Constitutional Design And the Perceived Legitimacy Of Court Systems:
Evidence From Cross-National Time Series Data

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September 10, 2022

Abstract

Many have argued that public perception of judicial legitimacy entrenches long-term public loyalty towards courts. Studies have shown that this public loyalty can help courts secure governmental compliance of their rulings, enhance rule of law and protect democratic rights. Despite its importance, studies of the concept of legitimacy have largely focused on the Supreme Court of the United States, with its particular legal history and context. We lack a cross-national measure of judicial legitimacy and little is known about the sources of legitimacy of court systems in different countries. In this paper, I combine cross-national surveys, expert data and government statistics, to build a new cross-national measure of judicial legitimacy for over 120 countries from 1990 till 2020. Drawing on this new measure and the comparative constitutions dataset, I test whether the constitutional structure of the legal system can affect future legitimacy of courts. I find that no evidence that courts in countries that have constitutional provisions such as guarantees of judicial independence and fair trial are more likely to be perceived as legitimate by the public. Instead, I find that temporal and country-level variation in judicial legitimacy can be explained by the levels of democracy, gross domestic product and de-facto independence of courts.

Contents

1 Introduction

In 2020, at the peak of the COVID-19 epidemic, several governments implemented drastic measures for the containment of the virus. For example, El Salvador initiated compulsory detention of persons who could potentially increase the spread of the virus. Similarly, Spain passed emergency rules enforcing a national-level lockdown, and imposed heavy fines on those who violated this lockdown. Both these measures faced judicial scrutiny. The High Court of El Salvador held that the government's measures were unconstitutional. In a similar vein, the Constitutional Court of Spain held that the government's emergency measures violated constitutional norms of individual liberty.

The governments of Spain and El Salvador differed greatly in their response to these judicial rulings. The Spanish government accepted the ruling— the lockdown came to an end and the government even returned all fines that it had collected pursuant to the lockdown norms.[1] In contrast, the government of El Salvador refused to follow the court's ruling and continued to detain persons. Publicly dismissing the ruling, the president of El Salvador argued that "five people [on the court] will not decide the death of hundreds of thousands of Salvadorans".[2] Faced with similar circumstances, why did one democratically elected government follow and the other ignore the ruling of an independent constitutional court? More generally, why do governments comply with the decisions of their high courts?

One possible answer involves the institutional legitimacy of courts. Many have argued that public perception of judicial legitimacy entrenches long-term loyalty towards courts (Gibson, Lodge and Woodson, 2014). Gibson (2007), for example, in decades-long research has argued

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[1] Al-Arshani, Sarah. 24th October, 2021. "Spain is reimbursing residents who were fined for violating COVID-19 lockdown rules". Insider. https://www.insider.com/spain-reimburse-those-fined-for-violating-covid-19-lockdown-rules-2021-10.

[2] Human Rights Watch. 17th April, 2020. "El Salvador: President Defies Supreme Court". https://www.hrw.org/news/2020/04/17/el-salvador-president-defies-supreme-court.

that while specific support by the public for the court may wane in light of particular political decisions of the court, long-term diffuse support remains relatively stable. Such legitimacy acts as a "reservoir of goodwill" which can be used by courts to secure compliance by both governments and the citizenry (Gibson, Caldeira and Spence, 2003a). Governments, thus, have to comply with the decisions of courts with a high degree of institutional legitimacy and can ignore the decisions of illegitimate courts.

Despite the prevalence of the concept, our knowledge of judicial legitimacy is still limited. First, there is a conceptualization problem—there is no agreement on how to validly measure legitimacy of courts. Scholars have used measures such as confidence (Benesh and Howell, 2001; Benesh, 2006), support (Caldeira and Gibson, 1992), satisfaction (Canache, Mondak and Seligson, 2001) and acquiescence (McEwen and Maiman, 1986). Second, there is a generalization problem—since much of the research on judicial legitimacy involves analyses of courts in the United States (US), we do not know the conditions under which these theories apply to other countries.

In this paper, I offer a solution to both these problems. I develop a new conceptualization of judicial legitimacy and construct the first cross-national time-series measure of judicial legitimacy for over 120 countries— the judicial legitimacy index (JLI) over 30 years (1990-2020). To show the validity and utility of the JLI, I apply the index to study a contemporary puzzle in comparative judicial governance— whether constitutional design can predict the legitimacy of court systems.

As Hamilton indicated in the Federalist papers, courts have no influence over either "the sword or the purse".[3] Due to the unique position they hold in government, they must rely on the self-binding nature of their decisions in order to make authoritative judgments. Legitimacy is the only currency that courts have in influencing policies or securing compliance.

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[3]Federalist No 78.

4

Yet, conceptualizing and measuring legitimacy remains woefully understudied in comparative judicial politics. In this paper, I lay down a framework that allows us to generalise theories of judicial legitimacy, primarily developed for the SCOTUS, to other countries in the world.

2 The Conceptualization Problem of Judicial Legitimacy

Political legitimacy has been one of the most contested concepts in social science (Tyler, 2006). Starting from Weber, scholars have defined the concept as the "right to rule" (Gilley, 2009), "rightfully holding and exercising political power" (Gilley, 2006) and "rulership based on good title" (Stillman, 1974). Scholars use legitimacy descriptively, to define the status of a particular entity, as well as normatively, to judge the rightfulness of such status (Risse and Stollenwerk, 2018). The definition of legitimacy also changes based on whether we are looking at the legitimacy of the state as a whole (Rothstein, 2009), a particular institution of the state such as the police (Tyler and Wakslak, 2004), or a particular action of the state (Chen, 2016).

A similar definitional dispute pervades the study of institutional legitimacy of courts.For example, one of the easiest and most direct ways of conceptualising legitimacy is to equate it with the general levels of public support that a court enjoys at any given time. Yet, questions about support can be susceptible to short-term reactions to the court's current performance or current events surrounding the court. As Gibson, Caldeira and Spence (2003a) note, legitimacy is more than agreement or disagreement with a case or a particular version of the court. Legitimacy is long-term support for the court as an institution. Thus, confidence measures are bad, "... because the Court has a solid reservoir of goodwill, unpopular decisions

generate ire that dissipates quickly and has no lasting consequence for the legitimacy of the institution" (Gibson, Caldeira and Spence, 2003b, p. 538). Accordingly, support is "more heavily influenced by performance satisfaction than institutional support" and is "not a very valid measure of the concept" (Gibson and Nelson, 2014, p. 8).

A second popular measure in early studies of judicial legitimacy depends on the legitimizing function of the court. According to Dahl (1957), "The main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition" (p. 294). In this conceptualization, legitimacy is defined as the capacity of the court to sanctify the policy outputs of their decisions and make them in some respect more acceptable to the public. The hypothesis here is that "the greater the perceived legitimacy of the Court, the greater the probability that its policies will be accepted" (Mondak, 1990, p.194).

The legitimizing function measure has problems with endogeneity. While the court may affect public opinion, it is also influenced and constrained by public opinion itself (Epstein and Martin, 2010; Mishler and Sheehan, 1993). Gibson (1990) concludes, "in the final analysis it is simply not clear whether the Court responds to public opinion, or shapes public opinion, or whether it responds to the same sort of factors that themselves shape public opinion" (p.290). Another, more conceptual, problem with measuring this legitimising capacity is defining precisely what it means for the public to "accept" the decision of the court. In most of the studies above, the operationalisation is whether the public changed its mind on a particular issue. So the idea is that if the court supports free healthcare, then public support for free healthcare will increase *because* of the court's decision. Yet, as I explain later, acceptance can happen without change of policy preferences. People can accept that a decision is legally binding and yet have negative opinions about the policy outcome that it prescribes.

Another conceptualisation of a court's legitimacy depends on its ability to secure voluntary compliance. According to Petrick (1968), "A review of the sociological literature on the

concept of legitimacy reveals general agreement with the notion that the final test of complete legitimacy must be compliance - preferably voluntary compliance" (p.7). The question that its measure asks is — do officials and the public comply with the courts rulings even when they do not agree with them? The problem is that most court decisions require only a small part of the populace to do any positive action to comply with their decisions. In most cases, only one of the two parties involved in the dispute has to change their behaviour as a result of the ruling. It is thus pretty costless and often socially desirable, to "agree" or "accept" a decision of the Supreme Court, when it does not apply to you. Moreover, compliance may be due to different factors, including fear or vulnerability (Jaros and Roper, 1980). It is unclear how we can build a measure which separates willing and voluntary acquiescence because of a sense of duty towards a legitimate institution and compliance due to fear of coercion.

The most widely used measure for legitimacy is diffuse support. While Caldeira and Gibson (1992) popularized its use, the first reference to diffuse support is in Easton's classic work *A Systems Analysis of Political Life* (Easton, 1965). Diffuse support, "refers to a 'reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging their wants" (p. 637). This long-term support is different from specific support, which is short-term support for the court based on public satisfaction about court performance.

Decades of research have now confirmed the stability of diffuse support for SCOTUS (Gibson and Nelson, 2016). For example, Gibson and Caldeira (2009) confirm that short-term dissatisfaction with particular policy decisions of the court do not affect the overall levels of diffuse support since the court has a reservoir of goodwill. Due to this reservoir, even particularly political or ideologically motivated decisions do not diminish diffuse support (Gibson and Caldeira, 2003). Yet, a string of favourable decisions can increase the overall diffuse support for any court (Gibson, Caldeira and Baird, 1998). Theoretically, this long-term reservoir is not bottomless and may deplete due to a string of unpopular decisions (Gibson and Nelson,

2014).

Recent work has, however, challenged the perceived stability of diffuse support for SCOTUS. Bartels and Johnston (2013), for example, argue that subjective ideological disagreement with the Court's decision decreases diffuse support for the Court.Similarly, Christenson and Glick (2019), find that knowledge and ideological incongruence with the court affects average diffuse support towards the court. Gibson and Nelson (2015) contest these results and argue that this relationship between ideology and support disappears once we account for democratic values. In a later article, Gibson and Nelson (2017) admit that ideological incongruence may affect diffuse support, but argue that this is only applicable to a small percentage of the populace- specifically those who believe that the Court does not follow the law (Nelson and Gibson, 2017, 2019).

Scholars are inconsistent in the ways that they operationalise diffuse support. In their original conception Caldeira and Gibson (1992) describe it as how willing are people "to accept, make, or countenance major changes in fundamental attributes of how the high bench functions or fits into the US constitutional system" (p.638). They test this using five survey questions on a likert scale, including questions asking about the abolition of the Supreme Court, reducing its powers and changing its jurisdiction. Later scholars have expanded this into a seven question list which includes, whether it gets too mixed up in politics and whether it should be less independent (Gibson and Nelson, 2014). It is unclear, however, why these five or seven criteria represent diffuse support. For one, this operationalisation seems to represent a dichotomous legitimacy concept, in which the person is either willing or not willing to tolerate the existence of the court. This is quite far from the "reservoir" concept of diffuse support. Second, a person may be willing to make foundational changes to the court in the future, and yet consider the court legitimate in the present.

Others have tried to improve on this scale by introducing other fundamental changes that people may wish to bring about in SCOTUS. Badas (2019) builds an "applied" legitimacy in-

dex, by looking at whether people would support term limits, judicial elections, and increased frequency of judicial removal in the SCOTUS. Badas finds that his index is more sensitive to ideological congruence with the court than Gibson and Caldiera's. Yet, even Badas does not answer the fundamental question- why does this index represent diffuse support and in turn, legitimacy?

This problem of measurement is indicative of a more fundamental conceptual problem with diffuse support. There is simply no theoretical basis for why diffuse support is the same as legitimacy. Other than referring to Easton, scholars do not seem to offer any theoretical justification as to why legitimacy should refer to diffuse support. For example, Gibson, Caldeira and Spence (2003a) argue that "Easton and many others use "diffuse support" as a synonym for legitimacy." Similarly, Gibson (2015) argues for the concept since, "Easton [substitutes] the concept "diffuse support" for judgments of legitimacy." The reference to Easton for this proposition is incorrect. Easton, as I show later, is very clear that while institutional legitimacy may lead to diffuse support, the two concepts are not synonymous. In fact, in his early work Gibson (1989) himself admits, "No direct measure of legitimacy is available ...Instead, I employ an index of diffuse support —*a closely related concept*" (emphasis supplied). Thus, relationship between diffuse support and legitimacy lacks theoretical foundations.

3   The Generalization Problem of Judicial Legitimacy

In the previous section, I highlighted the divergence in approaches to measure legitimacy and the problems with each of these approaches. A second, more practical problem is that scholars developed these measures for studying the US court system. Studies of legitimacy beyond the US remain scarce. The US is *sui generis.* In SCOTUS, it has the oldest constitutional court in the world, one that is relatively independent and has the power of judicial review.

These factors simply do not exist in many countries. Contextual differences in the structure and traditions of courts can not only change perceptions about judicial legitimacy but also the factors which influence judicial legitimacy. As Remington and Randazzo (2005) argue "not only do the baseline predictions vary substantially by geography but the substantive impact of the independent variables also varies by region." Moreover, the US benefits from the abundance of data- due to extensive independent polling, high resources and transparent reporting by government bodies. Data availability however remains a significant impediment to cross-country studies of legitimacy.

Studies outside the US underscore how differences in context can affect conclusions about legitimacy. For example, work done by Kaire (2019) in Bolivia shows that diffuse support might moderate the levels of economic inclusiveness in society. Kaire shows that levels of confidence may depend on perceptions of procedural fairness for highly-inclusive societies and on ideological congruence in disparate ones. Similarly, Hansen (2017) in his study of trust in the judiciary in the UK finds that crime rates directly affect the trust in court. Other such single country studies in the Netherlands (Grootelaar and van den Bos, 2018), Russia (Hendley, 2016), China (Wu, 2014), Zambia (Kerr and Wahman, 2021), Turkey (Akdeniz and Kalem, 2020) and the Czech Republic (Urban, 2014) also highlight how differences in context can affect public support for the judiciary.

Most studies of legitimacy of non-US courts use public confidence measures. Two exceptions are Gibson and Caldeira (2003) and Baird (2001). Gibson and Caldeira use the diffuse support to measure legitimacy and compliance in South Africa. Baird uses diffuse support to compare legitimacy in the judiciary between East and West Germany and argues that a longer exposure to an institution can mitigate volatile changes in specific support for it. Though they do not use it as a measure of legitimacy, Kapiszewski and Taylor (2013) test whether there was compliance of court rulings in Argentina and South Africa.

Other than these rare examples of studies in countries outside the US, most of the effort is

10

focused on international courts and whether people consider courts such as ECHR (Voeten, 2013), ECJ (Gibson and Caldeira, 1998; Helfer and Alter, 2013) and ICC (Niang, 2017) as legitimate. Needless to say international courts are entirely different from the national judicial sphere. One could argue that people are going to have less information and be less concerned about these courts than their own high courts.

Due to the problem of data-availability, cross-country comparisons of legitimacy continue to remain rare. One notable exception is Gibson, Caldeira and Baird (1998), which examines diffuse support for eighteen high courts in Europe. They find that older courts are more likely to have a reservoir of diffuse support and can survive changes in specific support. There has been recent uptick cross-country comparisons of countries in Europe, mostly due to the Euro Barometer Project and the European Social Survey which has led to availability of time-series data on public confidence in courts (Hough et al., 2013; Bühlmann and Kunz, 2011; Fix and Randazzo, 2008). Recent work by Magalhães and Garoupa (2020), for example, find that de-facto independence of a judiciary has a positive effect on the amount of confidence European citizens have in their judiciary. Similarly, Navarrete and Castillo-Ortiz (2020) show that perceptions of judicial independence and perceptions of judicial fairness both impact the confidence that people have in their constitutional courts.

Studies have largely ignored regions outside Europe and the US. One study in Latin America, shows how important the quality or effectiveness of justice delivery is to confidence in the judiciary (Salzman and Ramsey, 2013). Another in Africa uses the afrobarometer to study whether truth commissions promote trust in the judiciary (Ishiyama and Laoye, 2016). Cross-continental comparisons are even rarer. Remington and Randazzo (2005) is the only study I found which uses the World Values Survey to compare emerging democracies in Latin America and post communist Europe with established democracies.

Two conclusions follow from this discussion. First, context matters and the structural factors of a judiciary, that affect whether a particular court can be considered legitimate, differ by

country. Thus, we cannot generalize conclusions about legitimacy of courts from the US. Second, due to problems with data availability, scholars have not examined the legitimacy of courts in most countries in the world. Courts in developing countries as well as autocratic countries have particularly received very little attention. Consequently, there is a need to build valid cross-country measures which can start this process of studying judicial legitimacy in a comparative context.

4 Re-conceptualising Institutional Legitimacy

In the previous section, I highlighted the divergence in approaches to measure legitimacy and the problems with each of these approaches. Part of the problems of evaluating measures of legitimacy are that the underlying theoretical assumptions for these measures are never specified. Scholars in judicial politics assume the face validity of their measures, without explaining the link between these and the concept of legitimacy. As far as I know, none of the studies measuring judicial legitimacy attempt explain the concept using first principles. Scholars are thus forced to guess which conception of legitimacy each measure is meant to represent.

Given the lack of theoretical foundations for measures used in current work regarding legitimacy, it may be appropriate to first clearly define what I mean by legitimacy before proceeding to build the framework for a cross-country measure. My conceptualisation is based on Raz (1985) service conception of authority. This is not the only conception of institutional legitimacy. There continues to be a rich debate about the meaning of legitimacy in political theory (Buchanan, 2018; Adams, N.d.). I choose the service conception since it is the closest to one offered by Easton (1965), who most political scientists cite when building their measures. The service conception may be best illustrated through a thought experiment.

Assume there is a person A living in country N. N has two institutions which habitually exercise control over its territory. One is the roaming bandit B and the other is a democratically elected council C. Assume that both B and C give the following order to A- "You are ordered to give us 10 bundles of hay, failing which you shall be punished by imprisonment in solitary confinement for one year." How can we say whether B or C or neither is a legitimate institution?

The first thing to notice is that the morality or ethics of the order have nothing to do with the legitimacy of the institution that gave the order. Certainly, many would argue that the punishment is disproportionate and wrong, but this goes into the assessment of the normative legitimacy of the institution—which institution A *should* be consider as legitimate. Descriptive legitimacy—whether A *does* consider the institution as legitimate is independent from moral evaluations of institution's actions. The objective moral standing of the institution is, for the same reasons, irrelevant. The bandit may be evil and notorious for his misdeeds, but may still be legitimate *in the eyes* of A. The fact that one is called "council" and the other "bandit" is a question of nomenclature and is similarly irrelevant.

Observed compliance is also no indication of institutional legitimacy. If we observe A giving the ten bundles to B, we do not know whether she did it because of fear or because a sense of obligation towards B. Similarly, if we observe A giving the ten bundles to C, it may be because of fear of disapproval or social desirability rather than obligation towards the council. Moreover, if we *do not* observe compliance with either order, it does not necessarily mean that A does not consider both institutions as legitimate. Non-compliance may be due to several reasons. Perhaps A simply did not have 10 bundles of hay to give in the first place. It is no contradiction to say that one may have obligations towards legitimate institutions that one may fail to fulfil. Evidence of repeated past performance or compliance is also non-indicative for the same reasons—we cannot say whether habitual performance was because of fear or because of sense of duty.

What should become obvious by now is that it is impossible to know whether B or C is legitimate for A as external observers. The only person who can indicate which institution is legitimate for her is A herself. Only she knows whether she is following a particular institution because of fear or efficiency or because she thinks that the institution is legitimate. Thus, the concept of legitimacy is *relational*, it depends on the subjective evaluation of the institution by the concerned individual.

How does A determine whether B or C is legitimate? As the legal philosopher, Raz (1985) explains, what is important are the *reasons* for her actions. Consider three possible reasons that A may posit for following or not following C's order.

- R1- I should give C bundles of hay, or else I might be imprisoned.

- R2- I should not give C bundles of hay, since I need them for my cattle.

- R3 -I should give C bundles of hay, because C ordered so.

Notice the difference between the R1 and R2 on the one hand, and R3 on the other. R1 and R2 are positive or negative reasons to do, or not do, a particular form of action. Raz calls these "first-order reasons". People weigh these reasons against each other in order to make decisions. R3, on the other hand, is a reason based on the author of the order rather than the merits of the order. It is a "second-order" reason which is both exclusionary and preemptive to first-order reasons. It is exclusionary, since it excludes A's own judgment of the merits of the decision in favour of C's order. It is also preemptive since the judgment about the legitimacy of C, and thus the reason to have an obligation towards C, happens *prior* to the order being given. This brings us to our definition— C is legitimate for A, if and only if, A believes that C's directives form second-order reasons for actions by A. To simplify, we can say, that "legitimacy is the *belief* that the orders of an institution should be followed not because of its merits but because they originate from that institution."

Why a person chooses a particular institution as legitimate and why not others, is outside the scope of this discussion. This may be because of long held tradition, consent to the authority or even charismatic attraction to the leader. We should not confuse the sources of legitimacy and the concept of legitimacy. What is important is that the person believes, for whatever reason, rightly or wrongly, that the institution provides second-order reasons for action — that the person believes she has an obligation to follow the orders of the institution regardless of the substantive merits of the order.

This belief may not necessarily be inconsistent with contrary action. It is possible that a person may criticise the orders of the institution that she believes is legitimate. It is also possible that a person is unable to comply with the orders of a legitimate institution. Yet, even in their non-compliance they know they are disobeying orders from what they consider legitimate authority. Even when they disobey, they have an internalised belief about the binding and authoritative nature of the institution.

There may be scope restrictions in the amount of legitimacy that a person accords to an institution. For example, a person may consider an institution to be an authority, but only for things related to religion. In such a case, the person would believe they have an obligation to follow only the religious orders of this institution. There may also be indirect attribution of "thin" legitimacy through other institutions that one considers legitimate. For example, a person may consider the police legitimate who in turn consider courts to be legitimate. In this case, a person could be said to consider the courts legitimate, even when they lack knowledge about the court.

If the concept is relational, how do we then conceptualise the overall legitimacy of an institution like the court vis-a-vis a particular populace. Of course, there may be genuine differences between persons as to the legitimacy of a particular authority. A may consider the town council to be the legitimate authority and D may consider the bandit as legitimate. As an empirical matter and to simplify, we can say that an institution is legitimate in a

particular area, if a bulk of the population in that area considers it legitimate.

This conception of institutional legitimacy, broadly defined as individual beliefs about obligations to follow orders of the institution, is commonly used in the social sciences (Hurd, 1999; Tyler, 2006). Easton (1965), who is widely cited as the source of the diffuse support measure, conceptualises legitimacy in a similar fashion. According to him, legitimacy entails that, "regardless of what the members may feel about the wisdom of the actions of authorities...one simply ought to obey the authorities..." Considering something as legitimate thus, " implies a predisposition to accept the outputs regularly as authoritative or binding" (p.277).

What does this conception of legitimacy have to do with diffuse support? According to Easton, "...the inculcation of a sense of legitimacy is probably the single most effective device for regulating the flow of diffuse support in favor both of the authorities and of the regime" (p.278). Thus, for Easton, legitimacy is a *source* of diffuse support to a particular institution. Unlike what is regularly presumed by existing scholarship, the two concepts are not synonymous.

5 Building a Cross-National Measure Institutional Legitimacy

Now that we have a better theoretical grasp over the foundations of legitimacy, the next question is how do we measure it for the purpose of scientific inquiry. Unfortunately, as we had indicated above it is impossible for an external observer to know whether a person considers an institution as an authority. This is primarily because while we can measure a person's opinions or actions, we can never know their beliefs. For example, survey questionnaires which ask whether respondents would obey the orders of the court or even those which ask

whether they would obey a disagreeable decision of the court is legitimate are inconclusive. A person may simply lie in response to these questions due to fear or social desirability. This is why, Gibson (1989) in his early work concludes, "it is not obvious that legitimacy can be directly measured in survey research." An experiment comparing the efficacies of cues of a court against those of some other authority are similarly invalid. It is impossible to measure the internal response of a person to such cues. We may observe that a person disagrees with the views, follows them or changes their behaviour in some other way, but we will still not get at the question of whether they have internalised the binding nature of the institution.

What do we do when social concepts based on personal beliefs cannot be directly measured? Gilley (2009) suggests that in such cases researchers can use the substitutive approach which considers whether the concept can affect other measurable variables. Here, we can regard any unexplained joint change in these effect variables as a measure of a theoretical latent measure of the concept. The assumption here is that no other concept can better explain the joint change in the effect variables. Theoretically, this requires that we anticipate any possible effect that the concept might have and include it as an effect variable.

In practice, while building a cross-national measure for legitimacy, we may need to look at data availability rather than perfect construct validity. The objective, at least at this stage, is not to build a robust measurement model, but to simply lay down the list of possible indicators that we can consider and the practicability of measuring them in a cross-national setting. My immediate goal then is not to offer a comprehensive theory behind these but possible measurement strategies given the practical constraints of data availability.

A possible model for such a comparative latent measure comes from Linzer and Staton (2015), who build a cross-national measure of judicial independence. The advantage of the measure is that it aggregates from multiple-sources, which can obviate measurement errors in particular observations or indicators. The measure is also not perfect, but is considered the best available measure for scholars to gain leverage to multiple questions in comparative

Table 1: List of Indicators for the Judicial Legitimacy Index

Indicator	Trust in Judiciary	Compliance Rates	Formalisation
Type	Perception	Behaviour	Behaviour
Data Source	Cross-National Surveys	VDem	CINE
Source Type	General Survey	Expert Survey	National Statistics
Number of Countries	146	201	159
Start Year	1986	1789	1960
End Year	2020	2020	2007
Observations	1601	27192	16121

politics (Melton and Ginsburg, 2014).

I have similar objectives for the measure of judicial legitimacy. First, the measure should include indicators that measure both perception and behaviour. This would ensure that we can verify that people's stated beliefs about legitimacy are not motivated by fear or favour and are in line with their observed behaviour. Perceptual indicators can come from surveys of citizens and experts, while behavioural indicators can come from observational data about citizen-judiciary interaction. Second, these indicators should come from multiple sources including representative surveys, expert surveys, news event data and official statistics to ensure that invalidity in one indicator would not invalidate the measure.

In the following section, following previous literature, I list three potential indicators that are necessary consequences of judicial legitimacy. These are certainly not the only factors that are relevant. Miller, for example, lays down an illustrative list of twelve things that a court can do that can contribute to decreasing public confidence in the judiciary (Miller, 24). I select these three based on prospective effect size as well as cross-national data availability (Table 1).[4] Here, I am looking at the legitimacy of court system in a country as a whole, rather than the legitimacy of any particular court such as SCOTUS.

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[4]I continue to collect data for other possible cross-national indicators of legitimacy. Three other potential indicators of legitimacy of courts systems are original litigation rates, rates of protests against the judiciary and discussion of the judicial decisions in public culture.

5.1 Trust in judiciary

The most important perceptual indicator is simply asking people whether they trust the court. Unlike questions about support or satisfaction, which measure immediate approval of the actions of courts, questions about trust asks people about their relative confidence in the direction of the court's future decision-making. This determination should be partly based on perceptions of institutional legitimacy. As Bühlmann and Kunz (2011) state, "Institutional legitimacy is rooted in the public's belief that the institution is generally trustworthy."Some scholars have even suggested that high trust indicates institutional loyalty and would not be far away from the diffuse support measure (Armaly, 2017). Grosskopf and Mondak (1998), for example, argue that the measure performs well in capturing public sentiment. Comparing the measure to others, they say "public confidence occupies turf in between pure measure of diffuse and specific support... Longitudinal studies reveal that the confidence measure enjoys reasonable temporal stability."

The major advantage of the trust measure is data availability (Bassok, 2010). Even Gibson, Caldeira and Spence (2003a) admit that "political scientists would be foolish to ignore completely the vast stores of data collected" on the measure (p. 345). Due to this, it is the only measure that scholars apply to other courts in the US, such as State Courts (Hamm et al., 2013), District courts (Benesh, Steigerwalt and Scherer, 2009) local courts (Benesh and Howell, 2001), trial courts (Rottman, 2015). Thus, despite concerns about susceptibility to short term shocks due to bad decisions, it remains the only option to gauge cross-national public perceptions on legitimacy of courts.

For the purpose of our measure, I collect all trust/confidence questions about the judiciary from public cross-national surveys.[5] Since surveys these often have multiple phases taken over

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[5]We combine results from the following 12 surveys: Global Values Survey, European Values Survey, Global Barometer, Eurobarometer, Afrobarometer, Asian Barometer, Latinobarometer, South Asian Barometer, Asia Europe Survey, Americas Barometer, Gallup Global Survey and Arab Barometer.

multiple years, these surveys allow us to create a cross-national time-series of the data. The question in these surveys is usually, "How much trust you have in the following institution" or "How much confidence you have in the following institution." The institution in the question may vary- it can be "the courts" and in some cases "the legal system". We assume that all these questions point to the the same indicator. The scale also varies across surveys. In most cases, the scale has 4 values: trust absolutely, trust a lot, trust a bit, and don't trust at all. In some instances, there is a 7-point likert scale, and in the case of the European surveys- a simple two-point scale with "trust" and "don't trust" as options. For our purposes, we normalize the scale to a ratio. Thus, "trust absolutely" on a 4-point scale and "trust" on the 2-point scale both get 1.0 on the index. We then aggregate these across country-year. As far as I know, this is the single-largest aggregation of comparative surveys on judicial trust and the most expanded cross-national time series of such survey data.

5.2   Compliance Rates

While compliance is not synonymous with legitimacy, it is certainly indicative of it. Especially in free democracies, compliance with court decisions is likely to be free and voluntary. Even if we cannot use it in isolation, it can contribute to a latent measure which includes trust and participation.

Measuring individual compliance with court decisions is difficult. No country maintains observational data on court compliance, and no study has built such a dataset for any country. We are thus unlikely to find cross-country measures of individual compliance. However, a court which has a higher rate of perceived legitimacy in the eyes of the public is also more likely to command compliance from the executive. This is because not complying with the courts decisions can result in public backlash against the executive (Epstein, Knight and Shvetsova, 2001).

We have several cross-national indicators of governmental compliance. For our pilot measure, I use the high court compliance variable from the Varieties of Democracy dataset (VDem) (Coppedge et al., 2021). VDem is an expert survey dataset, which scholars often use in comparative research. The strength of the VDem measures are the coverage which extends from 1789 -present for 201 countries. The compliance variable in VDem asks experts, "How often would you say the government complies with important decisions of the high court with which it disagrees?". The measure also clarifies that, "We are looking for a summary judgment for the entire judiciary, excluding the high court. You should consider judges on both ordinary courts and specialized courts." Five Experts independently mark the question on a 5-point ordinal scale which are then aggregated using a Bayesian item theory response model (Pemstein et al., 2019). The final measure the scaled score of this aggregation and runs from 0 to 1.

5.3   Contract Intensity

The proportion of money in a formalised economy is indicative of how much the citizenry trust the formal dispute-resolution systems, including the judiciary, to protect them from governmental or private appropriation (Clague et al., 1999). It would follow then that citizens who consider courts as legitimate and binding are more likely to enter into formalised legal arrangements with other citizens. On the other hand, countries in which persons either directly consider courts to be illegitimate or believe that the bulk of the population see the courts as illegitimate, will not trust the formal system and will instead attempt to access the market through informal means. As Mousseau (2019b) suggests, "In status societies, individuals normally acquire securities not in the marketplace in the form of mortgages or life insurance, but through various networks, including families, tribes, clans, unions, parties, and criminal gangs" (p.164).

For our measure we use the Contract Intensity of National Economies (CINE) scores. CINE measures the institutionalization of asynchronous contract flows in countries for each country-year. Based on data by Demirguc-Kunt, Feyen and Levine (2013) these are publicly available for for 95 percent of country years for all 159 sovereign non-micro countries existing from 1960 to 2017 (Mousseau, 2019a) .

6   The Judicial Legitimacy Index (JLI)

One problem with the indicator data set is data sparseness, especially in the indicator for trust in the judiciary. Comparative surveys usually take place in multiyear waves, which leaves many gaps in our trust indicator. In order to create a complete cross-national time-series, I impute the missing data in all indicators using Kalman smoothing. This allows us to approximate the missing indicator for any county-year based available values in that countries' time-series for that indicator.[6]

The imputation process leaves us with data for 123 countries from 1990 until 2020. The Judicial Legitimacy index (JLI) is a country-year index of a linear combination of the the three indicators—trust in the Judiciary, compliance rates and contract intensity. We calculate the JLI using a standardised factor score estimate of the first and only factor in an Bayesian factor analysis of the indicators for all countries and in all years from 1990 till 2020.

Since the factor model uses three indicators for a single factor, it cannot be identified. Yet, without other indicators, such a unidimentional model is appropriate. An exploratory factor analysis of the three indicators yields an eigenvalue of 2 for the first factor, and only 0.1 for the second. All indicators have loadings greater than 0.4. The JLI and is also internally

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[6]I only impute data for a country if data for more than 3 years is available in a countries' series

consistent with a standardised alpha for JLI is 0.64, Guttman's lamda is 0.57 and inter-item correlation is 0.37. This seems to indicate moderate reliability for an index based on multiple sources.

The values for the standardised JLI scores for each country averaged across all 30 years are given in Figure 1. Figure 2 shows the JLI index across the world. The JLI scores are centered around 0. Figures 3 to 7 show the plots of JLI for all countries over time. As can be seen, according to the JLI scores, Denmark consistently has the highest judicial legitimacy with an average JLI score of 1.9. On the other end, Sudan has the lowest average JLI score at -1.79.

7 Applying the JLI Index: The Sources of Judicial Legitimacy

In this part of the paper, I apply the legitimacy index to analyse one of the most important problems in judicial governance—if legitimacy is a "reservoir of goodwill", how does the court acquire such goodwill? In other words, what leads people to accept the authority of the courts as binding?

Many have argued that perception of the court as a neutral institution is the most important factor impacting the court's legitimacy (Tyler, 2001). Studies examining the effect of procedural fairness on people's perception of the court have however had mixed results. On the one hand, as early as 1972, experimental evidence by Engstrom and Giles (1972) showed that court legitimacy falls when the decisions are perceived as lacking fairness. Similar results were found by Tyler and Sevier (2013), who conclude, "the perceived fairness of legal

procedures that drives popular legitimacy, with people reacting both to whether they believe decisions are fairly made and whether they think that litigants are fairly treated". On the other hand, Gibson (1989) and Mondak (1993) find no evidence for the effect of procedural fairness on diffuse support for the court. We thus test the hypothesis that:

Hypothesis 1: Increased fairness in courts increases the level of legitimacy the public accords to courts.

The problem with looking at fairness and procedural justice is again one of measurement. For a cross-national measure, I use Freedom House's rule of law as a proxy for fairness and procedural justice.[7] I also control for the independence of the court using the Linzer and Staton (2015) measure as well as levels of democracy and GDP, both from VDem.

In addition to procedural fairness, the country-level differences in legitimacy may be affected by the design constrains of individual court systems. For example, courts that have executive appointments may be perceived as biased in favour of the government and thus seen as illegitimate (Stroh, 2016). Similarly, courts that allow descriptive representation through quotas may be seen as more legitimate by the public (Scherer and Curry, 2010). Such constitutional guarantees can serve as assurances of judicial fairness and impartiality, and can in effect create baseline legitimacy for the judicial branch. Studies have found that de-jure constitutional guarantees of judicial independence effect the de-facto Independence of courts (Carruba et al., 2015; Melton and Ginsburg, 2014). This effect should be more pronounced in the case of judicial legitimacy. Constitutional guarantees of fairness and finality of courts should lead the public to perceive them as more legitimate. Thus:

Hypothesis 2: Constitutional guarantees of fairness in courts increases the level of legitimacy the public accords to courts.

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[7]We cannot use the VDem rule of law measure since it uses high court compliance as one of its components—an indicator which also forms a part of our index. The freedom house index includes due process and absence of judicial corruption as two of its components and thus directly measures court procedures.

Data on constitutional guarantees is obtained from the comparative constitutions project (Elkins, Ginsburg and Melton, 2021). The dataset consists of country-year observations of constitutional characteristics from 1789 till 2021 for over 200 countries. For our purposes, I examine four of these features— guarantee of judicial Independence, guarantee of finality of judicial decree, guarantee of fair trial and precedential value of court decrees. I also control for the age of the constitutional regime since older court systems may be afforded legitimacy simply due to socialisation and acquiescence to legal tradition.

Table 2: Two-Way Fixed Effects Regression Table

| | DV = Judicial Legitimacy Index | | |
	Model 1	Model 2	Model3
Procedural Fairness	−0.04		−0.04*
	(0.02)		(0.02)
Judicial Independence	1.39***	1.63***	1.42***
	(0.32)	(0.24)	(0.30)
GDP	0.03***	0.03***	0.03***
	(0.00)	(0.00)	(0.00)
Democracy	1.24***	0.43***	1.31***
	(0.35)	(0.25)	(0.35)
Guarantee-Independance		−0.12	−0.17=
		(0.11)	(0.13)
Guarantee-Finality		−0.04	−0.02
		(0.07)	(0.08)
Guarantee-Stare Decisis		0.08	0.11
		(0.08)	(0.09)
Guarentee-Fair Trial		0.02	0.02
		(0.07)	(0.07)
Age of Court Regime		0.00	0.00
		(0.00)	(0.00)
Constant	−1.42***	−1.45***	−1.28***
	(0.10)	(0.14)	(0.18)
Observations	1,219	2,554	1,170
Adjusted R^2	0.84	0.85	0.84
F Statistic	1,589.94***	1,758.26***	699.06***

 Note: *** p less than 0.001, ** p less than 0.01, * p less than 0.05. Parenthesis contain cluster robust standard errors.

To account for both unobserved country-level and unobserved time-level confounders in our panel data, I use a two-way fixed effects model with cluster robust standard errors [8]. Table 2 contains the results of all models. Model 1 tests hypothesis 1. Model 2 tests hypothesis 2. Model 3 tests hypothesis 2 with the addition of the procedural fairness control. In Model 1, we find after controlling for GDP per capita, judicial independence and democracy, we do

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[8]A pooled OLS model with cluster robust standard errors yeilds similar results

not find any significant effect for procedural fairness, at least as measured by the Rule of Law index. Similarly in Model 2 we do not find a significant effect for any constitutional guarantee or the constitutional age of the court system. We thus fail to find evidence that constitutional guarantees of court fairness lead to increased legitimacy of courts. In the combined Model 3 we find that after controlling for constitutional guarantees the procedural fairness variable is significant at the 95 percent levels of confidence. Contrary to our hypothesis, however, the coefficient is negative. We thus fail to find evidence that procedural fairness leads to increased legitimacy of courts.

It would seem that levels of liberal democracy, de facto independence and GDP per capita largely explain the variation in the legitimacy of court systems. Part of the reason for this may be the endogenous relationship between court legitimacy and these three variables. Legitimate courts can constrain executive action, enforce contracts and grant insurance for judges to be independent leading to increased levels of democracy, economic growth as well as de-facto indepedence. Further research using the measure may help uncover these relationships more clearly.

8   Conclusion

The study of law and courts in the social sciences has largely focused on SCOTUS. Comparative studies of judicial behaviour, which may shed some light on the relationship between courts and polity in different contexts, are rare. Part of the reason is the lack of adequate data for courts in other countries. Over the last decade, we have seen some progress in this regard, with new cross-national measures of judicial independence (Rıos-Figueroa, 2011; Hayo and Voigt, 2014; Linzer and Staton, 2015; Melton and Ginsburg, 2014) and Rule of law (Botero and Ponce, 2011; Versteeg and Ginsburg, 2017; Nardulli, Peyton and Bajjalieh, 2013). Until now, there have been no attempts at building a similar cross-national measure

of judicial legitimacy.

In this paper, my attempt has thus been to build and apply a valid cross-country measure of legitimacy. The current measures of legitimacy are unsuited for this purpose since they have both conceptual as well as practical problems. The conceptual problem is that current operationalizations of the concept seem to be built on intuition rather than any engagement with the theory of legitimacy. The practical problem is that most of these measures require data sources that are simply not available in a cross-country context. This paper, hopefully, makes inroads into both these problems—through offering a definition of legitimacy, constructing a possible cross-country measure and applying it to an important question of comparative judicial governance. My hope then is that the measure can advance comparative judicial research, and can help test whether the many theories developed about courts in the US apply in the cross-country context.

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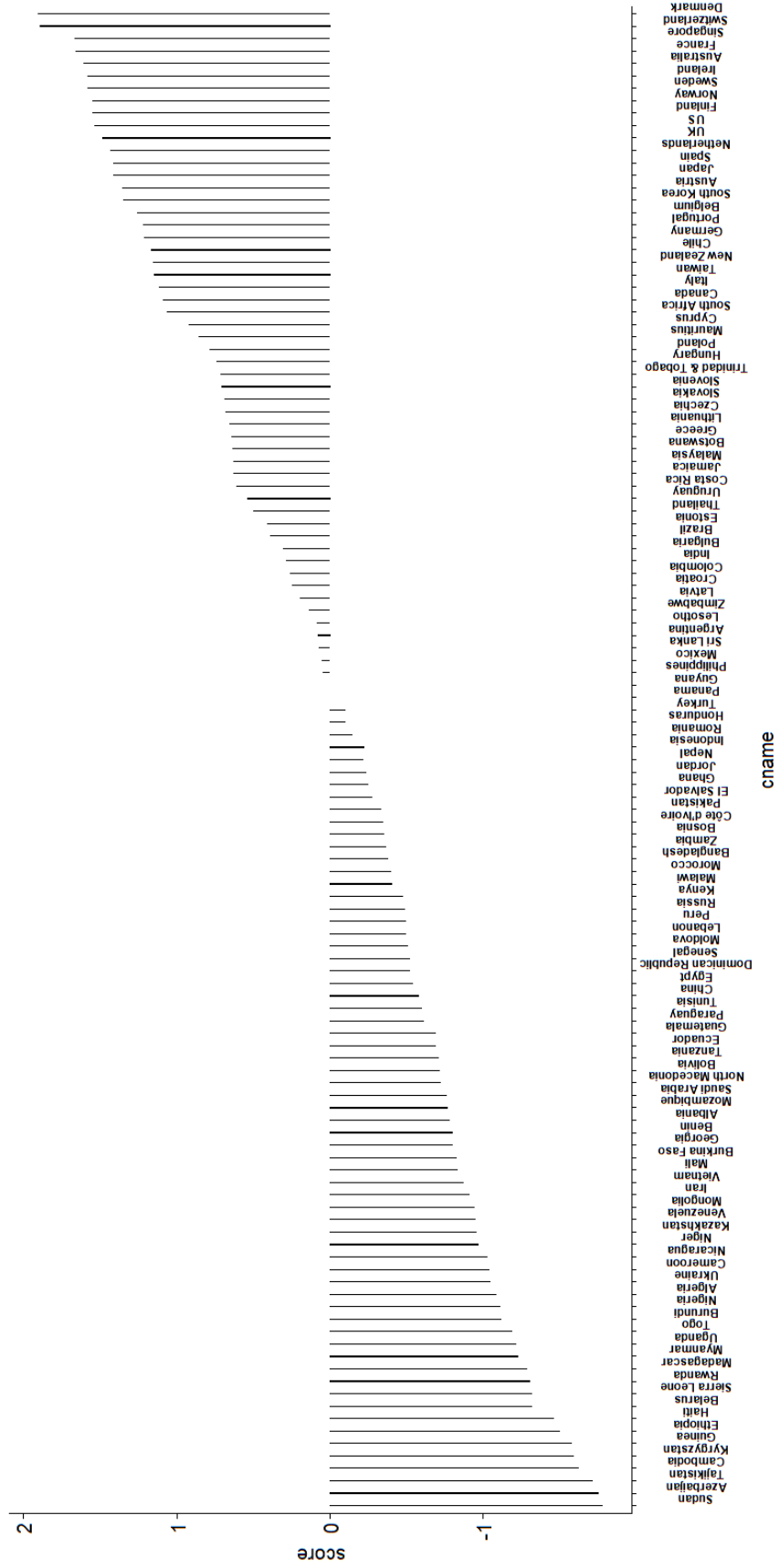
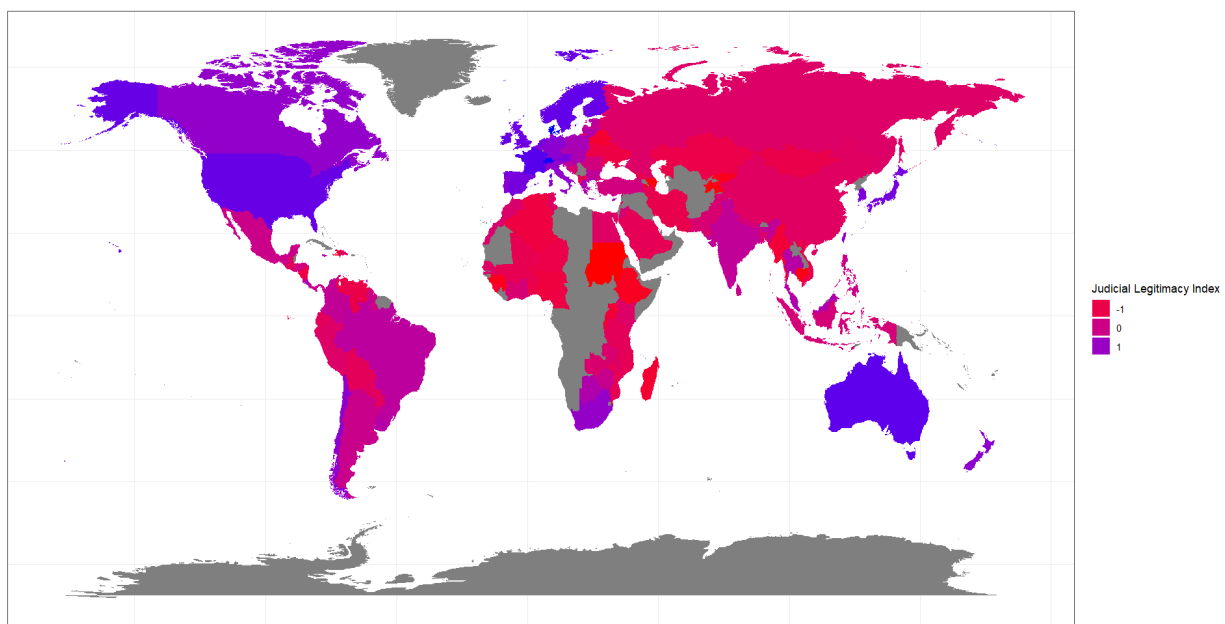Figure 1: Average JLI Scores by Country.
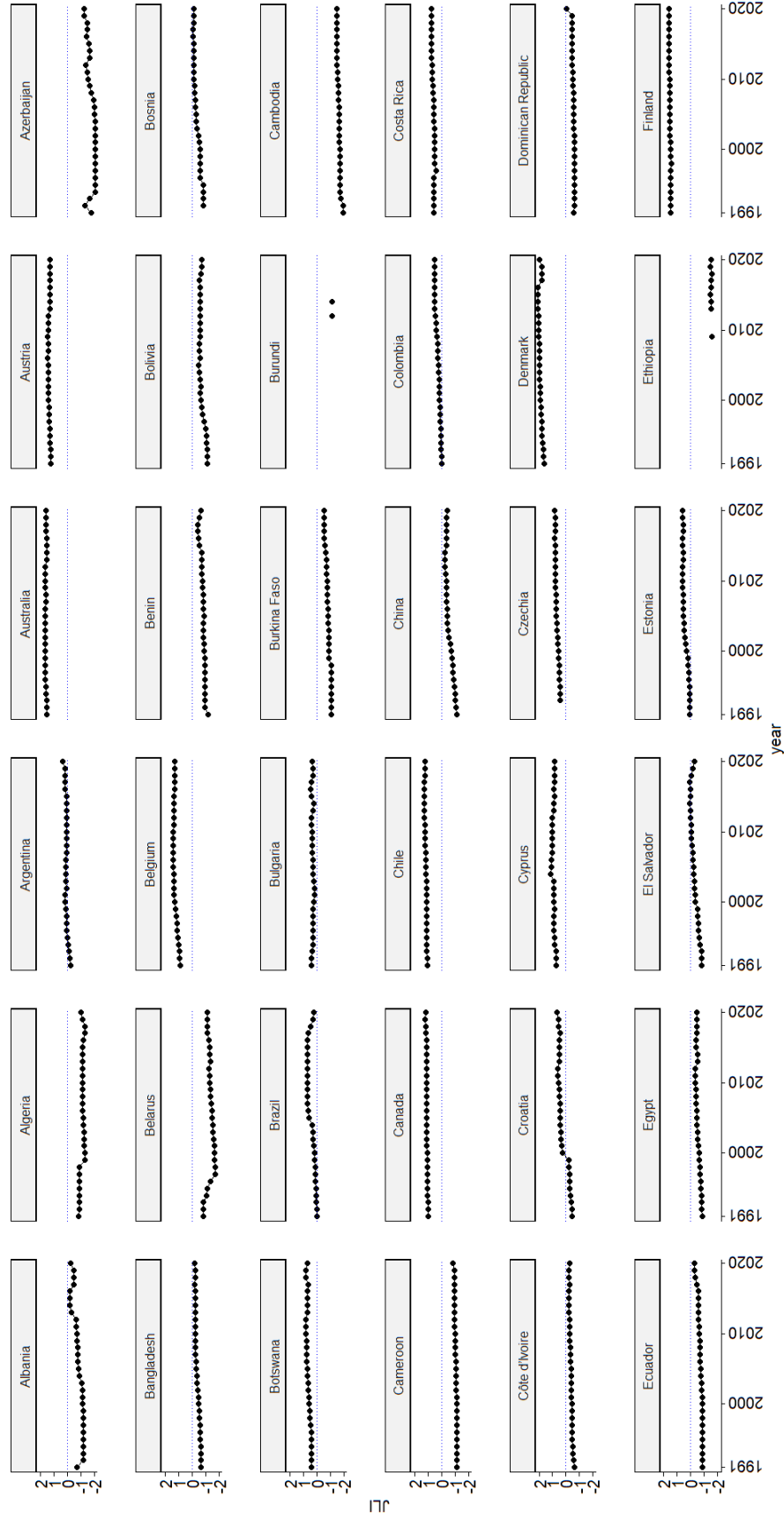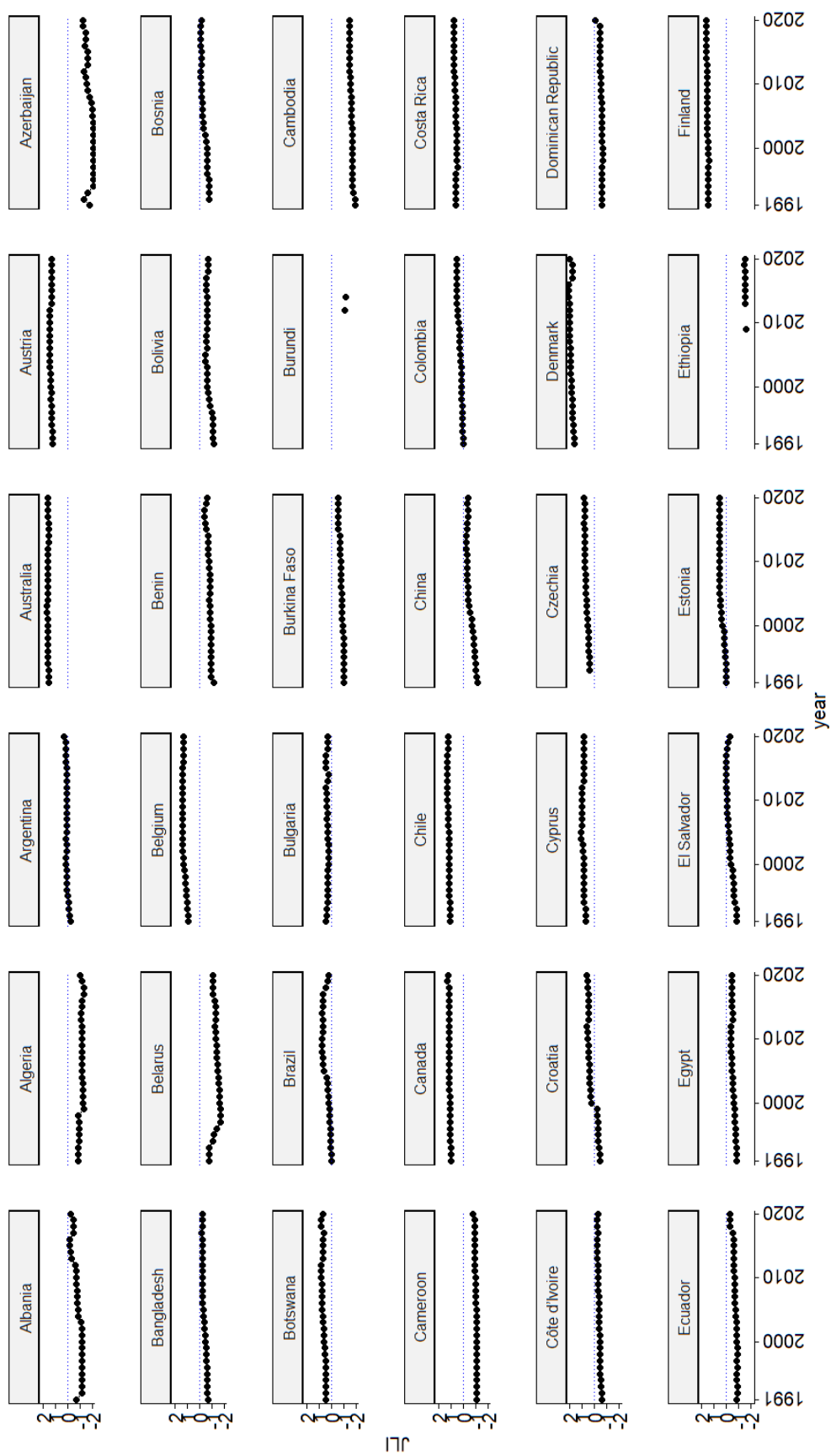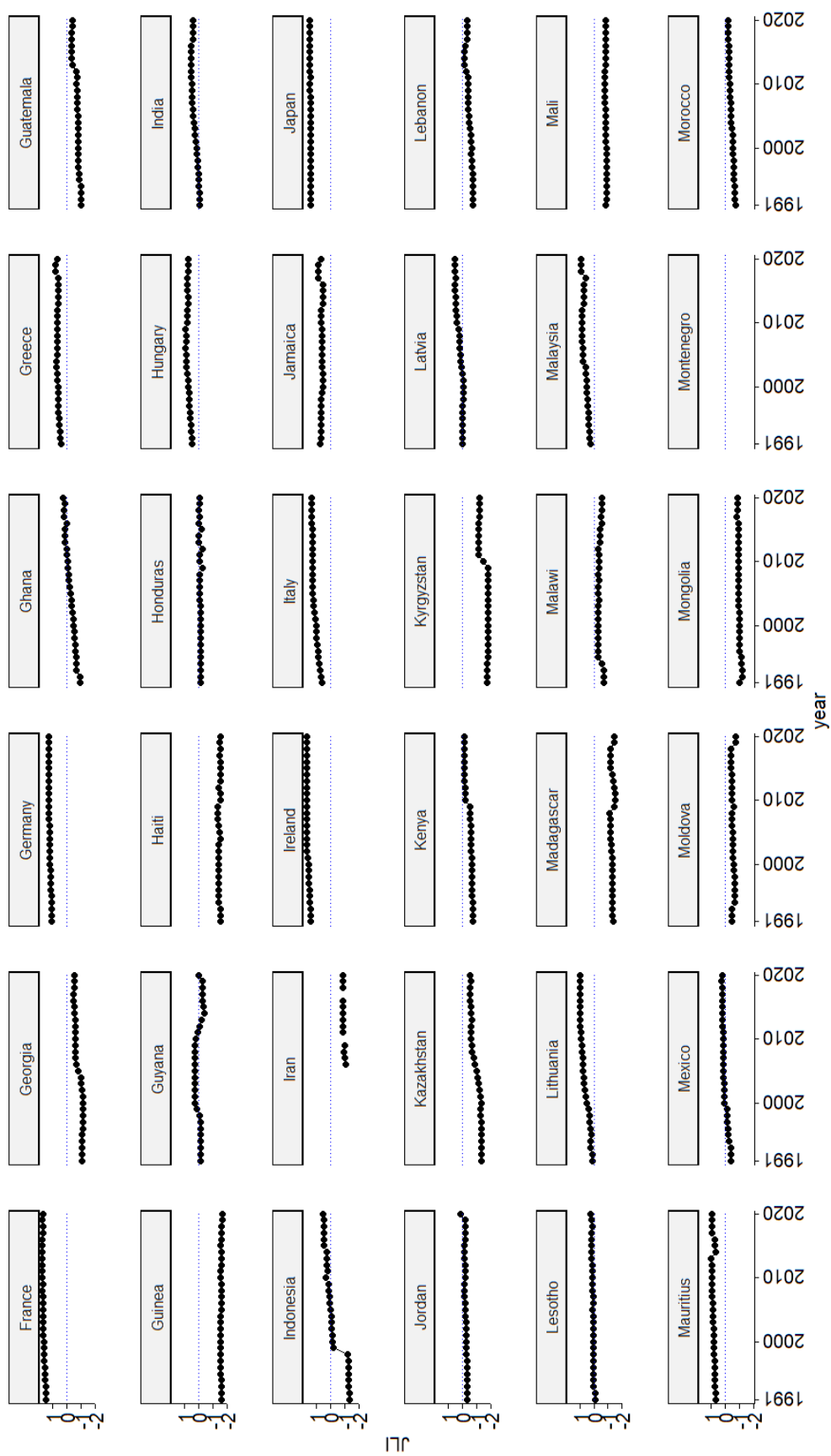
Figure 2: Map of Average Levels of JLI Index

Figure 3: JLI Scores by Country Year.

41

Figure 4: JLI Scores by Country Year.

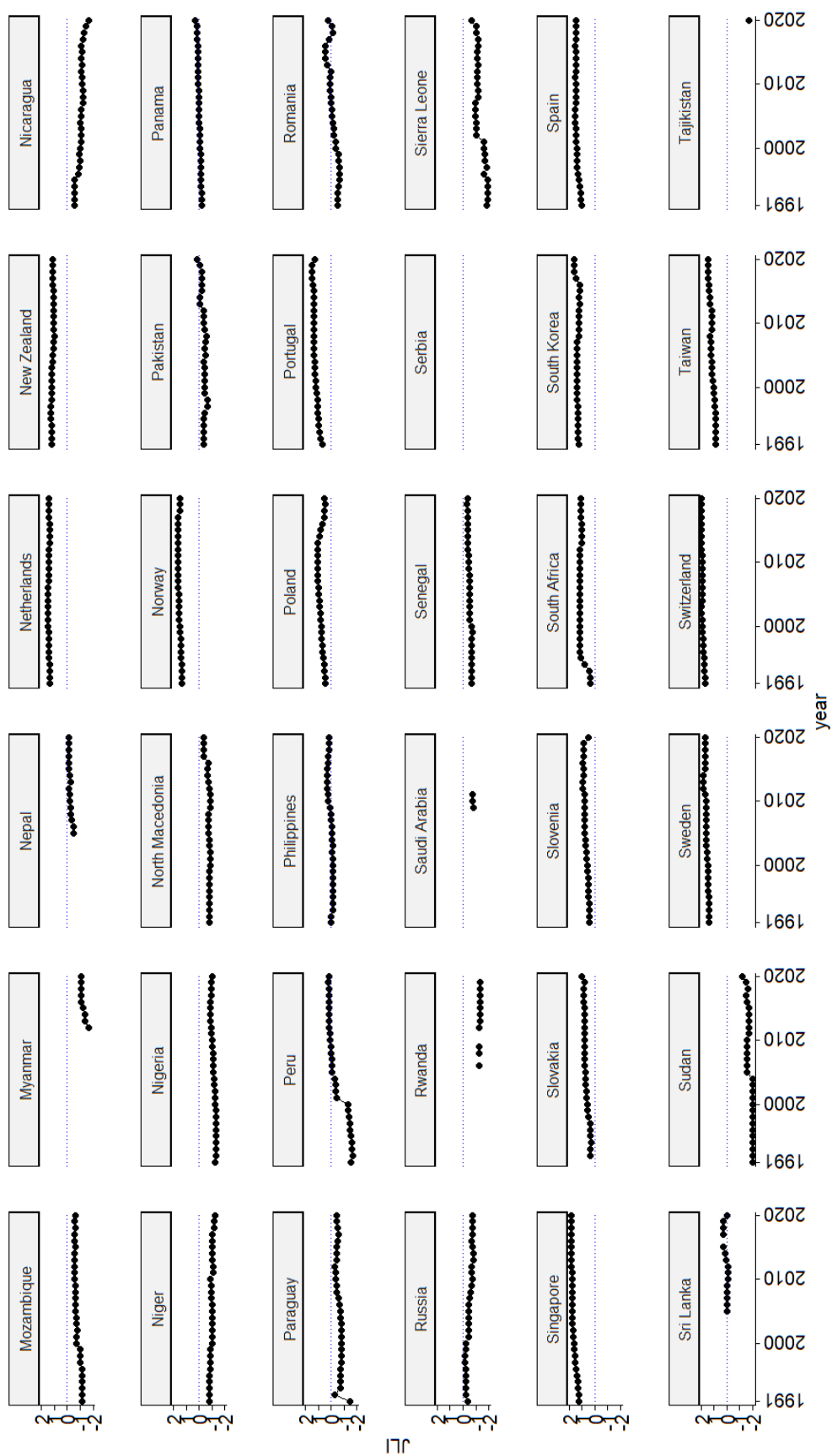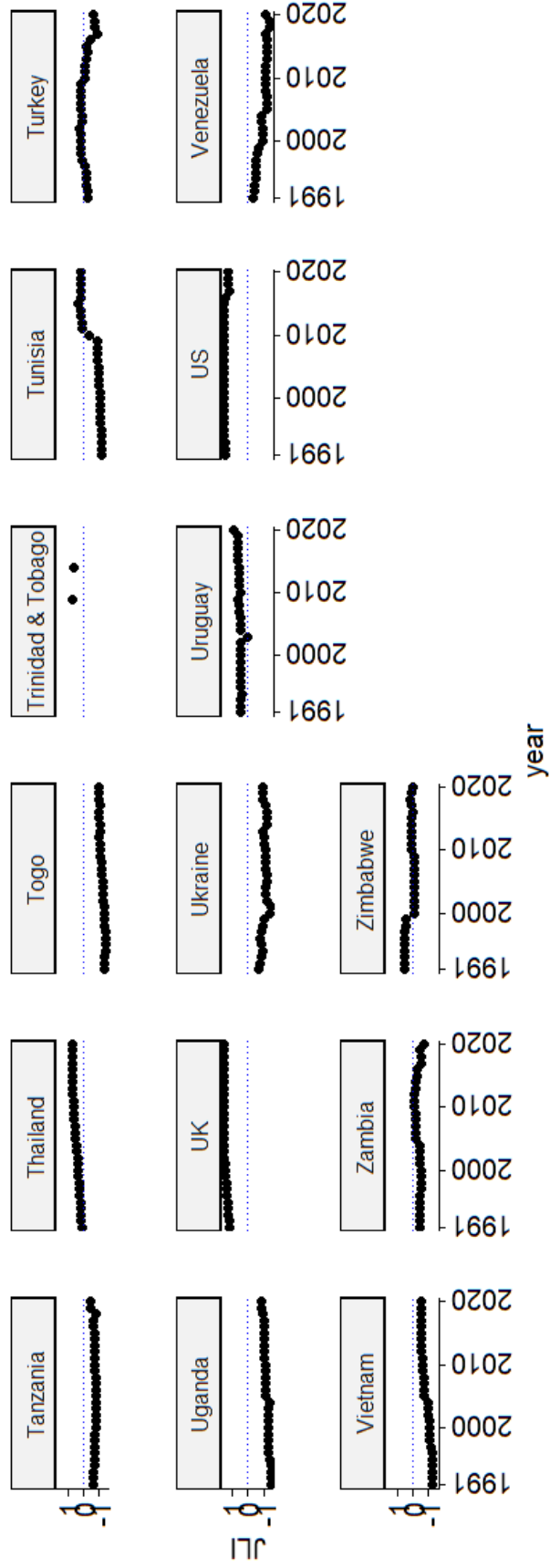42

Figure 5: JLI Scores by Country Year.

43

Figure 6: JLI Scores by Country Year.

Figure 7: JLI Scores by Country Year.