of work, for example, the family is one priority area, and that [LGBTI rights] would not fit into any of those areas’ (Sofia, 12 May 2009). Ultimately the cultural considerations inherent in defending someone of the basis of their sexual orientation or gender identity is
cited here as a reason not to take on such cases. I later explore how many of those working on human rights are willing to include LGBTI rights within that. Before exploring how the dominant socio-cultural discourses impact upon lawyers’ decisions to undertake legal action in these cases, I explore the relationship between lawyers, human rights and democracy.

6.5 Lawyers, Human Rights and Democracy

In Chapter Two I introduced the central role that lawyers played in opposing the dictatorship through extensive documentation of the abuses committed, such as disappearances and torture. This later served as an extremely valuable resource and model in the pursuit of justice in the mid-2000s when criminal trials were opened to deal with crimes perpetrated under dictatorial rule (Collins, 2005; Hilbink, 2007; Huneeeus, 2006; Garretón, 2008). Whilst many legal activists have been concerned with seeking retribution for past abuses, others have been working in a parallel manner to expand notions of human rights. As Cecilia Medina noted in Chapter Two, this notion inspired the creation of the Human Rights Centre that she co-founded at the Universidad de Chile. Such notions have also been adopted by the UDP and other civil society advocates.

Among these (small) legal activist communities, certain sectors have been using public interest litigation strategies as a means of expanding notions of human rights. The aim is to impact internally within the legal professional classes, and externally to generate public debate. This is not just the case with institutions such as the Universidad Diego Portales, or organisations such as Humanas or the I-Público, but also with the individual lawyers representing clients such as Karen Atala and Sandra Pavez. As Sandra’s lawyer indicates such lawyers are also interested in the broader agenda,

> Every time that Rolando asks me to take on a certain case to defend gay or lesbian rights, or cases of discrimination...or not just Rolando, but thinking more broadly about citizens rights, in human rights...Because human rights certainly are very important in relation to what happened before the 1990s, during the dictatorship. But human rights are the rights of the citizens of yesterday, today and tomorrow. And in that context, you take on a lot of cases to defend fundamental rights (Alfredo, 2 June 2009).
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Though expectations for securing favourable rulings from judges are often downplayed in view of the judicial institutional arena set out in Chapters Two, Three and Five, respondents paid particular attention to the ‘indirect’ consequences of litigation offering more potential for advance. Below I explain what I mean by public interest litigation in the Chilean case and how it is being used as a means of advancing the democratic ideal.

6.6 Introducing Public Interest Litigation

Public interest litigation is also referred to by respondents as ‘strategic’ or ‘emblematic’ litigation, I therefore interchange these terms. The academic literature, much of which emanates from the United States, refers to ‘cause lawyers’ and ‘cause lawyering’, which where quoted, will also be included. Public interest lawyers (or cause lawyers), as the name suggests, are those who use litigation to advance rights and/or contribute to the ‘public good’. They are at once seen as ‘moral activists’ (Sarat and Scheingold, 1998: 3) with political agendas, but who are also preoccupied with challenging the legal profession from within. According to Sarat and Scheingold, as ‘moral activists’ they ‘commit themselves and their legal skills to furthering a vision of the good society’ which is ‘frequently directed at altering some aspect of the social, economic, and political status quo’. Public interest lawyers encompass those working on human rights, feminism, civil liberties, poverty and environmentalism among other issues (1998: 3-5). Definitions are therefore not only broad, but are also context-contingent.

The mission is both to make the profession live up to its own avowed ideals and to somehow stretch those ideals from the representation of individual litigants to causes. Because cause lawyering is sometimes wedded to established rights, the rule of law, and technical excellence, it is not always easy to distinguish it from the practices of mainstream lawyers who take seriously the profession’s responsibility to serve the public interest as well as the interests of their clients. Moreover, involvement in pro bono activities make lawyers back and forth between cause and conventional public service lawyering. At this end of the continuum, cause lawyers tend to be distinguished primarily by a willingness to undertake controversial and politically charged activities and/or by a sense of commitment to particular ideals (Sarat and Scheingold, 1998: 7).

8 I use direct translations of the terms used in Chile as a means of maintaining cultural specificity, especially given the relevance of human rights and their application in Latin America.
The emergence of public interest or ‘strategic’ litigation in Chile has been closely related to advancing human rights and democracy. As González notes, pursuing public interest litigation strategies implies fomenting a well functioning democracy, the adherence of elites to the principles of rule of law, to guarantee the ability to exercise one’s human rights for citizen participation in public affairs, among other goals (2002: 12).

The challenges are therefore considerable in view of Chile’s recent history of authoritarian rule. Sarat and Scheingold differentiate strategic lawyering practices exercised under democratic rule from those deployed under authoritarian rule. In the latter scenario, lawyers are consigned to play a defensive role, and in the former an affirmative one (1998: 5). Legal activism in Chile therefore emerged initially in a defensive capacity through work carried out by organisations such as the Vicaría de la Solidaridad. This acted as a precursor to the affirmative action taken in the democratic era as new generations of lawyers seek to expand notions of human rights and democracy (González, 2002). The Centro de Estudios Legales (Centre for Legal Studies, CELS) views strategic litigation as a means by which to expose systematic or institutionalised human rights abuses, or expand rights, to cover those previously not guaranteed. It considers it to be a ‘fundamental tool to expand rights and to advance human rights policy’ (2008: 17). In Argentina, it has been used effectively to target policy (CELS, 2008: 13), as is the case in Colombia (Albarracín, 2009). The outcomes aspired to in the Chilean context have had more modest pretensions, not least in view of the legislative climate detailed in Section 2.5. The objectives have, however, been wide reaching. They include targeting legal professionals, such as judges, legal scholars and law students and forging links with NGOs and the media in order to raise awareness and generate public debate. In addition they seek to effect change within the judiciary by introducing new legal matters often with novel interpretations. But the Chilean context does fall into the ‘individual-state’ paradigm that Sarat and Scheingold draw our attention to

89 The terms used in Chile that I came across were public interest litigation and strategic litigation. Other scholars refer to it as cause lawyering, which appears in this text where used by the relevant scholars.
90 The Vicaría de la Solidaridad (Vicariate of Solidarity) emerged in the first days of the dictatorial rule and endeavoured to compile case files for all disappeared persons in Chile. These files have since been used in the subsequent trials seeking retribution for past abuses committed (Garretón, 2008).
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Under this framework cause lawyers use their expert knowledge to protect underrepresented individuals or groups against the state. In the conventional conception two things stand out: first, the assumption that client interests are determinate, and second, that the state can be treated as a unified institution whose interests are uniformly opposed to those of the client group (2001: 20).

Public interest litigators have two main objectives: to expose the judiciary to ‘new’ (previously not considered) bearers of rights, and to effect social and political change. In the Chapter Seven I explore the outcomes of the social processes occurring in tandem with the legal process, paying particular attention to the role of lawyers in influencing and directing the course of action. While I do explore potential impacts within the judiciary, I place more emphasis on the networks which emerge both as a consequence of the litigation undertaken, of the conditions under which lawyers decide to defend LGBTI rights, and how such litigation impacts upon the LGBTI movement and identities in Chile.

Sarat and Scheingold note that such ‘lawyers tend to be distinguished primarily by a willingness to undertake controversial and politically charged activities and/or by a sense of commitment to particular ideals’ (1998: 7). Despite the mass growth in lawyering in Chile, as Pérez-Perdomo (2006a) indicates, those dedicated to such causes are few and far between. This became evident during the research process as respondents made frequent references to the small nature of the reformist lawyering community. This is perhaps not surprising given that ‘cause lawyering is a deviant strain of lawyering everywhere’ (1998: 3) and that the rise of lawyering more generally has been attributed to the capitalist endeavour (Pérez-Perdomo, 2006a), which is deep-rooted in Chile.

6.7 Public Interest Litigation in Chile

Strategic litigation pursued in Chile is perhaps not as consolidated as in other Latin American countries, such as Argentina and Colombia, where activist courts play a more prominent role in influencing the rights agenda (Motta and Saez, 2008). Helena Olea, a lawyer at Humanas notes,

I think that undertaking strategies for emblematic litigation in Chile is very difficult, it is very difficult. Because the usual starting point is that you have a responsive judicial system, which helps you to shake up the system. And
generally in Chile, you don’t have that...In other countries strategic or emblematic litigation gives results, but here you don’t have that. Here you get results externally. But the Inter-American Commission is very slow, it’s very congested/oversubscribed (7 April 2009).

Relatively few actors engage in legal activism and resources are limited. External funding has dwindled, according to informants. Those engaged in such action have also been invited to take up new posts. Felipe González took up a post with the Inter-American Commission, moving from the UDP, for example. Activists also question the significance of the outcomes achieved. Social movement theorists draw our attention to the importance of the environment, be it hostile or reinforcing (Curtis and Zurcher, 1974), supportive, opposing or neutral (Klandermans, 1990) and how that might affect the actors’ ability to ‘mobilise resources, use opportunities and exert influence’ (Rucht, 2008: 199). I look at lawyers’ capacity to act as the ‘driving force’ (Rucht, 2008: 199) of activity and examine the decision-making processes that have led them to taking on cases involving members of LGBTI communities.

Within the legal reformist camp, a series of limitations has restricted the conditions under which public interest litigation is undertaken, not least in relation to sexual diversity. These encompass both human and financial resources, aggregated by cultural impediments in this case. As demand far outweighs supply, cases are subject to careful selection processes. In the sections that follow I detail lawyers’ decision-making processes that affect case selection and explore the ‘filtering mechanisms’ applied given the resource limitations discussed in this chapter. Such filtering mechanisms include geographical considerations, the ability to generate sympathy, timing and type of case.


My reference to legal resources here are to those that are accessible to members of LGBTI populations. I first look at the small nature of the legal activist community in Chile before exploring financial restrictions at the collective level and the role that geography plays. The former Director of the UDP’s Human Rights Centre, Nicolás
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Espejo, reflected in interview on the extent to which legal activism is present in Chile, and remarks that

Generally, as you know, there is very little [legal activism] in Chile, and I would say that there are three levels that operate outside of the state where there might be some form of legal activism...1. Universities – where the standard is generally low, and it is very concentrated in certain parts...Universities provide a social/welfare service and provide access to the justice system for those that can’t afford it...Then, there are the civil society organisations, where I would say it [legal activism] is concentrated. This basically refers to the hefty work done in the 1980s and those organisations carrying out human rights work, such as the Vicariate, CODEPU, FASIC...and who are the dinosaurs of legal activism. Some of them have managed to arrange something within the pseudo-state. That’s what I refer to in the third instance. Most of those organisations have continued functioning, many within the state, albeit at a very low level, but which serve to show that the state is interested in the issue (27 November 2008).

Similarly, another lawyer reiterated the sentiment of it being a small community and pointed to the difficulties in maintaining continuity as a consequence of losing members of this small community of human rights-oriented activist lawyers.

You know what happens, they are invited to take up other posts. It happened to Felipe González, he went to the Commission [IACHR]. And there are so few people in Chile [working in human rights]. The same with Lorena Fries, who is fantastic. It looks as though she is going to end up in the CEDAW\(^1\) committee. You see, it's a very small group (Sofía, 12 May 2009).

Former Judge Juan Guzmán, when working as the Head of the Law Department at the Universidad Central had created a Centre for Human Rights. His initial thoughts for the Centre were more ambitious than they finally ended up being. He recalled,

I wanted to do much more, it was more ambitious, and there was a part that was not approved by the committee of directors, or by the Rector himself. There was a part that had to do with taking cases of people who suffer human rights violations: indigenous people, miners, women, groups that are despised by the society, people that do not work, people that are expelled from schools because of racial or drug problems. We wanted to work with them as lawyers...but we wanted to have a centre that at the same time took cases and worked actively for the people, especially for the segregated or discriminated groups. But our Rector...said that we would be pigeon-holing ourselves...that's why we don't take cases (2 December 2008).

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\(^1\) Convention on the Elimination of All Forms of Discrimination against Women.
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Whilst there was some political and academic will to expand this University’s remit as regards human rights activism, it was eventually curtailed. Verónica Undurraga, member of the Universidad de Chile’s Human Rights Centre, also recognised that the only University to engage in such action has been the Diego Portales.

They have developed their work in this area, they are the only ones. When people approach our Human Rights Centre and ask us to do things related to human rights, we tell them that we just give classes and write. We tell them to go to the Diego Portales. At the Diego Portales they get involved in projects, they make an impact (12 May 2009).

This is added to the shortfall in financial resources that lawyers are able to draw on in the current climate.

Um, resources, or rather the lack of. I think the Ford Foundation was active in promoting public interest litigation strategies in the 1990s, but it seems as though the Ford has taken a step back over time…but generally there are few resources for legal activism (Nicolas, 27 November 2008).

The lack of availability of financial resources is not just present at the level of the individual claimant, as indicated at the start of the chapter, but also at the collective level, as the above examples attest. This is true for both human and financial resources. References were also made to Chile’s situation within regional and global arenas. Chile was not considered a high enough priority to be a recipient of financial aid. As a financially and politically stable country in the region, it has not been considered a priority for receiving financial support. Helena Olea considered that this was also true in relation to human rights and the Inter-American system, arguing that ‘Chile is not a priority country’ (7 April 2009).

One issue that is also notable when considering the availability of such resources is the geographical location. Karen’s case illustrates the complexities of securing legal representation in Chile’s more isolated regions. Chile spans more than four thousand kilometres in length. Santiago is located at its centre and houses approximately one third of its population. The concentration of resources generally is therefore significant and this is seemingly no different in relation to legal resources. All the organisations operate out of Santiago and as the cases set out in Chapter Four bear witness, there is a notable concentration of resources and cases in the metropolitan region. Karen’s lawyer confirms
that ‘basically, in the zone where she lived, the lawyers that she approached refused to
take on the case, for different reasons’ (Eduardo, 22 May 2009). Below he refers to both
the geographical constraints of having to contest a case in a city that was nearly 800
kilometres south of the capital. His conditions for taking on the case were that she has to
enlist someone locally to deal with the day-to-day management of the case.

The agreement was came to was that, as the case was being contested in
Villarrica, and as I live in Santiago, though I was willing to represent her, the first
thing we needed to do was to find someone in Villarrica to manage the day to day
running of the case. A recent graduate who lived in Villarrica at the time took on
the case...and he was willing to take care of the day to day...But we were
working against a lawyer who lived and worked in the region, and in the context
of a court in a largely very conservative region (22 May 2009).

He therefore drew my attention to the cultural barriers of contesting the case in a more
provincial area. Accessing such resources are not only geographically-contingent,
therefore, but also culturally-contingent. Karen’s case illustrates well how these two
factors intersect. Karen herself drew similar conclusions about the difficulties of
accessing a lawyer. She noted that these were exacerbated by her geographical location
and the ideologies that prevailed there. Situated in a small town, in a rural province in
southern Chile, she comments

Villarrica is a small community...the profile of lawyers from the provinces, most
have been educated at regional [not in the capital] Universities, such as the
Universidad de Concepción, the Austral de Valdivia [University of the South in
Valdivia]...so they have a more provincial outlook, they are less open-
minded...So I felt that I wouldn’t be able to find legal representation in the ninth
region to defend myself, and I am talking about the year 2002 here (17 June
2009).

Karen no longer lives in the ninth region, but in Santiago, where two of the three lawyers
now representing her case in the IACHR are based. The third is based in Washington.

This perceived level of conservatism was not reserved for the more southerly regions.
María Angélica Castro, who agreed to take up the Divine case (mentioned in Chapter
Two) in 2003 on behalf of MOVILH, reported a similar conservative climate in
Valparaíso. When she took up the case one of her main concerns was that she would face
a backlash from those conservative sectors, or the Neo-nazi groups. Valparaíso, where
the case was being contested, is located in the neighbouring region to the metropolitan region, yet there has historically been a concentration of more violent crime committed towards LGBTI populations in this region, especially the trans populations (MOVILH, 2003, 2004, 2005, 2006). María Angélica recalls below some of the concerns that she had when she took on the case. Towards the end she reflects on possibly being subjected to violence and stigma. Her concerns are not only for herself but also her family.

I tell you that I found it quite hard, not the fact of helping for free, even though other lawyers have asked me how I can do it...many of the things that stopped me taking on a case like that before was the fact that there are the neo nazi groups.92 There were certain institutions that could have affected me or have caused me or my family harm. Other lawyers didn’t take on the case for the same reason. Apart from the fact that they could have been seen as gay themselves. And when they [the media] interview me and ask me if I am a lesbian, they look at my hands to see if I am wearing a wedding ring, or they focus on my gestures and how I express myself...I don’t think it is necessary to be gay to represent gay people, I mean, they have the same rights as everyone else. We can’t leave them without the right to be defended. It’s hard, it’s been difficult to change that mentality. We are traditional in this country. It’s a machista country...Firstly, I was worried that people would think that I was a lesbian, yet I was married with children...secondly, at that time, one of the possibilities being investigated in the case was that it was a homophobic attack carried out by a neo nazi group. In fact, just yesterday, or the day before, a travesti was attacked by those homophobic people...most people don’t accept those whose sexual orientation is different.

Penny: Do you think that [violence] sort of thing is worse here than in Santiago?

There have been more incidents here than in Santiago, and that worries me, especially as its’s a smaller city (6 July 2009).

María Angélica was the only lawyer interviewed who expressed a fear of being subject to a physical attack when she was considering whether or not to represent LGBTI clients. This case had been very high profile since the outset, as the initial judge’s decision to close the case was perceived as an extreme miscarriage of justice. She would therefore have taken on quite a public role in this case. This extract suggests a culmination of stigma and conservatism towards LGBTI populations and those who associate with them.

92 Neo Nazi groups have been accused of committing cyber attacks on LGBTI websites and also physically attacking groups of trans women, especially those on the streets, and gay men. Some news headlines around that time included ‘Neonazis llaman a matar a gays en Chile’ http://www.opusgay.cl/1315/article-70617.html (accessed 21 January 2011) and ‘Neonazis preparan primera marcha “anti-homosexuales” en Santiago’ http://www.opusgay.cl/1315/article-61541.html (accessed 21 January 2011).
which has been compounded by a more violent response. Again, she raises the issue of stigma and deviancy and general perceptions towards those whose identities do not conform to the heterosexual and gendered norms. In the next section I explore in more detail how fear by association has been a central factor impeding lawyers representing such cases.

6.9 Cultural Barriers

One major impediment to securing legal representation from both public and private spheres has been the lawyers’ ability and willingness to engage in issues that are socially constructed as ‘deviant’, or ‘complex’ as referenced above. In a context where elite dominance of normalising discourses (Rubington and Weinberg, 1996) is very apparent, fear of stigmatisation by association (Kirby and Corzine, 1981; Lee, 1993) is largely avoided. The partisan views held socially and politically also seemed pervasive among legal professional classes, even among the more progressive elements (as they considered themselves to be). Such reluctance, reiterated on numerous occasions by lawyers, activists and claimants alike, was attributed not just to the personal fear of stigmatisation by association, but fear of their clients’ reactions to such associations. Verónica a former corporate lawyer-turned human rights lawyer notes that the general context is that ‘all of the big law firms in Chile are generally very conservative’ (12 May 2009). Within such a context, undertaking such a case might prove rather complex from both a personal point of view, as María Angélica suggests, but also here in relation to organisational concerns or the reputation of the private practice. Sandra Pavez’s lawyer, Alfredo Morgado, who undertakes public interest litigation in diverse human rights issues on a pro bono basis, indicated that

When you practice the profession freely you are able to take on such cases. But that means refers to being completely free in economic and ideological terms. That allows you to make decisions and take on cases, and also take on ‘crusades’. The problem is that many professionals are not willing to do that when it means entering into a complex debate, especially in a society where you can be easily identified (2 June 2009).

He expands here on the complications of lawyers engaged in private practice taking on such cases. He teases out the difficulties of being ‘completely free’ economically and
ideologically in a climate where clients are predominantly from the wealthier sectors of society. His use of the word ‘crusade’ implies getting involved in a case of great magnitude, which he seems to apply in this case. Such magnitude ultimately refers to the need to challenge the dominant socio-cultural context explored in Chapter Two and later in Chapter Five as individuals embarked on their own personal struggles with identity.

Karen’s first lawyer, also working in private practice, voiced precisely this concern following his decision to take on the case back in 2002,

...for my office the issue was complicated...I had four partners at the time, and for the most part our clients were from banks, or the corporate world essentially... Basically all of our clients were conservative people and so that became a source of tension within the office naturally (Eduardo, 22 May 2009).

As a consequence, he took precautions to conceal his identity. Though he had been involved in very high profile litigation cases previously, seemingly the subject matter of this case, his evaluation of Chilean society’s disregard for sexual orientation and his fear of alienating his client base and his law-firm partners encouraged him to obscure his participation in the custody battle. When interviewed in 2009, he reflected that his decision was a product of the time and circumstance and that had he taken on the case now, his decision would probably have been different.

Today, maybe...maybe I would have changed the strategy and would have been more willing to defend the case up front [publicly]. It’s about maturity, self-confidence...at the end of the day, if you are a good lawyer, you will get clients...and if a client doesn’t like it then, it’s a client not worth having...However, I’m 41 now, and I took on Karen’s case when I was about 32, 33. It was a long time ago. It was another time...we were recently starting up the law firm, and we had to make a lot of compromises among us (22 May 2009).

Karen’s earlier reference in the previous chapter that ‘it is public suicide to publicly acknowledge one’s lesbian condition, unless you are a millionaire, or you have your own business, and even then you can still lose clients’, does not refer to the legal profession per se. However, her evaluation also serves to contextualise her lawyers’ doubts and concerns regarding his participation in her case vis-à-vis his clients.
Alfredo Morgado who has been willing to defend matters of sexual orientation indicates above that his financial independence allows him more leeway to embark on ‘complex’ cases. He has represented a number of clients on the basis of sexual orientation on a pro bono basis and his involvement with such cases dates back to 2007. He notes that

The problem is that not many professionals are willing to take up cases that involve getting into complex debates, especially in a society where you are easily identifiable where people can literally point you out ...They then also associate you as being an activist for a particular cause which is difficult, complex and which generates a lot of discussion, and even hostility...

If you take on a case, let’s say for example, a discrimination case on the basis of sexual orientation, more than one person is going to think ‘Oh, they are going to think that I am gay or transsexual’, more than one is going to think that. Fortunately that doesn’t bother me. It doesn’t even enter into my head that they are going to think that I am this way or that way. But a person who wants to categorise you, will do, that’s up to them. There is not the same problem though when you are dealing with fundamental issues that are more universal (2 June 2009).

An associate of one legal advocacy group noted that the prevailing conservatism among its members meant that though they engaged in public interest litigation, they were unwilling to do so in relation to LGBTI issues. She intimated that it had been decided at an early juncture not to take on cases that could be considered ‘controversial’ and could cause division among its members. She implied that it was a taken for granted assumption that matters of sexual diversity, for example, would not be raised given the affiliations of many associated law firms willing to provide pro bono representation with elite clients, which she referred to as belonging to the “establishment”, in other words, the big law firms, those...big law firms with the family ties’ (Sofia, 12 May 2009). She indicated that one case that they were asked to represent as recently as 2008 had actually forced discussion on the topic. It was decided that the organisation was not willing to be publicly associated with a case that dealt with sexual orientation or gender identity. She estimated that it would be several years (five or ten) before this becomes a reality in this arena.

Verónica Undurraga, lawyer and academic at the Universidad de Chile, referred to the difficulty of combining work with the ‘big’ law firms and being associated with cases where sexual orientation played a prominent role. Prior to becoming involved in Karen
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Atala’s case, she had previously worked at one of Santiago’s ‘big’ law firms. When she informed them that she would be working on the case, ‘they took my name off the company logo because of my involvement in Karen Atala’s case, when I informed them that I was going to write the informe en derecho (report)’ (May 2009).

Susana, a lawyer who was new to the human rights field, admitted that prior to litigating cases with members of LGBTI populations, she had considered gay men to be ‘depraved’ (26 June 09). She attributed this to her Catholic upbringing and also indicated that representations of depravity were taken for granted depictions of gay men, lesbians and transgender people. This provides an insight into the ingrained characterisations of deviancy associated with LGBTI identities prevalent among religious and right wing sectors of Chilean society. In a country where 75% of the population considers themselves to be Catholic (Blofield, 2001), though not necessarily practising, the potential for the propagation of such associations of non-normative sexuality with deviancy are indeed extensive.

Such views are not just prevalent among those from private practice doing pro bono work, but also among public sector workers. Silvia, another lawyer and academic perceived a distinct lack of willingness on the part of her colleagues to address issues of the more marginalised in the clinics at the Universidad de Chile.

There are a group of 20 or so of us...and of those 20, I don’t that more than 5 would be willing to take on a case that defended the rights of transgender people. Nor that more than 5 of them would be willing to acknowledge that Chilean law discriminates against women, the indigenous, the poor. That’s how it is (10 April 2010).

She also speculates as to why the clinics had not taken on these types of cases when she recounts an incident that had apparently occurred some years earlier.

They [members of LGBTI communities] had never come to the clinic, because 15 years or so ago (I found this out in a meeting recently), a very well known professor at the clinics was actually approached by a transgender person looking

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93 An informe en derecho is a report written by a lawyer or legal scholar by one of the litigating parties. It is used to as a means of getting legal experts to give their opinion on the case based on jurisprudence, interpretations of the law, etc. They are used in domestic courts.
to present a petition for gender recognition...And apparently, this professor said to her: ‘I don’t work with maricones (faggots), get out of here’. So I presume from that day forward that no-one [from that community] wanted to go to the clinics (10 April 2010).

Lawyers from diverse backgrounds all seemed to be of the opinion that for the majority of those exercising the legal profession, LGBTI issues are essentially non-existent as a matter of rights. Questions pertaining to sexual diversity are generally greeted with rejection, hostility and a great lack of comprehension. Not only are reformist lawyers among the minority within Chilean legal professional circles, but even among those more progressive elements there seems to be a degree of hesitation as to whether they are willing to take on cases dealing with sexual orientation and gender identity.

A trans activist notes here their inability to secure legal representation following the death of a trans woman, Amanda Jofre. Such was the fear of stigmatisation by association that even those lawyers from the minority ‘progressive’ sectors of the profession were unwilling to take on such a case. Amanda, who worked as a prostitute, was found dead in a client’s home in Santiago in November 2002.94

We didn’t have a lawyer. Such is the extent of their vulnerability, that not even human rights lawyers, or at least back then, were able to take on a case of this magnitude. There is always the issue that people want to read in between the lines. [They think that] or you’re a client, or you like trans, or there’s something wrong with you. So, you can’t be normal. So we didn’t have a lawyer. One person from the Humanist Party offered to help, but then he let us down so then we didn’t have one (Krischna, 30 June 2009).

She later indicated that it had been slightly easier to secure legal representation towards the end of the decade. They had either approached sympathetic politicians, or used existing contacts, or asked for favours. Getting a lawyer was always achieved on a very ad hoc, temporary, and often fairly non-committal basis.

Lee's (1993) reference to ‘stigma by association’ and Kirby and Corzine’s (1981) ‘contagion of stigma’ seem ever present in the extracts above. The fear of such deviancy discourses being projected onto the lawyers’ themselves was raised as a concern in a number of instances. The same cultural impediments which hamper the processes of ‘accomplishing identity’ (Plummer, 1996: 66) and ‘coming out’ as a lesbian, trans or intersex person, are also expressed by lawyers in their concerns about associating themselves with members of the these communities. This has limited the availability of the human resources necessary for mounting a legal battle in Chile. Even among the small minority willing to challenge the status quo and attempting to broaden notions of human rights and citizenship, not all are prepared to overcome those barriers in the name of human rights. Indeed, it is unclear whether all such reformers consider that LGBTI rights should fall within the human rights framework. This seemed especially relevant for those defending human rights in relation to past abuses. Krischna therefore implies that the relationship between trans women and lawyers is a new one. This relationship has become increasingly consolidated and visible through the UDP sponsorship of both the transgender petitions for gender recognition and Claudia Espinoza’s case in 2007 and 2008 respectively.

When Víctor and Armando were attempting to find a lawyer, they approached an organisation that had an historic association with fighting human rights abuses. However, it also had strong links with the Catholic Church, and while it agreed to take on the case, it was not willing to do so publicly.

We started off with some lawyers that worked for the Vicariate of the Catholic Church [Vicariate of Solidarity]. But when we mentioned that we wanted to make the case public, they did not want us to. Because people could interpret that as the Catholic Church saying that it supported gays in Chile (Víctor, 2 June 2009).

Such restrictions on lawyers’ actions are not confined to representing lesbian or transgender clients. One prominent judge, turned lawyer, who has taken up the Mapuche cause also lamented the difficulty in securing legal professional help to defend such causes. In addition to himself, he had only been able to enlist the aid of six other lawyers.
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across the whole country willing to litigate on behalf of Mapuche clients and those from other indigenous populations. He reflects

Why don’t lawyers work on these cases?...First of all because this is pro bono, you won’t receive any fees. Secondly, because...the lawyers don’t want to lose their clients, which belong to timber, mining, industry, commerce, and so they prefer to look and say that they only work for the people that have power. And I would say the third case is a racial problem, they don’t like indigenous people (Juan, 2 December 2009).

Again he refers to the notion of Chile being a highly divided society. Those divisions work in multiple and intersectional ways along class, ethnic, gender and sexuality lines (Richards, 2004; Universidad Diego Portales, 2008, 2009, 2010) which seem to back up the arguments that citizenship is restricted in its practice (Agüero and Stark, 1998; Caldeira, 2000; González, 2002, 2003; Holston, 2009). Importantly, in this instance, belonging to such categories clearly impacts upon one’s ability to mobilise resources, and more specifically, legal resources. Where the stigmatising potential is high, access to resources therefore becomes more remote and problematic. Juliana’s appreciation of her inability to secure legal representation of her own accord in the opening quote of the thesis, illustrates precisely these intersections between financial and cultural resources. She laments both her lack of money and not having a name of consequence ‘no tengo apellido’. This refers to not having a name that is recognisably as being associated with the elite. She suggests that if she did have a surname of consequence, that it could effectively open the rights doors and facilitate her legal battle. She intimates that if she had ‘un apellido’, that this might override her condition as an intersex person. She therefore argues that class does play a role in these debates, but only at the top end of the class spectrum. I do not enter into great detail on this topic so as not to veer off the point. I was told about one case where the family had connections with members of the judiciary. The case was resolved quickly, quietly and favourably. Not surprisingly, cases where legal representation could be paid for do not feature in this thesis as they have remained resolutely within the private sphere.

6.10 Getting There: Networks and the Collective Nature of Securing Legal Representation
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The practicalities of securing legal counsel often became a collective endeavour in itself, as Gamson (1975) argues. Here, the protagonists drew on patronage networks, personal contacts, and social movement or legal advocacy networks to access lawyers. These networks were also influential in how and where legal representation was accessed. Both Armando and Victor and Karen accessed legal counsel through personal contacts initially. Armando and Víctor relied on a neighbour for help initially, Victor notes that ‘a lady that lives near us took us and told us that she knew of some lawyers’ (2 June 2009). In Karen’s case, she drew on friendship networks given that she had many friends working in the profession. She recalls,

a friend...who I graduated with...said to me, ‘Karen...I know of a lawyer that came to talk to us about human rights and he seemed very progressive and buena onda (‘a good sort’).9 If you want, I’ll phone him and tell him about the case to see if he wants to take it’ (17 June 2009).

Prior to engaging in legal action neither party had been involved with the LGBTI community and this is reflected in the initial legal representation that they found. Karen pursued numerous avenues before actually finding a lawyer. She comments that,

When my ex husband filed for custody the children I was a magistrate in Villarrica. Villarrica is small, all of the lawyers who I approached to take on the case either knew me or Jaime. They were parents at the same school, and so none of them wanted to take the case. In Temuco, there was one lawyer who had worked as Rolando Franco’s assistant, the lawyer Rolando Franco Ledesma. He had in turn been Mario Mosquera’s assistant, the former Dean of the Law Department at la Chile [Universidad de Chile]. So I knew this lawyer from when he had been an assistant [Rolando Franco’s]...so I said, well, he’s from la Chile, he knows me from back then and he’s different from the ‘provincial’ lawyers in Villarrica and Temuco...He accepted to take on the case, but when he saw the case file that Jaime had prepared, he called a meeting. He said to me: ‘You know, Karen, looking at this file, I don’t know, I don’t think that I can take the case’ (17 June 2009).

She was therefore unable to draw on networks in her local area, and again implies that cultural barriers were more salient in the provinces than the capital, Santiago. She eventually had to draw on her networks in Santiago to get a lawyer. Eduardo recalls

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9 The term buena onda is used in a very contextual and colloquial way usually. It can mean someone who is a good laugh, a very sound person, a very measured person, basically someone who is a ‘good sort’. However, it has a more informal connotation than the English translation given here.
Chapter 6: Mobilising Legal Resources

I received a phone call from a lawyer, a friend of mine. She asks me if I would be interested in taking on Karen’s case...umm...and basically, the reasons that she gave were that...I was already known for having taken on case that was considered very ‘brave’ in view of the ‘establishment’ of lawyers in Chile, in that it was highly complex from a cultural point of view (22 May 2009).

However, as Karen’s and Víctor and Armando’s cases progressed and they became the subject of media attention, their legal situation changed. By the time Karen’s case became public, it had moved from the lower courts to the Supreme Court. It was at this time that Eduardo enlisted a network of people to aid him in the latter stages of the case. Those same lawyers that were then enlisted in 2003 and 2004 then presented the petition to the Inter-American Commission of Human Rights. Eduardo then moved into the shadows having already worked on the case for two years on a pro bono basis. In Víctor and Armando’s case, the original legal representation that they had secured was not comfortable continuing with the case once it had gone public. The organisation’s strong Catholic affiliations were cited as the reasons for this. It was following their appearance in the media that Rolando Jiménez, MOVILH President, contacted them. He has since organised two different legal teams to represent them, as the first of these two was unable to continue. This again reflects the ad hoc and unpredictable nature of finding and keeping a lawyer. For those lacking the financial means to do so, their need to rely on freely provided services has its downsides.

For the most part, LGBTI organisations acted as mediators for the individuals in this study to take their case to court. Those who were aware that LGBTI organisations existed usually approached them first. The organisations then acted as mediators, building on loose networks established over the years to meet the demands of taking legal action. Claudia, César and Sandra all approached MOVILH directly, as César notes,

When all this business starts, I go and see Rolando. Because just around the same time, there was a gay couple who had been in the Police, and so I went to Rolando and explained my situation to him (César, 14 May 2009).

Claudia notes that LGBTI groups other than MOVILH placed less emphasis on legal strategies. This is a further indication of the lack of available legal resources and is not just a reflection of the different strategies of LGBTI organisations.
Because there were groups that wanted to offer their support initially. One of those groups was MUMS. But in the end, it was Rolando who took on the case...He was faster, and more spontaneous than MUMS. They said: ‘yes, come and have a chat, we’ll discuss your case. You’ll have to come back the week-after-next.’ And do you know that the lawyer didn’t even turn up. Or maybe they just didn’t want to take the case on. But in MOVILH, they were quicker (8 April 2009).

MOVILH have called upon the services of lawyers involved in private practice, such as Alfredo Morgado, the UDP clinics, lawyers working with politicians and political parties, and legal advocacy groups, such as the recently formed I-Público. Alfredo Morgado recalls how he came to be acquainted with Rolando, and how they began working together,

And just like that one day Rolando came to my office and asked for a meeting. ...It must have been about four years ago, or something like that, that he appeared one day. I recognised him from the news, I had seen him around. So one day he phones and asks if I can spare time for a meeting with him. I say, ‘yes, come to the office’. So he came, we talked and he told me about a case. Someone’s rights had been violated. So, I listened to him and I said ‘yes, we can take it [this case] to court’ (2 June 2009).

Nicolás Espejo, former Director of the UDP’s Human Rights Centre and co-founder of I-Público, tells a similar story of how the UDP came to take on cases dealing with sexual orientation and gender identity. He considered that both Rolando’s pro-active approach and the Centre’s involvement in HIV/AIDS cases were precursors to these relations becoming more established. By approaching both Alfredo and the UDP, Rolando was therefore purposefully targeting lawyers involved in public interest litigation. This strategy mirrors broader social movement goals seeking social and legal change. It also privileges the collective over the individual as the outcomes sought are expected to contribute to the ‘public good’. Here, therefore there are overlapping objectives with those of lawyers engaged in strategic litigation. Recourse to such lawyers is not only guided by the severe limitations in those willing to undertake cases defending sexual orientation and gender identity, but these very small networks also concur in their pursuit of the collective endeavour.

It was always part of the strategy, because when we founded MOVILH as a political organisation, in the broadest sense of the word...we were always clear that we had to occupy a space in the judiciary. We had the examples from other
countries where the homosexual movement had achieved rights gains through court action, so we always considered it to be a possibility...so, if the strategy of taking emblematic cases through the courts isn't effective, we think that we have to persist. Because in the medium or long term, there will be a break through. And in one way or another, by presenting recursos de protección, civil cases, and criminal and work-based claims, it is a means of maximising the impact and dissemination of the case and the specific type of discrimination that has occurred...We knew that it wasn't going to form the basis of our action because it required a level of development of the homosexual community, enough that it felt that its rights had been infringed and that it was prepared to acknowledge that publicly. That was part of the medium term strategy (18 November 2008).

This highlights the circular and interconnected nature of the resources that Gloppen (2006) sets out in her framework in Chapter Five. It serves to illustrate how these claimants' rights awareness increases through engagement with LGBTI groups. Equally, they are simultaneously able to access legal resources through the same means. Lawyers and claimants alike are also able to overcome the motivational barriers through the same process of interaction. Both individuals and lawyers begin to challenge the stigma and deviancy discourses prevalent in both society and legal circles. Claimants are encouraged to overcome the stigma discourses over the course of pursuing legal action and are persuaded to do so by how resource limitations play out. Lawyers, on the other hand, are being increasingly exposed to these issues through testimony, better media dissemination and visibility and a growing expertise in the area. Seemingly only those independent enough are willing to challenge these discourses within what is characterised as a conservative legal cultural climate. The data suggests that this is shifting and increasing numbers of lawyers, though still limited, are indeed willing to embark on such courses of action.

6.11 Conclusion

This chapter describes how the means of accessing legal representation is very ad hoc in this context. It is conditioned by a number of factors encompassing financial constraints, geographical location, temporality/time, legal institutional matters and fear of stigmatisation by association, among others. The quantity and quality of legal counsel have also presented a significant impediment to maximising legal mobilisation strategies. The state provision of legal aid clearly comes at a personal cost, as the quality of legal
representation is deemed inadequate in achieving favourable rulings, or direct outcomes (McCann, 1994). Both informants and those involved in taking cases from within the service itself held little optimism about winning cases.

Overall I argue that the severe limitations placed on the ability to mobilise legal resources, both financial and human, have also meant that a good number of the protagonists introduced in Chapter Four have had little alternative in choosing their legal representation. Of the factors mentioned above, the ability of lawyers to overcome the ‘stigma contagion’ has proven most relevant. Not even all legal professionals working towards a human rights agenda, in university-based clinics or legal advocacy groups, have proven willing to challenge the dominant moral orthodoxy that privileges heterosexuality and well defined gender roles.

If we refer back to the extract that introduced the chapter, Mauricio’s case draws out a number of issues that illustrate the argument set out in this chapter. This is relevant aside from the fact that he eventually paid for a lawyer himself. It draws our attention to the difficulties in securing legal representation, especially when one is devoid of the necessary financial resources to hire a lawyer, or indeed, where individuals face geographical barriers. Being dependent on pro bono legal services highlights the precarious nature of legal representation in terms of its quality. It also points to how these individuals are effectively then denied any agency in the process as non-paying clients. Víctor and Armando recount a similar scenario. Mauricio’s case shows how the concept of ‘vulnerability’ is not applied to him, and the organisation that he approached cited educational attainment as a reason. However, I was later informed that the moral and cultural nature of his case had been the actual reason for not taking the case on. The complexity of finding a lawyer willing to defend rights on the basis of sexual orientation or gender identity is complicated by the same factors that restrict lesbians, gay men and intersex people openly assuming an identity based on their sexuality or gender. Fear of stigmatisation by association has been cited as the main reason for lawyers not wishing to represent clients from these communities. The already limited access points for those contesting rights under a broad human rights paradigm are further reduced when sexual
orientation and gender identity are factored in. As a consequence, resource-related and cultural constraints have impeded legal professionals in undertaking cases of this ilk in Chile in the late 2000s. This has meant that for gays, lesbians and transgender individuals to obtain a lawyer, they have often had to engage with activist lawyers seeking to advance an agenda with the ‘public good’ in mind. In the next chapter I explore how the cases and their protagonists are becoming more ‘visible’ and I examine how this is a consequence the nature of legal action undertaken given the very limited nature of such resources.

This chapter also points to how the legal process is being collectivised. Mauricio’s case exemplifies the types of networks mobilised, personally and through activists, to secure legal representation. Some mobilise friendship networks, and others use LGBTI activist groups. The shift from individual to collective action is a goal also consistent with both social movement ideals and those of public interest litigators. The interconnectedness of mobilising resources and overcoming barriers to engage in legal action, as set out in Gloppen’s (2006) framework, are apparent in both Chapters Five and Six. The processes discussed here, predominantly, those of accessing legal resources, are closely tied to the individual’s perception of themselves as a subject of rights as lesbian, gay, trans, bisexual or intersex individuals. These processes are all intertwined, and have only been disaggregated here in order to be more coherent in conveying these processes to the reader. In the next chapter I look at the outcomes of these processes and explore the central role that lawyers play, directly or indirectly, in maximising the arenas that LGBTI identities are emerging in as a result of engaging in public interest litigation.
Chapter Seven: Brokerage: Contemplating Outcomes

I was sat waiting outside the Supreme Court and Courts of Appeal in Santiago, accompanied by Claudia. It was the first time that I had met her, but I recognised her from the media coverage her case had received. We were waiting for the lawyer to arrive. She and I were the first to arrive, so I introduced myself when I saw her standing under the tall stone columns, hovering, waiting. We started chatting. She started talking quite freely about the case. Her discourse oscillated between anger and frustration at her local Mayor, who had refused her the opportunity to work, and hope that the case would resolve itself favourably for her based on the evidence presented. All hope was then lost and she became dejected, as she contemplated that the Courts of Appeal in Chile were run by 'ageing fossils' who were never going to rule in her favour. It was logical to her that justice should prevail, in objective terms. 'How could they not find him guilty of violating her constitutional rights?' The video evidence was ample proof of his prejudice towards her. Yet she was aware that the Mayor was part of the 'system'. It was taken for granted that he was immune from justice. The logic that justice should prevail was complicated by this fact and by her characterisations of judges as divorced from any reality other than their own. Claudia is an articulate individual, aware of her rights, university-educated, yet unable to get a job given that she is a trans woman. She was aware that her case had done well to get this far. After an hour or so of waiting, we found out that the case wasn't to be heard that day. The student lawyers cited some legal, technical reason as to why, that went beyond Claudia's and my knowledge. More than a month later when the case was eventually heard, Claudia could not attend. We had been called to attend on other occasions, only to be disappointed again. The case was eventually heard 28 October 2008. Cases in Courts of Appeal are presented orally in contrast to civil demands that are written. After the court clerk provided a summary of the case and the main arguments, each litigator was given around ten minutes to argue their case. They were given no opportunity to reply to each other's claims, only present their own ideas. The grandiose court room was a far cry from a potential street trader's reality. Its opulence even made me feel uncomfortable. Three judges presided over the case, sat in wooden throne-like chairs, raised above the rest of the court, on an equally
The lawyers presented their exposé from different sides of the courtroom, each standing facing the judges behind a wooden podium. The students working on the case (with the litigating lawyer) sat on the plain wooden benches lining the back wall, which were set aside for members of the public. Rolando and I accompanied them. Even despite the brevity of the hearing, one of the judges appeared to be sleeping throughout. Whether he just had his eyes closed, or was actually sleeping will remain a mystery, but it offered little comfort to us. After the hearing, the five of us congregated outside the courtroom whilst the lawyers evaluated how it had gone. The litigating lawyer still had high hopes for a favourable outcome, especially given the clarity of the proof presented and the limited arguments presented by the mayor’s lawyer. Yet she also questioned whether the judges would actually fully read and debate the case file. They had a significant number of cases to preside over and had displayed considerable indifference in the courtroom, in addition to the general presumed indifference to dealing with cases of this kind. We waited outside the court until the court clerk came over to announce that they would not be giving a verdict immediately. Again with mixed emotions of hope and undeniable resignation to working within the ‘system’ (a closed one at that) we left the court. Several weeks later we learned that the recurso de protección (protection writ) had been rejected. On the second appeal, given that the first was rejected, the Supreme Court upheld the Court of Appeal’s ruling.

7.1 Introduction

The extensive limitations placed on mobilising legal resources for disenfranchised populations, as I indicated in the previous chapter, means that competition for resources is very high. This means lawyers are forced to consider which cases resonate with their personal, political, organisational and legal objectives, goals and aspirations. Once the cultural barriers of agreeing to represent clients from the LGBTI communities are overcome, other factors then impact upon their decision-making. In this chapter I explore these processes by drawing on McAdam, Tarrow and Tilly’s (2001) concept of a ‘broker’ as a means of examining lawyers’ roles in linking previously unconnected sites within the judiciary and further afield. Here I focus on the ‘filtering mechanisms’ that lawyers seem to apply when deciding which cases to pursue. I also examine the links made by lawyers in an attempt to broaden the scope of the impact of the case beyond the judicial realm. I
argue that as a consequence of these developments, more diverse characterisations of LGBTI identities have emerged in the public arena. The emergence of this first wave of members of LGBTI populations willing to contest their cases in public is starting to challenge patterns of invisibility, patriarchy and heteronormativity as they emerge into multiple public domains. Claudia’s case is just one example of the outcomes of the decision-making processes taken by lawyers. Importantly, these decisions impact on the diversity in representations of members of LGBTI populations engaged in legal battles and how symbolic examples of bearers of rights are expanding as a consequence.

Given the collective nature of the legal mobilisation strategies undertaken as described in the previous chapters, the objectives of the actors involved are multiple, diverse, and at times, even conflicting (Sarat and Scheingold, 1998, 2001, 2006). Some are seeking justice on a personal level and others are intent on expanding the human rights discourse into new areas, or advancing gains for the collective good. Both social movement activists and public interest litigators are more interested in the latter, for example. Whilst obtaining favourable judicial outcomes are the ideal standard, most are aware of the difficulty in achieving such goals, as I exemplified when describing Claudia’s court hearing. McCann’s reference to the indirect and direct outcomes of legal mobilisation strategies is particularly relevant for a study of this nature therefore. Indeed most respondents from the legal professional and activist populations believed that only indirect outcomes would result from legal action. In this chapter I build on the public interest litigation strategies introduced in the last chapter and I pay particular attention to the roles of lawyers and their decision-making processes in more depth. I therefore explore the indirect outcomes of those processes.

In the late 2000s, lawyers presented petitions for gender recognition for transgender and transsexual men and women in the cases of Andrés, Emmanuel, Karin, Juana, Romina, Kathy and Alison. They represented Claudia, a transsexual woman contesting work-based discrimination, a gay couple, Víctor and Armando, who were forced to resign from the police force, and Sandra, a lesbian teacher who was denied the right to continue teaching religious education on the basis of her sexual orientation. This presents a departure from
Chapter 7: Brokerage

the scenario described in the previous chapter by Krischna Sotelo, where human rights lawyers were unwilling to transcend the socio-cultural barriers and represent Amanda Jofre’s case. The fear of stigmatisation by association seemingly started to diminish somewhat in certain sectors in the latter half of the 2000s.

Karen, Juliana and Emmanuel have made personal journeys in relation to their sexual or gendered identity and rights awareness. However, they have been dependent upon members of the legal professional classes also being able and willing to interact publicly and professionally with members of these often stigmatised communities. So not only are those individuals from LGBTI communities modifying and changing their identities through interactions emerging through the legal process, but meanings are also seemingly changing for those lawyers involved through the same interaction processes. This relates to Blumer’s second premise that ‘the meaning of such things is derived from, or arises out of, the social interaction that one has with one’s fellows’ (1969: 2). Lawyers are showing an increasing tendency to overcome the deviant status associated with those unable to conform to the ‘culturally prescribed roles’ (Kitsuse, 1964: 89) and represent more diverse cases pertaining to LGBTI rights issues. In so doing, outcomes are manifest in broader judicial and public realms. Again, if we return to Blumer’s third premise, that ‘these meanings are handled in, and modified through, an interpretative process used by the person in dealing with the things he encounters’ (1969: 2) then this chapter explores some of the outcomes of those interpretative processes occurring between lawyers in relation to claimants.

Sarat and Scheingold claim that lawyers’ ‘primary loyalty is not to clients, to constitutional rights, nor to legal process but to a vision of the good society and to political allies that share that vision’ (2001: 7). These political objectives are also apparent within the LGBTI activist community in their quest to establish legal networks, as I detailed towards the end of Chapter Six. Lawyers are therefore not the only ‘brokers’ operating within these parameters. Litigation advocating LGBTI rights does not operate in a vacuum and is often pursued in conjunction with multi-strategic social movement
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action. Dieter Rucht argues that social movement literature has largely focused on interactions with adversaries as opposed to allies. He notes that

Social movements are internally differentiated actors operating within complex social settings that, in part, consist of public arenas. These settings are not just a kind of neutral background but include different kinds of actors with whom a given social movement engages (2008: 197).

He continues by advocating that ‘social movements and their reference groups tailor their activities to make an impact’ (2008: 200). I focus here on the relationship between human rights lawyers, LGBTI activists, and individuals such as Karen, Victor, Armando and Claudia who are intent on asserting their rights. These interests converge to advocate social and legal change. In pursuing legal change, social processes occur through interaction at micro level between these actors. Such processes are beginning to have an impact in Chilean judicial institutional arenas, by challenging dominant legal cultures, and also within multiple public domains as public interest litigators adopt ‘brokerage’ roles.

7.2 Defining Brokerage

I argue that through advancing strategic litigation practices, lawyers assume a brokerage role. They become the main mediating force between social movements, afflicted individuals, the judiciary, and other public domains. McAdam, Tarrow and Tilly define brokerage as

The linking of two or more unconnected social sites by a unit that mediates their relations with each other and/or with yet another site. In the simplest version, sites and units are single persons, but brokerage operates with cliques, organizations, places...Brokerage creates new boundaries and connections among political actors (2001: 142-3).

As one prominent lawyer, notes, ‘pro bono work implies trying to incorporate as many people as possible into the strategy’. When defending Karen Atala’s case in the Supreme Court he informed me that ‘as the case progressed we kept involving as many people as possible into the strategy...which is part of a typical public interest strategy’ (Eduardo, 22 May 2009). Effectively, lawyers broker relations within judicial and legal professional arenas, and also through other civil society organisations and the media, at times, in conjunction with LGBTI actors.
In this chapter I explore lawyers’ role as the ‘driving force’ (Rucht, 2008: 199) in linking populations and organisations with individuals whose realities had often previously been confined to private spaces, rendered invisible from the public sphere. Lawyers have been instrumental in projecting these realities into new arenas as a consequence of engaging in public interest litigation strategies. For example, transgender realities are presented to judges through civil petitions to achieve gender recognition. In June 2007, Karin, Juana, Romina, Kathy and Alison all presented civil petitions to achieve name and gender recognition. The cases were sponsored by the public interest clinic based at UDP and MOVILH. The aim was to build on a favourable ruling obtained by OTD President, Andrés Rivera, in Rancagua in May 2007. As he had not undergone sex reassignment surgery in order to achieve the change, this set a new precedent in relation to Chilean transgender jurisprudence (that was known about). Aside from the actual legal process, which involves presenting a voluntary petition to the court, the strategy has broader components. The lawyers have sought to involve NGOs in mobilisation and communication strategies in order to maximise the dissemination of the cases, and engage with LGBTI groups to access potential aggrieved claimants.

This action therefore no longer remains a case mediated between a transgender person and a judge, but has expanded its reach through the instigation of the lawyer into areas where such identities would not normally be present. For example, they may garner the support of a feminist group, or the media, or challenge the Director of the SML to regulate the protocol for medical examinations performed on trans individuals undergoing this process. Thus previously non-existent (or possibly non-visible) associations emerge as an increasing number of actors become involved in pursuing and disseminating the case. The legal cases that comprise this study demonstrate that legal mobilisation processes are clearly in the tentative early stages in Chile. However, they are already starting to challenge the question of invisibility surrounding lesbian, gay and trans populations. They similarly contest the dominant perceptions held regarding these populations and aim to push the bar as to what is legally acceptable or applicable in rights terms. Therefore, as a result of interaction produced at the micro level, which refer to the initial encounters between lawyers and claimants, more expansive associations are later
created. As a consequence interaction is invited on a more macro level, be it at societal level through media dissemination, or within the judiciary through exposure to cases demanding 'new' rights, or within medical settings.

In line with the goals of public interest litigators, McCann’s work on legal mobilisation refers to the wide-ranging outcomes sought, which include both ‘direct’ and ‘indirect’ outcomes. The former refer to achieving favourable sentencing from judges, yet McCann’s approach to legal mobilisation ‘gives considerable attention to the indirect – or, in Galanter’s terminology, the ‘centrifugal’ or ‘radiating’ – effects and secondary tactical uses of official legal action in social struggle’ (1994: 10). In the Chilean case, the latter seem more relevant given the difficulties in persuading judges through legal arguments to uphold the rights of lesbians, gay men and intersex people. My concern in this chapter rests predominantly on the indirect outcomes of these legal mobilisation strategies focussing on the impact of the coming together of these actors. Contesse and Lovera (2008) noted similar indirect outcomes in HIV/ADIS-related court cases. Though not one judge ruled in favour of the claimants to ensure government provision of anti-retroviral drugs, the resulting pressure that mounted, ended in the creation of CONASIDA. It must be noted, however, that Karen was successful in her two lower court cases, only to be denied custody through the Supreme Court ruling. Similarly, Andrés Rivera has secured favourable outcomes in both his petition for gender recognition without recourse to GRS and his work-based discrimination against the Universidad de Rancagua on the basis of his gender identity. These latter cases have been especially important in trans male organising and movement consolidation, which I touch upon later in the chapter and in the concluding chapter.

These public interest strategies seek to maximise the media attention and dissemination of the cases in order to generate public debate, raise rights awareness and challenge the socio-cultural orthodoxy. If we refer back to Levitsky’s (2006) summary of the benefits of legal mobilisation introduced in Section 5.2, these outcomes resonate with her appreciation of the process. The dissemination of such matters and identities is not confined solely to public realms, however. I then explore how these lawyers, as brokers,
aim to create an impact within the judiciary and other legal arenas, and among other civil society organisations through the ‘linking’ of ‘previously unconnected sites’ and how this serves to disseminate further these realities, identities and rights issues into multiple domains.

7.3 Brokering the LGBTI
In addition to the broad objectives of public interest litigation, lawyers’ decision-making processes have essentially determined which cases have been pursued. This, in turn, has influenced which cases have become public. By applying filtering mechanisms, whether purposefully or not, certain LGBTI characterisations have been brought into the public domain. For example, Karen Atala’s case presents the first instance of a media campaign around a court case dealing with issues of sexual orientation on such a big scale. Prior to that, the ‘Divine’ case, where sixteen gay men died in the disco fire that I mention in Chapter Two, had received relatively significant attention. It has been subject to sporadic bouts of media attention, but it has never managed to garner the same intensity in coverage as Karen’s case. As I mentioned in Chapter Six, they were only able to secure legal representation for the case in 2003, ten years after the initial event. Even then, the lawyer concerned voiced her worries about getting involved in the case. She cited her personal safety and being subject to discrimination by association given that she was a practicing Catholic.96

In contrast, by 2004 when Karen’s case comes to the fore, the public were presented with a professional, female judge and mother who was fighting discrimination on the basis of her sexual orientation. Though the opposing legal team actually ‘outed’ the case, her own legal team’s strategy included mitigating portrayals of Karen into the media spotlight in corroboration with Fundación Ideas. This NGO, at the time, worked principally on the issue discrimination in Chilean society. As the former director of the organisation notes,

*Fundación Ideas* was a pioneering NGO in its work countering discrimination...Prior to that there was work done by communities in specific areas...those fighting for women’s rights...and there were also those that

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96 When the initial fire occurred, activists and legal representatives both recounted that some family members did not even claim the bodies such was the fear of stigmatisation surrounding gay identities in the early 1990s.

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defended sexual minority rights...But from 1995 onwards, what Ideas does is it says that ‘Here, we have a universal problem. We have a society that discriminates. The power structures are discriminating, and this is occurring in different areas.’ So for the first time, it presents the Chilean population with a mirror image of itself, an image of itself that it did not have previously. The traditional image was that Chile was not a country that discriminated, at all. Here, we didn’t discriminate. It was the gringos\textsuperscript{97} who discriminated, not us. For years, that was the dominant perception. So what Ideas does is present Chile with a reflection of itself, like a mirror image, so that it is able to see the grave problems of discrimination that we have (9 July 2009).

Ideas’ objectives were universal as regards combating discrimination, yet it also had experience of dealing directly with LGBTI issues. It had commissioned a report on homophobic attitudes which was published in 1997 (Fundación Ideas, 2007), and another in 2000. To question the population on their perceptions regarding homosexuality was exceptional among Chilean civil society organisations at the time. At Karen’s lawyer’s behest, therefore, the Director of this NGO emerged to mediate the publicity surrounding the case. Not only was Fransisco Estevez a prominent sociologist, but his approach to combating discrimination on the basis of sexual orientation is located within a broader struggle against discrimination. In symbolic terms therefore, the representative role he assumed, therefore, is more transcendent than if it were to be adopted by a LGBTI movement representative. It locates the battle within wider rights-based discourses and encourages associations with those willing to overcome and challenge the ‘stigma contagion’ (Kirby and Corzine, 1981).

In 2007, when Sandra Pavez decided to contest her case after being denied the right to continue teaching religious education as she refused to suppress her sexual orientation, she eventually emerged publicly to claim her rights to privacy and to work. She eventually appeared in the media coverage alongside her lawyer, and MOVILH activist, Rolando Jiménez. Prior to that, Rolando had taken on the public role of mediating the case with Alfredo, her lawyer. In Chapter Five, Sandra explains that it was not an instant decision citing the importance of stigma and its relation to both identity and rights awareness. In contrast to Karen’s case, Sandra’s lawyer brokered the relations with the

\footnote{In Chile, the word \textit{gringo} was originally reserved for people from the United States. However, it is also commonly applied to all foreigners, usually of western origin.}
media himself. He is well known as a human rights lawyer who represents diverse cases pertaining to dictatorship-related abuses, access to justice, police brutality, and so on. His mediation and public presence alongside Sandra also served to locate this battle in a wider context, which located the battle within the broader remit of anti-discrimination and human rights. It came to symbolise more than an initiative of the LGBTI movement.98

We took Sandra’s case to court and we argued that Sandra was a citizen, a person, with rights and obligations and that the members of the clergy, especially that member of the clergy who decided to revoke her certificado de idoneidad (eligibility certificate), was also a person, a person the same as Sandra, a citizen the same as Sandra, with the same rights and obligations...I am asking the court that if person A affects person B with his/her actions to restore and guarantee the rights which have been violated because the court is responsible for complying with its constitutional obligations and to respect the treaties signed and ratified by Chile…it’s irrelevant that the outcome has not been favourable…we can’t say that it has been a total failure, because we have generated a whole new space, a space which will allow future generations to keep modifying these criteria (2 June 2009).

He was, therefore, actively seeking to ensure that Sandra is portrayed as a legal citizen, with rights, on an equal footing to the Bishop who denied her the right to freely exercise her profession. The fact that they then presented the case to the IACHR further strengthened the associations of sexual diversity rights with human rights discourse. The very public nature of the case, heightened by the high level of mobilisation, which occurred as a consequence of her treatment served to cement these associations more widely.

Levitsky, in her work with LGBTI activists in Chicago, reaches similar conclusions in relation to litigation strategies becoming public. She reported that

Some asserted that press coverage not only makes people more aware of GLBT issues, but it also helps people suffering from discrimination to realize that they are not alone...Other activists noted that lawsuit publicity helps put a human face on an otherwise abstract issue (2006: 151).

She similarly concurs that the mobilising potential of even failed litigation can be equally influential (2006: 152), as occurred in Sandra’s case.

The examples set out above highlight the role of these lawyers in brokering the cases into new arenas. They began to link populations and encourage new associations and representations through personally negotiating the media attention in the case of Sandra. These are both relatively new trends within the field of public interest litigation in relation to LGBTI rights issues. However, the decision to undertake this representation and mediation, even by such litigators, is dependent upon a number of factors. This is largely determined by the lawyers themselves, or the organisations that they represent, above and beyond the process of overcoming the stigma and deviancy discourses. I explore these decision-making processes below.

7.4 Contemplating ‘Good’ Victimhood
Helena Olea claims that emblematic cases require a certain kind of victim to maximise the potential of strategic litigation. She argues the need for a ‘good victim’ (2008), one who will generate sympathy among the public. Other factors to maximise impact include a supportive media environment, academic and civil society support and good litigation strategies. Here I contemplate what lawyers considered a ‘good victim’ to be. I then expand on the other organisational priorities, already hinted at in the previous chapter, the strength of the legal argument, and timing, which featured in lawyers’ decisions regarding case selection. Helena argues that a ‘good’ victim is just one essential factor necessary to advance the broader strategy associated with PIL (public interest litigation). Other factors include favourable media attention, good litigation strategies and the ability to draw on academic and expert advice. Being able to generate sympathy as a victim is not a given, as she claims that it depends on how media friendly individuals are (Olea, 2008). In reference to the UDP’s agenda, in relation to its public interest clinic, Nicolás remarked that

Now the University does send out mixed messages. Public interest does not cover just any case, it’s not just for any person, it has to fulfil certain criteria for that person to be considered worthy of help…(27 November 2008).
The university therefore determines the agenda by considering what is relevant to the public interest at any given time and whether the potential clients (and their cases) that approach the public interest clinic fit that profile. The lawyers must therefore bear in mind which attributes are going to generate sympathy among the Chilean population, given the context set out in Chapter Two and developed throughout the thesis. Representing cases dealing with sexual orientation and gender identity therefore requires consideration of the factors that can mediate and challenge the prevailing characterisations associated with stigma and deviancy. This raises further questions as to the processes through which members of LGBTI communities are presented as legal subjects.

Karen Atala is a mother and a judge, in her early forties who has been denied custody of her children on the basis of sexual orientation. Sandra Pavez is a school teacher in her mid-forties who has taught religious education for over twenty years at her local school and has been removed from her duties again on the basis of her sexual orientation. The widespread support that these two cases garnered from diverse civil society actors hints at their ability to draw widespread sympathy. The central role of the ‘mother’ in Chilean society, has certainly helped maximise support in Karen’s case given that ‘the discrimination on the basis of sexual orientation here intersects with the issue of motherhood’. Karen’s lawyer believes that ‘if it had been the case of a father, that we would not have got so far.’ (Helena, 29 April 2010), because

there’s this Latin American thing regarding the mother’s role. The mother is the most important figure...and in Chile the mother plays a very important role...if you look at the Civil Code, it says that when parents separate that the children should live with the mother (Helena, 29 April 2010).

She argues that this case ‘goes against the mother’s role that a woman plays’. Therefore being denied the ability to fulfil her role as a mother has helped Karen generate sympathy across the board. I was talking to a young journalist about Karen’s case, which coincidentally had come to light just after she herself had acknowledged her sexual orientation to her parents. Given the media attention surrounding the case, her father said to her ‘Don’t worry, by the time you come to have kids, things should have changed by then’ (Mayte, 14 November 2008). The discourses of rejection often voiced by
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informants regarding their sexual orientation or gender identity when they come out to the family, were seemingly absent here. On the contrary, the clear compassion voiced by this woman’s father indicates that he was able to empathise both with Karen’s case and his daughter’s ability to later fulfil her role as a mother.

Sandra’s case also drew widespread support within the community. The breadth and depth of the support suggests that she was able to generate considerable sympathy even in spite of the fact that her legal adversary was the Catholic Church. In terms of countering the dominant bearers of moral legitimacy as detailed in Chapter Five, the level of mobilisation detailed below by Rolando, MOVILH President, is all the more relevant.

As regards, for example, Sandra’s case. She is a professional who has been working for more than 20 years giving classes. She has the backing of the whole community: the parents, the governors, the students, her colleagues. But the Church authorities are stigmatising her because of her sexual orientation. But she has her defenders who reject...her community is objecting to a situation which is clearly and brutally discriminatory. I would say that these emblematic cases are useful for that, to help force deeper cultural change. In that by making such cases more visible in such a concrete and specific way to exemplify how sexual lives in Chile are of unequal status compared to other sectors of the population. I think that has been positive (18 November 2008).

Though he locates this within the broader struggle, he certainly points to the multiple groups that willingly publicly supported Sandra’s case and thus openly challenged the Church’s authority on the ramifications of its decisions.

Since 2004, when Karen’s case first became public, Víctor and Armando, a young gay couple in their early twenties forced to resign from the police force, and six transgender individuals seeking gender recognition have become the subjects of public interest litigation strategies, as have Claudia, a transsexual street vendor, and a gay police investigations officer, César. Lawyers have therefore been pushing the boundaries of what they consider to be a ‘good victim’, or one that is able to generate sufficient sympathy from the media and the public. From a lesbian mother denied custody of her children considered in the initial stages of public legal mobilisation strategies, these strategies have now expanded to include transgender women seeking gender recognition and a transsexual woman openly discriminated against by her local mayor on the basis of
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her gender identity. In the latter instance, in relation to stigma and deviancy, not only
does it mean mediating their gender identity, but often the lingering associations of these
populations with prostitution.

They don’t have an option. It’s not as if they wake up and say ‘Um, today I am
going to get up and go and prostitute myself’. They don’t have an option. I go and
prostitute myself because I can’t get another job. They have done dressmaking
courses, sewing courses, cake-making...I’ve got some trans that are educated or
have professional skills, they have skills and yet they are working on the streets.
They are placed in very vulnerable situations, they are subject to violence by the
police or delinquents, they are exposed to drugs. The clients like taking drugs and
drinking, so the girls also have to drink...they lead you to drink. If they are taking
cocaine, then they are going to offer you cocaine too. There are some trans girls
who don’t do drugs, but they have to as part of their job, and to be able to cope
with the idiots, and with the cold at this time of year, and with the whole
environment (Krischna, 30 June 2009).

Given the fact that many trans are seen in this light by the general population through
their visibility on the streets, or through media portrayals of them, this renders their
presentation as bearers of rights in the public eye even more salient. When Claudia is
represented by the UDP to contest her right to work as a street trader, this helps to
dissociate depictions of trans women with other forms of deviancy. In a similar manner,
the sponsorship of the transgender petitions for recognition by MOVILH and the UDP,
lawyers are proving that they are able to overcome the associations with deviancy on two
counts. It also serves to portray their identities in a more complex manner. They are no
longer just transgender prostitutes, but essentially they are actively claiming citizenship
through these legal battles.

The outcomes of a two-way interaction process here seem to be apparent therefore. As
lawyers become more informed regarding LGBTI identities, they are exposed to more
frequent and more varied forms of testimony, their expertise or knowledge of sexual
diversity expands, and so meanings also shift through this interaction as Blumer duly
notes (1969), and as set out in Chapters Three, Five and Six. One example where the
interaction was most questioned and perhaps most complex was the case of César. César
is the police investigations officer who was also forced to resign on the basis of his sexual
orientation. In the efforts to remove him from his post, he was accused of having
downloaded child pornography by the investigating authorities within the Police Investigations department. Though the charges had subsequently been contested in court and César had won his case. He explained the judges ruling on the matter below.

This case is suspended due to lack of evidence that a crime has been committed, no charges to be brought, with immediate effect, the individual should be released (César, 14 May 2009).

But in spite of the judge’s decision, César points to the subsequent difficulties that he encountered when he attempted to find a lawyer to represent him. He describes his encounter with the lawyers representing I-público, who eventually took up the case.

In the beginning they were scared, would you believe?...First, they interview the two young policemen, and then they interview me. We both put our presented our cases, and handed over the paperwork, etc...Then Rolando phones and says, ‘Look, I’m really sorry, but you know what, in the end...[they can’t take the case]’. So I said to him, ‘Look, this is a cause worth fighting for, that’s what we have done until now, isn’t it? So, what are you talking to me about? If this lawyer comes and says we don’t have much chance, then I don’t need that lawyer’...Rolando said ‘Ok, let me talk to them again’. And I don’t know what he said to them, but then they turn around and say, ok, we’re actually going to take your case on. For me that was a big disappointment, because it wasn’t the first time...they weren’t the first lawyers to bail out. I spoke to a number of lawyers and all said that they agreed with me, but they said that we have to fight against that monster which is huge indeed. We have to fight against the state attorney’s office and many aren’t interested in that, or they don’t have the time, or they are scared...(14 May 2009).

When I personally questioned one of I-público’s lawyers about whether or not they actually had been reluctant to take his case, he informed me that they did not want to associate themselves in a case where child pornography was involved (July 2009). He said that they had to be convinced that there was no truth to the claims presented by the police investigations team. This ‘double deviancy’ barrier is hard to break down and therefore does impact upon lawyers’ decision-making as to whether or not the individual concerned is in a sense ‘marketable’ publicly. Here the lawyer is clearly concerned with distancing himself and his organisation from potentially stigmatising discourses, not on the basis of sexual orientation, but in relation to the child pornography accusations also levied at César. This refers back to Section 6.9 which details how this small community

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of lawyers were willing to overcome the cultural barriers associated with representing clients on the basis of sexual orientation or gender identity. Again, this presents a clear instance of legal professionals being capable of surmounting deviancy discourses on two counts. It also illustrates how lawyers understand and affiliate themselves to the cause, albeit being pursued in the public good.

Respondents also argued that being able to generate sympathy relied on the claimant appearing personally. Rolando informed me that those pursuing this course of action were given the options of appearing personally or not. However, he believed that it was more effective for the individual to appear in person, as opposed to him representing the client’s interests in public.

If I am the public face in a child custody case and the visible face associated with the case is mine, its much less powerful in communicational terms than if the mother herself shows her face publicly (18 November 2008).

Gentle and indirectly persuasive encouragement to ‘come out’ publicly also comes from the activist core it seems. It is not dictated by lawyers’ decision-making processes alone. The brokerage role is not just confined to the unilateral lawyer-client relationship, but is more blurred in some instances, particularly where legal counsel has been secured through activist networks.

The complex nature of interactions means that lawyers do not just mediate between social movements and other third party actors, but at times who actually instigates the action is unclear. The process of securing media attention, dealt with later in the chapter, raises similar issues. César indicates below how he was encouraged to appear publicly from the activist core, ‘he [Rolando] tells me that for things to happen, I need to appear in the media’ (14 May 2009). Engagement with movement activities, increased exposure to rights discourses, and battles for the latter, all play a role in the decision-making processes to come out. Such persuasion or encouragement must be viewed within the broader goals of the movement. When asked whether legal mobilisation has always been considered part of MOVILH’s strategy, President Rolando Jiménez remarked that

It was always part of the strategy, because when MOVILH formed, it was created as a political organisation, in the broadest sense of the word. And considering the
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trends occurring internationally, we were always clear that we would have to move into the judicial arena at some point. We could draw on the examples of the homosexual movement...from other countries that it was possible to advance recognition of rights...of equality through judicial channels. So, it was always considered as a possible course of action (18 November 2008).

So this gentle encouragement therefore formed part of the strategy of advancing the wider political goals of both the organisation and the movement. However, it also resonates with the shift from the personal/individual battle, to the collective struggle. The protagonists in these cases recognise this as part of advancing the agenda more generally. These strategies are, however, reliant upon a favourable media climate that is willing to present the protagonists and rights issues in a measured way (I explore this relationship in more detail later in the chapter). Therefore lawyers’ perceptions regarding what constitutes a good victim is just one influencing factor as to where they channel scant resources in selecting cases to sponsor and pursue. Such decisions are highly influential as regards which cases are then propelled into the media spotlight and consequently, which characterisations of LGBTI identities the public and other publics are exposed to.

7.7 Civil Society Organisational Agendas

Closely tied to the availability of resources are the various institutional agendas that those participating in such litigation establish. In some respects, this is related to the practical barriers of mobilising resources that Gloppen (2006) refers to in Chapter Five, and are often driven by financial constraints or geographical considerations. At Humanas, Helena Olea has already indicated that they might wish to pursue a certain agenda and actively seek to take on cases of a certain kind by ‘establishing annual themes’ or deciding that ‘we would like a case that deals with...’ (7 April 2009). Humanas is an organisation dedicated to advancing gender rights, more generally focussing on domestic violence and reproductive rights, for example. In relation to sexual orientation, their cases have largely comprised women who have been discriminated against in the workplace or school on the basis of their sexual orientation. Given their broad understanding on gender issues, cases deal with sexual orientation, domestic violence, or reproductive rights. She argues that the possibilities for advancing the agenda are dependent upon ‘finding a victim who is willing to fight for the cause’ (7 April 2009). In discrimination cases on the basis of sexual orientation, one major impediment has been finding those individuals who are
willing to go public. She remarks below that most often women accept financial compensation in return for not going public.

When has happened for example with teachers, when we have explained what our objectives are with the case, and what interests us, they lose interest because they realise that they have a better chance of coming to a financial agreement instead of pursuing the case...So what the state does is offer them compensation in return for absolute silence (7 April 2009).

The difficulty in finding willing clients to fight publicly for rights on the basis of sexual orientation seemed to affect their disposition to continue with this agenda. She noted that ‘that’s the problem, we found the right cases, but then, it [the strategy] didn’t work’ (7 April 2009), as she refers to not being able to capitalise on these cases and litigate publicly. She seemed to express a sense of fatigue and resignation when talking about attempting to secure cases that could challenge discrimination on the basis of sexual orientation.

In a similar manner, lawyers at the UDP’s public interest litigation clinic would decide collectively which agendas they wanted to pursue. Both students and teachers therefore had to express an interest as to which agendas and cases to litigate on. Seemingly, the uptake of cases dealing with sexual diversity rights by the Diego Portales was historically borne out of the personal interest of individual lawyers in advancing this agenda, as former Director, Nicolás Espejo indicated in Chapter Six. Informal conversations with others concerned with trying to mobilise initiatives in the late 1990s and early 2000s revealed the same. Contesse and Lovera (2008) also refer to HIV/AIDS activism attempted through the courts around a similar time. In these cases there was also an overlap with both sexuality and stigma. This relationship with the UDP then became more institutionalised even as the personnel changed, but most of those that I spoke to who had worked with the UDP noted that cases that dealt with sexual orientation or gender identity more often than not arrived through MOVILH. One student refers to both the UDP’s public interest agenda and the relations with MOVILH.

Well the objective of the clinic is to take cases where there is a significant public interest and which we are interested in defending, independent of whether or not they have the financial means or not. What is most relevant is that it is, in a sense, ‘emblematic’ in terms of rights...for example, like the name change petitions.
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this instance, they were suggested to us by MOVILH, through Rolando, who is in direct contact with...[in the UDP] (Carla, 5 November 2008).

One lawyer commented that this relationship dated back to the time that LGBTI activists were contesting the repeal of the code that regulated sodomy back in the mid to late 1990s (July 2009). This is indicative of the almost ‘clientelistic’ ties that in some instances have formed between legal advocates and social movement activists. Such relations are then further exacerbated by the antagonisms prevalent in the internal politics of the LGBTI movement. A number of activists from other LGBTI groups now seeking legal redress through the courts often view the UDP’s relationship with MOVILH as exclusive and exclusionary. Individual motivations of UDP students and recent graduates working at the Human Rights Office affiliated to the Corporación de Asistencia Legal [Legal Aid Corporation] in taking cases dealing with transgender rights encompassed the ‘novelty’ factor, an empathy with the cause and their extreme marginalisation set within a broader concern for social justice. The extracts below indicate the motivations of two students from the UDP clinic as they recount why they were interested in taking the trans petitions for gender recognition.

This is one of the reasons that I took the case, to deal with a minority issue that one doesn’t have any contact with, that I don’t have any contact with. I’d never had any contact [with trans populations] prior to this. So I start getting to know the realities of these minorities, for example, you see that their rights are not enshrined in the law, so how can we achieve a gender recognition law?...(Julieta, 5 November 2008).

Well, I had never had any contact with transgender people before this and for the most part it’s been a really emotive experience because most of them are really affectionate, very understanding and very concerned with their cases...we are immersed in their reality. You can imagine so many things, because they explain to you what life is like, or when we are walking down the street with them you can see how people treat them. Sometimes, people treat them like anyone else, sometimes they don’t. But you can get an idea about their daily life (Carla, 5 November 2008).

One example that illustrates the intersection between resource availability and institutional agendas follows the interest that was generated after the six petitions for gender recognition were presented by the UDP in June 2007. The ensuing media

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100 So as not to antagonise relations further, respondents will remain unquoted and anonymous here.
coverage encouraged a number of individuals and organisations to approach both the UDP and MOVILH wishing to also present similar petitions. But the UDP had decided that they were both unable to take on more cases due to resource limitations, but were also unwilling to close due to the legal activist agenda. Here the concept of ‘public good’ that drives lawyers’ action is indeed concerned with the collective and not the individual (Sarat and Scheingold, 1998, 2006). Resource limitations restrict the extent to which litigation can be pursued en masse by any one organisation. The multiple agendas of the UDP allow them only to introduce new legal matters into the public agenda. This serves to show what is possible in terms of litigation, and to encourage litigation by third party actors. Clearly, the problem in facilitating a strategy whereby litigation strategies are deployed to achieve change (principally policy change) through presenting numerous demands of the same (Epp, 1998) is severely restricted in this case. The financial and cultural impediments to securing legal representation discussed earlier cannot sustain such a plan of action. The principal objective therefore seems to be to ignite the debate, raise the profile of the cases, and publicise what is legally possible.

Those interested parties who subsequently sought legal representation for trans petitions back in 2007 and 2008 were referred to the Human Rights Office associated with the Legal Aid Corporation run by Nelson Caucoto. However, when I returned to the field in 2010, the lawyer who had taken over the running of the UDP clinic had expressed an interest in expanding relations with other groups from the broader LGBTI movement. He indicated that he was prepared to take on any type of case dealing with sexual orientation and/or gender identity, and was willing to support more transgender petitions for recognition too. However, he wanted to explore alternative and innovative means of presenting such demands. The institutional agenda therefore seems closely tied to the personal.

The broad human rights remit of the Centre based at the UDP, to which the public interest litigation clinic is affiliated, means that resources are spread across a range of issues. The Centre prides itself on pushing the agenda on emergent issues and being avant garde in that approach, and as a consequence it is always looking to advance new areas of
law and human rights, as Carla indicates above. In conversations with the Centre’s Director, we discussed the agendas of some potential funders. He believed that he was able to secure some funding from the Dutch Embassy. They were keen to fund research on LGBTI rights and human rights. However, the Director indicated that he had tried to convince the Dutch Embassy that research funding would be best directed at immigration issues. This reaffirms Helena Olea’s point that institutional agendas can affect the extent to which any human rights matter may be pursued, and how reformist lawyers are concerned with maximising impact with minimal resources when having to (or wishing to) promote multiple agendas. In a similar manner, it is no coincidence that \textit{I-público} is willing to pursue sexual diversity rights issues given that the corporation comprises former and current UDP academics and legal advocates who have a personal history in taking cases dealing with LGBTI rights. They have both been involved in advocating legal mobilisation and in drafting legislative proposals. This overlap in activism is also indicative of the very small nature of the legal activist community, as I established in the previous chapter.

7.8 Conforming to Legal Technicalities

One of the founders of \textit{I-público}, Nicolás Espejo, actively encouraged me to inform them of any potential discrimination cases that I came across, as they were keen to pursue the sexual diversity rights agenda. Given that my extensive links within the LGBTI community far exceeded their own links, they were keen to take advantage of my position. It was in this capacity that I contacted them regarding Mauricio’s case dealing with work-based discrimination that I introduced in Chapter Four. It was not for the petition for gender recognition described in the preface to Chapter Six, but another case. He wanted to contest his dismissal from the workplace. He had been fired not long after he admitted that he was transitioning from female to male. Thus, in my own mediatory role, I contacted \textit{I-público} to see if they were interested. Emails were sent back and forth between myself, the Corporation, and Mauricio in order to establish the feasibility of the case as regards timing, documentation, and legal technicalities. After some deliberation they replied that there were two reasons for which they were not able to take the case. The first was based on legal technical reasons, and the second, was a matter of timing.
Initially Mauricio had been urged to pursue the case legally by officials working at the Work Inspectorate. However, as I-público’s litigating lawyer lamented below,

Here at the Corporation, our specialist in employment law...has analysed your case. Having evaluated it, we have concluded that it is a case that lacks sufficient proof, such proof as the law requires (email correspondence, 3 June 2009).

The ‘proof’ that they refer here to is that the company that Mauricio had worked for had asked him to sign a letter confirming that he would commit his services to the company for the next five years. They had funded his University course. This had all been signed when he still identified as a woman, prior to transitioning. As they had invested in furthering his education, they wanted to ensure that she (at the time of signing the letter) remained with the company. This letter was signed a year or two prior to him being dismissed from his position. Yet within a month of him informing the company that he was undergoing surgery to begin his transition from female to male he was dismissed. He had consulted the Work Inspectorate on this matter and they encouraged him to fight the on the basis of discrimination. But according to I-Público it was insufficient proof for them to pursue the case.

Indeed, I-público’s second reason for not taking the case related to timing, which was dictated by judicial reform initiatives. She continued in her email that,

In addition,...at present we are not willing to support work-based discrimination cases in the jurisdiction of Santiago. Until legal reform is implemented, which will be in the month of August. Otherwise, we would have to undertake a very lengthy battle (at least two years) (email correspondence, 3 June 2009).

This meant that the organisation would have contested the case under the old inquisitorial (written) system, as opposed to the new adversarial (oral) system. It was being implemented region by region across the country, prior to being implemented in Santiago. Ultimately, they would have been interested in pursuing a case that could have given quick results under the new system. They estimated six months or so. But the two to three year endurance test facing them under the old system proved to be less attractive to them. The organisation was interested in achieving quick results to achieve higher impact publicly, but also, resources were indeed very scarce. In 2009, they employed only one lawyer on a part time basis, and the associates themselves carried out the
remainder of the work in their spare time. Most of them worked as academics. In this instance, therefore, had the reform initiatives reached Santiago by the time the case was to be contested, which was by mid-2009, *I-público* might have been more willing to contest the case. However, the judiciary also imposed time restrictions in cases of this kind, which meant that Mauricio only had a limited period within which to contest his dismissal through the courts before the case ran out of time. Overall, timing, legal technical issues, and limited organisational resources influenced the non-uptake of his case in this instance.

Numerous factors have ultimately influenced whether cases dealing with sexual orientation and gender identity are sponsored or not. These plus other factors therefore assist lawyers in determining whether they support certain cases or not. I refer you back to Judge Juan Guzmán’s appreciation of the difficulties of securing change for indigenous populations in Chapter Six. He attested, ‘today there is no money for the lawyers to help minorities in the defence of their human rights, this is what happens to the indigenous’. He also cited difficulties of geographical constraints and fear of stigmatisation by association, but in this instance based on race and ethnicity, in securing legal uptake of these cases (2 December 2008). The importance of the strength of the legal case, the timing, the lawyers’ perceptions regarding client suitability in their ability to generate the necessary ‘sympathy’, the organisational agendas, and the means through which lawyers are accessed all seem to impact upon which cases dealing with sexual diversity are mobilised legally principally through PIL strategies.

As a consequence of these decision-making processes therefore, there is a convergence of legal resource availability with individual client willingness to subject themselves to public exposure. Though, as Carla from the UDP notes, these relations with the media are often mitigated by LGBTI movement actors,

> These cases have generally received more media attention than other cases, mostly because of Rolando’s contacts. For example, when they presented the cases, there was a lot of media there (5 November 2008).
I therefore argue that the culmination of these processes has impacted upon the depictions and characterisations of members of LGBTI populations that have emerged in the media and in other public, institutional and civil society arenas as these processes converge. Furthermore, lawyers in their decision-making have been instrumental in advancing this agenda by using their criteria to determine what actually emerges in the public agenda. The public nature of these battles cannot be considered, however, without reference to the Chilean media. Below I briefly detail the media’s relationship with reporting on LGBTI issues.

7.9 Media

Lawyers engaged in PIL strategies are also in a sense reliant upon social change occurring sufficiently as media coverage of the cases can play a central role in the strategies. This means that social change needs to be reflected in the media coverage so that they report matters with enough sensitivity and dignity that the ‘sympathy’ (Olea, 2008) of the claimant can be ‘marketable’ in a sense. Karen’s lawyer remarks that he did not consider the media environment back in 2002-03 to be sympathetic to Karen’s cause.

We understood in that first stage that the media or the public debate would go against Karen...it was a question of Chilean culture and of [lack of] institutional maturity. Though this case was able to contribute to the development of the cultural aspect, it was best to keep it the most low key possible...I would say that was one of the first important battles that we won, because the opposing legal team was trying to used the media as part of its stragegy...We were able to stop them using the media for the first two years, on the basis that there were children involved, and I think that was positive for Karen’s case (22 May 2009).

He openly acknowledges here that the media attention would not have helped Karen’s case at that time. He does, however, recognise the impact that the case could have had on the cultural arena, had it been subject to media attention. As previously mentioned, the opposing legal team forced the media exposure in this case as they were contesting custody in the Supreme Court.

Relationships with the mainstream Chilean media have been established over the years as part of a concerted strategy, principally by MOVILH. Other groups have also forged links with media outlets or have pursued alternative strategies for rendering their cause
visible, but perhaps not with the same intensity that MOVILH has done. MOVILH President, Rolando, notes that now, ‘we have a good relationship with the media. There are two or three media outlets that we give the exclusive to, and so we have good coverage’ (18 November 2008). I was able to witness his capacity to mobilise the media first hand on a number of occasions, and the Preface provides just one example of the scale of the media attention garnered. I reiterate that I was never expecting to be facing a thirty-strong media barrage when I entered the hallway that Santiago morning back in May 2009.

Importantly, MOVILH’s ability to mobilise the media ultimately enabled Claudia Espinoza to present a recurso de protección to the Santiago Court of Appeal in June 2008. Drawing on extensive networks developed within these circles, the organisation was able to mobilise the necessary coverage to challenge the mayor personally regarding Claudia’s case. When the Mayor publicly declared his homophobia and personal attitudes towards Claudia to the press, it provided Claudia’s legal team with enough proof for the case to be taken on by the UDP, and for it to be admitted, on second attempt, to the Court of Appeal.\footnote{You may present a recurso de protección [protection writ] on two occasions to the Court of Appeal. If it is rejected in the first instance for lack of legal antecedents, then you have one opportunity to appeal and represent the case.}

Though media coverage of these cases has been mobilised principally through these existing networks, Armando and Víctor had not even heard of MOVILH prior to approaching the media. However, they still considered it a means to raise awareness of their plight. The groundwork carried out by MOVILH seems to have been salient here, in that Armando and Víctor’s case was initially covered by Chilevisión, which is one of the media outlets named by the MOVILH President as being particularly willing to cover stories on sexual diversity.

Víctor was the only individual that I spoke to who had initiated contact with the media prior to embarking on a legal course of action. In other words, he was the only person who came out publicly, with his partner, Armando, of his own accord, and without prior
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encouragement of movement activists nor activist lawyers. I say 'Víctor' because he first approached the media without Armando’s knowledge.

It was my idea...I’d been thinking about it for a while. That day we went for lunch here in the centre. After lunch I was feeling really down about the situation, and so I went to all of the tv channels...afterwards I phoned Armando and told him that I had made it public and everything, and so he said, ok then, I’ll talk as well now then. He wanted to support me... (2 June 2009).

As I detail in Chapter Five, his ‘legal learnings’ and comprehension of his rights on the basis of his sexual orientation had expanded when he began to explore the internal mechanisms for redress and reincorporation into the institution prior to taking that decision. In fact, it was the very frustration at the lack of advance through these channels, which urged him to take the action described below.

So I went to all the channels, to all of the television channels. I walked from the centre [of Santiago] to all the channels to see if anyone was interested in the case, talking to the journalists. In Las Últimas Noticias they took photos and everything. Then I went to TVN, they didn’t take any notice of me...then I went to Chilevisión and they were interested straight away. They asked to do an interview and started filming immediately (2 June 2009).

I had interviewed Rolando previously, back in 2004 and asked him about media attention then. His response had been that any media attention was welcome. Clearly, perspectives differ across the LGBTI community on the nature of media attention. The most vulnerable sectors among these populations, such as the transgender women, reported having a very ambiguous relationship with the media. Media portrayals of trans women have often been sensationalist, insensitive and highly partisan. They reported being subject to the most discriminatory, defamatory and arbitrary reporting practices. Mariana, a trans activist notes that in relation to covering issues relating to trans women that ‘the press coverage has changed a lot, it still has its downfalls, but before the press presented a sort of morbid fascination with things, or made a mockery’ (19 June 2009).

This advance must be kept in perspective and it should be reiterated that whilst the portrayals of these populations are more ‘sympathetic’, there is still much room for improvement in relation to comprehension of the issues affecting these populations and in how these are to be reported. For example, it is unlikely that their gender identity would
be respected in the reporting, as Andrés indicated with the sensitive ruling emitted by the judge in his discrimination case. Andrés refers below to how a trans woman accused of raping a minor was treated by the press,

...she was treated brutally by the press, they referred to her as a woman, they didn’t respect her gender identity, and of course, they had already accused her even before she had gone on trial...That’s the kind of news that sells. And the police, when it’s a heterosexual person accused of rape, the policeman always holds his head down so that they can’t take photos or anything...In this case, those same policemen made sure that her head was held up high so that you could see her face. They even stopped so that the press could take photos. She was treated very brutally, whether the allegations are true or not, you can’t pass sentence on her before [the trial]...(19 October 2009).

Another report in a local Valparaiso newspaper on one visit to the city in July 2009 told of the beatings the previous night of two transgender women, with pictures of one of the injured women on the front page. Whilst they acknowledged her adopted name in the first instance, they soon referred back to the masculine name inscribed on her identity documents and used male pronouns to refer to her. Thus there was a complete lack of recognition of her adopted gender identity. However, one change is that it is unlikely that this case would have made the headlines, even in the recent past. It would have been confined to the back pages in all likelihood as Kathy indicates below. Though some account must be made taken of the tendency for sensational press stories, and how transgender issues fit into that.

In another informal conversation with Kathy, a trans woman, she indicated that the media played another important role for members of their community. As many trans women worked in prostitution, the level of their vulnerability was extreme. She commented that when the media paid significant attention given to human rights abuses perpetrated by Neo-nazi groups, the levels of violence that they would face would decline as a consequence. The (albeit fleeting) media spotlight placed on them and their extreme vulnerability served as a protective buffer effectively. Yet she noted that this was rare and short-lived She recalled when one of her colleague had had her throat slit one night, it had received minimal press attention. It was covered in a very small piece in the back
In her opinion, the stabbing merited much more coverage than that received when they presented the petitions for gender recognition with the UDP in June 2007. The media attention that she described in that instance resonated with the scene set out in the Preface. She dismissed their reporting as being driven solely by sensationalism. Despite her description of the media attention garnered in this instance as sensationalist, it served to present them as bearers of rights, heightened by the presence of a lawyer, and the backing of a prominent University, as bearers of greater social and cultural capital (Bourdieu, 1996).

I do not enter into the media coverage in great detail here given the limitations of the thesis. However, a brief evaluation of the press coverage on matters exploring gender identity and sexual orientation reveals a broader coverage of these issues and more careful and considered treatment of them. This was apparent both in respondents’ appreciation, and my own awareness, of media attention on the subject since 1998. This seems in line with a more general concern for political correctness, as lawyer, Alfredo Morgado notes:

Today, everyone wants to appear to be respectful of rights, even the institutions, however conservative they may be. They do not want to be seen to commit arbitrary nor discriminatory acts, no one does. Certainly no institution wants to be seen as discriminating on the basis of sexual orientation (2 June 2009).

Nevertheless, at the same time, he recognises that this display of political correctness is actually a cover.

We know that the arguments that they [the institutions] provide are polished, polished, varnished and disguised so as not to reveal the actual homophobic practices or policies operating (2 June 2009).

Such observations also seem to be applicable to reporting on sexual diversity. A greater number of newspapers and television channels such as the broadsheet papers, La Nación,

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102 This national newspaper is considered to be Chile’s most sensationalist. Andrés recalls that ‘When I filed my discrimination case against the Universidad de Rancagua, La Cuarta used the headline: ‘Profesor que se le fue el gustito para adelante demanda universidad’ (roughly translated it refers to how the university teacher’s sexual preference has change, though there is an implicit reference to the changing sexual organs), which is just one example of how some such cases are reported.
El Mercurio and La Tercera, as well as the more sensationalist ones, such as La Cuarta, cover the subject matter and are more considerate in their coverage.

But other groups have also used different media outlets and media-based strategies as a means of raising awareness and publicising rights victories. Andrés Rivera, President of OTD, has approached media coverage in a different way. Instead of inviting the media to cover particular stories, he has appeared in a number of documentaries as a means of sensitising the population to transsexualism, particularly male transsexualism. Among the programmes that he has appeared on, the one he refers to below had a particularly wide impact. I refer back to an extract from Andrés that I part-quoted in Chapter Five. So where before I cited the importance of the media for uncovering LGBTI identities more extensively, here I continue the quote to indicate how it impacted on the wider public.

What helped us in the other programme was the mother’s testimony. It was incredible how a woman speaking about [male] transsexualism helped to sensitise the issue. The fact that that woman was the mother of a trans [man] had a huge impact. I’ve noted it in talks that I have given, all the questions are about that, also my colleagues at work, they all saw it and commented on it. Of course, they know me and we talk about it, but for them to see other trans, to see young men and their mothers, it had a huge impact (19 October 2009).

This builds on the data introduced in Chapter Five, which relates how awareness surrounding such ‘invisible’ identities was raised. The victories that he has achieved through judicial channels have initially been documented on the organisation’s website.

With certain cases we have had a lot of coverage. When the ruling against the Universidad de Rancagua came out, the media covered that in a very respectful way. When I got my recognition we organised a press conference, and the media dealt with that well too. All except La Cuarta, I refused to give them an interview...The media has always treated me well...and I have noticed that every time I post something new on the internet, a journalist phones up. There are two in particular that are interested. One is a local paper from here [Rancagua] called Tipográfo, they are always covering stories. The other is Las Últimas Noticias, a national newspaper which reports the trans issue respectfully\(^{103}\) (19 October 2009).

\(^{103}\) Here he does not differentiate whether or not they report on trans issues in general respectfully or just male trans issues respectfully.
This also relates back to Robles’ (2008) and Sáa’s noting that change within the broader communicational arena has occurred, as I mention in Chapter Five. This resonates with Levitsky’s work with LGBTI activists in Chicago in that she reported that

Some asserted that press coverage not only makes people more aware of GLBT issues, but it also helps people suffering from discrimination to realize that they are not alone...Other activists noted that lawsuit publicity helps put a human face on an otherwise abstract issue. Note that in these cases it is not the litigation itself that activists perceive as valuable, but the publicity associated with the litigation (2006: 151).

From a more activist perspective however, Domingo Lovera (2009) highlighted the important role that movement activists play in mobilising the media given the limitations on lawyers’ time and resources in being able to do so. As indicated in Chapter Three, many of these lawyers only engaged in public interest litigation on a part time basis, in addition to their academic or legal professional work. To provide the reader with an idea of the multiple demands placed on their time, Domingo works as an academic at the Centro de Derechos Humanos (Human Rights Centre) at the Universidad Diego Portales, teaches at Universidad Adolfo Ibañez, and is a founding member of I-Público. Given the demands placed on his time in conducting research, teaching, compiling case files and litigating, his ability to mobilise media attention to cover such cases is severely limited. It also takes a certain kind of lawyer to want to actively seek the media limelight, as Verónica indicates below.

They offered me a job at the UDP, the then Dean of the Faculty asked me if I wanted to work there. But he warned me that there a low profile didn’t exist. He said, you have to be willing to appear in the newspapers and on television. And I hate all that... (12 May 2009).

In Karen’s case, given its magnitude, its emblematic status, and the limitations of the lawyers’ time and capacity to mobilise the media, and the timing of the case as regards the prevailing social and cultural conditions, the decision to enlist the support of an official representative to manage the media coverage of the case was a practical decision as well as a strategic one.
Chapter 7: Brokerage

The overall relationship with the media is inherently complex, and often contradictory. Though it performs numerous functions, here its importance relates to the evolution in reporting on LGBTI rights issues. Since Karen’s failed attempt to secure the custody of her children in 2004, one case has emerged where a favourable ruling conceded custody to a gay father garnered ample media attention in March 2009.\(^{104}\) It should be noted that the legal basis for the case differed in that the mother agreed to the father having custody and did not contest it. This ultimately limited the judge’s faculty for legal interpretation.

The relevance of this case is the different way in which it was ultimately handled in the media and the general willingness to openly discuss the outcome of the case in public. In contrast to the discourses of stigmatisation evoked in Karen’s case through the very ruling, there is a marked level of acceptance and normalisation of this custody case. In one article, the children’s mother was quoted as saying,

> They support their father in his decision to have a new partner and to live with someone of the same sex...When my children found out about their father's sexual condition, they supported him unconditionally and they went [to live] with him.\(^{105}\)

This more media-friendly environment has certainly facilitated the strategies embarked on by movement and legal activists in their determination to advance the LGBTI agenda. Its role has been central to the public interest litigation strategies explored in this thesis. Though it has not been the central element of analysis throughout, I must recognise its relevance in enabling the strategies pursued that are discussed here and certainly its role in the outcomes achieved as a consequence. In the following section I return to the brokerage role assumed by lawyers in the process of mobilising legally, exploring the depth of ‘new links’ created.

### 7.10 Augmenting the Networks

This brokerage role in public interest litigation strategies extends beyond merely bringing such cases under the media spotlight. Returning to Karen’s lawyer’s assertion that ‘pro bono work implies trying to incorporate as many people as possible into the strategy’ (22

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\(^{105}\) Ibid.
May 2009), this section explores the kinds of networks created through the interactions of lawyers, claimants, movements and other civil society actors, with a particular focus on the latter arenas. I will draw quite heavily, though not exclusively, on Karen’s case to illustrate the kinds of networks established in the pursuit of justice in her case. As mentioned previously, it wasn’t until the Supreme Court hearing that the opposing legal team were able to make it public. Karen’s lawyer had successfully obtained a legal injunction to stop the opposing legal team from making the case public in the both the Villarrica and Temuco cases. However, when forced to respond to the ‘outing’ of the case, Karen’s lawyer mounted a multi-pronged strategy that involved incorporating multiple actors, which ‘made the case belong to many people’. This, in turn, meant that ‘all involved felt that they were responsible for a part of the case’ (22 May 2009). These encompassed lawyers representing a number of legal advocacy groups that included Libertades Públicas A. G. [Public Liberties A. G.], the Universidad Diego Portales and, more recently, Corporación Humanas, academics writing informes en derecho, and NGOs managing the communicational aspects of the case. This adds to those recruited to contest the case in the lower courts. In this instance, Karen’s lawyer enlisted both the practical help of the law graduate who was managing the day-to-day running of the case, and a judge who contributed her expertise on gender issues to construct the legal argument.

Having been forced to adopt a strategy to manage the media coverage when litigation reached the Supreme Court, Karen’s lawyer recruited Fransisco Estévez, of Fundación Ideas,

...who was precisely involved in dealing with issues of minority rights and discrimination. We asked Fransisco to assume responsibility for the communicational side of things...so we presented the opposition’s lawyer not with another lawyer, but with a sociologist, a specialist in minority rights (Eduardo, 22 May 2009).

Clearly his concern, expressed earlier in this chapter, regarding the lack of maturity in both Chilean society and the judiciary in dealing with sexual diversity publicly meant that it was an issue that demanded careful mediation. The matter was made even more
delicate given that Karen herself was a judge.\textsuperscript{106} In the extract below, Fransisco here draws our attention to the innovative nature of the links forged with Fundación Ideas. He notes that while he had been called upon to defend other causes publicly he had never been asked to do so by a lawyer.

The defence therefore considered it important to have a representative who could defend Karen’s case publicly. And they thought of me, they asked me if I would be interested, and I accepted. But in contrast to other cases that Ideas had taken on, this case was put to us by the legal team...My role, as the ‘public voice’ of the case, came about only during the last stage of the legal action when it was still being contested in Chile...So my role was only temporary, temporary but important, because it enabled us to generate a greater level of consciousness in society as to what was going on (9 July 2009).

Of the networks established by Karen’s lawyer and mentioned above, Fransisco Estevez was the exception, in that he had prior knowledge of matters of sexual orientation and gender identity. In most other instances, this prior knowledge was largely absent. Karen herself acknowledges that

When the case was first taken back in 2002, I wasn’t aware of the problems of sexual minorities either...We were all ignorant, we were all new to it. In other words, I couldn’t give you the whole list of sexual minority rights back then, because I didn’t know them either. I had to do a Masters in gender to understand what had happened to me (17 June 2009).

Awareness surrounding matters of sexual diversity were not just transmitted to the wider public through the media, and mediated by Fransisco Estevez and Fundación Ideas, but was also generated in the immediate networks created to support the case. Therefore, this meant that sexual diversity as a legal question was brought into new legal arenas such as civil society and legal organisations. The lawyer who was asked to provide an informe en derecho for the Supreme Court, Verónica Undurraga, recalls that

I had just started working at the University, I had little experience in academia, and I wasn’t completely in the group [of human rights lawyers]...I’ve never asked why they asked me, I wasn’t a natural choice, and when he asked me I was a bit surprised really...But I was known for being a hard worker and they needed someone to do the job well and to investigate the matter, and that I could do. I was also really interested in doing it, because being asked to do informe en derecho for the Supreme Court was a great opportunity for me.

\textsuperscript{106} In addition to the child custody battles, Karen was also investigated by the judicial authorities in relation to her sexual orientation. This was an additional battle that she was forced to fight, and which she and her legal team won. But is a further example of the extent of institutional hostility directed towards her.
**Chapter 7: Brokerage**

derecho is an honour... So I met up with Karen’s lawyer and he gave me the case file. I studied it and then I began to study the subject matter. I’d never been involved in anything like this before. I knew something about family law, I had been involved in feminist circles, and I had been exposed to the debates during my time in the United States. So, it wasn’t difficult to gather information and I started to collect international and comparative jurisprudence. Back then I wasn’t even working on human rights or anything. It must have been back in 2004, and in 2003 I was working as a corporate lawyer (12 May 2009).

Below I include a set of diagrams to assist the illustration of some of the links forged at the lawyer’s instigation in Karen’s case. It is designed to give a more visual perspective on the associations made during the case at different stages.

**Figure 4: Brokering in the Lower Courts**

Figure 4 covers the links brokered in the first two lower court cases, the Villarrica Court and the Temuco Court of Appeal. Figure 5 looks at the links created for the Supreme Court case. I include this latter diagram to illustrate how the links increase exponentially as the case progresses. Though I am more concerned with the links, which are brokered domestically through the legal process and the lawyers themselves, the latter instance also provides an insight into the increased level of resource input that is necessary to contest a case within the Inter-American system. This change in resource input clearly has implications for those wishing to pursue cases at the higher levels. It further
contextualises the difficulties in mobilising the resources necessary (Gloppen, 2006) as they grow exponentially. Brokerage therefore is not only driven by the need or desire to maximise exposure to the case in different arenas, such as the judicial, the public or the civil society arena, but also becomes necessary given the very nature of the limitations of legal resources. Contesting a case in the Supreme Court versus the lower courts presents a very different scenario in terms of strategy and legal expertise. Karen’s lawyer admitted that the limitations to his pro bono work forced his hand in securing additional legal support to contest the case in the Supreme Court. He recalls that

When the case got to the Supreme Court...we knew that it was a difficult case in front of the Supreme Court and the strategy of the case had been to use pro bono...and so, it seemed intelligent in that instance, and so took advantage of the new legal stage and we invited another group, Libertades Públicas, a group of liberal lawyers, so that they could litigate the case in the Supreme Court (Eduardo, 22 May 2009).

Figure 5: Brokering in Temuco Court of Appeal

Added to that, in the Inter-American system, you have added financial burdens that have stretched the resources of those organisations in contesting a case at international level, over a period of six years thus far. One of Karen’s lawyers asked me if I knew of any
possible funding sources for the case. Resource limitations therefore also encourage a broader legal strategy in some instances and force the ‘brokering’ of new relations.

Again, as a consequence of such processes, the dissemination of the case into new civil society or legal advocacy arenas has important implications for beginning to challenge perceptions surrounding sexual diversity, expanding expertise in the area, and broadening interactional processes. This, in turn, can impact upon meaning-making at both the individual and collective levels and has the potential to impact both within legal cultural circles and the civil society organisations participating in the legal battle. The following sections examine how legal cultural realms are challenged through theses public interest litigation strategies and looks at the internal impact of brokerage within the judicial realm.

7.11 Direct Outcomes: Brokerage in the Chilean Judiciary

If we refer back to the literature on legal mobilisation introduced in Chapter Six, McCann (1994, 2006) argues that there are two potential outcomes of engaging in such strategies. These refer to the direct and indirect outcomes of the processes. As already intimated in Chapter Two when compared to other countries in Latin America, there seems to be a consensus among Chilean legal and movement activists as to the limitations in achieving favourable outcomes through legal action when presenting cases advocating the rights of members of LGBTI communities. As Rolando Jiménez remarks,

Now the qualitative and quantitative evidence from Chilean courts is that effectively there aren’t the same possibilities that there are in the Colombian, or Brazilian systems, nor the Argentine one, in their capacity to recognise rights through the courts, to then effect legal change. In Chile, there are none of these possibilities. However, we still believe that we have to persist in presenting cases (18 November 2008).

Helena Olea (2008) also argued that strategic litigation has not been fruitful in the Chilean case in terms of both the difficulties in securing favourable outcomes and consequently in its ability to effect subsequent policy change. Though Rolando draws similar conclusions, he notes that this has not detracted from his resolve to continue presenting cases as part of a broader social movement strategy.
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Therefore if we evaluate the strategy of whether or not to take on emblematic cases in the courts, to resolve situations or discriminatory practices, we can say that it has not been effective. However, we believe that we have to persist, because in the medium or long term, because at some point we will have a breakthrough. Furthermore, in one way or another, by presenting protection writs...and civil demands and or cases in criminal courts and labour tribunals, it becomes a means of maximising the legal case as regards the specific instance of discrimination (18 November 2008).

During the field work it became apparent that the legal battle itself was seen as a means of challenging the dominant legal culture, and favourable rulings were ultimately aspired to in order to set the all-coveted precedents. Despite the fact that precedents have a rather ambiguous role in the Chilean system given that it is based on civil law and not common law, precedents are indeed cited in case files. Legal scholars and practitioners have remarked how the civil and the common law traditions are increasingly converging, with precedents being increasingly considered and used. Numerous respondents from among lawyers and judges referred to the importance of setting precedents. However, this was duly countered by those who denied the importance of precedent-setting, given that jurisprudence did not have the same role as in common law legal systems. In fact, the creation and dissemination of jurisprudence, relating to matters of sexual diversity among other issues, is important not only within domestic judicial settings, but are also cited externally. Case files explored for this thesis often cited Argentine and European jurisprudence, or referred to work by Spanish or Peruvian jurists, for example. In the Global Arc of Justice conference held in UCLA in March 2009, much emphasis was placed on the conference being a forum for sharing both legislative and jurisprudential material relating to both sexual orientation and gender identity. Legal approaches and strategies were similarly imparted.

During fieldwork, despite the prevailing legal cultural conditions, a considerable number of lawyers whom I spoke to had strong convictions about the possibility of winning cases. Claudia’s lawyer (see beginning of this chapter) believed that in view of the extensive evidence presented, and the limitations of the defence’s argument, that it would be difficult for the judges not to rule in Claudia’s favour. However, in spite of this underlying hope, there was an undeniable level of scepticism as to the possibilities of
achieving successful outcomes given the inherently conservative and formalistic judicial system. Whilst standing outside the courtroom discussing the case with her students, Claudia’s lawyer raised two concerns. The first was that one of the judges appeared to be sleeping during the short hearing. The second was that the evidence required reading appendices and watching a DVD, even though the case file was not long. She voiced her apprehension that this might well be beyond their level of interest in resolving a case where a Mayor was being brought to court by a transsexual woman claiming that her constitutional rights had been violated. In other words, the discrepancy in symbolic and social capital between the two parties (Prieur 1998; see also Chapter Two of this thesis) seems almost insurmountable. Claudia’s own reflection on the difficulties of challenging the dominant power structures and elites from below, as described at the start of Chapter Six, illustrates the oscillation between hope and impossibility. She ultimately hoped that the defence of her rights will win through, yet simultaneously resigned herself to the fact that these structures are almost impossible to overturn or challenge.

...the Mayor...who made all those declarations in the press, he made it explicit that he is homophobic and of his attitude towards me. But that wasn’t sufficient for the Appeals Court, nor the Supreme Court. Or maybe they did understand it, but they just ignored it...I always knew that we weren’t going to win...and if we did win, it would have been [she makes a sound like an explosion], something never before seen in Chile if I had won against him in court (8 April 2009).

These hopes of securing favourable outcomes therefore seem idealistic, yet essential for the cases to be embarked on by claimants and ultimately lawyers alike. Yet these hopes in most instances are accompanied by contradictory realistic, or more pessimistic, appreciations of the judicial setting in which they are seeking legal redress. César also internalised these same contradictions in relation to the judiciary. While he perceives that ‘we have a court that is incredibly homophobic’, on a personal level through his work as a police investigations office, he claimed that ‘my relationship with the justice system was always good.’ But his resolve meant that ‘I am going to fight it until the end’ (14 May 2009) whatever his perceptions of the justice system and judges might be. There is thus a whole complex set of interconnecting perceptions that converge in relation to taking a case and expecting a win.
Domingo Lovera also noted that where there were repeated failures, underlying hope still remained, to the point that he insisted that it had to remain because without hope there would be no legal action. Nicolás referred to the complete feeling of euphoria when a case was successful, partly due to the unexpected outcome and the importance of setting precedents but also to bolster the lawyer’s ego. Among the younger generations of lawyers I spoke to, a couple professed an unconditional optimism and did genuinely believe that their cases had a chance of winning. In the intersex petition for gender recognition, it turned out that Edith was actually right to be optimistic, as it was granted in July 2009 just after I had left the field. Edith was Juliana’s lawyer who had been extremely engaged in the case when she took it on. Not only was she acting as Juliana’s lawyer, but they had become friends. They were in contact more than twice a week regarding the case, and Edith was very committed to this, her first, case. The legal team was euphoric about the result, most notably in setting a precedent, but also for the extent of the personal investment in both the case and the claimant. Setting a precedent thus provides a tool in that it creates jurisprudence for those able to access the case to cite in future petitions, this is very important for an issue that is generally invisible. However, this is dependent upon the possibilities for information sharing. These have been extremely limited in these cases, even where the cases have been contested in the public interest. Lawyers undertaking similar cases are most likely to be unaware of the case. Dissemination of cases and jurisprudence was a repeated issue that emerged during the course of the fieldwork. Or rather, the extreme lack of such dissemination was very noticeable.

Though the possibilities of winning cases is generally viewed with scepticism among the majority of legal professionals aiming to push the boundaries of what is judicially viable, this does not detract from the importance of the internal legacy sought within the judicial realm. Influencing legal culture, presenting new and alternative discourses and legal arguments are all necessary to expose judges to realities, such as those of the protagonists

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107 These perceptions were all expressed during informal conversations at the University, or at lunch, rather than during the more formal interviews.
of this thesis, which differ considerably from their own. As Mauricio remarks in relation to his case file,

I think it's really important how the case is written, it's really important because that it will affect how the judge will perceive the case...and also because it refers to the jurisprudence from the three cases in Rancagua...it's also important that it is written in the masculine form. So, I think that with a good written petition, if the case is well presented that it will be easy for the judge to imagine the situation. If the petition is not clearly written, they will just get confused (26 May 2009).

He contrasts this clarity with the confusion that he was greeted with when they went to meet lawyers while seeking legal representation. Another lawyer at the Universidad de Chile recognised that exposure to such issues may indeed have been minimal in the people that they reach. However, she noted that even exposing students working in the clinics to these issues is already a means of making headway in beginning to challenge practices and perceptions. One law graduate who had inherited some of the transgender petitions through the Human Rights Office run by Don Nelson Caucoto was adamant that given the unique nature of the case in comparison to all other cases he had been asked to process, he would not forget these cases.

The insight from inside the judiciary, as expressed by the Supreme Court judge in Chapter Two indicates that more exposure to cases dealing with sexual orientation and gender identity is needed in order for judges to begin to consider them in a more favourable light. One judge that I interviewed did challenge this in perception in that he had been responsible for creating some of the most advanced jurisprudence relating to discrimination against transsexuals in Chile. The jurisprudence was so advanced as it ruled that the Universidad de Rancagua had discriminated against Andrés on the basis of his transgender identity. Indeed they even referred to Andrés in his adopted, and not his legal, gender. This is particularly important since Spanish is a gendered language in that not only do pronouns denote a person’s gender, but also adjectives, as I mention in more detail in Chapter Three.
Chapter 7: Brokerage

Though Karen’s legal team won its initial court cases, these were largely overlooked as the Supreme Court ruling effectively rendered them null and void. However, her lawyer reminded me that ‘the ruling in the lower court is a ruling that is written by a person that clearly has a more progressive vision of the law’ (22 May 2009) and that there are indeed some progressive spaces within the judiciary even dating back to 2002-03. This coincides with Huneeus’ (2006) and Hilbink’s (2007) contention that new generations of judges are indeed more progressive as they are more diverse. UDP lawyer is of the same opinion, as were at least three of the judges who I interviewed. This has followed reform of the judicial recruitment process. Other favourable outcomes have been instrumental in encouraging more concerted legal strategies of trying to judicialise issues such as transgender petitions for recognition, as the President of AADGE noted. The uptake of cases has expanded, become more visible, more experimental and more questioning of the system. Petitions now attempt to achieve legal recognition without individuals having to undergo the GRS that was previously essential for judges to consider that such changes could be granted. Andrés’ decision to originally publicise his case back in May 2007 was seized upon by other movement activists to present those cases that were sponsored by the UDP and MOVILH. Since Andrés’ case, the UDP, Universidad de Chile, the Human Rights Office affiliated to the Corporacion de Asistencia Legal (Legal Aid Corporation) and lawyers hired privately have all presented cases since 2007.

7.12 Conclusion

This chapter has explored more fully the roles adopted by lawyers in presenting legal challenges dealing with sexual orientation and gender identity. I have explored how their decision-making processes have served as a means of selecting cases and how this has impacted upon which cases are then transmitted into wider publics. Generating awareness around rights relating to sexual orientation and gender identity has not therefore been confined to the limited set of actors involved in the legal battle per se. As legal activists establish networks to contest these cases, often again driven by resource limitations, LGBTI identities are being introduced into broader spheres.

Karen’s lawyer remarks that despite the loss in the Supreme Court by three votes to two, on 31 May 2004,

...after Karen’s ruling by the Supreme Court, *La Tercera* newspaper conducts a survey which reveals that 53% support the court’s decision, and 45% backed Karen...That is a great success. For the first time that the issue is discussed publicly in Chile, we lost in the courts, but we won in the country...If you have 45% of the population backing the issue, that means that in five years time that 53% cannot keep growing, but we [the 45%] can keep growing (Eduardo, 22 May 2009).

Through the networks created during the parallel process of contesting Karen’s case, by drawing on other organisations, the support levels can augment, as can the platforms through which both the wider public and the legal classes can engage with these emerging figures who had previously been confined wholly to the private sphere. These networks have augmented yet again in Karen’s case, as it moved into the Inter-American Court system for deliberation, though it is beyond the scope of this thesis to enter into these processes as they take on regional and international significance. I touch on Karen’s case and its impact domestically, regionally and internationally in the Afterword given its salience within the continent. It is very close to becoming the first case to be tried in the Inter-American Court of Human Rights that deals with human rights and sexual orientation, though human rights relating to motherhood and children’s rights also make this case more complex than simple discrimination on the basis of sexual orientation (Helena, 7 April 2009).

The diversity of cases that have emerged since Karen’s case in 2004 have included school children contesting their expulsion on the basis of their sexual orientation, policemen and detectives removed from their duties on similar charges, and cases seeking gender recognition for transsexual and transgender women. The concept of what constitutes a ‘good’ or ‘viable’ victim has therefore expanded beyond that of the mother denied her right to exercise her maternal role on the basis of her sexual orientation. In particular, the transgender petitions serve to actively challenge the dominant characterisations of trans women in Chile, breaking the ‘doubly deviant’ associations with prostitution. The
challenges presented to the judiciary and to the public more generally invite both audiences to consider a cross-section of members of LGBTI populations as legal subjects, and as represented by members of the legal profession, albeit by predominantly ‘transgressive’ members of that profession. The importance of this transfer of symbolic capital, the overcoming of stigma by lawyers to openly engage in these battles, and the support of a growing number of civil society organisations perhaps previously unaffiliated with such causes are important by-products of these initial attempts at mobilisation, which will be explored further in the next chapter.

In this chapter I have drawn out the role of socially-oriented lawyers in driving public debate. Through undertaking public interest litigation to sponsor legal action to advance and/or uphold rights pertaining to sexual diversity, I have shown that they are facilitating cultural and legal openings, and in so doing, are promoting LGBTI rights issues and identities in multiple domains. I contend that as a consequence of such action, reformist legal professionals have played an active role in the creation and dissemination of public depictions of LGBTI identities by directly or indirectly assisting their ‘coming out’ processes. Engaging with media outlets as a means of generating and maximising ‘sympathy’ for ‘victims’ and expanding links with other political and civil society actors, or experts, depictions of LGBTI individuals and issues have moved from ‘hidden’ spaces into multiple public domains.

Though networks established to contest these cases have often been established on a temporary basis only, the indirect consequences of such interactions have longer-lasting consequences. Karen’s case illustrates the breadth of networks that can be called on to contest a case of this nature, encompassing diverse members of judicial and legal professional fields and NGOs and how those in turn mediate LGBTI identities within their given areas. Similarly, the transgender petitions pursued by the UDP in conjunction with MOVILH served to challenge dominant deviancy discourses aimed at the most vulnerable among the LGBTI collective, trans women. The indirect outcomes of the legal processes occurring here also required substantial input from the lawyers into previously un-entered domains, such as the questioning of medical practice and ethics at the SML
and the forcing of a public response by the Director of this institution. Whilst it seems that such practice is hostile to change, such revelations also push others to consider alternative means of presenting their cases judicially, as in the recent cases undertaken by the *Universidad de Chile*. It also served as the basis for further media attention and was able to again draw attention to their vulnerability, the extent of discriminatory practices faced by them and questioned the authority of the medical services in relation to their treatment, all as by-products emanating from the wider legal process itself.

Lawyers’ engagement in this context thus has the potential for wide ranging outcomes. The cumulative interactions of movements, lawyers and aggrieved individuals in conjunction with other civil society actors, therefore addresses legacies emanating from both dictatorial rule and the historical processes that have located women, disabled people, indigenous people and LGBTI individuals as second-class citizens.

The decision-making processes and filtering mechanisms applied by lawyers as to which cases to pursue, guided by financial, geographical, legal technical and media-driven factors, in addition to the severe resource limitations detailed in earlier chapters, have impacted upon the very characterisations that have entered the public domain as a result. The lawyer’s role becomes prominent in effectively deciding which cases are able to generate public sympathy and sufficient media attention. However, resource limitations, organisational agenda setting and the existence of multiple worthy causes, all affect where litigious strategies are deployed. The apparent expansion of what constitutes a ‘good’ victim in relation to LGBTI rights issues seems to indicate a greater propensity to advance the LGBTI agenda by these individuals. The recent support of cases of trans women represents an important evolution in lawyers’ willingness to overcome the differentials in social, cultural, and symbolic capital where they are at their most extreme between lawyers and their clients, exacerbated by gender and class distinctions. It forms a clear departure from previous characterisations of such populations as being associated with prostitution and stigmatisation and asserts them as legitimate bearers of rights through the sponsorship by legal professionals. Such strategies have also shown the
media to be more a credible vehicle through which individuals can be portrayed in their pursuit of justice.

The subject of this thesis is not the tension between lawyers seeking redress at the individual level versus the collective, nor the glory of winning a complex or controversial case. The focus rests on the social processes that occur in tandem with the processes of attempting to legal mobilise to advance the LGBTI rights agenda. Most specifically, it explores the outcomes of the multiple interactions occurring between claimants, legal advocates and movement activists. I draw these conclusions together in more depth in the following final chapter.
Chapter Eight: Conclusion

8.1 Introduction
This thesis started with the aim of establishing the extent to which legal mobilisation was occurring in Chile in relation to LGBTI rights issues in the late 2000s. I undertook a year-long ethnographic exploration which led me to investigate the arenas where such processes were being initiated. I moved between courts, university campuses, and activists' and claimants' homes and other spaces to gauge the extent to which such possibilities were evident. Initial findings revealed that the initiatives to mobilise were in their incipient stages. Gloppen's framework to explore how individuals were able to 'articulate voice' (2006) in the legal arena, became the point of departure for the data collection and subsequent analysis. What emerged from the data was the important role of interaction among those actors mobilising collectively to advance such a rights agenda through the courts. I have argued that the processes involved in mobilising resources and overcoming barriers to engage in legal action are interlinking and are mutually reinforcing, as interaction plays a central role in influencing these actors. I have therefore drawn together Gloppen's work with interactionist perspectives on stigma and deviancy to explore the social processes occurring parallel to the legal mobilisation process. I contend that the lawyers' ability to 'broker' the cases, and direct the course of action through decision-making processes, is also conditioned by their ability to overcome dominant discourses of stigma and deviancy. In this chapter, I reflect on the role of human rights lawyers and how social processes at micro level are thus moving into the macro level through their instigation, and I examine it in relation to the cause lawyering literature. Lastly, I return to McCann's (1994, 2004, 2006) work on legal mobilisation, which became the initial point of reference prior to embarking on this course of study. I consider how the indirect and direct outcomes have the potential for movement consolidation and explore future possibilities for research within that realm. Prior to that, I briefly contemplate the research process of which this thesis is a product.
Chapter 8: Conclusion

8.2 Reflections
This study sought to examine the extent to which legal mobilisation strategies were possible in the Chilean context of the late 2000s. I arrived in the field in September 2008 with little expectation of finding, or being able to access many legal cases that involved trans, lesbian, intersex and gay people seeking to advance or uphold their rights. Personal experience of the Chilean LGBTI activist and non-activist field, of human rights related injustices, of political moral conservatism and the associated institutional inaction were some of the reasons for my scepticism. Initial findings confirmed that few cases were actually being contested, and the ethnographic methods used were instrumental in maximising access to cases in this context. In the second instance, it became evident that lawyers were playing a central role in relation to both resource availability and in their control over the legal process. I came to view this mediatory role assumed by lawyers as a ‘brokerage’ role (McAdam, Tarrow and Tilly, 2001). Again, this was facilitated by the methods used. As a participant observer, yet one with extensive connections in the activist community, I became a natural link between the activist community and the legal community. Their own lack of knowledge of each other, and their often restricted access to each other, meant that I was privy to both interactional processes and lawyers’ decision-making in a way that, otherwise, I would not have been. Mauricio’s case, which I describe in Chapter Six, illustrates this point very well. In the following section, I bring together the work on interaction and how that has been manifest in these processes of attempting to ‘articulate voice’.

8.3 Voice Articulation and Interaction
I began exploring the legal mobilisation processes by drawing on the first stage of Siri Gloppen’s (2006) framework for seeking social justice. It acted as a guide for studying and breaking down the potential barriers and resources necessary to embark on a legal course of action. It also served as the point of departure for examining the social processes which were occurring parallel to the legal process. The implications of these extended to the actors at both the individual and collective level. The importance of associative capacity (Gloppen 2006), and the shift from individually to collectively held resources (Edwards and McCarthy, 2008), also emerged as central features of the
process. It was precisely in this shift from the individual to the collective that interaction, or the outcomes of interaction, became increasingly salient as the object of study.

Drawing on Blumer's (1969), Goffman's (1963) and Plummer's (1995, 1996) work on symbolic interaction, I considered how it was reflected within the legal mobilisation processes that I analysed. I contend that interaction among these actors has impacted on how they construct meaning. As cited in Chapter Three, Blumer introduces three guiding principles to his work on interactionsim.

The first is that human beings act toward things on the basis of the meanings that the things have for them...The second premise is that the meaning of such things is derived from, or arises out of, the social interaction that one has with one's fellows. The third premise is that these meanings are handled in, and modified through an interpretative process used by the person in dealing with the things that he encounters (1969: 2).

The meanings that I have studied have emerged as a result of individuals seeking to 'articulate voice' through the Chilean legal system. In this instance, meaning-making centres on what constitutes the 'moral' agenda. Discourses of stigma and deviancy have played a significant role in marginalising people whose sexual orientation and/or gender identity do not conform to the 'ascribed sex statuses' and the associated 'culturally prescribed roles and behaviors' (Kitsuse, 1964: 89) in Chile.

The framework on articulating voice enabled me to disaggregate the resources mobilised, and the barriers overcome, before looking at the interconnectedness of the processes occurring. For example, in Chapter Five I referred to how an individual's awareness of both their sexual and/or gender identity seemed to increase with exposure to the legal process and legal discourses. Thus interaction with both legal advocates and movement activists served to enrich their own comprehension of their sense of self, awareness of associated rights and engenders a willingness to move the battle from a personal concern to a more collective one. Pursuing legal action for the protagonists has thus enabled individuals to further 'accomplish' their sexual and/or gender identity (Plummer, 1996) and/or come out. In turn, this interaction has also impacted upon the legal representatives in expanding their comprehension of sexual diversity, their expertise in the area, and
often, their desire to pursue further causes relating to that agenda. As Goffman argues in his work on stigma, when ‘normals and stigmatised’ do mix that, ‘these moments will be the ones when the causes and effects of stigma must be directly confronted by both sides’ (1963: 24). He therefore reiterates that the outcomes of interaction are two-way processes, which mutually influence the actors concerned. What links these interconnected processes ultimately is the ability to challenge the dominant concepts of ‘moral legitimacy’ (Edwards and McCarthy, 2008) that have privileged the heteronormative.

The shift in perceptions achieved through interaction facilitated a change in the meanings that lawyers may have held initially. The lawyer who considered gay men to be ‘depraved’ prior to any personal contact with gay men, then went on to publicly represent a case of discrimination on the basis of sexual orientation as spokesperson in front of a thirty-strong media contingency. That very same lawyer also asked me for more documents and information on civil unions on other countries, was seen to increase her own expertise and understanding of the legal arguments in the area. The 180-degree about-turn in her awareness and understanding of sexual orientation, and her willingness to associate with and publicly represent members of the gay community occurred as a consequence of her personal involvement in a subject matter. Something that she initially assimilated as ‘deviant’, she then resolved to be otherwise to such an extent that she became the public face associated with the case.

So whilst legal representatives are impacting, albeit, indirectly on individual claimants’ understandings and acceptance of their sexual or gender identity in gently persuading them to come out and publicly embrace their sexual or gender identity. Those same individuals are simultaneously impacting upon the lawyers in challenging their preconceptions regarding sexual diversity. They are helping to debunk the dominant discourses that may have informed the meanings that lawyers attributed to such issues in the first instance. The lawyers themselves did not always reflect on the extent of their interaction with the LGBTI movement and how this affiliation had become more entrenched. Yet many referred to the unwillingness of other professionals to consider
work of this kind, especially among the elite circles, as Verónica Undurraga indicates in Chapter Six.

Testimony has played a central role in this interaction from the lawyers’ perspective and has contributed to the shift that Blumer (1969) refers to in his third premise. The shift in lawyers’ action in agreeing to undertake cases to advance or uphold the rights of lesbian, gay and transgender individuals occurs when there is a general commitment to social and political justice. However, in relation to LGBTI issues, it also occurs when there is both a greater understanding of the subject matter as meanings are later modified through interaction. They shift away from the deviancy and stigmatising discourses that have informed the dominant ‘moralistic’ agenda as forwarded by the ‘Right Wing’ hostage-taking elite that Chilean politician María Antonieta Sáa refers to in Chapter Two.

However, the shift in the choice of cases to represent, and the greater frequency with which such cases were being taken up, especially towards the end of the field work, and evident during the return visit in 2010, both presented indications of a greater willingness of the legal professional classes to keep pushing and expanding this agenda in relation to rights. These lawyers then ultimately assume the defence of these LGBTI individuals and then construct them as rights bearers both through written petitions presented to the judiciary and into wider publics, through associated strategic litigation strategies as discussed in chapters Five, Six and Seven.

The processes of overcoming barriers and mobilising resources, in relation to motivating rights and identity awareness and securing legal resources, are circular and interconnected. The outcomes of these processes are mutually reinforcing in that they converge to reinforce and influence each other. What links these developments is the relationship among these actors in their ability to overcome stigma and deviancy in relation to sexual diversity, and how the individual influences the collective, and vice versa. The social processes, which occur initially at the ‘micro’ level, are also now manifest in broader spheres. This resonates with Gloppen’s definition of social transformation as
Chapter 8: Conclusion

...the altering of structured inequalities and power relations in society in ways that reduce the weight of morally irrelevant circumstances, such as socio-economic class/status, gender, race, religion or sexual orientation (2006: 37-38).

Though these battles are in the incipient stages, they are beginning to challenge inequalities at the institutional and societal levels which have been so apparent in ensuring the continued invisibility of lesbian, gay, bisexual, transgender and intersex identities and experience.

8.4 Brokers, Public Interest Litigation and the Rights Agenda

The outcomes of the processes of overcoming barriers and mobilising resources therefore form the central analysis of this thesis, as resource limitations encourage members of LGBTI communities to pursue legal action in the public domain. In so doing they are essentially agreeing to prioritise the collective over the individual. Gentle encouragement by activists and lawyers, added to raised awareness has meant that during the last half of the 2000s, members of previously very invisible communities are moving to the fore to contest their rights through judicial channels. As lawyers become more engaged with the broader struggle and modify their conceptions of sexual diversity, they are willing to push the boundaries further in challenging both legal cultural realms and raising the bar in generating public debate. As a consequence of these multiple interactions therefore, more diverse characterisations of LGBTI populations are being presented to the Chilean public, civil society and judiciary.

Within these interactions therefore, I am particularly concerned with the role that lawyers play in this central ‘brokerage’ role, drawing on social movement theorists such as McAdam, Tarrow and Tilly (2001). This final chapter therefore explores the intersections of the interpretive and the critical and how meaning making at the micro level impacts at the macro level through the instigation of these human rights lawyers concerned with advancing social justice, human rights and democratic deepening and who aim to achieve these goals largely through public interest litigation. The limitations of availability of legal representation, for example, have meant that associative capacity has expanded as a consequence of this dearth of financial and human resources. In Karen’s case, for example, numerous legal teams have convened to contest this one case over its long
trajectory in Chilean lower courts, the Chilean Supreme Court, and now, in the Inter-
American system. The very concept of public interest litigation itself implies pursuing
litigation to advance the public agenda, generate debate, influence legal culture
(Gonzalez, 2002, 2003) and in the Chilean case, broaden notions of human rights and
democracy.

As the relationships between claimants, lawyers and organisations become more
entrenched, links begin to strengthen between movements and legal advocates. Examples
include those formed between MOVILH and the UDP or I-público, or the new
relationship established between GAHT and the Universidad de Chile. The availability of
legal resources becomes more consolidated therefore. Other relationships have been
established between lawyers acting privately, but that have become increasingly aligned
with the cause. Cristián Orellana, the legal representative that has taken on the cases
brought through OTD and as such has become the unofficial ‘official’ lawyer
representing the organisation, and has even appeared in a documentary on trans male
realities in Chile.

Similarly, Nicolás Espejo, a founding member of I-público, frequently referred to the
organisation’s commitment to advancing the LGBTI agenda in numerous conversations,
as did the UDP’s public interest clinic in 2010. Furthermore, as those relationships have
developed, what public interest lawyers constitute as a ‘sympathetic’ or viable victim has
expanded somewhat from the defence of Karen’s rights to be a mother, to more
controversial cases that support trans women in their petitions for gender recognition.
This presents a shift from Krishna Sotelo’s acknowledgements that even human rights
lawyers were unwilling to undertake such cases in the early 2000s. The UDP’s agenda in
promoting LGBTI rights issues through their public interest litigation clinic has shifted
from representing Karen to the uptake of numerous petitions for transgender recognition
and Claudia’s discrimination case.

The political nature of such action seeks to impact not only on internal judicial
institutional culture and practice, but also external ambits, such as generating public
debate and disseminating the discussion within wider civil society circles. Sarat and Scheingold noted that in the United States ‘litigation mobilized movements, informed the public about particular injustices and reframed political struggles’ (2006: 1). These additional goals of the public interest litigation strategy have served to maximise the different levels at which interaction is occurring and where meaning making in relation to gender identity and sexual orientation is being challenged and expanded.

McCann (1994) recognises the importance or potential of using law ‘to transform or reconstitute relationships among social groups’. In other words, drawing on Swidler (1986), he contends that

...legal conventions provide some of the most important “strategies of action” through which citizens routinely negotiate social relationships (1994: 6).

Inherent in these incipient legal mobilisation processes are the social relations which underpin and facilitate a more consolidate level of action, as multiple new associations form under the guise of these ‘brokers’. The thesis therefore premises law’s enabling potential, and how legal strategies are used to ‘disrupt the status quo and leverage social change’ (McCann, 2006: xix). This has been illustrated here through the contestation of lesbian motherhood, transgender identity, gay policemen and employment rights for LGBTI people. From the individual process of ‘accomplishing identity’ to the collective endeavour of presenting a legal case, lawyers as central players in legal action have sought to maximise the associated outcomes.

...law is also understood to be a resource that citizens utilize to structure relations with others, to advance goals in social life, to formulate rightful claims, and to negotiate disputes where interests, wants or principles collide...law provides both normative principles and strategic resources for the conduct of social struggle (McCann, 2006: xii).

Conceptualising Chilean human rights lawyers as ‘brokers’ certainly resonates with the work on cause lawyering or public interest litigation. This literature contemplates the lawyer’s role in legal activism from multiple perspectives. Some focus on the political objectives of these lawyers and the relationship with their professional roles, whilst others explore this activism in relation to social movements (Sarat and Scheingold, 1998,
Within this area, Sandra Levitsky's (2006) work is particularly relevant, albeit much more succinct. It deals with lawyers and LGBTI social movements in Chicago and focuses on the interorganisational relations between legal advocacy groups and GLBT organisations more specifically. The parallels are apparent in that she argues that lawyers indirectly set the agenda, help advance public understanding of LGBTI rights issues through media dissemination, and that legal discourse was empowering in this context. There is some overlap, therefore, in the outcomes of the legal mobilisation strategies employed in both cases. She does go someway to exploring the extent to which 'patterns of interaction are generally more complex and multi-dimensional than such scholars recognize (Silverstein, 1996)' (Sarat and Scheingold, 2006: 4). I would argue that in using Gloppen's framework, and doing so through ethnographic methods, I have been able to explore the multi-dimensional nature of the relations between lawyers, claimants and other third party actors. This has enabled me to focus on the outcomes of interaction as a two-way process. Whilst they are 'brokers' who direct a considerable amount of the action, they are also not the only ones who direct action and they also modify their practice as a consequence of engaging with, in this case, LGBTI populations.

8.4 Possibilities for Further Exploration

The findings here resonate with McCann's (1994) contention that the indirect outcomes of legal mobilisation are indeed significant. These might take the form of mobilisation following a negative ruling, or raising rights awareness around certain matters. In particular, McCann is concerned with how 'indirect' outcomes impact upon social movement building and consolidation and how legal mobilisation may impact upon raising legal consciousness and 'providing leverage to supplement other political tactics' (McCann, 1994: 10). Indeed, these encompass the more immediate outcomes of the actual interaction among actors collectively seeking to use legal action as a strategy for effecting social and legal change. However, his conceptualisation of how they impact upon social movement development certainly provides further scope for analysis in relation to my study. One important example which presents a significant point of departure for more considered study is the emergence and development of trans male
organising and how it relates to the emerging and rising litigation surrounding petitions for gender recognition. I touch on the importance of legal mobilisation for the consolidation of trans male activism in Chile since 2004 where favourable legal gains (direct outcomes) have converged with indirect outcomes, such as increased exposure, more established legal and medical networks. It both provides an interesting contrast with trans female organising and legal gains and is an interesting case within the broader LGBTI movement also.

8.4 Drawing to a Close

This thesis has drawn together literature on social justice (Gloppen, 2006), legal mobilisation (McCann, 1994, 2004, 2006), and through empirical study, has incorporated studies on public interest litigation (Sarat and Scheingold, 1998, 2001, 2006) and interactionism (Blumer, 1969; Becker, 1963; Goffman, 1963; Plummer, 1995, 1996). The processes of overcoming barriers and mobilising resources, in relation to motivating rights and identity awareness and securing legal resources, are circular and interconnected. The outcomes of these processes are mutually enforcing in that they converge to reinforce and influence each other. What links these developments is the relationship among these actors in their ability to overcome stigma and deviancy in relation to sexual diversity, and how the individual influences the collective, and vice versa. This work speaks to the problems associated with mobilising resources to engage in legal action. But in particular it is relevant where stigma, deviancy discourses and ‘discrediting attributes’ (Goffman, 1963) have impacted on social and political spheres serving to marginalise those who do not conform to the dominant or the hegemonic groups in society. In this instance, the discrediting attributes are very much located within what constitutes the ‘moral’ order. However, these findings and conclusions are also applicable to other disenfranchised populations seeking to articulate their voice (Gloppen, 2006) through legal channels.

The excerpt that follows illustrates how Don Juan Guzmán, the judge responsible for indicting Pinochet, started to litigate cases in defence of the Mapuche population in Chile. His words are especially poignant in informing us how such encounters emerge
and subsequent legal action ensues. It is especially so, as he was previously considered to be affiliated to the Chilean Right (Politzer, 2008). Stigmatisation processes are equally applicable when considering Chile’s largest indigenous populations, and the parallels described here are very relevant in this context.

I don’t know how, I just got involved. How did it start? It started when I was working as a Dean of the School of Law of the Universidad Central and that I was invited once to Temuco and went to a place called...and heard the people speak about the loneliness that they felt regarding the state, regarding the country and how they were criminalised permanently. They showed me the bullets in the old ladies’, old men, and children, they showed me how they continued to have rubber bullets in their back, arms, in their legs, and then I saw how hurt they were, I realised they were not only hurt because they were truly victimised, that they were very sad because that they expected that in this so-called democratic government, that they would be treated with more respect. They consider that the armed forces, especially the police forces, are fascists, and that they are militarised, and they do not deserve to have militarised groups that invade their communities all the time and have the children grow up with fear and hatred and divided from the rest of our society. I would say that was an invitation that I had and after that many times people, dirigentes [indigenous leaders], or families...came to ask me to help them as a lawyer, and what do I do? I tell them that if we manage to have one lawyer in the place that they are being bothered [we can take the case]. And we took the case. I could be [there] for the most important hearings, and the other lawyers should be for the rest of the time there. Yesterday, I got a girl, a lawyer, 30 yrs old, who lives in Valdivia, and she accepted to take a case in Angol, where there are zero lawyers...I told her, that she wasn’t going to be paid, secondly that the indigenous were going to find a place for her to stay on the days that the trial took place, six days, 8 days, 15 days perhaps, this was an important case, and that they were also going to pay her transportation, but that I would be alegando [litigating the case] (2 December 2008).

In this excerpt, he reveals his realisation at the extent of their stigmatisation and victimisation by directly engaging with them. As a former high-ranking judge based in Santiago, he would have been personally quite far removed from Mapuche realities in southern Chile. The personal and testimonial seem to have influenced his decision to undertake this legal representation. Lawyers who I spoke to regarding LGBTI rights cases gave similar narratives, though perhaps not quite in such rich detail. As in Juan’s case, through interaction they were able to overcome the discourses that had positioned sexual orientation or gender identity as ‘an attribute that is deeply discrediting’ (Goffman, 1963: 13), and ultimately align themselves as public representatives of such causes. In Juan’s case, the shift in meanings for him, as a lawyer, become evident as he
adopted the people's own language to describe their plight. The resource and geographical limitations he faces have forced him to form a network of lawyers across the country, covering north and south. This has enabled him to contest more cases, as has his media presence. As the judge who impeached Pinochet, this has been significant in securing media coverage of those cases.

I have married literature on social justice (Gloppen, 2006; McCann, 1994, 2004), with perspectives from the interactionist tradition, which have been particularly relevant for studying stigma, deviancy and identity (Becker, 1963; Blumer, 1969; Goffman, 1963; Plummer, 1995, 1996). Overall, it is the very tension between increasing resources and overcoming barriers, and the inter-related nature of these processes, that forms the basis of the analysis in this thesis. I have drawn principally on Gloppen's (2006) reference to mobilising legal resources, rights awareness and associative capacity and overcoming the motivational and practical barriers. The ability to overcome and challenge the dominant discourses that are ascribed to gender and sexuality in the Chilean context, and which construct alternative expressions of non-heterosexual or non-gender-conforming identities or practices as 'deviant', have proven highly influential at both personal and collective levels. My research ultimately speaks to areas of legal activism, or legal mobilisation where initiatives are in their early stages, and/or deal with issues that are far from the hegemonic and the dominant in society.
Afterword

In September 2010, Karen Atala’s case was presented by the IACHR to the Court for consideration. The Commission recommended that the case be heard in the Court, as its members considered that Karen and her daughter’s human rights had been violated. Successive Chilean governments had failed to reach an agreement with Karen’s legal team and satisfy their demands, and so the Commission proceeded to the Court for redress. If the Court decides to hear the case, it will be the first case to be heard in the Court where human rights abuses on the basis of sexual orientation are dealt with. In its previous report to the Chilean government issued in December 2009, the IACHR found that her and daughter’s rights to a private life, to a family life and to due process had been violated by the Chilean state, in the form of the Supreme Court ruling which had denied her custody of her three children. In order to prevent the same occurring again, the Commission concluded that the Chilean state needs to

Pass legislation and public policy, create programmes and guidelines to prohibit and eradicate discrimination on the basis of sexual orientation in all spheres of the power structures, including those that administer justice. These measures must be allocated the financial and human resources necessary to guarantee their implementation, and also to implement training programmes for those civil servants involved in upholding these rights.109

However, despite being given the chance to respond to these recommendations and to provide the necessary compensation, the Chilean government failed to reach an agreement with Karen’s legal team. This points to both a lack of political will, but also to the institutional impediments of being able to respond to Karen’s demands. These include ensuring that no individual is ever treated in the same manner as she was (measures to ensure non-repetition), which means that legislative change is required to secure rights protections on the basis of sexual orientation. As indicated above, it also implies creating an institutional framework which can ensure that these rights are actually upheld. Though

the majority of the negotiations between the Chilean state’s legal team and Karen’s were conducted under Concertación rule, in 2010 the first Right-wing coalition took power since the fall of the Pinochet government.

In March 2010, Sebastián Piñera assumed the Chilean Presidency. As a consequence, he inherited Karen’s case from the former government. It was therefore his responsibility to respond to the IACHR report and recommendations emitted in December 2009. The timing of this report was very significant. As I mention briefly in the main body of the thesis, in the run up for the 2009 elections, the issue of LGBTI rights made it into the presidential candidates’ debates. Initially ignited by outsider, Marco-Enriquez-Ominami, these debates were then taken up by Piñera himself. Though he fell short of advocating for civil unions, he did publicly concede that same-sex couples should have rights, such as inheritance rights, health insurance rights, and so on. This was then supported even more symbolically when he included a gay couple in his media campaign for President. In Chapter Two I detail the extensive opposition of the conservative right to advancing the LGBTI rights agenda on moral grounds. Though Sebastián Piñera himself is from the more liberal party in the Right-wing coalition, Renovación Nacional, this move was still somewhat unexpected among the general population and LGBTI activist circles.

Activists were generally fairly sceptical regarding both the pre-electoral political discourse and the merely symbolic nature of gestures such as appearing alongside a gay couple during the campaign. Krischna, activist with Sindicato Amanda Jofre, was quick to show her scepticism regarding this sudden interest with supporting the LGBTI agenda,

I don’t really know what the point is...that a gay couple has appeared in Piñera’s campaign, because it’s just a media campaign...There’s no document, there has been no work with the different organisations, so there haven’t been any proposals created either. I don’t know if it will lead to something more concrete...like legislation, or a closer relationship with the organisation (13 May 2010).

Yet given that the government was facing possible sanctions by the IACtHR if it failed to respond to the Commission’s recommendations, there was some expectation that the Executive might act. Indeed, in the early months of Piñera’s rule, both members of the
executive and the legislature became more amenable to meeting with members of the LGBTI activist community, these included the Women’s Minister, the Minister for Culture and the Home Secretary. An attempt was made to convene a round table to discuss the December 2009 recommendations. However, the Supreme Court refused to participate and Karen’s lawyers reported that they were never actually invited to attend (Jorge, informal conversation, April 2010).

The Commission’s report did instigate shifts in displays of outward political will towards engaging with these movements. Timing was important in this instance, as the LGBTI movement was able to use pre-election promises as leverage to increase the pressure to respond. But the government the actually proved itself unable and/or unwilling to respond, hence the Commission referred the case to the Court. The Chilean state therefore faces the possibility of the Court ruling against it.

Such a court ruling would impel the Chilean government to pass such legislation. As a consequence it would need to overcome the legislative impasse that has been manifest when dealing with moral issues. The informal workings internal to the legislature as described by María Antonieta Sáa in Chapter Two give little prospect for political discourse being translated into law. Tensions are apparent in the ruling coalition between the more conservative and liberal factions. Carlos Larrain’s words equating homosexuality with bestiality and paedophilia in May 2010 show that conservative views are also very present in the more liberal party Renovación Nacional, of which he is President. Seemingly the ‘conservative elite’ to which ‘Chile is hostage’ that Maria Antonieta Sáa refers to is still ignorant and hostile regarding sexuality and gender where they do not conform to the ‘natural’ norm.

This indicates the difficulties in advancing LGBTI rights in Chile. Even when facing the threat of IACHR referral to the IACtHR, the government fails to respond. This contrasts greatly with the legislative scenario across Latin America as mentioned in Chapter Two where LGBTI rights are being enshrined at federal and national level in Ecuador, Brazil,

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Afterword

Uruguay, Mexico, and Argentina. Karen’s case has gained the recognition of the international community. The political, legal and symbolic repercussions are considerable even thus far.

Though this thesis deals with the social processes that are occurring in a parallel fashion to the legal cases being presented in the late 2000s, the innate political nature of the research locate it where law, society and politics intersect. The case is also important as the legal dimension of this work is located in the very institution which has been found guilty of violating Karen’s and her daughter’s rights. The media attention surrounding Karen’s case and the attention it received sparked initial debates around lesbian rights in Chile back in 2004. The complexity of Karen’s case which touches on motherhood and the children’s rights equally presented a very emotive case for the Chilean public to deal with. Karen’s resolve to pursue the case came at a tremendous personal cost. Her decision to pursue justice and to advocate battles on behalf of a collective are indicative of the activist role that she has since adopted. Her case has also been dependent on pro bono resources and the collective has not just extended to her own personal ideals, but the pooling of collective resources has been a central feature of this case. It is THE emblematic case in LGBTI rights not just in Chile, but now in the Latin American human rights system, whatever the Court rules. In a sense it is fitting that Karen’s journey is going full circle. This piece has very much mirrored my own journey in relation to studying LGBTI rights in this context, leading me to explore her own learnings regarding identity and rights, and that of her lawyers. And what started out as a very personal endeavour, influenced by my own experience of human rights, student life and notions of injustice, also came full circle. Human rights is where this project started, and where it finishes.
References


References


