In scholarship on human rights policies during democratic transitions, the focus has been on the executive for too long. It is time to shift attention to another important actor: the courts. Although many scholars have written on the courts in recent years, the links between constitutional reform and justice for past human rights violations remain largely unexplored. The main argument presented in this chapter is that constitutional reforms have made Latin American judges more prone to prosecute the military for past human right violations because judges now enjoy more independence from powerful executives and the hierarchy of the judicial system has loosened, making lower court judges less dependent on their superiors. As a result, judges, especially those sympathetic to a human rights agenda, can push prosecutions more forcefully than they could before.

The argument made here is primarily structural. Nonetheless, it should be acknowledged at the outset that a plethora of individual, structural, and contextual factors at the national, regional, and international levels may influence the behavior of judges. Starting from the individual perspective, judges are human beings with diverse personal characteristics: each judge has a certain education, belongs to a certain social class, and holds certain religious, moral, and ethical values, all of which are likely to bear on how he or she forms opinions. Some judges are described as conservative and others as liberal. Some judges are considered activists, while others practice judicial restraint. These characteristics imply that knowledge of a judge’s personal ideology and convictions helps us predict how that judge will rule in a particular case.¹

Judges may also be perceived as rational actors who act to maximize their own interests and preferences, just as politicians do (Epstein and Knight 1998).² According to this perspective, judges may be concerned with preserving their power, position, and privilege, in which case a desire
to please their superiors—the executive or other judges—may influence their rulings. Indeed, some observers have seen judges’ propensity to satisfy the government rather than require accountability as detrimental to the proper functioning of the judiciary. In some contexts, the judiciary may display loyalty to the former government, which raises the important question of independence from whom. Yet another interesting twist occurs when judges in certain political contexts, rather than respond to the sitting government, try to curry favor with the incoming government to maximize their chances of retaining their jobs (Helmke 2002, 2005).

Judges are not the only actors on the scene. In any court case, the judge interacts with prosecutors, police, witnesses, other judges—including foreign judges. Like politicians, judges react to various forms of pressure external to the judiciary. This can include public pressure, often expressed through the media. It can also include incentives in the form of bribes or other corrupt inducements.

Although judges function as individuals, they do so in an institutional context. They carry out their work within courts that operate according to procedural rules that differ from country to country (civil law, common law) and are constrained by constitutional mandate, law, and resources. Moreover, every court is situated in a particular political-legal context and shaped by a specific legal culture. All of these factors may delimit or expand the scope for court action and ultimately shape judges’ incentives. These are the “opportunity structures” that judges operate within (see Chapter 1).

In the international arena, national courts are at the lowest level in a three-tier hierarchy of judicial bodies. There are also regional courts, such as the Inter-American Court of Human Rights, and, as of 2002, the International Criminal Court; both of these higher-level courts develop norms and may hand down judgments that judges in national courts must respond to. An interesting question with respect to Latin America is to what extent judges have been receptive to changing regional and international human rights norms, and how this, in turn, may have affected their judgments in particular human rights cases.

To sum up, judicial behavior, like any other human behavior, is shaped and constrained by an infinitely large set of factors. Each of the explanations for judicial behavior briefly sketched above, though incomplete in itself, may lend valuable insights that help explain why judges act the way they do in any given setting. Examining all the potentially relevant factors that might influence judicial behavior is a monstrous, even impossible, task. It is useful, though, to keep in mind that the different sets of factors briefly noted above together constitute a multilayered framework for judicial action.

This book examines a small but significant part of this large web of potential explanatory factors. The analysis will focus first on how judicial