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De Jure and *De Facto* Institutions: Implications for Law and Economics[1]

Introduction

Scholarship in law and economics, both theoretical and empirical, has been confirming for decades the relevance of law for economic outcomes in various contexts. A more detailed view of these studies, however, reveals that it is seldom *de jure* legal provisions, i.e. the text of enacted legal acts, that this literature directly relates to, but rather the way that these rules function in practice (i.e. *de facto* legal rules). Based on these studies one, therefore, cannot draw direct conclusions concerning economic effects of specific legal provisions. For this to be possible, more attention must be devoted to the study of interrelationships between *de jure* institutions and their *de facto* equivalents.

Recent works in law and economics have begun to introduce the distinction between *de jure* and *de facto* institutions, e.g. in relation to constitutional rights and freedoms (including property rights), judicial independence, central bank independence or the independence of regulatory agencies (e.g. Hanretty, Koop 2013; Law, Versteeg 2013; Melton, Ginsburg 2014; Bjørnskov 2015; Voigt et al. 2015; Hayo, Voigt 2019; Metelska-Szaniawska, Lewkowicz 2021; Metelska-Szaniawska 2021; Voigt 2021). Similarly, political economy studies use the *de jure – de facto* distinction in reference to political power and its role for economic growth and development (e.g. Acemoglu, Robinson 2006). Analysis of the interrelationships between *de facto* and *de jure* institutions has also begun to attract attention of works in institutional economics (e.g. Zawojska 2012; Voigt 2013; Shirley 2013; Robinson 2013; Lewkowicz, Metelska-Szaniawska 2016, 2019; Szczęsny 2018).

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The current state of the art with respect to the *de jure – de facto* distinction merits a critical review of the law and economics literature on economic effects of law and, in particular, its empirical findings. The main goal of this paper is to provide such a review, leading to the assessment of the validity of conclusions of the existing law and economics literature pertaining to economic effects of legal rules, and propose an enhanced approach to studying these effects that takes into account the *de jure – de facto* distinction. We focus on a selection of constitutional-legal rules, including judicial independence, protection of constitutional rights and freedoms, central bank independence, fiscal rules, independence of regulatory agencies, and property rights protection. The justification for the choice of these rules is twofold: firstly, they pertain to crucial aspects of countries' institutional framework for markets and political spheres, and secondly, their economic effects have been broadly confirmed in existing research. In analyzing this literature we draw on the conceptualization of *de jure* and *de facto* institutions proposed earlier in Lewkowicz and Metelska-Szaniawska (2016) and the discussion of their interrelationships. In effect, this paper brings conclusions concerning the validity of existing law and economics research on economic consequences of law, as well as provides lessons for further development of this research program in a way that incorporates the *de jure – de facto* distinction and its consequences.

The paper is structured as follows. In section 1 we introduce the conceptualization of *de jure* and *de facto* institutions and summarize the discussion of their interrelationships. In section 2 we relate to six areas of constitutional-legal regulation enumerated earlier (devoting a separate subsection to each of them) and review the existing works concerning their economic effects that distinguish between *de jure* and *de facto* dimensions of these rules. While the selection of these six areas is based, as already mentioned, on their crucial role as elements of the institutional framework for markets and political spheres, as well as their broadly confirmed economic effects, they also serve as an illustration of uneven development of the current law and economics research with regard to the *de jure – de facto* institutional distinction. With regard to two of them – judicial independence and protection of constitutional rights and freedoms – the relevance of *de jure* institutions originating from (constitutional) legal text for *de facto* (constitutional) practice has already received noticeable attention and brought valuable (even if not ultimate) conclusions. For the rest, however, the picture is significantly less reassuring as the literature has often not reached beyond identification of *de jure* and *de facto* institutions corresponding to these rules and, therefore, requires further development. In the conclusions of the paper we reflect on the benefits for law and economics from making the distinction between *de jure* and *de facto* institutions more pronounced in future research and, in particular, from examining the role of *de jure* legal institutions for their *de facto* equivalents in different areas of law. Such an approach can not only contribute to the development of this cross-disciplinary field by delivering more reliable results regarding economic effects of legal rules but will also provide more convincing grounds for formulating scientifically based recommendations for legislators.

1. *De jure* and *de facto* institutions and their interrelationships[2]

Undoubtedly, law and economics as a science movement has benefited from the growing popularity of institutional economics in the last decades (Ratajczak 2011). Studies in law and economics have been developing in a close relation to the formal – informal distinction and the concept of institutional order introduced and broadly applied in institutional economics (North 1990; Boehlke 2005). It has to be stressed that a variety of definitions of institutions is available in the literature (Gaweł, Klimczak 2005; Voigt 2013). In our research we do not aim at diminishing the relevance of the existing classifications of institutions, but we simply focus on the one allowing for another valuable perspective of research, which has not been widely applied so far. For the sake of our further analysis, we follow one of the common definitions of institutions, which implies that "institutions are humanly devised constraints that structure political, economic and social interaction" and "they consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct) and formal rules (constitutions, laws, property rights)" (North 1991).[3] So basically, formal institutions are laws, policies, regulations, rights etc. that are enforceable by official authorities (i.e. with respect to them there exists an official sanctioning mechanism). Informal institutions, on the other hand, are social norms, traditions and customs that may also shape social behavior, however are not enforced by any official authority (Berman 2013). In relation to this classification an important strand of literature has evolved within law and economics – interested in the distinction between the law and social norms, as well as their interrelationships (see e.g. Posner 1997, Posner 2002; Carbonara 2017).

In this paper the focus is, however, on *de jure* and *de facto* institutions. *De jure* stands for a state of affairs that is in accordance with the law. Classical works define the law e.g. as a "rule laid down for the guidance of an intelligent being by an intelligent being having power over him" (Austin 1885, p. 86), or a "rule of conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong" (Blackstone 1979, p. 44). Given these definitions, *de jure* institutions are formal in nature. However, as other formal rules may exist, which are not rooted in the legal system[4], *de jure* institutions are a subclass of formal institutions. The definition and conceptualization of *de facto* institutions is, however, more sophisticated. *De facto* institutions are those observed in actual

[2] This section draws substantially from two earlier publications of the authors: see Lewkowicz and Metelska-Szaniawska (2016, 2019).

[3] It is noteworthy that switching to other leading definitions of institutions does not affect our conclusions.

[4] This may relate to formal policies, as well as formal rules governing the functioning of various organizations. The distinction between institutions and policies is a strongly debated issue in the institutional literature in economics (see e.g. Dixit 1996; Glaeser et al. 2004; Voigt 2013). We follow here the most inclusive approach, as suggested by Besley and Case (2003) and treat formal policy documents, which may be sources of constraints shaping interaction but do not have the status of law as (formal) institutions.

human interactions – in the market and social practice. *De facto* means a state of affairs that is an identifiable fact, but does not have to be officially sanctioned. While fulfilling the condition of being actually operative (effective), *de facto* institutions may be of varying nature – formal or informal.

De jure and *de facto* institutions are clearly not antonyms and their sets are not disjoint. As argued above, *de jure* institutions constitute a subclass of formal institutions. *De facto* institutions, in turn, may be either formal or informal, provided that they are operative. A subclass of *de jure* institutions that are perfectly enforced will simultaneously belong to the set of *de facto* institutions. At the same time, *de jure* institutions that are not observed (effectively enforced), will not be classified as *de facto* ones. To conclude, while the formal – informal distinction produces two disjoint sets of institutions composing together a complete set of existing institutions, the *de jure – de facto* distinction produces sets with an overlap which do not cover the entire spectrum of institutions.[5]

Interrelations between *de jure* and *de facto* legal institutions, or institutions in general, constitute a rather recent focus in the literature. A connected problem that has already been thoroughly studied by institutional economics and related fields is that of interrelations between formal and informal rules/institutions (or, put differently, between the law and social norms). According to much of this literature, it is not possible to understand the functioning of the law without reference to social norms, which interact with the legal system (e.g. Posner 1997). The following possible relations have been discussed: (1) formal and informal rules are complements (e.g. Baker et al. 1994; Lazzarini et al. 2004); (2) formal rules are substitutes for social norms and it is possible for societies to function based on informal rules, without the need to establish costly *de jure* institutions (Macaulay 1963; Ellickson 1991; Huang, Wu 1994); (3) formal rules are substitutes for informal rules and introduction of the former undermines or even destroys the functioning of social norms (e.g. Frey, Oberholzer-Gee 1997; Fehr, Gachter 2001); (4) depending on the particular context and conditions, formal and informal rules are complements or substitutes (e.g. Posner 2002; Zasu 2007). Chmielnicki (2014, 2015) proposed to approach these two types of rules as equivalent components of the so-called normative set (in Polish *komplet normatywny*) concentrated around the specific goal of a given human's actions.

Theoretical literature regarding interrelations between *de jure* and *de facto* institutions has recently began to develop. While the literature usually suggests classifying formal and informal institutions as complementary, substitutes or overlapping (Jütting et al. 2007), in an earlier paper (Lewkowicz, Metelska-Szaniawska 2016) we have argued that the distinction between boosting and inhibit-

[5] An example of formal institutions which are neither *de jure* not *de facto* are unenforced policies based on documents which are not law. It may be questionable whether an informal institution that is inoperative (i.e. neither *de jure* nor *de facto*), may still be regarded as an institution. This resembles the controversy in social norms literature regarding the role of normative beliefs and actions (e.g. Bicchieri, Muldoon 2014). For more on *de jure – de facto* institutions versus other classifications of institutions see Lewkowicz and Metelska-Szaniawska (2016).

ing impact is a better matched approach to the problem of interactions between *de jure* and *de facto* institutions, as it allows for a broader conceptual analysis, in particular in the context of the latter's economic effects. The relevance of these interactions from the economic perspective still requires systematic, both empirical and theoretical, research. Apart from investigating the impact of *de jure* and *de facto* institutions, as well as their interrelationships, on particular economic goals, this topic may be also analyzed from a broader perspective, *inter alia* in the context of institutional equilibrium (Wilkin et al. 2019). However, this still remains a research challenge. *De facto* and *de jure* institutions boost each other when they lead to commonly desired behavior (from the perspective of the assumed goals of these institutions), while they inhibit each other when they create incentives leading to different/contrary decisions (Lewkowicz, Metelska-Szaniawska 2016). Interactions between *de jure* and *de facto* institutions regarded from this perspective vary depending on whether these institutions are functioning in different or the same area of human interaction. When we consider institutions from different regulatory spheres, it is likely that there is no interaction between them (i.e. neutrality)[6], however for institutions functioning in the same area of regulation interrelationships are inevitable.

In this paper we discuss relations between *de jure* institutions and their *de facto* equivalents within the same area. In the same area *de facto* institutions will be boosted by *de jure* ones when the legislator enacts *de jure* institutions that are in line with already existing *de facto* institutions. If the enacted *de jure* institutions differ from existing *de facto* ones and these *de jure* institutions are perfectly enforced, they also become *de facto* institutions and, in effect, both types of institutions overlap and boost each other (nevertheless, at the beginning some friction between them is inevitable). The divergence between *de jure* and *de facto* institutions functioning in the same area may, however, also result in a mutually inhibiting relationship or even in a crowding-out effect (i.e. when *de jure* institutions crowd out conflicting *de facto* institutions from the institutional system – cf. Zasu 2007).[7]

In the next section we are interested in a subset of *de jure – de facto* interactions, namely situations when *de jure* institutions impact (or not) *de facto* practice and this with regard to the above mentioned areas of constitutional-legal regulation. An important strand of (mainly) political science literature has developed, focusing on the question whether the constitution imposes significant constraints on those in power and establishes rules, according to which the political game is played within states, or accounts to simply no more than *parchment barriers* (see

[6] However, in specific cases they may also boost or inhibit each other. An example of such a mutually boosting relationship could be when regulations contained in civil and penal codes both incentivize to safer and more careful driving, while of an inhibiting relationship – when hiring employees based on civil and labor contracts, primarily designed for different purposes.

[7] Both the boosting and inhibiting effects can also derive in the reverse direction – from *de facto* institutions to *de jure* ones, in particular when connected with enforcement of law – however their detailed consideration falls beyond the scope of this study.

more in Levinson 2011). On the one hand, various authors acknowledge that gaps between the legal text and its functioning in practice are inevitable, both because of imperfectness of actors drafting the law (in particular, bounded rationality), as well as the need identified in legal literature to apply 'workarounds' allowing for a more pragmatic approach to situations, when the regulatory text is a source of institutional tensions (see e.g. Tushnet 2009). Some authors advocate an even more extreme view and reject *de jure* constraints as mere parchment that has no effect on government activity (De Jasay 1989). On the other hand, literature advocating the relevance of *de jure* institutions argues that constitutional-legal solutions work provided that they are self-enforcing, i.e. it is not necessary that an external actor supervises the execution of a bargain (see e.g. Ordeshook 1992; Weingast 1997).

Constitutional-legal provisions written on paper and publicly available contribute to the self-enforcement mechanism thanks to providing a focal point, around which various actors may concentrate their enforcement efforts (Carey 2000; Elkins et al. 2009). Additionally, parchment may lead to creation of mutual expectations among political actors and it is essential for *de facto* functioning of institutions (Carey 2000). Various enforcement mechanisms may also be at play, such as judicial and electoral enforcement, when considering the relevance of *de jure* legal text for *de facto* practice.

2. Selected legal institutions in the *de jure – de facto* perspective

In this section we review a selection of the existing works on economic effects of six constitutional-legal rules distinguishing between *de jure* and *de facto* dimensions of these rules. As mentioned in the outset of this paper, they pertain to crucial aspects of countries' institutional frameworks, both for markets and political spheres. Firstly, we discuss two areas, where the study of *de jure – de facto* interrelationships and their economic effects is relatively well developed, namely judicial independence and the protection of constitutional rights and freedoms. Secondly, we elaborate on those, where the *de jure – de facto* distinction is used in studies pertaining to economic effects of the given constitutional-legal rules (more or less extensively), however these analyses do not reflect (thoroughly or at all) on the link between *de jure* and *de facto* dimensions, which is crucial for formulating conclusions and recommendations relating to the law.

2.1. Judicial independence

Economic studies of judicial independence have flourished since Feld and Voigt (2003) laid down the fundaments for analysis of the relevance of judicial independence for economic growth. Independent judiciaries and, in particular, independent constitutional courts, which can expect their decisions to be implemented regardless of whether, or not, it is in the (short-term) interest of other

government branches upon whom such implementation depends, constitute constitutional enforcement mechanisms and can serve as the final stage in turning promises made by state authorities (e.g. regarding protection of property rights) into credible commitments. If such mechanisms function, citizens develop a longer time horizon, resulting in more investment in physical capital, as well as higher degree of specialization and different structure of human capital.

From the point of view of our discussion, Feld and Voigt's (2003) paper is also crucial as one of the first works introducing the *de jure – de facto* distinction in the analysis of constitutional rules and its economic effects. *De jure* judicial independence is assumed to include formal rules regarding the following issues: institutional stability of the environment for the constitutional court's activity (including the constitutional amendment process), the procedure of appointing judges, their term of office and remuneration, the accessibility of the court, the division of cases between the judges of the court, the court's scope of competences, and the public announcement of the court's decisions. *De facto* judicial independence, in turn, reflects the practical operation of constitutional courts (e.g. the factual duration of judges' terms of office, their factual remuneration levels and the financial situation of the courts, the stability of legal rules governing the operation of the courts, etc.). Feld and Voigt (2003) find that while *de jure* judicial independence does not affect real GDP growth per capita, the latter is positively influenced by *de facto* judicial independence. This result is later confirmed by Voigt et al. (2015), who rely on more recent data on *de jure* and *de facto* judicial independence. They also show that the growth effect of *de facto* judicial independence depends on the institutional setting in a country and not its initial per capita income.

The above findings merit the question, whether an improvement in *de facto* judicial independence can be achieved by changes in the *de jure* institutional framework in this area. In an early empirical study Hayo and Voigt (2007) claim that there exists a positive relationship between them and, furthermore, that *de jure* judicial independence is the most important predictor for its *de facto* equivalent (although the magnitude of this relationship is relatively small). On the contrary, Melton and Ginsburg (2014) generally do not find a significant correlation between *de jure* and *de facto* judicial independence (using various measures of the former, except for rules governing the selection and removal of judges which are the only *de jure* protection that impacts *de facto* judicial independence positively). In a more recent study, Hayo and Voigt (2019) focus on the long-run relationship between *de jure* and *de facto* judicial independence using newly published indicators and find that the relationship between the two variables is positive and weak in terms of magnitude (it is, in particular, driven by non-OECD countries). The cointegration between the *de jure* and *de facto* judicial independence variables that they find may even be interpreted as evidence of the existence of a long-run equilibrium in this context. In the short term, however, the relation between the two variables is found to be negative, which is in line with the results of another study by Gutmann and Voigt (2020) conducted for the EU countries. Based

on data from the EU's Justice Scoreboard, the latter authors discover a puzzle, namely that *de jure* legislation in the area of judicial independence is negatively correlated with its *de facto* dimension for these countries. They suggest that this is the result of two independent effects of cultural traits – individualism and trust, which lead to higher levels of *de facto* judicial independence while at the same time reducing the public demand for regulation and, thereby, lowering incentives for politicians to introduce legislation that would formally insulate the judiciary from the other branches of government. Gutmann and Voigt (2020) emphasize that this does not directly imply that legal reforms are bound to be ineffective or counterproductive, but that it is a challenge to reform a country's *de facto* judicial institutions by simply changing the law, in particular as cultural conditions matter.

2.2. Constitutional rights and freedoms

Economic effects of the protection of various types of constitutional rights and freedoms have widely been confirmed in the literature (e.g. Blume, Voigt 2007). In this area *de jure – de facto* gaps have also been investigated, probably most thoroughly to date. With regard to this set of constitutional rules the terms of constitutional underperformance (when countries fail to respect rights which have been coded in their constitutions) and constitutional overperformance (when citizens of countries factually enjoy rights that have not been coded in their constitutions) have been coined in the seminal work by Law and Versteeg (2013). Further studies have aimed to identify the determinants/correlates of these gaps (e.g. Metelska-Szaniawska 2021), underperformance or overperformance (Metelska-Szaniawska, Lewczuk 2019), as well as asked whether *de jure* protection of constitutional rights and freedoms significantly impacts its *de facto* equivalent (e.g. Melton 2013; Chilton, Versteeg 2016, 2020; Metelska-Szaniawska, Lewkowicz 2021).

When investigating the relevance of *de jure* constitutional text for *de facto* practice in the field of respect for rights and freedoms, the issue of enforcement is of particular relevance. Economic literature pertaining to state repression, inspired by the rational choice approach, argues that governments decide to repress rights when their benefits from this option exceed the costs (Davenport 2007a). *De jure* rights may play a role in this calculus as long as they increase the government's expected cost of punishment for repressing rights (Melton 2013).

Several enforcement mechanisms may be at play with regard to constitutional rights and freedoms. Firstly, there are types of rights and freedoms that have the potential to be self-enforcing. Self-enforcement mechanisms create a positive interrelationship between *de jure* and *de facto* constitutional rules (Melton 2013). This is, in particular, the case when rights involve setting up organizations, which have the incentives and adequate means to guard and protect them (Chilton, Versteeg 2016). The latter authors, as well as Metelska-Szaniawska and Lewkowicz (2021), provide evidence that such "organizational rights" are indeed

associated with an increased *de facto* rights protection (as opposed to "individual rights" which do not have this feature of self-enforcement).

Secondly, enforcement of rights and freedoms may be guaranteed by an independent judiciary – as discussed earlier, an institutional solution to the dilemma of a strong state. In such setting *de jure* rights may also become self-enforcing as governments fearing punishment by (an independent) judiciary will refrain from transgressing the rights set forth in the constitution (Weingast 1997), rendering these rights *de facto* operative. The functioning of an independent judiciary (in particular, at constitutional level, wherever constitutional courts or other similar arrangements exist) constitutes, therefore, a condition for effective functioning of the constitution itself understood as a set of self-restraints imposed on the state, expressed in the form of credibility-enhancing mechanisms (Feld, Voigt 2003; Voigt et al. 2015). Melton (2013) posits that relatively smaller gaps between *de jure* and *de facto* constitutional rules relating to catalogues of rights and freedoms exist where factual constitutional court independence is high[8].

Finally, a third type of enforcement mechanism considered in the context of constitutional rights protection is electoral enforcement which might overtake the role of organizations or the judiciary (Davenport 2007a) and assure that *de facto* protection of these rights does not diverge significantly from *de jure* content of constitutions. This is one of the reasons why the chances of *de jure* rights being *de facto* enforced are found to be considerably higher in democratic than in autocratic systems. Democratic governments also tend to have less incentives to repress rights from the beginning (Davenport 2007b).

Melton (2013) emphasizes that the existing literature on *de facto* enforcement of international human rights treaties already suggests that judicial independence and regime type are important conditions of the effectiveness of these treaties (e.g. Simmons 2009; Hafner-Burton et al. 2011). Another condition put forth by these works is political conflict. In conflict settings the government may be transgressing the constitution to protect national security and if conflict is severe enough, this may be done by the government even if it is certain to be punished for doing so (Melton 2013). This is the reason why even in democracies repression of *de jure* constitutional rights is much more likely in periods of political conflict (Davenport 2007a, b).

Based on the literature discussed so far, one may conclude that *de jure* entrenchment of constitutional rights is expected to improve constitutional practice under a set of conditions. *De jure* rights are neither a necessary nor a sufficient condition for *de facto* protection of these rights. This phenomenon has been coined constitutional overperformance (cf. Law, Versteeg 2013; Metels-

[8] More and more often constitutional courts have, however, recently taken on the role of an ultimate legislator adjusting the content of formal rules to changing social circumstances (Stone-Sweet 2007). This has been so in particular in situations, when transaction costs connected with law-making activity at the constitutional level were high (Stone-Sweet 2000). On the basis of these arguments, one may conjecture that judicial activism at independent constitutional courts may lead both to an increase and to a decrease of the gap between *de jure* and *de facto* constitutional rules.

ka-Szaniawska, Lewczuk 2019). The existence of constitutional overperformance around the globe indicates that it is possible that some factor other than *de jure* rights assures their *de facto* protection (Melton 2013). Metelska-Szaniawska and Lewczuk (2019) generally find that controlling for the comprehensiveness of countries' constitutions (which determines the possibility of constitutional overperformance) the common existence of this phenomenon around the world may be explained by the type of regime (democratic regimes are more prone to upholding rights even when the latter have not been explicitly stipulated in the constitution)[9], presence of a political conflict (hindering constitutional overperformance, in particular with regard to personal integrity rights), as well as age of the constitution and economic development (which are contributing factors, specifically with regard to socio-economic rights). Some effects of legal origins can also be observed but not with regard to civil and political freedoms. Finally, they confirm that mechanisms of diffusion, based on competition (in particular in the case when neighboring countries become socio-economically more successful, spurring a mechanism of yardstick competition between countries), as well as possibly acculturation and learning, play a significant role in fostering the spread of constitutional overperformance around the globe.

The *de jure – de facto* relationship in the area of constitutional rights and freedoms has also been the focus of several studies with an empirical component (see e.g. Davenport 1996; Keith 2002, 2012; Keith et al. 2009; Fox, Flores 2009). Two empirical works are of particular relevance. In the first one, based on a study of 189 countries for the period 1981–2010, Melton (2013) uses random effects models and matching techniques to find that *de jure* entrenchment of the freedom of association, freedom of expression, and freedom of movement improves their *de facto* protection, while this is not the case for freedom of religion, press freedom, and the prohibition of torture (where entrenchment may actually increase the violation of these rights/freedoms). In the second one, Chilton and Versteeg (2016) focus on the relevance of *de jure* protection of six constitutional rights (the right to form political parties, right to unionize, freedom of association, freedom of religion, freedom of expression, and freedom of movement) for the degree of government repression of these rights, i.e. their *de facto* equivalents. In their study they find a robust and statistically significant positive impact of the rights to establish political parties and to unionize on government respect for these rights, while freedom of movement and freedom of expression do not exert such an effect. For the remaining two freedoms included in their study (freedom of religion and freedom of association) the results do not allow for clear conclusions. They interpret these findings as a confirmation of their theoretical suppositions suggesting that "organizational" rights establishing organizations, having the means and incentives to protect the given rights, become self-enforcing and are *de facto* more effective than rights that do not establish such organizations ("individual rights").

[9] This relates both to the formal checks and balances (institutional pressure), as well as to the robustness of civil societies (social pressure).

In an empirical study for all post-socialist countries for the period 1989–2011 Metelska-Szaniawska (2021) confirms the presence of two counteracting effects in relation to the evolution of the *de jure – de facto* constitutional gap referring to six constitutional rights and freedoms in post-socialist countries: the effect of the aging of constitutions (increase of the gap as time passes from the adoption of a constitution), as well as the constitution-as-blueprint effect, however only for post-socialist countries other than former Soviet republics in Asia, Belarus or Russia. More importantly, this study also identifies several explanations of the *de jure – de facto* constitutional gap relating, in particular, to the democratization process in these countries, presence of political conflicts, as well as their constitutions' age and degree of comprehensiveness. These considerations, however, relate to the size of the *de jure – de facto* constitutional gap (in the area of selected rights and freedoms) and do not answer the question about the significance of *de jure* protection of these rights for their *de facto* functioning. They do, nevertheless, indicate that the degree of comprehensiveness of the *de jure* bill of rights envisaged in a constitution (i.e. the number of included rights and freedoms) was a relevant factor, as promising too much in this respect could lead to an even larger constitutional gap ("*the key to successful avoidance of the negative consequences of large de jure – de facto constitutional gaps lies in making sure that countries are drafting constitutions which are intended to serve as blueprints 'don't bite off more than they can chew'*" – Metelska-Szaniawska 2021, p. 24–25). In a recent study, that supplements the discussed findings, Metelska-Szaniawska and Lewkowicz (2021) reveal that the content of *de jure* constitutional rules originating from the text of post-socialist countries' constitutions had, generally, no significant impact on their *de facto* performance in the area of protection of rights and freedoms. Exceptions from this general finding may only be expected in the area of "organizational" rights, for which, as explained earlier, mechanisms of self-enforcement are at play (e.g. freedom of assembly/association). In principle, therefore, countries striving to improve factual protection of rights should not limit their efforts to envisaging broad *de jure* protections of rights in their constitutions but also rather the functioning of a highly independent judiciary, a competitive electoral democracy, and a robust civil society. Only under such conditions does the constitution text matter, also – indirectly – for economic outcomes.

2.3. Central bank independence

Independence and autonomy of central banks is another area where the *de jure – de facto* distinction has explicitly been applied in some economic studies (e.g. Hayo, Voigt 2008; Arnone et al. 2009). Acemoglu et al. (2008) refer CBI to policy reforms and reveal that central bank reforms have reduced inflation in societies with intermediate constraints. In these studies CBI is often perceived as a combination of *de jure* and *de facto* characteristics. Specific measures of CBI constitute a subject of debate in social sciences (Cargill 2012; de Haan et al. 2008). While this literature argues that some elements may be defined as CBI's

core components, a precise formulation of the scope of its *de jure* or *de facto* variants is lacking and, furthermore, interrelationships between them are generally not considered.

Works that focus on the effects of CBI, i.a. on financial stability, often do not refer to *de jure* regulatory underpinnings of this independence (Berger, Kissmer 2013). Thus, even if they confirm the impact of CBI, particular institutional forces lying behind CBI are still ambiguous.

Measures of CBI that are of (primarily) *de facto* character are at the same time much more accessible and useful for empirical economic inquiries than *de jure* ones, especially in case of investigating effects of CBI (Haga 2015). For instance, the turnover rate of central bank governors, a *de facto* proxy for CBI, is considered a better predictor for less developed countries than "legal independence" of the central bank – a *de jure* CBI measure (Hayo, Hefeker 2002). It seems that also the sphere of political institutions with respect to CBI, i.e. political stability, government effectiveness, rule of law, democratic accountability or corruption, are more thoroughly investigated than legal rules (Hielscher, Markwardt 2012).

De jure stipulations for central banking are relatively poorly investigated. Even if certain indices are available that relate to the legal background for central banking and may be used as predictors for monetary stability (Cukierman et al. 1992) or even analyzed in the context of political veto players (Keefer, Stasavage 2003), they are suitable for cross-country studies but do not shed much light on the mutual interrelationships between *de jure* and *de facto* CBI institutions. A more interesting complex approach towards *de jure* aspects of CBI has been proposed by Siklos (2008), who studies *de jure* provisions for *de facto* procedures of appointing central bank authorities, their autonomy, decision-making processes and mandates.

Even if some empirical studies do include both *de jure* and *de facto* measures of CBI (e.g. Taylor 2013 with respect to the Federal Reserve), they do not consider mutual interactions between these two types of institutions. A similar remark relates to relationships between *de jure* political provisions for CBI and central banks' performance (Bodea, Hicks 2015). Research by Hayo and Voigt (2008), focusing on the relevance of *de facto* CBI (perceived as independence from other government branches) for inflation provides a notable exception as it indicates certain elements of *de jure* CBI as a relevant indirect link in this respect. Although this paper primarily concentrates on general quality of the legal system and its relation to inflation, it can be considered as one of the very first attempts to study the relevance of *de jure* institutions for *de facto* institutions in the sphere of central banking.

So far, conclusions derived from studies of CBI concern, at most, institutional quality problems and do not provide precise suggestions for desirable changes in specific legal provisions laying ground for this independence (Crowe, Meade 2008). To a large extent they concern *de facto* activity of central banks, e.g. transparency (Crowe, Meade 2008; Siklos 2011) and relate it i.a. to the broad public, mass media and financial markets topics (Dumiter 2014). There are, however, encouraging perspectives for further research on the interrelationships between *de jure* and *de facto* determinants of CBI and their economic effects. For instance,

there are promising sources of data, like Garriga (2016), dealing with *de jure* CBI (containing i.a. information about relevant statutory policy reforms both for industrialized and developing countries).

2.4. Fiscal rules

Fiscal rules are designed and implemented to impose stable constraints on fiscal policy *via* limits on selected budgetary aggregates. The goal of imposing such fiscal rules is to correct the incentives that may be distorted and bring pressure to overspend, in particular during periods of prosperity (IMF 2017). Adequate institutional design in this area may help in mitigating fiscal profligacy and irresponsible decisions (von Hagen 2002). But again, the question with respect to fiscal rules may concern relationships between their *de jure* stipulation and *de facto* execution (with the latter in this context often equated with *de facto* fiscal policy).

Differently from other areas of regulation discussed in this paper, with regard to fiscal rules much of the literature concerns their *de jure* aspects. Policy makers are constrained by *de jure* fiscal rules and those rules are subject to change but in a long-term perspective they are aimed at providing benefits for the state in terms of fiscal sustainability (von Hagen 2002).

Fiscal rules fixed in legislation (IMF 2017) may bring institutional changes that provide signaling functions, as they are visible to the public. For instance, governments willing to pursue disciplined fiscal policy may find it easier to convince the interested agents of their good intentions (von Hagen 2002). This is significant also because the public awareness of fiscal difficulties often varies. In particular, in times of economic prosperity problems of excessive spending and deficits may gain less public attention. Better *de jure* fiscal rules may, in such a case, be a crucial mechanism to preserve fiscal awareness.

There are also studies that investigate potentially negative outcomes of *de jure* fiscal rules and examine the effects of fiscal rules with creative budget accounting (Milesi-Ferretti 2004). Another important point in this respect is that in some circumstances *de jure* fiscal rules are effective but not binding, since they have a negative impact on social transfers in countries with weak legal protection of social rights (Dahan, Strawczynski 2013).

Some works on fiscal adjustments refer to *de facto* fiscal policy and then do not take into account the interplay between fiscal rules and fiscal policy (McDermott, Wescott 1996). An important point is that the relevance of *de jure* fiscal rules for *de facto* fiscal policy is dependent on the precise shape of legal institutions. Von Hagen (2010) reveals that deviations from the projections presented in Stability and Convergence Programs with respect to fiscal policy may be explained i.e. by the stringency of fiscal rules. Wierts (2008), in turn, shows that there are correlations between the institutional design of fiscal rules and fiscal outcomes. Stricter rules lead to circumventing behavior. The strength and execution of *de jure* fiscal rules seem to be determined by the degree of political commitment (Wierts 2008). Auerbach (2014) also stresses that in the context of economic out-

comes of fiscal rules, their design, implementation and way of enforcement are necessary aspects to consider. Debrun et al. (2008) determine that the causality indeed runs from fiscal rules to fiscal behavior.

Despite the fact that recently fiscal rules gained significant political appeal and prominence in the European Union and beyond, we still know very little about the relationships between *de jure* fiscal rules, budgetary outcomes and market behavior, or even the distinction between *de jure* and *de facto* fiscal rules in itself (Rommerskirchen 2015). Empirical studies in this area struggle with problems related to i.a. measurement, contextuality and endogeneity between the included factors. Even if it is agreed that fiscal rules matter for fiscal discipline and sustainable public finance, research aimed at proposing specific new fiscal institutions that may strengthen the budget discipline is needed (Schick 2004).

2.5. Independence of other regulatory agencies

Interest in the delegation of governments' powers to independent regulatory agencies (IRAs) concerns not only central banks and empowered constitutional courts but also specialized agencies, e.g. supervising liberalization, privatization and regulation of utilities or the media. The establishment of IRAs is based upon the assumption that their independence from the government will create peer pressures and reputational incentives, leading to more expertise-based decisions instead of the pursuit of short term policy-driven objectives (Majone 2001). The independence of such regulators, perceived as trustees acting in the public's interest and commitments, rather than as mere agents of ruling political parties, eventually leads to a higher quality of regulatory decisions and, therefore, may also impact economic outcomes.

There exists a variety of studies focusing on *de facto* independence of regulatory agencies only, e.g. Ozel (2012) on regulatory independence in Turkey, Ingold et al. (2013) on the Swiss telecommunications system, as well as numerous works on agency governance in the European Union (Rittberger, Wonka 2011; Busuioc 2012) or in selected countries (Fernandez-i-Marin et al. 2016). *De facto* independence of regulatory agencies depends, however, on motivation for establishment of such agencies, their design and experience in practical operation (Debrun et al. 2009). All of these three crucial components are, in turn, dependent on *de jure* institutional underpinnings.

Hanretty and Koop (2013) is an important pioneer work on *de jure – de facto* relationships focusing on IRAs. They argue that actions of such independent agencies may bring better policy results but the key issue is to provide formal independence assuring actual independence of IRAs from politics and policy decisions. In an earlier work focusing on Turkey, Sezen (2007) analyzes the legislative basis for *de jure* autonomy of regulatory agencies and its relevance for their *de facto* autonomy. The connection that this paper makes is *via* perception of formal rules by board members of IRAs. Some other works do not refer to particular legal rules aimed at guaranteeing independence of regulatory agencies

but they consider the level of their formal independence from the perspective of politicization of regulatory agencies (e.g. Ennser-Jedenastik 2016).

All in all, studies referring to *de jure* and *de facto* aspects of IRAs are scarce. As is the case in other areas, without a deep insight into the legal prerequisites for independence of regulatory agencies, it is difficult to debate on optimal institutional settings. Further research in this area differentiating between *de jure* and *de facto* independence of regulatory agencies, reflecting a variety of strategies adopted in different countries, could bring new insights in this context.

2.6. Property rights

A property right may be regarded as an enforceable authority to undertake particular actions in a specific domain (Commons 1957). Property rights, as a social creation, clarify what may be treated as property and how it can be used. Specifically, property rights establish legal relationships between users (owners) and others that have to respect that use (ownership).

Strong private property rights are seen as a crucial driver of long-run economic development (Angeles 2011).[10] Privatization of property rights is considered to ensure that users/owners have motivation to manage their resources optimally (Gibson et al. 2003). Analysis of *de jure* property rights *per se* is, in principle, not enough to predict the variation of benefits from some assets. So *de facto* property rights, accompanied by social customs and culture, play an essential role in real resource policy. Likewise, the majority of research on the impact of property rights on economic growth tends to focus on the relevance of *de facto* property rights (Leblang 1996). Perceived property rights, that are evidently a concept close to *de facto* protection, are also studied (e.g. by Yasar et al. 2011) and considered as one of drivers of firms' performance.[11]

However, some studies concentrating on legal (*de jure*) institutions in the area of property rights are also available. For instance, Bjørnskov (2015) identifies a relationship between *de jure* property rights protection and economic growth of post-socialist countries. Miletkov and Wintoki (2012), in turn, reveal the impact of financial development on legal rules shaping property rights. Green and Moser (2012) show that formal land titles (*de jure* property rights) matter for the emergence of large firms at low administrative levels, while enterprise development also strengthens formal property rights.

There are also studies that relate both to *de jure* and *de facto* property rights, as Alston et al. (2012) who study land rights in Australia, the United States, and

[10] However, empirical evidence of a causal link between property rights protection and economic growth within countries is rather limited (Green, Moser 2012).

[11] An interesting voice in the discussion concerns gender differences in property rights (Meinzen-Dick 1997), where the effects of gender differences and implications for policy design are studied with regard to *de facto* property rights, since in the last decades *de jure* property rights have remained virtually the same for men and women in most states.

Brazil. Jandhyala (2012) examines the role of formal and *de facto* property rights protection in information technology services[12]. The obtained results highlight the role of *de facto* property rights protection for location choice for investments. These studies, however, do not ask about the relationship between *de jure* and *de facto* property rights protection. A scarce exception are papers that deal, specifically, with the issue of property rights enforcement, which is closely connected to the *de jure – de facto* differentiation (Acemoglu, Robinson 2006).

Although, as discussed above, the concept of property rights has various applications, available studies usually refer to *de facto* property rights and/or *de jure* ones separately. What seems to be missing is an approach uncovering the relationships between *de jure* property rights (at the constitutional or sub-constitutional level) and their *de facto* equivalents. A deeper analysis of interactions between *de jure* and *de facto* property rights protection could bring significant value-added to the debate on legal and social underpinnings behind factual and perceived property rights, which in turn are essential for economic growth and development.

Conclusions

In this paper we aimed to contribute to the law and economics literature on economic effects of legal rules by extending the focus to the *de jure – de facto* distinction. Firstly, we provided a conceptualization of *de jure* and *de facto* institutions, as well as elaborated on their interrelationships. Then, we investigated the up-to-date application of this perspective to six selected areas of research in (constitutional) law and economics. In two of them, partially in relation to theoretical works and partially independently of such background, recent empirical studies have explicitly considered the relationship between *de jure* and *de facto* constitutional rules. Quantitative studies have been conducted for broad samples, usually consisting of more than 100 countries from different continents and with considerable institutional heterogeneity both in the formal and factual dimension. Hayo and Voigt (2007, 2019), Melton and Ginsburg (2014), Gutmann and Voigt (2020) study this problem with regard to judicial independence, while Melton et al. (2013) (as well as Metelska-Szaniawska and Lewkowicz 2021 for a limited sample consisting of post-socialist countries in Europe and Asia) focus on the relationship between *de jure* and *de facto* legal institutions in the area of constitutional rights protection – to name a few examples in these two "more developed" areas. For the remaining four areas of constitutional-legal regulation discussed in this paper, such perspective is much less advanced (Hayo and Voigt 2008 is a notable developing step with regard to central bank independence) or virtually absent.

[12] Formal institutions are considered in this study as laws and different kinds of policies, so they cover a broader sphere of institutions than *de jure* ones, what is accentuated within the text.

We believe that employing the proposed *de jure – de facto* classification (which, as explained in section 1, also refers to the formal – informal distinction, however does not overlap with it) will lead to more consistency in the theoretical and empirical work in the field of law and economics. By indicating the common components of institutions in the *de jure* and *de facto* dimensions, that are significant for the analysis of interrelations between these rules in the context of their impact on the economy, in a subsequent step such approach may also facilitate the development of holistic research on the economic impact of institutional (in particular, constitutional) frameworks, including the interaction of various rules. The illustrations that we have discussed in the paper clearly show that it is a worthwhile task to review and systematize the literature in all areas of economic analysis of law from the perspective of this distinction. This is particularly the case now, when law and economics has developed into a rich cross-disciplinary research program delivering a whole plethora of different (in some cases conflicting) results concerning the economic relevance of legal rules in various areas/branches of law. The approach that we here propose involves, in the first step, distinguishing between the effects that *de facto* legal rules exert on the economy and any direct impacts of *de jure* arrangements in this respect, and, subsequently, determining whether *de jure* institutions affect their *de facto* equivalents thereby influencing economic outcomes indirectly (if so then in what way – boosting or inhibiting, and under which conditions). A more systematic empirical analysis based on solid theoretical fundaments relating to the *de jure – de facto* distinction will allow for formulating more reliable policy recommendations concerning the design of effective legal institutions leading, directly or indirectly, to desired economic outcomes.

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DE JURE AND *DE FACTO* INSTITUTIONS: IMPLICATIONS FOR LAW AND ECONOMICS

Summary

The paper contributes to the debate on economic effects of law by extending the focus to the *de jure – de facto* distinction. Identification of economic effects of legal rules has been the focus of law and economics for decades. However, the literature on the subject relates relatively rarely to *de jure* provisions; rather it deals with the way in which these rules *de facto* function in legal practice. The authors refer to the conceptualization of *de jure* and *de facto* institutions, as well as their interrelationships, and investigate the applications of this perspective to the literature on economic effects of law. Specifically, they focus on constitutional-legal institutions, including judicial independence, protection of constitutional rights, central bank independence, fiscal rules, independence of regulatory agencies, and protection of property rights. Their conclusions concern the validity of research on economic consequences of law and provide lessons for its further development.

Keywords: *de jure* and *de facto* institutions, law and economics, judicial independence, constitutional rights, central bank independence, fiscal rules, independence of regulatory agencies, property rights

JEL: B52, D02, K00, K40

INSTYTUCJE *DE IURE* I *DE FACTO* – IMPLIKACJE DLA PRAWA I EKONOMII

Streszczenie

Artykuł, przez odniesienie do klasyfikacji *de iure – de facto*, wpisuje się w dyskusję dotyczącą ekonomicznych skutków prawa. Identyfikacja ekonomicznych skutków reguł prawnych stanowiła obszar zainteresowania w ramach ekonomicznej analizy prawa przez dekady. Jednak w literaturze przedmiotu znajdujemy relatywnie częstsze odniesienia do instytucji *de facto*, które funkcjonują w praktyce niż do gwarancji o charakterze *de iure*. Autorzy odnoszą się do konceptualizacji instytucji w wymiarze *de iure* oraz *de facto*, jak

również do wzajemnych relacji między nimi, a także do zastosowania tej klasyfikacji instytucji w literaturze z zakresu ekonomicznych skutków prawa. W szczególności skupiają uwagę na analizie instytucji prawnych na poziomie konstytucyjnym, z uwzględnieniem niezależności sądownictwa, poszanowania praw konstytucyjnych, niezależności banku centralnego, reguł fiskalnych, niezależności organów regulacyjnych oraz poszanowania praw własności. Wnioski dotyczą poprawności badań nad ekonomicznymi skutkami prawa i dostarczają wskazówek do ich dalszego rozwoju.

Słowa kluczowe: instytucje *de iure* i *de facto*, ekonomiczna analiza prawa, niezależność sądownictwa, prawa konstytucyjne, niezależność banku centralnego, reguły fiskalne, niezależność organów regulacyjnych, prawa własności

JEL: B52, D02, K00, K40

ИНСТИТУТЫ *DE JURE* И *DE FACTO* – ИМПЛИКАЦИИ ДЛЯ ПРАВА И ЭКОНОМИКИ

Резюме

Автор статьи, обращаясь к классификации *de jure – de facto*, входит в дискуссию, касающуюся экономических последствий права. Идентификация экономических последствий правовых урегулирований была предметом интереса ученых, занимающихся экономическим анализом права, в течение десятилетий. Однако в литературе предмета гораздо чаще присутствует анализ института *de facto*, функционирующего на практике, чем гарантий характера *de jure*. Авторы относятся к концептуализации институтов в измерении *de jure* и *de facto*, к взаимному соотношению между ними, а также к применению этой классификации институтов в литературе по экономическим последствиям права. В частности, авторы сосредоточивают свое внимание на анализе правовых институтов на уровне конституции, с учетом независимости судопроизводства, уважения законов конституции, независимости центрального банка, фискальных правил, независимости регулирующих органов, а также уважения права собственности. Выводы касаются правильности исследований экономических последствий права и дают указания относительно их дальнейшего развития.

Ключевые слова: институты *de jure* и *de facto*, экономический анализ права, независимость судопроизводства, конституционные законы, независимость центрального банка, фискальные правила, независимость регулирующих органов, право собственности

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