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POLISH AND CHINESE CIVIL LAW PERSPECTIVES ON THE PRINCIPLE OF GOOD FAITH

INTRODUCTION

Comparative legal studies on civil law from different cultural backgrounds and countries give us the opportunity to better understand what connects us and what divides us. The general principles, that is, principles intentionally not specified by the legislator, may be particularly difficult to understand. Hart noted that the legal text is characterized by its potential blurriness - its meaning may vary depending on the context in which it is examined¹. Legal norms, expressed in natural language, abounding in out of focus, ambiguous expressions, as well as evaluative expressions or general principles, are characterized by

¹ K. Doliwa, A. Doliwa, *Zasada słuszności i dobra wiara a prawo pozytywne (na przykładzie polskiego prawa cywilnego)*, Studia Prawnoustrojowe, 2015, no. 30, p. 86.

“open textuality” - immanent property of all-natural languages, referring to general terms². Regardless of how complicated the definitions of concepts are, it is impossible to construct them in such a way that they “definitively decide for each particular case, whether the considered concept applies to it or not”³. Due to the “openness” or “porosity” of language expressions, the existence of definitive and comprehensive definitions in legal science is precluded⁴. According to Katarzyna Doliwa and Adam Doliwa general principles refer to non-legal reality, other than the law of normative patterns and assessments of proceedings⁵.

The main purpose of introducing general principles in the legal system is to give the law the necessary “flexibility”⁶. They are the result of centuries-long searching for the idea of law, which will allow entities using law to adapt *ius strictum* to the needs of each particular case⁷. The use of general principles allows us to “keep up” with the law in force, which is often a rapidly changing social reality, without the need for formal change. The role of general principles is particularly useful in the case of codified laws that “are inherently inauspicious to rapid changes in the relationship of social relations”⁸.

This chapter has been written with the thought of Teemu Ruskola, who wrote that even regarding the comparative legal method it should be remembered that nowadays neither

2 F. Waismann, *The principles of linguistic philosophy*, London 1997 (as cited in *Ibidem*).

3 H.L.A. Hart, *Niebo pojęć Iheringa i współczesna analityczna filozofia prawa*, [in:] *Eseje z filozofii prawa*, Warsaw 2001, p. 278-279.

4 *Ibidem*.

5 K. Doliwa, A. Doliwa, *op. cit.*, p. 90.

6 *Ibidem*.

7 J. Gajda, *Pojęcie dobrej wiary w przepisach Kodeksu cywilnego*, *Studia Prawnicze* 1997, no. 2, p. 45.

8 T. Zieliński, *Klauzule generalne w nowym porządku konstytucyjnym*, *Państwo i Prawo* 1997, z. 11-12, p. 134.



Western nor Chinese law exists separately from the other, and both are part of the global discourse of so-called “legal modernity”⁹. Especially that, according to Łukasz Gacek, China is currently striving to rebuild its position in the world, trying to use both the achievements of Chinese civilization and those adapted from the West¹⁰. Therefore the scope of this chapter is to compare how the principle of good faith is interpreted on the basis of Polish and Chinese civil law, to try to find resemblances and alterations in the meaning of this principle in different, though at first glance similar legal systems. Moreover, this chapter is also an extension and supplementary to the topics discussed in the book written in Polish, under the title: *Zarys chińskiego prawa cywilnego w dobie kodyfikacji* [An Outline of Chinese Civil Law in the Age of Codification] in 2019¹¹.

ROMAN LAW CONTRIBUTION

At the very beginning, we should know that the term *bona fides* was first introduced into Roman law no later than in the second century BC¹². Officials, primarily praetors, when announcing how they will exercise jurisdictional power, have introduced into the formulas of some complaints a principle, authorizing the judge to award „as much as it deserves according to good faith” (*ex fide bona oportet*)¹³. An important area of application of *bona fides* was the assessment of the binding

9 T. Ruskola, *Legal Orientalism – China, The United States and Modern World*, London 2013, p. 35.

10 Ł. Gacek, *Rola konfucjanizmu w kształtowaniu ideologii państwowej w Chinach w XX w.*, „Krakowskie Studia Międzynarodowe” 12, no. 3 (2015), p. 41.

11 G. Lebedowicz, I. Szpotakowski, B. Wiśniewski, *Zarys chińskiego prawa cywilnego w dobie kodyfikacji*, Toruń 2019, p. 112-114.

12 W. Dajczak, *Zasady współżycia społecznego czy dobra wiara?*, Rejent, no. 1 (117), January 2001, p. 41.

13 Ibidem.



power of the contract. In this respect, the *bona fides* could fulfil the corrective function of the content of the activity determined by the parties, also it could constitute a law justifying the binding force of a contractual provision¹⁴. In ancient Rome, as well as in most of today's continental legal systems, we can indicate the function of *bona fides* as a criterion for interpretation, an instrument for correcting the contents of a legal action or supplementing it¹⁵.

POLISH CIVIL LAW PERSPECTIVE

According to Article 7 of the Polish Civil Code: "Where the statute makes legal consequences contingent on good or bad faith, the existence of good faith shall be presumed"¹⁶. This legal provision deserves special attention, because it refers to the whole system of Polish private law, or more strictly - to all cases in which legal provisions bind some legal consequences with good or bad faith of a person¹⁷. In the past, the good faith principle was present as a general rule in the Polish civil law system, like in General Provisions of Civil Law from 1946: "Private law should be exercised in accordance with their content in a way that suits their social purpose and the requirements of good faith"¹⁸.

It is worth noting that there is a good faith in subjective meaning and good faith in objective meaning in Polish civil

14 Ibidem, p. 43.

15 M. Hesselink, *Good Faith*, [in:] *Towards a European Civil Code*, A. S. Hartkamp (Ed.), Nijmegen 1998, p. 292.

16 Article 7 of the Polish Civil Code of 23 April 1964 - the Polish Civil Code (Journal of Laws of the Republic of Poland, No. 16, item 93).

17 Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna*, Warsaw 2017, p. 63.

18 Article 8 of the General Provisions of Civil Law - The Decree of 12 November 1946 - General Provisions of Civil Law (Journal of Laws of the Republic of Poland, No. 67, item 369).



law regulations in force today and in the past. Generally speaking, both normative solutions and their support theoretical concepts serve to reconstruct the norm of behaviour in a given civil law relation by referring to what is right, on the basis of objective (positive) law and normative rules beyond the written law¹⁹. The division into good and bad faith is exhaustive and at the same time separable - so it is a logical division in the strict sense of the word. Consequently, a person can only be in good or bad faith, and the legal system does not recognize any intermediate forms with which legal effects would be connected²⁰. But the principle of good faith is applied in an objective, not in a subjective sense (which means that it does not refer to the knowledge of specific participants in legal acts)²¹. Thus, in good faith in an objective sense, remains a person whose behaviour is impeccable (at least acceptable) from the point of view of ethical and moral rules²².

This is about the mental states of a person referring to his/her knowledge of the existence of some legal relationship or the subjective right resulting from it. Good faith therefore consists in the erroneous, but justified, conviction of someone about his/her rights (e.g. ownership). On the other hand, the person in bad faith is one who either knows that a certain right is not due to him/her or he/she does not know but should know²³.

However, the question of what measure of duty of care should be taken into account when assessing whether the person concerned fulfilled the obligation to determine the actual legal status, cannot be uniformly determined for all cases

19 K. Doliwa, A. Doliwa, *op. cit.*, p. 85.

20 Z. Radwański, A. Olejniczak, *op. cit.*, p. 63

21 J. Mojak, *Dobre obyczaje w polskim prawie kontraktowym – wybrane zagadnienia*, Studia Iuridica Lublinensia, 2016, vol XXV no. 2, p. 164.

22 K. Doliwa, A. Doliwa, *op. cit.*, p. 88.

23 Z. Radwański, A. Olejniczak, *op. cit.*, p. 64.



provided for by law, in which legal consequences are connected with good or bad faith²⁴.

CHINESE CIVIL LAW PERSPECTIVE

Good faith or *bona fide* is considered by many as the highest principle in continental civil law systems family²⁵. Also, in Chinese law scholars argue that this principle under Chinese civil law is the “emperor’s provision”²⁶ or known as the “imperial principle”²⁷ (帝王条款). It means that the principle can be effectively applied to all areas of private law, plays a guiding role within the civil parties, establishes that the parties must exercise their rights and obligations in good faith, if the parties violate the principle of good faith in exercising their rights, it is considered as an abuse of rights²⁸.

Chinese civil law understanding of the good faith concept were inspired by the German model, filtering from the Japanese experience, since the beginning of the XX century²⁹. In romanistic legal systems (like in Italy or France) the term “good faith” is used to indicate both the concept in an objective or subjective sense, while the German legislation distinguish the two notions using two different terms: the good faith intended as the legitimate belief, typical of the right of property, has been called “*guter Glaube*”, that correspond to the literary definition of good faith, while the good faith intended as loyalty is called

24 Ibidem, p. 64.

25 X. Qiu, *Contract Law*, [in:] *Perspectives on Chinese Business and Law*, Ł. Gołota, J. Hu, K. Van der Borght, S. Wang (Eds.), Cambridge 2018, p. 161.

26 Bu Yi, *Chinese Civil law*, Portland 2013, p. 6.

27 Y. Zhu, *China’s Civil Law*, Guangzhou 2003 p. 8.

28 S. Simonetti, *The principle of good faith in Italy and China*, Venice 2017, p. 79, <http://hdl.handle.net/10579/11695> (accessed: 11 May 2020).

29 I. Szpotakowski, *Suwerenność państwa i rządu prawa: kodyfikacja prawa prywatnego w Chinach* [State sovereignty and the rule of law: the codification of private law in China], *Świat Idei i Polityki*, Issue XVII, p. 165.



“*Treu und Glauben*”, in which *Treu* means faith and *Glauben* which means as well belief faith or loyalty³⁰.

Chinese jurists distinguish between *shanyi* (善意), that is the good faith intended in a subjective sense with the meaning of “good intention”, and “*chengshi xinyong*” (诚实信用), that is the good faith intended in an objective sense³¹. The new Civil Code of the People’s Republic of China which will take effect on 1 January 2021 instead of “*chengshi xinyong*” (诚实信用) will describe the principle of good faith as *chengxin* (诚信)³².

According to Article 4 of the General Principles of the Civil Law of the People’s Republic of China from 1986³³, civil activities should follow the principle of good faith (诚实信用)³⁴.

Article 6 of the Chinese Contract Law³⁵ provides that the parties shall abide by the principle of good faith (诚实信用) in exercising their rights and performing their obligations³⁶. This principle requires that the contracting parties conduct themselves honestly and responsibly. This means that parties to a contract should perform their duties in responsible manner, avoid abusing their rights, avoid intentionally and maliciously harming the other party’s interest, follow the law and common

30 Ibidem, p. 58.

31 Ibidem.

32 The Civil Code of the People’s Republic of China adopted at the Third Session of the Thirteenth National People’s Congress on May 28, 2020 (中华人民共和国民法典), http://www.xinhuanet.com/politics/2020-06/01/c_1126061072.htm (accessed: 01.09.2020).

33 General Principles of the Civil Law of the People’s Republic of China (Adopted at the Fourth Session of the Sixth National People’s Congress on April 12, 1986 and promulgated by Order No. 37 of the President of the People’s Republic of China on April 12, 1986).

34 In Chinese: 第四条 民事活动应当遵循自愿、公平、等价有偿、诚实信用的原则。

35 Contract Law of the People’s Republic of China, March 15, 1999.

36 In Chinese: 第六条 当事人行使权利、履行义务应当遵循诚实信用原则。



business practice³⁷. The principle of good faith is embodied in major provisions of the Chinese Contract Law with the respect to every major stage of the contract law, but also to preliminary negotiations and post-contractual rights and duties³⁸. Article 42 of the Contract Law provides that “party shall be liable for damages in the following circumstances if it negotiates a contract that causes damage to the other party: (III) committing other acts which violate the principle of good faith (诚实信用)”³⁹.

Additionally, article 7 of General Part of Chinese Civil Code from 2017⁴⁰ provides that: “The parties to civil legal relations shall conduct civil activities under the principle of good faith (诚信), adhere to honesty, and fulfil their promises”⁴¹.

In the article 142 of the new Civil Code of the People’s Republic of China we can find that the meaning of an expression of intent that is made to a certain party shall be interpreted according to the literal meaning of words used and in combination with the relevant articles, nature and purpose of the act, usual practices, and the principle of good faith (诚信原则)⁴².

This principle consists in always telling the truth to the other party and in not violating or cheating the principle of good faith. This means to maintain the word given and to fulfil

37 X. Qiu, *op. cit.*, p. 161.

38 *Ibidem*, p. 162.

39 In Chinese: 第四十二条 当事人在订立合同过程中有下列情形之一, 给对方造成损失的, 应当承担损害赔偿责任: (三) 有其他违背诚实信用原则的行为.

40 General Provisions of the Civil Law of the People’s Republic of China (Adopted at the Fifth Session of the Twelfth National People’s Congress on March 15, 2017) – now known as General Part of Chinese Civil Code, <http://www.npc.gov.cn/englishnpc/laws-of-the-prc/202001/c983fc8d-3782438fa775a9d67d6e82d8.shtml> (accessed: 01.09.2020).

41 In Chinese: 第七条 民事主体从事民事活动, 应当遵循诚信原则, 秉持诚实, 恪守承诺.

42 In Chinese: 第一百四十二条 有相对人的意思表示的解释, 应当按照所使用的词句, 结合相关条款、行为的性质和目的、习惯以及诚信原则, 确定意思表示的含义.

all the civil duties. If a damage occurs all the parties have to try to find a remedy, all the civil subjects within the relation must be loyal, keep their promises, must be careful and safeguard the interests of the other party and meet their general expectation. One party has to also provide other parties that are involved with all the necessary information in order to seek personal interests and social public interests. Since modern society is increasingly becoming a commercial society, to maintain an efficient and secure market environment, it is necessary to establish sufficient trust among different subjects.

Article 4 of the general principles of civil law stipulates that civil activities shall follow the principle of good faith⁴³. The parties shall exercise civil rights and perform civil obligation honestly and with good faith⁴⁴. The courts may undertake creative judicial acts with fairness and justice in their minds. Due to its extensive and comprehensive functions, it is also known as “imperial principle” in the civil law⁴⁵. It goes without saying that application of such principle in judicial practice is subject to restrictions. Else it may result in abuse of discretionary power and soften the specific rules of the civil law⁴⁶.

Nevertheless, the term *chengxin* may very well be interpreted by Chinese court in ways that are unfamiliar to foreign lawyers. Naturally, specific application and interpretation of *chengxin* and other contract law terms may require reference to existing Chinese practices and law, which also raises the prospect of interpretations different from international conventions and laws related to contract⁴⁷.

43 S. Simonetti, *op. cit.*, p. 79.

44 Ibidem.

45 Ibidem.

46 Y. Zhu, *op. cit.*, p. 8.

47 D. Cao, *Chinese Law: A Language Perspective*, New York 2017, p. 168



LEGAL LANGUAGE PERSPECTIVES

When analysing how to understand general principles, dependent on moral access, it is necessary to eliminate arbitrariness. It is also necessary to admit the need to respect in the process of applying the law in the basic and lasting values rooted in the culture and tradition of a given society⁴⁸. In the PRC, how civil law concepts are perceived deeply depends on cultural and historical conditions, also bearing in mind the perception of civil law in imperial China⁴⁹.

According to Deborah Cao concept of *chengshi xinyong* (诚实信用) or *chengxin* (诚信) is rooted in the Chinese cultural tradition⁵⁰. *Chengxin* (诚信) is found in all of the Chinese traditional philosophical doctrines: Confucianism, Mohism, Taoism, Legalism and Buddhism, but according to D. Cao is predominantly a Confucian concept⁵¹. The character *xin* (信) in *chengxin* (诚信) is one of the most important word in the Analects⁵². *Xin* (信) is often translated as “trustworthiness”, but can also be described as “making good on one’s word” or living up to the one’s word”, as 信 consists of the radical 亻 *ren* – “a person” standing to the left of the character 言 *yan* – “speaking or words”⁵³. Also regarding to Polish law and the understanding of the concept of “dobra wiara”, determinants related to

48 W. Dajczak, *op. cit.*, p. 54

49 See: I. Szpotakowski, Z. Kopania, *Między prawdą, a mitem – o kontrowersjach co do istnienia prawa cywilnego w Chinach dynastycznych*, [in:] *Rozważania nad procesem stanowienia prawa w Polsce i Chinach na przestrzeni wieków. Wybrane zagadnienia*, I. Szpotakowski (Ed.), Łódź – Kraków 2020, p. 117-133; I. Szpotakowski, *Geneza i rola zwyczaju w nowej części ogólnej kodeksu cywilnego Chińskiej Republiki Ludowej [The genesis and role of custom in China’s General Provisions of Civil Law]*, *Warsaw University Law Review*, Volume XVIII, no. 1/2019, p. 173-186.

50 D. Cao, *op. cit.*, p.168.

51 Ibidem.

52 Ibidem.

53 Ibidem.



European civilization values are important. More specifically, according to professor M. Safjan, in Polish civil law the values of Christian culture should be regarded as fundamental to recognise how to apply good faith principle in practice⁵⁴.

CONCLUSIONS

Presented here comparative analysis shows, that from the Polish perspective the term “good faith” is understood from both an objective and subjective perspective, so using Polish word “dobra wiara”(good faith) we should understand the equal meaning of both Chinese words *shanyi* (善意), that is the good faith intended in a subjective sense with the meaning of “good intention”, and “*chengshi xinyong/chengxin*” (诚实信用/诚信), which is considered as the good faith intended in an objective sense. It is worth noting, that for a Polish lawyer it would be deceptive to understand the principle of good faith in Chinese law in the same way as it is interpreted by Polish civil law doctrine, without using the division into subjective sense *shanyi* (善意) and objective sense *chengshi xinyong/chengxin*” (诚实信用/诚信). Also, a Chinese lawyer should understand that in Polish civil law both Chinese concepts are included in the term “dobra wiara”.

To sum up this chapter, it should be emphasized that although at first glance, both Chinese and Polish civil law derives from Roman law and was strongly influenced by the concept of German law in the past, the understanding of general principles, like good faith principle, is not the same. To notice these differences, the best way is the comparative analysis that has been presented in this paper. Regarding Chinese law, it is also necessary

54 W. Dajczak, *op. cit.*, p. 55.; M. Safjan, *Klauzule generalne w prawie cywilnym (przyczynek do dyskusji)*, Państwo i Prawo 1990, no 11, p. 54.



to have a good understanding of the cultural-historical and linguistic relationships between the current situation and the past.

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