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The concept of legal atavism – the example of Art. 880 Code of Civil Procedure

Abstract: The article focuses on the application of the concept of atavism, which originally was developed in biology, in the area of legal science. The article analyzes characteristics of legal atavisms. Negative consequences of their existence are also depicted. The concept of atavism is discussed based on Art. 880 of the Code of Civil Procedure, which can – in the author’s opinion – be an appropriate example to reflect the significance of this term. The analysis which was conducted enabled the author to propose *de lege ferenda* postulate, which may positively affect the course of the judicial enforcement proceedings and the way of shaping the legal order of the Republic of Poland.

Key words: ATAVISM, LEGAL ATAVISM, COURT ENFORCEMENT PROCEEDINGS, ART. 880 CODE OF CIVIL PROCEDURE

Introduction

The notion of *atavism* derives from biology. Contemporarily, it raises considerable interest on the part of researchers representing different domains of science. Thus, it is worth analyzing whether the notion of atavism can also be applied in legal science. On the other hand, in case the transfer of the term onto the ground of legal science is found possible, it is indispensable to present its meaning in the framework of this discipline, as well as to discuss this with the use of a concrete instance. It seems therefore advisable to refer the notion of atavism in the theory of law to Art. 880 of the Code of Civil Procedure,¹ which – in the opinion of the author – can

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¹ The Act of 17 November 1964 – the Code of Civil Procedure, *Journal of Laws* of 2019, item 1460 as amended; hereafter referred to as “CCP”.

fully explain the meaning of the term. This will facilitate making a detailed presentation of what atavism is in legal science. Also, such an analysis will make it possible to pose *de lege ferenda* postulates, which can have a positive effect on not only court enforcement proceedings, but also on the manner of forming the legal order of the Republic of Poland.

The aim of this paper is to prove the thesis that there exist regulations and articles of law which can be called atavisms. In order to confirm the statements included in the research thesis, the author applied two auxiliary theses: the first, assuming that certain features of the notion of atavism, which are found to exist in biology, can occur with reference to regulations and articles of law as well, and the other – that Art. 880 CCP offers an instance of article which possesses such features.

The notion of atavism

Atavism means the occurrence of a trait in individuals, which was characteristic of their distant ancestors, one that has not been inherited for a very long time, or revealing of certain behaviors or features that used to be typical of ancestors, or of certain environments or cultures.² The occurrence of atavistic features has already been described in many organisms, e.g. they cover atavistic muscles in birds and mammals, or additional nipples in the latter.³ Atavism proves that genes which defined the traits in forefathers and the developmental paths connected with them, are often retained during a long period of evolution.⁴

As far as biology is concerned, atavism and atavistic traits have been subjected to penetrating analyses. Nowadays, the notion appears also in other scientific disciplines which are frequently not connected directly with examining the structure of living organisms.⁵ The notion itself has penetrated into domains dealing with examining behaviors of human beings, as well.⁶

² <https://sjp.pwn.pl/slowniki/atawizm.html> (accessed 08.12.2018).

³ B.K. Hall, *Descent with modification: the unity underlying homology and homoplasy as seen through an analysis of development and evolution*, "Biological Reviews of the Cambridge Philosophical Society" 2003, vol. 78, issue 3, p. 422.

⁴ N. Tomić, V.B. Meyer-Rochow, *Atavism: medical, genetic and evolutionary implications*, "Perspectives in Biology and Medicine" Summer 2011, vol. 54, no. 3, p. 349.

⁵ In the assessment of the author of this paper, the use of the notion of atavism with reference to subcultures and acts of violence on grounds of racism and religion, which are connected with them, are especially interesting (see: F.W. Viehe, *Atavistic Culture: The Bête Noire of Social Change*, "Forum on Public Policy: A Journal of the Oxford Round Table" Spring 2009, no. 1).

⁶ It is noteworthy that the activities of gathering (as opposed to collecting) are attributed to the nature of atavism (see: T. Kruszewski, *Kolekcjonerstwo – atawistyczne zbieractwo a poczucie społecznej użyteczności. przyczynek do psychologii posiadania* [Collecting – atavistic gathering and the sense of social usability. A contribution to psychology of possessing], „Toruńskie studia biologiczne” 2017, vol. 10, no. 2 (19), p. 73).

Its application in criminology is especially worth paying attention to.⁷ Apart from this, the notion of atavism has found its use in social studies, where it refers to behaviors that do not perform their primary functions.

The notion of legal atavism

Simplifying, it can be accepted that the term of atavism depicts the situation, where a certain feature or form of behavior used to be useful in the past, or – indeed – was indispensable due to its playing an important role, whereas the disappearance of the function which it was expected to perform, did not lead to elimination of this trait or behavior.

In the author's opinion, a similar phenomenon can also be perceived in the case of legal acts. Individual rules and articles could be of importance in the past for legal regulations in force then, as they played defined functions that made regulating particular problems possible in the right way. Yet a significant change in the character of the regulation resulted in the impossibility of realizing the function of the given rule or article. Such regulations (or articles) still exist and are in force despite the fact that the characteristic legal solution of the given issue was changed by the legislator a long time ago and superseded with another newer regulation. Certain rules and articles that ceased to play their primary function are still retained in the legal system, although they have lost their *ratio legis*. From the author's point of view, rules and articles of law of this kind should be called "legal atavisms".⁸

The fact that the given rule (article) which used to fulfil or was expected to fulfil a determined role in the legal order of the day, yet – because of changes that followed in the law – does not have any influence on the real carrying out of its old function any longer (which makes it redundant in the present legal system), however, is still binding, ought to be considered to offer sufficient premises indicating that the rule (article) is an instance of legal atavism.⁹

Regulations and articles referred to as legal atavisms are thus a kind of remnant of earlier rules existing in the legal system, which – not fulfill-

⁷ Here it is worth mentioning the importance of the scientific achievements of C. Lombroso, who pointed to the existence of atavisms in criminology (see: F.P. Fernández, *El atavismo en el albor de la psicología criminal: Cesare Lombroso y los orígenes del tatuaje*, „Revista de Historia de la Psicología” 2004, vol. 25, número 4, p. 233-234.)

⁸ In the remaining part of the paper, the author will use the notion of "legal atavism" with reference to legal regulations and articles which, in consequence of relevant changes, have lost their function(s) but – despite this – have not been eliminated from the legal system and are still in force.

⁹ It is worth stressing that legal atavism should not be associated with the situation where the given norm ceases to be binding due to not being abided by or not being carried out.

ing their roles anymore – are still in force. They do not have any influence on either the legal solutions or practice in force at present, though. In this respect they remind of the atavistic traits presented earlier: they do not perform their function; nevertheless, they still occur in living organisms.

Therefore, it needs acknowledging that the first auxiliary thesis put forward at the beginning, has been confirmed, as in compliance with it, certain features of the notion of atavism which are typical of biology can also occur with reference to regulations and articles of law.

Function of Art. 880 CCP

In accordance with Art. 880 CCP, execution from remuneration for work is the responsibility of a court bailiff acting for the district court proper to the debtor. Complying with the principle of *actor sequitur forum rei*, it is one of the bailiffs employed for the court operating in the district relevant to the place of debtor's abode who is empowered to conduct the execution from the debtor's remuneration for work. Thus, the function of Art. 880 CCP is brought down to making the properties of court bailiffs more precise with reference to their carrying out the execution in court enforcement proceedings, which anyway results from Art. 27 para 1 CCP. This article was intended to transfer the property resulting from the general part of the CCP onto the grounds of regulations concerning enforcement proceedings, with the aim to settle which of the court bailiffs can carry out the execution from the remuneration for work against the given debtor.

A historical sketch of Art. 880 CCP

Art. 880 CCP was already part of the original text of the CCP, being in force since 1 December 1964. According to the primary version of Art. 880 CCP, execution from the debtor's remuneration for work was the responsibility of a court bailiff at the county court proper to the debtor's place of abode. It needs noting that the replacement of the county court by the district court in the content of Art. 880 CCP did not make any significant impact on realization of the function of this article, but was caused by changes in the polity, ensuing with reference to the organization of the judiciary in Poland. However, what was relevant to the regulations in force then was the fact that the Minister's of Justice decree of 9 March 1968, concerning the bailiff's proceedings¹⁰ did not regulate questions pertaining to the properties of this court officer with respect to enforcement of financial obligations. This meant that realization of the function of Art. 880 CCP was not disturbed by the polity regulations relating to court bailiffs.

¹⁰ *Journal of Laws* 1968.10.52 of 1968.04.10; hereafter referred to as "MDBP".

On the other hand, the attribute relevant to conducting execution from the given component of the debtor's asset was settled in the regulations of the CCP, including in Art. 880 of this code.

The Act of 29 August 1997 on court bailiffs and enforcement procedures¹¹ entering into force brought about a significant alteration in this respect. In contrast with the regulations of the MDBP in the ABEP, the question of possibility of bailiffs' carrying out enforcement proceedings against debtors was regulated. In the legal state in force as on 31 December 2018, the detailed regulation of the question of conducting enforcement of financial obligations, included in Art. 8 ABEP, caused Art. 880 CCP to lose its significance for the system of court enforcement.¹² According to Art. 8, para 5 ABEP, the creditor had the right to choose the bailiff on the territory of the Republic of Poland, with the exception of cases of execution from the real estate or those in which regulations of execution from the real estate applied respectively.¹³ In the case of such a choice, the court bailiff could act beyond their district. The introduction of this detailed rule cancelled the significance of and the need for the further existence of Art. 880 CCP. Moreover, Art. 880 CCP does not contain powers for the creditor to make a choice between court bailiffs.¹⁴ The question of attributes and possibilities of conducting execution from the remuneration for the debtor's work was settled on the basis of Art. 8 ABEP and not Art. 880 CCP. Despite this, the legislator has not removed the latter from the legal order.

By means of the Act of 22 March 2018 on court bailiffs¹⁵ the legislator again regulated the question of possibilities of the bailiff's conducting execution of financial obligations in the given area. In compliance with Art. 8 ACB, the bailiff acts in the area of their district, with the inclusion of Art. 10 ACB. However, the debtor was given the possibility of choosing the bailiff from outside the district within the limits of which the debtor's place of abode is situated. Art. 10 para 1 ACB provides that in cases dealt with in Art. 3 para 3 points 1 and 2 ACB¹⁶ the creditor has the right to choose the court

¹¹ *Journal of Laws* of 2018, item 1309 as amended; hereafter referred to as "ABEP".

¹² Also because of Art. 27 §1 CCP in connection with Art. 13 §2 CCP, which could find its application in the case of concurrence of court executions.

¹³ This wording of Art. 8 ABEP was meant to lead to the situation where court bailiffs were to strive to be chosen by creditors. (K. Kazimierzak, *Struktura i wielkość kancelarii komorniczych, a skuteczność egzekucji w związku ze zmianami art. 8 ustawy o komornikach sądowych i egzekucji część I* [The structure and size of bailiffs' offices and the effectiveness of executions with regard to the changes of Art. 8 ABEP, Part I], „Przegląd Prawa Egzekucyjnego” 2018, nr 11, p. 27).

¹⁴ S. Cieślak, In: J. Jankowski (ed.), *Kodeks postępowania cywilnego. Komentarz do art. 730-1217* [The Code of Civil Procedure. Commentary on Art. Art. 730-1217], vol. II, Warszawa 2015, p. 695.

¹⁵ *Journal of Laws* of 2020.121; hereafter referred to as "ACB".

¹⁶ According to Art. 3 para 3 item 1 ACB, court bailiffs are entrusted with execution of court's judgements in cases of pecuniary and non-pecuniary claims, as well as securing claims, including European order to secure claims on the bank account, with the inclusion of exceptions stipulated

enforcement officer in the area relevant to the appeal court, in which the seat of the bailiff's office is located in accordance with the rules of the CCP, excluding cases of execution of real estate, cases of delivering real property, cases of introducing into possession of real estate; cases of emptying places, including living quarters, of persons or objects, in which the regulations on execution from real estate are applicable, respectively. The right to choose the bailiff, which is granted to the creditor, is a departure from the principle, according to which the court enforcement officer acts in the area of their district.¹⁷ Art. 8 and Art. 10 ACB define precisely the required data relating to the court bailiff selected to conduct execution proceedings.

This confirmed the character of Art. 880 CCP as a legal norm which – in practice – does not hold any significance,¹⁸ since at present the issue which it concerns is systemically and in a far more detailed way determined in the rules of another act¹⁹ that makes the attributes of bailiffs' office more precise.

Article 880 CCP as an instance of legal atavism

In this place one needs considering whether Art. 880 CCP offers an instance of legal atavism. It is necessary therefore to refer Art. 880 to features of legal atavisms presented in the article earlier.

In the legal order in force in the past, Art. 880 CCP performed the function which consisted in indicating the proper court enforcement officer to conduct execution from the remuneration for debtor's work.²⁰ This fact

in the CCP. On the other hand, in accordance with Art. 3 para 3 item 2 ACB, bailiffs are entrusted with conducting of other writs of execution and enforcement orders that are subject to execution in the court enforcement proceedings. without being invested with the enforcement clause.

¹⁷ B. Falkowski, In: M. Simbierowicz, M. Świtkowski (eds), *Ustawa o komornikach sądowych. Ustawa o kosztach komorniczych. Komentarz* [The Act on Court Bailiffs. The Act on Execution Proceedings Costs. Commentary], Warszawa 2018, p. 63.

¹⁸ It needs noting that Art. 880 CCP points to the fact that in the case of enforcement from the debtor's remuneration for work, a bailiff relevant with regard to the place of debtor's abode is the proper court's officer to conduct the enforcement. On the other hand, in the case of eliminating Art. 880 CCP from the legal order, this property would not be changed, because Art. 27 §1 CCP in connection with Art. 13 §2 CCP would be applicable. In such a situation, a likely removal of Art. 880 CCP from the legal order would not lead to any alterations in norms relating to court enforcement proceedings, which would be most significant with reference to the regulation contained in Art. 773¹ CCP dealing with settlement of convergence of executions between court bailiffs.

¹⁹ Art. 8 ACB.

²⁰ It must be observed, though, that due to the content of Art. 27 §1 CCP a possible lack of Art. 880 CCP in the legal order would not result in a change in solutions related to court enforcement proceedings. On the other hand, Art. 880 CCP realized its function through making precise the attributes to conduct execution from the remuneration for work in the court enforcement proceedings.

fulfils the first requirement to acknowledge the given rule, article of any norm to be an example of legal atavism.²¹

The entrance into life of Art. 8 ABEP and, later on, that of Art. 8 ACB in connection with Art. 10 ACB, together with Art. 27 §1 CCP being in force, caused the regulation contained in Art. 880 CCP to become redundant. The regulations included in the legal acts directly related to the polity questions of court enforcement officers, which also were in the rank of an act, included detailed norms of questions which Art. 880 CCP concerned. Moreover, both Art. 8 ABEP and Art. 8 ACB in connection with Art. 10 ACB point to cases in which execution from the remuneration for work can be conducted by a different bailiff from what follows from Art. 880 CCP. This again suggests that the norm included in Art. 880 CCP is redundant as it does not have any significance as regards the manner of regulating the relevance of bailiff's place with regard to their conducting court execution from the remuneration for work. This is confirmed by the fact that in the case where Art. 880 CCP is removed from the legal system, there will ensue no changes in the court execution procedures with regard to which court enforcement officer is proper to conduct enforcement proceedings against the given debtor, or even the very execution from the remuneration for work itself.²² Thus, Art. 880 CCP does not perform its primary function at present, since the property of the bailiff has already been made precise in the ACB. What is more, the lack of Art. 880 CCP would not bring about any alterations in the scope of regulating questions of properties of court enforcement officers. The property of bailiff's place is defined in the specific regulation proper to the determined manner of execution by means of the location of the object or the debtor's general property.²³ Nevertheless, the rules contained in the CCP, which concern the fact which bailiff can conduct the given enforcement procedure are simply redundant in the situation where this question has already been regulated in the ABEP and then in the ACB. Therefore, the existence of Art. 880 CCP is of no consequence as it does not perform any function nowadays. Accordingly, it can be stated that in the case of Art. 880 CCP the second condition to acknowledge a norm, regulation or article as legal atavism has been met. As a result of the ABCP and afterwards – the ACB – entering into force, Art 880 CCP does not hold any influence on the factual realization of its original func-

²¹ It is worth noting that, in a similar way, the present atavistic features used to perform some functions in biological organisms.

²² It needs underlining that Art. 8 ACB does not make *lex specialis* in relation to Art. 880 CCP. Also, Art. 880 CCP does not contain a statement, either, saying that the Minister of Justice or the legislator, by means of a decree or an act, makes the questions of properties necessary to conduct execution from remuneration for work more precise.

²³ A. Marciniak, *Ustawa o komornikach sądowych i egzekucji. Komentarz* [The Act on Court Bailiffs and Execution Proceedings. Commentary], 6th edition, Warszawa 2014, p. 87.

tion.²⁴ At present the existence of this article is completely unnecessary and has no practical application any longer.²⁵

The fact that Art. 880 CCP continues to stay in force satisfies also the third of the conditions mentioned earlier for the given article to be acknowledged an instance of legal atavism. As a result, in the author's opinion, the second auxiliary hypothesis, assuming that Art. 880 CCP possesses features of legal atavism, has been proved in positive.

Consequences of the existence of legal atavisms

Seemingly, it may appear that the functioning of Art 880 CCP in the legal system is not connected with negative effects to the order and regime of the legal system. Such a view is not true, though. In reality, the appearance of regulations and articles in the legal order, which are called legal atavisms by the author of this paper, is detrimental to the stability and transparency of the legal order.

First of all, legal atavisms cause an unnecessary increase in the number of rules and articles related to the same issue. Fairness and clarity of the legal system require individual questions to be regulated in a way which facilitates getting familiar with them and understanding them. Over-regulating of issues is a negation of this. In consequence, this leads to lowering of the level of clarity and coherence of regulations in force.

Still another negative effect of the existence of legal atavisms is that they make it possible to have many different interpretations of the same legal state. The situation when the given question is normalized by different regulations which do not read identical, creates a potential chance for the occurrence of cases in which state organs dealing with the same situations will act in different ways. It is especially confusing since it is not equally obvious to all people interpreting law which rules or articles make *lex specialis* and which are *lex generalis*.²⁶ The possibility of exist-

²⁴ According to Art. 8. 1 ACB, the court enforcement officer acts in the area of his/her district, with the inclusion of Art. 10 ACB that stipulates the possibility of conducting court execution (including that from the remuneration for work) outside the district of the given bailiff. At present, it is Art. 8. 1 ACB, together with Art. 10 ACB, that determine which court bailiff can carry out the enforcement procedure from the remuneration for debtor's work.

²⁵ Similarly, in living organisms, atavistic features do not perform any tasks.

²⁶ It is worth observing that such interpretative disputes are possible already using the instance of Art. 880 CCP, since there may appear an erroneous view that the code-based regulation contained in this article makes *lex generalis* in relation to the rules included in the regulations of the ACB. Moreover, there exists a danger that a bailiff can – in the course of the erroneous interpretation – accept a contradicting view. In the author's opinion, both of these views are faulty: acknowledgement of Art. 880 CCP as *lex specialis* with respect to the regulations contained in the ACB is favored by the fact that it is Art. 8. 1 ACB, together with Art. 10 ACB, which point to general norms relating to the possibilities of conducting enforcement proceedings, covering all the

ence of considerable disparities as regards interpreting the same regulations (or articles) definitely contradicts the uniformity and stability of law. It needs accepting the fact that, in practice, the existence of legal atavisms can be connected with the occurrence of phenomena which are univocally acknowledged to be negative.

De lege ferenda postulates

Now, it is worth bringing into the discussion *de lege ferenda* postulates, whose realization will make it possible to counteract negative effects of legal atavisms. In consequence, it needs advocating liquidation of the currently existing legal atavisms. Also, the postulate which deserves considering is that, each time following the acceptance of a new legal act in the legislative process, relevant regulations and articles should be indicated, whose existence will not be necessary.²⁷ This postulate would relate not as much to regulations and articles that contradict the new legal act as those which do not perform their function any longer in the new legal order. Such rules and articles should be repealed as soon as new legal acts enter into life, as the application of the latter is connected with making it impossible for the former to be applicable. Such a practice would certainly prevent legal atavisms from arising. Again, in the case of Art. 880 CCP, if the above-postulated procedure were binding, this article would have been removed from the legal system the moment the regulations of the ABEP or the ACB came into force.

Making use of the example of Art. 880 CCP, the author of this article has presented concepts behind the existence of legal atavisms with the aim to prove that *de lege ferenda* postulate should definitely be raised in order to remove this article from the legal system as it does not perform its primary function any longer and retaining it does not influence the legal solutions currently in force. Still, it can be feared that its presence in the form of a legal atavism may lead to the appearance of some negative effects.²⁸

manners of execution. On the other hand, Art. 880 CCP refers exclusively to one concrete manner of execution and makes solely an exception to the regulations of the ACB. Acknowledging this view to be right, could lead to a diametrical change in the practice accepted by court enforcement officers as well as the character of the evaluation of the regulation in force. It is thus easy, using this example, to realize how harmful the existence of atavisms in the legal system can be. Neither of the above-mentioned interpretations of the relations of Art. 8. 1 ACB in relation with Art. 10 ACB juxtaposed with Art. 880 CCP, is correct, since they do not make either *lex specialis* or *lex generalis* in relation to each other. Nevertheless, it should be concluded that both of them illustrate in a good way the risk connected with the existence of legal atavisms.

²⁷ It needs remarking that the fact that Art. 880 CCP is still in force testifies to that the legislator does not realize this postulate.

²⁸ The effects were outlined in the earlier part of the article.

It is necessary to stress that the postulate of removing legal atavisms from the legal system ought not to be restricted exclusively to regulations connected with court enforcement proceedings. The legislator should eliminate redundant regulations, articles or norms irrespective of the branch of law in which they exist, since presently they do not perform any function.

Conclusion

In the author's assessment, both auxiliary hypotheses have been confirmed: certain features of the notion of atavism, which are typical of biology, can also occur with reference to legal rules and articles of law. The instance of an article possessing such features is Art. 880 CCP. Thus, the thesis that there exist regulations and articles in the legal order which can be called atavisms has been confirmed, too.

Summing up the considerations presented in this article, it can be rightly generalized that the notion of atavism borrowed from the natural sciences, finds its application also in the case of legal science. The term legal atavism perfectly reflects the significance of regulations and articles which – in consequence of changes in the legal system – do not perform their primary functions anymore, yet remain in force. The existence of legal atavisms can have negative consequences to the order and stability of the legal system. It is therefore necessary for the legislator to undertake actions intended to remove such rules and articles from the legal order. In particular, the postulate of removing Art. 880 CCP from the Code of Civil Procedure is worth considering as it does not fulfil its role, while its continuing presence may result in cases of divergence in interpreting the rules of law which are currently in force.

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POJĘCIE ATAWIZMU PRAWNEGO NA PRZYKŁADZIE ART. 880 K.P.C.

Streszczenie: Artykuł koncentruje się na możliwości przeniesienia na obszar nauk prawnych, wywodzącego się z biologii, pojęcia atawizmu. W artykule poddano analizie cechy charakterystyczne atawizmów prawnych. Rozważono negatywne konsekwencje istnienia atawizmów prawnych. Pojęcie atawizmu omówiono na przykładzie art. 880 k.p.c., który w ocenie autora w pełni oddaje znaczenie tego terminu. Przeprowadzona analiza umożliwiła postawienie postulatów *de lege ferenda*, które mogą pozytywnie wpłynąć na przebieg sądowego postępowania egzekucyjnego oraz na sposób kształtowania ładu prawnego Rzeczypospolitej Polskiej.

Słowa kluczowe: ATAWIZM, ATAWIZM PRAWNY, SĄDOWE POSTĘPOWANIE EGZEKUCYJNE, ART. 880 K.P.C.