

“OMNE, QUOD NON EST EX FIDE, PECCATUM EST”  
THE RELEVANCE OF GOOD FAITH IN CANONICAL  
TRANSACTION

(“OMNE, QUOD NON EST EX FIDE, PECCATUM EST”: THE RELEVANCE  
OF GOOD FAITH IN CANONICAL TRANSACTION)

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Sara Parini Vincenti  
*Università degli Studi di Milano*  
sara.parini@unimi.it

*Riassunto:* Il substrato canonistico della transazione è di particolare evidenza. In essa, infatti, il conflitto ha spesso già raggiunto lo stadio litigioso. Ragion per cui nella sua interpretazione la dottrina tende a separare i due profili economico ed etico. Su quest'ultimo, in particolare, la Chiesa, pur dotata di un sistema di sanzioni giuridiche necessariamente imperfetto, ha svolto, nei secoli, un ruolo di primo piano. È infatti un insegnamento evangelico che alla base di ogni rapporto umano debba regnare la *concordia*, poiché *concordia mater est unitatis*: se le parti, ignorando l'etica, stanno per giungere ad una lite, o vi siano giunte, la Chiesa deve esortarle a comporla. Ciò che si intende qui indagare è dunque la rilevanza di due fra i requisiti essenziali dell'istituto transattivo, ovvero la *lis* e la *res dubia*, all'interno del sistema delle Decretali (X 1.36. 1-11 *de transactionibus*). La cornice sarà offerta dal principio cardine che sancisce l'effettività del negozio: *Effectus transactionis est, ut ei stetur*; questo per valutare come debba essere intesa nell'ordinamento canonico l'incertezza della lite in rapporto al principio di buona fede.

*Parole chiave:* Principio generale di buona fede; contratto; transazione; IV Concilio Lateranense; 1215; Papa Innocenzo III; diritto canonico

*Abstract:* It is quite clear that there is a canonical foundation underlying the institute of *transactio*. Indeed, a compromise is often reached when a dispute has already entered the litigation phase, and as such legal doctrine tends to separate the economic aspect from the ethical aspect in its interpretation. Though the Church has a necessarily imperfect system of legal sanctions at its disposal, over the centuries it has in fact played a fundamental role in the ethical aspect of compromise. Indeed, the Gospel teaches that every human relationship must be based on *concordia*, as *concordia mater est unitatis*: if parties have ignored such morals and are about to litigate, or have already started legal proceedings, the Church must exhort them to settle the dispute. This article aims to examine the relevance of two of the essential requirements of *transactio* – namely *lis* and *res dubia* – within the Decretals (X 1.36. 1-11 *de transactionibus*). The framework of this analysis is provided by the tenet *Effectus transactionis est, ut ei stetur*, which sanctions the effectiveness of *transactio* as a juristic act. The goal is to evaluate how the uncertainty of legal proceedings relates to the principle of good faith in canon law.

**Keywords:** General principle of good faith; contracts; *transactio*; IV Lateran Council; 1215; Pope Innocent III; Canon law.

### 1. *TRANSACTIO* AND *FIDES*: A NECESSARY STARTING POINT

The aim of this article is to illustrate the complex issues surrounding *transactio* in the canonical debate on the nature and regulation of good faith – a debate wherein both the meaning<sup>1</sup> and function of *bona fides* were far removed from the principles of Roman law<sup>2</sup>. Indeed, upon closer examination, it becomes clear that it is difficult to define the conceptual scope of *transactio*, as its many interpretations, while lending

<sup>1</sup> For a general discussion of the issue: RUFFINI, F., *La buona fede in materia di prescrizione. Storia della teoria canonistica*, Torino 1892; FEDELE, P., *Discorso generale sull'ordinamento canonico*, Padova 1941; SCAVO LOMBARDO, L., *Il concetto di buona fede nel diritto canonico*, Roma 1944, (new edition, Bologna 1995, with an introduction by FINOCCHIARO, F., *La buona fede nella canonistica contemporanea*); ID., «buona fede (dir. can.)», in *Enciclopedia del Diritto*, V, Milano 1959, pp. 664-667; LOMBARDI, L., *Dalla fides alla bona fides*, Milano 1961; CUJAS, M., «La buona fe en la prescripcion extintiva de Duedas», in *Analecta gregoriana*, 122 (1962), pp. XXVIII- 256; DE LOS MOZOS, J. L., *El principio de la buena fe*, Barcelona 1965; GROSSI, P., *Le situazioni reali nell'esperienza giuridica medievale. Corso di storia del diritto privato*, Milano 1970; ID., *L'Ordine giuridico medievale*, Roma-Bari 2006, part. p. 213 (wherein the author speaks about *aequitas*); CORRADINI, D., *Il criterio di buona fede e la scienza del diritto privato*, Milano 1970; MOLANO, E., *La autonomia privada en el ordenamiento canonico*, Pamplona 1974; OTTE, G., «Der Probabilismus: eine Theorie auf der Grenze zwischen Theologie und Jurisprudenz», in *La Seconda Scolastica nella formazione del diritto privato moderno, Atti dell'incontro di studio*, Bologna 1976; ALBISETTI, A., *Contributo allo studio del matrimonio putativo in diritto canonico. Violenza e buona fede*, Milano 1980; ID., «Riflessioni sulla bona fides canonistica dopo il Codex del 1983», in *Studi in onore di G. Catalano*, Soveria Mannelli 1998, I, pp. 19 ss.; MASSETTO, G.P., «buona fede, (diritto medievale e moderno)», in *Digesto italiano delle discipline privatistiche, Sezione civile, II*, Torino 1988, pp. 133-153. More recently: GORDLEY, J., «Good faith in contract law in the medieval *ius commune*», in *Good Faith in European Contract Law*, by ZIMMERMANN, R., WHITTAKER, S., Cambridge 2000, pp. 93-117; D'ANGELO, A., «Il contratto in generale», Tomo IV, 2. La buona fede, in *Trattato di diritto privato*, BESSONE, M. (directed by), Torino 2004; MASSETTO, G. P., «Brevi note sull'evoluzione storica della buona fede», in *Tradizione civilistica e complessità del sistema. Valutazioni storiche e prospettive della parte generale del contratto*, MACARIO, F., MILETTI, M. N. (eds.), Milano 2006, pp. 291-343; for a definition of good faith as a distinguishing trait of legal actions in *ius gentium*, see the essay by STORTI, C., «Foedus, Amicitia e societas: Alberico Gentili tra tradizione e innovazione», in *Alberico Gentili San Ginesio 1552-Londra 1608*, II, Milano 2010, pp. 335-376; ALBISETTI, A., «Buona fede», in *Stato e Chiesa, pluralismo confessionale*, marzo (2008), pp. 1-9; ID., *Tra diritto ecclesiastico e canonico*, Milano 2009; VIDAL OLIVARES, Á., «La noción de incumplimiento esencial en el "Código Civil"», in *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, 32 (2009), pp. 221-258.

<sup>2</sup> RUFFINI, F., *La buona fede...*, cit. p. 162. Numerous texts present the hermeneutic effectiveness of good faith in the eyes of the Roman jurists, demonstrating that the criterion of good faith allows for, if not requires a specific evaluation of a given juristic act and the consequent execution thereof. In particular, this is the case of Tryphoninus in D.16.3.31 (*infra*, nt. 30). This article will only examine some of the many points raised in the sources: GANDOLFI, G., *Studi sull'interpretazione degli atti negoziali in diritto romano*, Milano 1966, pp. 361 e ss.; STOLFI, E., *Bonae Fidei interpretatio. Ricerche sull'interpretazione di buona fede fra esperienza romana e tradizione romanistica*, Napoli 2004, pp. 121-172; SCHMIDLIN, B., «Il consensualismo contrattuale tra *nomina contractus* e *bona fidei iudicia*», previously published in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, from now on ZSS, 124 (2007), pp. 53-93 and now in *Diritto romano, tradizione romanistica e diritto europeo, Giornate in ricordo di G. Pugliese 1914-1995*, VACCA, L. (ed.), Padova 2008, pp. 105-114; NEME, M.L., *La buena fe en el derecho romano. Extensión del deber de actuar conforme a buena fe en materia contractual*, Bogotá 2010; CHINCHILLA IMBETT, C. A., «Contrarius consensus: terminación del contrato per mutuo acuerdo en la experiencia jurídica romana», in *Revista de Derecho Privado*, 28 (2015), pp. 79-126, part. pp. 92-93 nt. 51; pp. 94-96; pp. 103-105.

value to individual aspects of *transactio* itself, are nonetheless wholly unfit for achieving a global vision of the institute. Similarly, it is hard to arrive at a single definition that can contain the essence and content of a term such as *bona fides*, which has been associated with a number of different meanings based on the field in which it is applied<sup>3</sup>.

The picture is complicated even further by the fact that good faith in canon law met the needs of medieval society – a society that had to obey both spiritual<sup>4</sup> and temporal<sup>5</sup> powers in equal measure. Indeed, the Ordinary Gloss on the *Decretum* cautioned thusly: *Multipliciter enim dicitur fides*<sup>6</sup>. For this reason, *fides* possessed an innate integrative strength, which came to include the adjective *bona* as well.

*Transactio* and *bona fides*: over the centuries, few institutes have provoked such openly contrasting interpretations from a doctrinal, jurisprudential and regulatory point of view as these two have, not only in terms of identifying a governing rule, but even as regards their general principles.

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<sup>3</sup>This is an obvious reference to the famous D. 1.1.1, a text which has been the subject of extensive study and which holds very special value in canon law due to its reference to Roman equity. Indeed, a judge was always expected to conform to this principle of equity by rewarding the good and punishing the evil. Thus, it was a requirement that went beyond a sense of justice, and as such – and as attested by Ulpian – there was a need to coin a new, different term. This issue would then be greatly expanded by Hostiensis, both in his *Summa* – wherein he not only recounted the renowned definition of *ius* provided by Celsus, but also cited the *Placuit* in order to declare the existence of equity (OSTIENSE, *Summa Aurea*, Liv. V, *de dispensationibus*, v. *quid sit dispensatio*, Venetiis, 1487, n. 1, 848) – and in *Lectura ad X 1.36.11, de transactionibus* v. *Aequitas*, (*In primum Decretalium librum*, Venetiis 1581, [anastatic reprint 1965], n. 9, 181a), wherein he stated that, if a question of equity arose in law, then equity took precedence over the strict interpretation of the law. For more details see: BRUGNOTTO, G., *L'“aequitas canonica”: studio e analisi del concetto negli scritti di Enrico da Susa*, Roma 1999, part. pp. 237-238. For a detailed account of the jurisprudence of the Severan age SCHULZ, F., *History of Roman legal Science*, Oxford 1946; FREZZA, P., «La cultura di Ulpiano», in *Studia et documenta historia et iuris*, from now on *SDHI*, 38 (1964), today in *Scritti*, AMARELLI, F., GERMINO, E. (eds.), Romae 2000, II, pp. 645 ss.; ID., «A proposito di “fides” e “bona fides” come valore normativo in Roma e rapporti dell’ordinamento interno e internazionale (a proposito del volume di NÖRR, D., *Die Fides im römischen Volkerrecht*)», in *SDHI*, 57 (1991), pp. 297-301, partic. p. 300; SCARANO USSANI, V., *L’ars dei giuristi. Considerazioni sullo statuto epistemologico della giurisprudenza romana*, Torino 1997, pp. 111 ss.; SCHIAVONE, A., «Giuristi e principe nelle Istituzioni di Ulpiano, Un’esegesi» in *SDHI*, 69 (2003), pp. 3 ss.; DE BUJÁN FERNÁNDEZ, F. F., «Aemilius Papinianus: análisis prosopográfico y jurisprudencial», in V.V.A.A., *Liber Amicorum Juan Miquel. Estudios romanísticos con motivo de su emeritazgo*, Barcelona 2006, pp. 321-355 and DE GIOVANNI, L., *Istituzioni, scienza giuridica, codici nel mondo tardo antico: alle radici di una nuova storia*, Roma 2007, pp. 89-93, which provides a clear bibliographical summary.

<sup>4</sup>See DAOYZ, S., *Juris pontificii summa, seu index copiosus*, t. I, sub v. *Bonae fidei*, Mediolani, 1745, 92-94, which provides an overview of the institutes affected by good faith in *utroque iure*.

<sup>5</sup>See BRISSON, B., *De verborum quae ad ius pertinent significatione*, Libri XIX, Francofurti ad Moenum, 1578, sub v. *Bonae fidei*, 76-81.

<sup>6</sup>gl. *Neque*, ad C. 16 *Movet te*, c.22., q. 1, 1169 (For details on the Glossa, see MACERATINI, R., *La Glossa ordinaria al Decreto di Graziano e la Glossa di Accursio al codice di Giustiniano: una ricerca sullo status giuridico degli eretici*, Trento 2003, part. pp. 1-19; PENNINGTON, K., «The Biography of Gratian, the Father of Canon Law», in *Villanova Law Review*, 59 (2014), pp. 679-706).

In light of such a maze of issues, this article shall attempt to highlight the salient aspects of each institute, as well as the links that exist between them. The title *A necessary starting point* was chosen with this in mind, namely to provide an interpretation of the *amicabilis compositio* which examines the legal nature of the relationship between the two institutes through the lens of the *ratio peccati*, and how that relationship changed due to faith in the virtue of man and the legal interventions on the part of Innocent III.

## 2. THE HISTORICAL DEVELOPMENT OF *TRANSACTIO* IN CANON LAW

Compromises were not limited merely to civil or criminal law – canon law, too, had its influence. Indeed, the institute of *transactio* was better than others at achieving peace and harmony among men.

The structure of *transactio* was passed down from the Roman tradition<sup>7</sup> thanks to titles in the Digest – D. 2.15<sup>8</sup> – and the Code – C. 2.4 – which specifically dealt with its regulation as a contractual instrument aimed at preventing or settling disputes. Once the Church received it, it sought to adapt it to its own spiritual and regulatory needs<sup>9</sup>. After all, humanity had expended much effort in pursuit of the most advantageous compromise between the collective interest and individual interest. It was not easy to accept that one's rights might not be respected, and the resulting frustration could lead to irreconcilable differences if there was no economic compensation. Thus, adequate means were necessary to guarantee balance in social relations without resorting to the

<sup>7</sup> The compilation of Justinian is the predominant source of the *transactio* regime. The following are specifically dedicated to this institute: D. 2.15 and C. 2.4, both entitled *De transactionibus*; and C. 2.4.31, entitled *Si adversum transactionem vel divisionem minor restituere velit*. A speech by Marcus Aurelius is reported in D. 2.15.8, which describes the procedures and requirements for the *transactio* to be valid in cases regarding alimony. As far as the other works in the Compilation are concerned, there is no mention of compromise in the *Institutes*, though this should not be surprising, as this work was mainly didactic in nature. The *Codex Theodosianus* provides a sort of continuity of norms and principles for the period prior to (and leading up to) the Compilation. Indeed, title 2.9 *De pactis et transactionibus* contains three references to the subject of compromise, though there is no attempt at a definition (MELILLO, G., «Transazione (dir. rom.)», in *Enciclopedia del diritto*, XLIV, cit., Milano 1992, pp. 771-790, particularly pp. 772 and 777; furthermore, an overview of pre-Justinian works can be found in PETERLONGO, M. E., *La transazione nel diritto romano*, Milano 1936, pp. 320 ss.). In any case, it seems opportune to point out that these sources were recognized early on – in the seventeenth century – thanks to the investigative capability of one of the greatest exponents of the Dutch Elegant School: NOODT, G., «Ad Edictum Praetoris de Pactis et Transactionibus, Liber Singularis», in *Opera Omnia*, To. II, Coloniae Agrippinae 1763, Caput III, 427.

<sup>8</sup> The passage: D. 2.15.1 (*Ulpianus libro quinquagesimo ad edictum*). *Qui transigit, quasi de re dubia et lite incerta neque finita transigit. qui vero paciscitur donationis causa rem certam et indubitatum liberalitate remittit*).

<sup>9</sup> DE LUCA, L., *La transazione nel diritto canonico*, Roma 1942, *passim*.

use of force. The contracted settlement of a dispute sought a compromise between what the law objectively stated – through judicial ascertainment – and what individual parties claimed on their own.

As is well known, the *transigens* “*non vincit nec vincitur*”<sup>10</sup>. However, in the name of greater practicality, he was content with turning a merely subjective claim into a moderate form of compensation, provided it was readily collectable.

This is the strong point of compromise agreements, and the main reason that they have had the good fortune to last for so many years. And the fact that such compromise satisfied the higher moral goal of avoiding disputes led canon law to adopt it as a valuable part of its system, which was eager to introduce corrective measures to the civil-law system so as to better respond to its *salvific* purpose, in accordance with the *odium peccati*<sup>11</sup>.

Thus, the instruction to avoid disputes<sup>12</sup> served a goal that went beyond the legal sphere: it was a precept preached by the Apostles, in keeping with the solidarity of the People of God. Saint Ambrose expressed it well in one of the earliest works to address the issue, wherein he explicitly called upon the faithful, and upon all people in general, to avoid sin and to always preserve the *salus animarum*: “*dolus abesse debet e intimanda veritas esse*”<sup>13</sup>.

That said, there were only very few references to compromise in sources predating the *Prima Compilatio Antiqua*<sup>14</sup>.

<sup>10</sup> See ALCIATO, A., *Codicis Iustiniani titulos aliquot Commentaria*, To. IV, Comm. ad C. 2.4.15 *de transactionibus*, l. *ut responsum*, § *acceptilatio*, Lugduni 1560, n. 11, p. 80.

<sup>11</sup> The decretal *Quoniam omne* (*infra* nt. 43), which repeated c. 41 of the IV Lateran Council, was included in the *Liber Extra* X 2.26.20. The same title contained the decretal *Vigilanti* X 2.26.5 (*infra* nt. 51), wherein it was clearly stated that good faith and sin were incompatible.

<sup>12</sup> The evangelical principle of avoiding disputes is the primary recurrent theme that can be found in the majority of authors and collections in the Church’s early centuries. For more details, see: *Mt.* 5, 25; 5, 39-41; *Ad Rom.* 12, 21; 13, 8-10; ISIDORO DI SIVIGLIA (Isidorus Hispanicus), «*Concilia Africae Concilium Carthaginense quartum*», in PL 84, XXV, col. 202; LIX, col. 204= *Concilia Africae*, MUNIER, C. (ed.), Turnhout 1974, XXV, p. 346; LIX, p. 349; BENEDETTO, (Benedictus Diaconus) «*Capitularium collectio*», in PL 97, col. 705.

<sup>13</sup> Saint Ambrose had already mentioned compromise and agreements in his *De officiis ministrorum*, concluding that “*Non solum itaque in contractibus (in quibus etiam vitia eorum quae veneant, prodi iubentur, ac nisi intimaverit venditor, quamvis in ius emptoris transcripserit, doli actione vacuantur), sed etiam generaliter in omnibus dolus abesse debet: aperienda simplicitas, intimanda veritas est*” (S. AMBROGIO (Ambrosius Mediolanensis Episcopi), «*De officiis Ministrorum*», in PL, lib. III, cap. 10, 66, Parisiis 1845, [reprinted in 1979], pp. 163-164).

<sup>14</sup> CESARIO, S., «*Regulae ad virgines*», XXXI, in PL, 67, col. 1113, “*Lites nullas habeatis, secundum illud Apostoli: Servum Dei non oportet litigare [...]*”. BURCARDO DI WORMS, «*Decretorum libri*», cap. CCXV, in PL 140, col. 661 (AUSTIN, G., *Shaping Church Law Around the Year 1000. The Decretum of Burchard of Worms*, Aldershot, 2009); REGINO DI PRUM, «*De ecclesiasticis disciplinis et religione christiana*»,

Furthermore, while the collections of Anselm of Lucca<sup>15</sup>, Cardinal Deusdedit<sup>16</sup> and Ivo of Chartres<sup>17</sup> represented an extremely important moment for this branch of the *ius commune* – reforming the ecclesiastical hierarchy and reaffirming the Holy See’s authority – they nonetheless did not focus much attention on the legal regulation of contracts in general, let alone the specific issue of compromise. Indeed, on the latter, reference was once again made to Roman-law sources: “*cum ergo omnis institutio ecclesiasticarum legum ad salutem referenda sit animarum*”<sup>18</sup>.

The situation did not seem to change with the publication of the *Decretum*. In *Distinctio XC*<sup>19</sup> there was only an instruction *ad evitandas lites*. In this context, any episode of conflict was not seen as a normal occurrence in real life, but rather as a reprehensible moment of tension in the *sodalitas* that bound *homines fideles* – precisely because they were people who shared a common destiny.

Only Paucapalea<sup>20</sup> provided a notion of *transactio* in his *Summa* of the *Decretum*, describing it as “*litis decisio, vel pactum interpositum de re dubia*”.

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CCCLXXX, in PL 132, col. 355 (FOURNIER, P., «L’Œuvre canonique de Réginon de Prüm», in *Bibliothèque de École de chartes*, (1920), pp. 5-44); IVO DI CHARTRES (Ivoni Episcopi Carnotiensis), «Epistolae», in PL 162, n.60, col. 74 (BRASINGTON, B., *Ways of Mercy. The Prologue of Ivo di Chartres*, Münster 2004; ROLKER, C., *Canon Law and the Letters of Ivo of Chartres*, Cambridge 2009).

<sup>15</sup> *Anselmi Episcopi Lucensis Collectio canonum*, THANER, F. (ed.), Innsbruck, 1906-1915 (reprinted in Aalen 1965).

<sup>16</sup> *Die Kanonessammlung des Kardinals Deusdedit*, VON GLANWELL, V. W. (ed.), Paderborn 1905 (reprinted in Aalen 1967).

<sup>17</sup> “*Pacta quae turpem causam continent, non sunt observanda*” (IVO DI CHARTRES, «Decretum», in PL 161, XVI, cap. 165, col. 937); and: “*Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet*” (ibidem, cap. 190, col. 941).

<sup>18</sup> Letter from Ivo to Hugh, archbishop of Lyon and legate of the Apostolic See (IVO DI CHARTRES, «Opera Omnia, Epistolae», in PL 162, n. 60, col. 74).

<sup>19</sup> “*Litigiosus quoque prohibetur ordinari, quia qui sua potestate discordantes ad concordiam debet attrahere, qui oblationes dissidentium prohibetur recipere, nequaquam litigandi facilitate alios ad discidium debet prouocare*” (GRAZIANO, *dictum ante D 90. c. 1*). There has been extensive research into the work of Gratian, with a wide range of sources that can be cited. Nonetheless, here it might be useful to refer to WINROTH, A., «The two Recensions of Gratian’s Decretum», in *ZSS KA*, 83 (1997), pp. 22-31; ID., *The making of Gratian’s Decretum*, New York 2000, and ID., «Recent work on the making of Gratian’s Decretum» in *Bullettin of Medieval Canon Law*, from now on *BMCL*, 26 (2004), pp. 1-29. Finally, on the canonical and patristic sources of Gratian, see LANDAU, P., «Gratian and the Decretum Gratiani», in *The history of Medieval canon Law in the classical period, 1140-1234. From Gratian to the Decretal of Pope Gregory IX*, HARTMANN, W., PENNINGTON, K. (eds.), Washington D.C. 2008, pp. 22-54.

<sup>20</sup> Cf. DURANTI, T., «Paucapalea Pocapaglia», in *Dizionario Biografico degli Italiani*, pp. 758-759; FIORI, A., «Paucapalea», in *Dizionario Biografico dei Giuristi Italiani (XII-XX sec.)*, I, Bologna 2013, pp. 1525-1526; PAUCAPALEA, *Summa Über das Decretum Gratiani*, VON SCHULTE, F. (ed.), Giessen 1890 [reprinted in Aalen 1965], causa XXIII, cap. 29, p. 101. (See also NOONAN, J.T., «The True Paucapalea?», in *Proceedings of the Fifth International Congress of Medieval Canon Law* (Salamanca 1976), KUTTNER, S., PENNINGTON, K. (ed.), Vatican City 1980, pp. 157-186).

It would not be until the *Quinque Compilationes Antiquae* that a title *de transactionibus*<sup>21</sup> could be found, wherein it was possible to find texts that would eventually be incorporated in the *Liber Extra*<sup>22</sup>. And it was here that the debate shifted from the theory of *transactio* to its actual effectiveness – “*Effectus transactionis est, ut ei stetur*”<sup>23</sup> – as different definitions of the institute allowed it to be identified alternatively as a contract or as a mere ascertainment of facts. Furthermore, as mentioned at the beginning of this article, this focus on the effectiveness of *transactio* also included reflections on good faith.

### 3. INTRODUCTION TO CANONICAL *BONA FIDES*

Before moving on in our analysis, it would be opportune to highlight a few observations concerning good faith in canonical juristic acts. Only afterwards will it be possible to examine its relevance in *transactio*.

“*While in general it seems futile to search through the copious works of the Middle Ages for a definition of bona fides that is able to thoroughly describe its essence*”<sup>24</sup>, there were two points in which it was defined with very specific technical precision: on the subject of obligations, and on the subject of possession. In the case of the former – *objective* good faith<sup>25</sup> – the concept was interpreted as loyalty in one’s

<sup>21</sup> The first four *Compilationes Antiquae* were compiled by AUGUSTÍN, A. which included Johannes Teutonicus’ apparatus on the *Compilatio IV (Antiquae Collectiones Decretalium, Lerida 1576)*. On that edition, see KUTTNER, S., «Antonio’s Augustín’s Edition of the *Compilationes antiquae*», in *BMCL*, 7 (1977), pp. 1-14. Instead, the following is a partial edition: FRIEDBERG, Leipzig 1882 (reprinted in Graz 1956). Indeed, only those texts that were not included in the *Liber Extra* were published in full. In any case, *transactio* was addressed in Comp. I (1.27); Comp. II (1.16), which would then be incorporated in X 1.36, chap. 7-10 and another decretal by Alexander III which was not included in the Decretals of Gregory IX. Lastly, there is a decretal by Honorius III on the subject of *transactio* in Comp. V (1.20) under chap. (X 1.36. 11).

<sup>22</sup> X 1.36.1-6. Although Gratian had already examined and selected previous material, interest on the part of the doctrine led to new life for some of the canons that he had discarded, which were included in post-Gratian collections up until the *Liber Extra*. Thanks to this work, it was possible to examine the state of canonical legislation in a specific time period. For a comprehensive overview: LEFEBVRE, C., *Histoire de droit et des institutions de l’Église en occident, VII, L’âge classique 1140-1378*, Paris 1965, p. 239; WETZSTEIN, T., «Resecatis superfluis? Raymund von Peñafort und der *Liber Extra*», in *ZSS KA*, 92 (2006), pp. 355-391, part. pp. 387-391; LIOTTA, F., «Tra compilazione e codificazione, l’opera legislativa e di Gregorio IX e Bonifacio VIII», in *Tra diritto e storia: studi in onore di Luigi Berlinguer promossi dalle Università di Siena e Sassari*, Soveria Mannelli 2008, I, pp. 1283-1298.

<sup>23</sup> BERNARDO DA PAVIA, *Summa decretalium*, LASPEYRES, T. (ed.), Regensburg 1860, Tit *de transactionibus*, XXVII, § 4.

<sup>24</sup> See MASSETTO, G. P., «Buona fede...» cit. p. 6, which is the source of the quotation.

<sup>25</sup> See DIEZ-PICAZO, L., in «Introduzione» a WIEACKER, F., *El principio general de la buena fe*, Madrid 1977, p. 15 and GALLO, P., «Buona fede oggettiva e trasformazioni del contratto», in *Il ruolo della buona fede oggettiva nell’esperienza giuridica storica contemporanea, Atti del Convegno internazionale di Studi in onore di Alberto Burdese*, GAROFALO, L. (ed.), Padova 2003, II, pp. 155-189.

conduct; the latter – *subjective* good faith – was identified as a false belief held by a party due to a mistake they had made<sup>26</sup>. The canon law system also adopted this taxonomy<sup>27</sup>, but it transformed the term *fides* in a theological sense so that it corresponded to the Greek term *Πιστις*<sup>28</sup>, which was more in line with the needs of the Church and its goal of providing salvation.

But let us proceed in an orderly fashion.

The main source of reference on the subject of contracts was a passage by Tryphoninus<sup>29</sup>, D. 16.3.31<sup>30</sup>. He interpreted *bona fides* as honesty and loyalty in one's conduct, as opposed to *fraus*, or deceit, meaning conduct that went against principles of fairness (*correttezza*) in binding relationships between parties. Now, here the term *good faith* was not meant to indicate a sincere desire on the part of contracting parties to act honestly and fairly when entering into a contract, but rather as a criterion for identifying certain types of contracts that did not fall under the category of *stricti iuris*<sup>31</sup>. These

<sup>26</sup> In the Roman contractual system, good faith performed three functions in order to aid contracting parties. Namely, it served to determine the way in which the contract was to be fulfilled and safeguard its synallagmatic nature; reconstruct the intentions of the parties; and supplement contractual conditions. DE BUJÁN, A. F., «Contribución al estudio del arbitraje de Derecho Público en la experiencia jurídica romana», in *Religión y cultura*, 270-271 (2014), pp. 483-502; ID., «Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea» (II, pp. 31-58); GUTIÉRREZ MASSON, L., «Actos propios y buena fe. En torno a Papiniano 3 Quaestionum D. 50.17.25» (II, pp. 274-292) all in *Il ruolo della buona fede oggettiva...*, cit. GARCIA GARRIDO, M., «Tradicón Romanística medieval en los principios contractuales visigóticos», in *Revista de Derecho*, 2 (2013), pp. 245-256.

<sup>27</sup> ALBISETTI, A., *Contributo allo studio del matrimonio putativo...*, cit. pp. 157-167.

<sup>28</sup> On the religious nature and meta-juridical value of *fides*, before it took on a legal function with *bona*, see CALDERONE, S., *Πιστις-Fides. Ricerche di Storia e diritto internazionale dell'antichità*, Messina 1964; ALBISETTI, A., *Contributo allo studio del matrimonio putativo...*, cit. pp. 161-162, part. nt.77 bis; CASTRESANA, A., *Fides, bona fides: un concepto para la creación del derecho*, Madrid 1991; MARTINI, R. R., *Fides e Πιστις in materia contrattuale* (II, pp. 439-449) and KOFANOV, L., *Il carattere religioso-giuridico della fides romana nei secoli V-III a.C.: sull'interpretazione di Polibio 6,56,6-15* (II, pp. 333-345), both in *Il ruolo della buona fede oggettiva...*, cit.

<sup>29</sup> On Claudius Tryphoninus, member of Septimius Severus' council, see CANNATA, C.A., *Histoire de la jurisprudence européenne I. La jurisprudence romaine*, Torino 1989, p. 154 e LITEWSKI, W., *Jurisprudencja rzymska [Roman Jurisprudence]*, Kraków 2000, p. 154.

<sup>30</sup> Thanks to references to both *bona fides* and *aequitas*, the fragment D. 16.3.31 is particularly rich and elaborate. Indeed, it retraces a very well-known current of Severan jurisprudence characterized by magisterial flexibility and *ars boni et aequi* (VOCI, P., «Ars boni et aequi», in *Index*, 27 (1999), pp. 1 ss.) as opposed to the rigorism of the *ius civile*. Tryphoninus in fact subverts the traditional logic: faced with the hypothesis of a plunderer who stores his bounty with a third party who is unaware of the theft, he believed that the bounty was to be returned to the *latro* only if one considered the contract between the parties; otherwise, the goods were to be returned to he who had been plundered, thereby creating a link between *bona fides* and *aequitas* which clearly took into consideration all of the interests of those involved. In this solution – which eliminates a contractual obligation in favor of returning the goods to their real owner – it is possible to identify an unorthodox concept of good faith which in itself involves the concept of equity and transcends the obligations of parties to a contract. (BUJÁN, A. F., «El papel de la buena fe en los pactos, arbitrajes y contratos», in *Anuario de justicia alternativa*, 10 (2010), pp. 149-180 e TAFARO, S., «Buona fede ed equilibrio degli interessi nei contratti», in *Il ruolo della buona fede oggettiva...*, cit. III, pp. 255-277).

<sup>31</sup> *Infra*, nt. 33.



contracts were so dependent on good faith – *aequitatem quandam et iustitiam ipsam* – that it left the realm of the subjective and influenced the *interpretatio* and the relevance of any deceit committed. In other words, these were contracts wherein good faith was seen as more of a duty than a right<sup>32</sup>.

The *interpretatio ex bono et aequo* allowed the judge to go beyond what was inferable from *acta et expressa*, without distorting the *voluntas* of the contracting parties – indeed, it allowed the judge to resort to hermeneutic criteria that would have otherwise been precluded from contracts *stricti iuris*. This paved the way for specific protective measures to be taken in court, and even legitimized agreements based on *simplicitas oris*, though the latter were nonetheless subject to the strict limitations of mercantile and canonical courts. In all of these cases, good faith was thus interpreted as a sort of supplementary *legalitas* – an additional validation of all those agreements that were reached with the most serious of intentions, but which unfortunately lacked formalities.

The Code of Justinian expressly provided that “*bonam fidem in contractibus considerari, equum est*”<sup>33</sup>.

In another passage by Modestinus (50.16.109)<sup>34</sup>, the *ratio vitandi peccati* merged with the principle of *alterum non ledere*, thereby merging the moral issue with the legal issue.

<sup>32</sup> FUENTESCA, P., «Visión procesal de la historia del contrato en Derecho Romano Clásico», in *Estudios Homenaje a A. d’Ors*, Pamplona 1987, pp. 487-500; ALBUQUERQUE, J. M., *Historia del “pactum” antes del “edictum”*: “Pactum” como acto de paz en las XII Tablas, *Estudios-Homenaje al prof. Alvarez Suarez*, Madrid 1988, pp. 1107 e ss.; ID., *La proteccion juridical de la palabra dada*, Córdoba 1995, part. 37 ss.; CANTARELLA, E., «Regola di correttezza in materia contrattuale nel mondo greco» (I, pp. 275-281); DI PIETRO, A., «La fides publica» (I, pp. 507-549) and NÖRR, D., «Fides punica-fides romana», (II, pp. 497-541), all in *Il ruolo della buona fede oggettiva...*, cit.; GUTIÉRREZ-GARCIA, J. A., «La palabra pacto en las fuentes literarias», in *Estudios Homenaje a B. Rejmundo*, II, Burgos 2000, pp. 433-440.

<sup>33</sup> ACCURSIO, *Glossa in Codicem*, (anastatic reprint Augustae Taurinorum, 1968), Venetiis 1488, gl. *Bonam fidem* C. 4.10. 1., *De actionibus et obligationibus*, 188.

<sup>34</sup> There are disputes in the Roman-law doctrine regarding the dating and insertion of the passage in the Justinian compilation (ANGELINI, P., *Il procurator*, Milano 1971; BURDESE, A., «Sul procurator a proposito del volume di Piero Angelini», in *SDHI*, 37 (1971), pp. 307 ss.). Indeed, the passage considers a good faith buyer he who believed he was buying from a person who held the *ius vendendi*, referring to a *procurator* or *tutor* only as the most frequent hypothetical cases in which a buyer might be wrong about the dispositive powers of a seller. According to Angelini (p. 146), this interpretation of the passage would be justified by the basic fact that at the time of Modestinus, it was very likely (one can reasonably assume) that the powers of a *procurator* and *tutor* had been subject to restrictions, and thus were no longer unlimited. As far as the *tutor* is concerned, there is a specific reference in the *Oratio Divi Severi*, which dates to the year 195 AD. As it is extremely unlikely that Modestinus wrote this text before 195, we would therefore have to assume that this passage does not represent the regime in place before the *Oratio* of 195, and thus it does not attest to an older form of law that escaped the notice of the compilers.

This specific case was a sort of *bridge*<sup>35</sup> between morality and subjective conscience, wherein good faith was identified as a justified belief or justified ignorance, as opposed to the *mala fides* of the counterparty. This meaning was clearly defined in positive terms and was an essential part of good faith in usucaption, creating a genuine right held by a claimant.

The problem for anyone who, in light of the above, sets out to examine the complex issue of the relationship between good faith and *transactio* lies not only in distinguishing the legal concept from the theological concept, but also in identifying the effects that such classifications have on the rules governing compromise. Thus, we must go back over both categorizations.

As far as obligations were concerned, the reform brought about by the canonists turned the principle of *nuda pactio obligationem non parit* on its head: namely, they inverted the principle according to which a simple agreement that was lacking all legally-required formalities (*pactum nudum*) was not enforceable by action (*transactio* essentially took the form of a simple agreement). The original principle was regarded by civil law as the result of greater respect for the human will, placing emphasis on the formal way an agreement was reached; canon law, however, justified an inversion of the principle by the fact that any party who did not keep his promise – deliberately and deceitfully failing to fulfill his agreed-upon obligations – was at fault. As far as so-called *subjective* good faith is concerned, we will have to examine the essential elements of a *transactio* contract in order to determine whether this type of good faith gives rise to a form of *transactio* that *ascertains* legal facts, and in what way it affects the validity of a juristic act.

But there is more to consider.

It is true that from a purely legal point of view, canonical *bona fides* does not diverge from other *forms* of fairness (*correttezza*) and legality that are present in secular legal systems, as mentioned in the introduction of this article. Yet there is a sort of dual meaning that we will have to bear in mind when examining the friendly settlement of

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In reality, the only certain date is that Modestinus wrote *Libri Pandectarum* after Caracalla's death in 217 AD. (MICELI, M., *Studi sulla rappresentanza nel diritto romano*, Milano 2008).

<sup>35</sup> MASSETTO, G. P., «Buona fede...», cit. p. 13.

disputes, one that forces us to reassess the concept of *fides*, transforming it into a theological form: namely, the absence of sin<sup>36</sup>.

In the field of contract law as well, the concepts of *conscientia* and *fides* converge; nonetheless, this does not mean that *mala fides* and sin are interchangeable terms<sup>37</sup>. Quite simply, in both Roman law and canon law, good faith ends and bad faith begins whenever an individual violates the ethics of his or her society. As a result, there is no bad faith in canon law until an individual can be attributed with having committed a violation of ethical norms. There are profound differences, however, when it comes to the objectives of secular and canonical legal systems, as the latter naturally aims not only for justice, but also for the eternal beatitude of humankind (“*civium actionis ad finem aeternae beatitudinem dirigit*”)<sup>38</sup>. Thus, it is easy to see why the Church has always been interested in making sure that the law corresponds to morality, or at least, that legal regulations do not sanction principles that run against morality – in other words, making sure that laws are not *nutritiva peccati*.

No law can exist in and of itself if it goes against morality: such a juristic act was considered invalid by the canonists. In his decretal *Si vero* Alexander III responded to an archbishop who had asked him about an oath that had been unfulfilled *per metum*, stating that it was not legal “*contra iuramentum venire, nisi tale sit, quod servatum vergat in interitum salutis aeternae*”<sup>39</sup>; and Gregory IX reinforced this precept, declaring that as a general principle, all those “*pactiones quae observatae vergunt in animae detrimentum*”<sup>40</sup> were null.

<sup>36</sup> Good faith in Roman law was understood as the result of an individual – *prudens* or *peritus* – unknowingly prejudicing the rights of another; but in canon law, this idea acquired its own, autonomous specificity and foundation. Indeed, it came to be identified with the awareness of not violating religious principles, thereby corresponding with the absence of sin (RUFFINI, F., *La buona fede...*, cit. p. 177; FEDELE, P., *Discorso generale...*, cit. pp. 87-90). The concept of good faith developed along both theological lines and more strictly legal lines, which spoke to a valorization of the two concepts of *fides* – that of the material and that of the spiritual – which would become established in the period between Gratian’s *Decretum* and the IV Lateran Council (see, *infra*, nt. 43).

<sup>37</sup> gl, *non iusta*, ad Extrav. Io. XXII, *De verborum significatione*, 14: “*omne quod non est ex fide, id est conscientia, peccatum est*”; gl., *Possessor*, ad VI, tit. *De regulis iuris, Regula II*: “*hic accipiatur fides et quis dicatur bonae fidei possessor [...] unde fides hic accipitur pro conscientia*”; BALDO DEGLI UBALDI, *In decretalium volumen Commentaria*, lib. I, cap. III, *de officio delegati, cap. si pro debilitate*, Venetiis 1595, n. 15, 102: “*et voco bona fidem illam bonam mentis qualitatem et conscientiam, quae etiam in contractibus stricti iuris requiritur*”.

<sup>38</sup> GIOVANNI D’ANDREA, *In titulum De regulis iuris novella commentaria, Regula IV*, Venetiis 1581, n. 25, 64v.

<sup>39</sup> X 2.24.8: “*Si vero aliquis quem aliquam gravissimo metu sub religione iuramenti, suum ius refutare coegerit, ipsumque sibi retinuerit, quia nos consulere voluisti [...] Tibi duximus respondendum quod non est tutum contra iuramentum suum*”.

<sup>40</sup> X 1.35.8.

In any case, canonical doctrine was quick to realize the importance of good faith, and thus the two criteria were united under the following principle: a juristic act that went against morality was certainly invalid, but it was also possible that a juristic act became immoral due to the bad faith of one of the parties. In other words, the negative influence of morality in legal matters could translate into provisions of the law having an objective or subjective nature. In such cases, it would be left to the judge to determine whether the juristic act could be carried out *salva conscientia*, that is whether there was no longer bad faith (due to intervening circumstances or because the counterparty granted his approval), or whether it was actually still an instance of bad faith, in which case the juristic act would be irremediably invalid.

Put differently, these same canonical legal reforms found justification regardless of whether reference was made to *aequitas canonica*, to the protection of good faith, or again to the repression of bad faith. By being able to equate an immoral juristic act with a bad faith juristic act, it was also possible to declare that all contracts had to be in good faith, and what's more, that: "*omne quod non est ex fide, peccatum est*".

This precept reached its maximum expression with the decretal *Quoniam omne*, which was undoubtedly influenced in its content by previous writings and by the teachings of Huguccio<sup>41</sup>. We shall examine the frenetic legislative activity undertaken by Innocent III<sup>42</sup> from this perspective.

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<sup>41</sup> See Huguccio, *Summa Decretorum*. c. 16. q.3, Biblioteca Apostolica Vaticana, ms. Vat. Lat. 2280, f. 218v: "*Usucapio igitur est acquisitio domini per continuationem possessionis temporis lege definiti [...] scilicet bona fides ab utraque parte, iustus titulus, continua possessio [...] Bona fides exigitur ab utraque parte [...] credimus exigatur continua [...] et titulus est omnis causa acquirendi domini*". In this passage, Huguccio identifies all of the elements that would eventually be developed by Innocent in the IV Lateran Council – continuous good faith, valid title and a suitable *causa acquirendi* – thus subverting the Roman-law principles that up to that point had been accepted on the subject of possession and good faith. Huguccio had equated *bona fides* with *bona conscientia*, in accordance with the words of Saint Paul. For Huguccio's influence on his student, see RUFFINI, F., *La buona fede...*, cit. p. 99; GISMONDI, P., *La prescrizione estintiva nel diritto canonico*, Roma 1940, p. 7. For a more general overview of Huguccio (Hugh of Pisa) and his teachings, see: CATALANO, G., «Biografia di Uguccione da Pisa», in *Il diritto ecclesiastico*, 1 (1954), pp. 3-67; ID., *Impero, Regni e Sacerdozio nel pensiero di Uguccione da Pisa*, Milano 1959; ALBISETTI, A., *Contributo allo studio del matrimonio putativo...*, cit. pp. 170-172; MÜLLER, W.P., *Huguccio. The Life, Works and Thoughts of a Twelfth-century Jurist*, Washington DC 1994; FERRANTE, M., *L'apporto del diritto canonico nella disciplina delle pie volontà fiduciarie testamentarie del diritto inglese*, Milano 2008, pp. 110-111, and lastly, see again ALBISETTI, A., *Tra diritto ecclesiastico e canonico*, Milano 2009, spec. p. 119, nt. 5.

<sup>42</sup> See: HAUCK, A., «Innocent III desire to rule the world», in *Innocent III Vicar of Christ or Lord of the World?*, POWELL, J. M. (ed.), Washington, D.C. 1994, pp. 15-18; ID., «Innocent III: the making of an image» and «Pope Innocent III and secular law» both in *The Papacy, Frederick II and Communal Devotion in Medieval Italy*, (ed.) ID., Farnham [u. a.] 2014, pp. 1363-1373 e pp. 41-48.

Indeed, not only am I alluding to canon 41 from one of the most important Councils ever to have taken place – the IV Lateran Council<sup>43</sup> – but also to the intense epistolary activity that preceded 1215, whereby Innocent III tried to ensure that the principles of good faith prevailed even before officially tackling the issue at the Council. More specifically, I am referring to various epistles written on several occasions between the second year of Innocent’s papacy (1199)<sup>44</sup> to 1212, which called for the continuity of good faith during the entire period of a juristic act (known as *bona fides continua*)<sup>45</sup> and the presence of valid title, even going so far as to annul the principle of *mala fede superveniens non nocet*<sup>46</sup>; indeed, “the most significant and

<sup>43</sup> According to what was established by the IV Lateran Council, c. 41. The text of the decretal is as follows: “*Quoniam 'omne quod non est ex fide peccatum est', synodali iudicio diffinimus, ut nulla valeat absque bona fide praescriptio tam canonica quam civilis, quum generaliter sit omni constitutioni atque consuetudini derogandum, quae absque mortali peccato non potest obsevari. Unde oportet, ut qui praescribit in nulla temporis parte rei habeat conscientiam alienae*”. For the edition of the constitutions and headings based on the oldest 20 of the 64 known codices, with commentaries by JOHANNES TEUTONICUS (*Quoniam omne*, pp. 243-245), VINCENTIUS HISPANUS (*Quoniam omne*, pp. 346-348), DAMASUS HUNGARUS (*Quoniam omne*, pp. 441-442), and the *Casus Parisienses* and *Fuldenses*, see *Constitutiones concilii quarti Lateranensis una cum Commentariis glossatorum*, GARCÍA Y GARCÍA, A. (ed.), Città del Vaticano 1981 (*Monumenta iuris canonici*, Series A, *Corpus Glossatorum* 2, const. 41, p. 82). There have been many recent congresses on what has been called *the forgotten council*, such as Rome 9-15 September 1998, International conference proceedings, *Innocenzo III. Urbs et Orbis*, SOMMERLECHNER, A. (ed.), Roma 2003, particularly GARCÍA Y GARCÍA, A., *Las constitutiones del Concilio quarto Lateranense de 1215*, pp. 200-224, as well as Rome 15-17 October 2015, *Il concilio lateranense IV. Riforma istituzionale e rinnovamento spirituale*, and more recently, the congress in Murcia and the present collection of its proceedings. See also: KUTTNER, S., GARCÍA Y GARCÍA A., «A New Eyewitness Account of the Fourth Lateran Council», in *Traditio*, 20 (1964), pp. 115-178; GARCÍA Y GARCÍA, A., «El gobierno del la Iglesia universal en el Concilio IV lateranense de 1215», in *Annuarium Historiae Conciliorum*, 18 (1988), pp. 91-102; PENNINGTON, K., «Innocent III and canon law» in, *Innocent III Vicar of Christ or Lord of the World?*, POWELL, J.M. (ed.), Washington D.C. 1994, pp. 105-110; DUGGAN, A., «Conciliar Law 1123-1215: The Legislation of the Four Lateran Councils», in *The History of Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, Washington, D.C. 2008, pp 338-339 and the recapitulatory work of PARAVICINI BAGLIANI, A., *Il Papato nel secolo XIII. Cent'anni di bibliografia*, Firenze 2010.

<sup>44</sup> RUDOLF, K., *Die Register Innocenz' III. 2. Pontifikatsjahr, 1199-1200*, Rom-Wien 1983, n. 12, p. 19: “*Inhibemus ne vos vel Ecclesias vestras super illis quae bona fide per annos XL continue possedistis, aliquis praesumat de caetero molestare*” = *Innocentii III Romani Pontificis*, «Opera Omnia», in PL, To. I, Parisiis 1890, XII, p. 546. On the value of these letters and Innocent’s legal education, see PENNINGTON, K., «The Legal Education of Pope Innocent III» in *Bulletin of Medieval Canon Law*, 4 (1974), pp. 70-77; ID., «Further Thoughts on Pope Innocent III’s Knowledge of Law», in PENNINGTON, K., *Popes, Canonists, and Texts 1150-1550*, Aldershot, 1993, II, pp. 1-10; ID., «Pope Innocent III’s Views on Church and State: A Gloss to Per Venerabilem», in *Law, Church and Society*, Philadelphia 1977, pp. 49-67. The most important piece of evidence for Innocent’s legal skills as a judge in the papal court, if not for his legal education, is chapters pp. 41-45 of the *Gesta Innocentii*; see POWELL, J. M., *The Deeds of Pope Innocent III by an Anonymous Author*, Washington 2004, pp. 55-61.

<sup>45</sup> The introduction of this new concept of continuous good faith was not only a legal consequence of the Church’s system of laws and its extramundane aims, but also an expression of the Church’s desire to exert its reformatory authority over as many cases as possible (SCAVO LOMBARDO, L., *Il concetto di buona fede nel diritto canonico*, cit. p. 118; ALBISETTI, A., *Contributo allo studio del matrimonio putativo...*, cit. pp. 162-169; ID., *Buona fede*, in *Stato Chiese e pluralismo confessionale...*, cit. pp. 5-8.

<sup>46</sup> (X 2.26.19). This principle is nothing but a legal adaptation of a specific theological concept. On this subject, see RICCOBONO, S., «Malafede superveniens non nocet», in *Apollinaris*, 21 (1948), pp. 25 ss; ALBISETTI, A., *Contributo allo studio del matrimonio putativo...*, cit. pp.179-184 and for a reference to

*conspicuous trait of the new dogma*<sup>47</sup> was to be found in the very opposite of the latter principle. The Pontiff was fully aware of the difficulties he faced with the triumph of this new principle, as demonstrated by the fact that the above-mentioned letters were followed by the issuance of three purely private-law maxims, each of which aimed to combat bad faith in all its manifestations, and each contained in three consecutive constitutions of the Lateran Council, namely: c. 39 *de restitutione danda*, c. 40 *de vera possessione* and the above-mentioned c. 41 *de continuatione bonae fidei*.

These were the principles that would be put down in the *Compilatio IV*<sup>48</sup>, to be subsequently included in the Gregorian collection (X 20, *De prescriptionibus*) and then in the *Liber Sextus*<sup>49</sup>; and they would have a profound influence on the Roman-law regime.

Innocent demonstrated a certain “*perspicuity and comprehensiveness*”<sup>50</sup> of the *Quoniam omne*, which allowed him to make it a rule that applied to everybody. In so doing, he was not indiscriminately and confusedly striking at the Roman-law theory of good faith – as Alexander III had done before him<sup>51</sup> – but rather, he specifically targeted the applications of good faith that were most troublesome and discordant with canon law.

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the sources, see RUFINO, *Summa decretorum*, SINGER, H. (ed.), Paderborn 1902, *causa XVI, quaest. 3*, 159 (*infra*, nt. 53) and SAN RAIMONDO DE PEÑAFORT, *Summa de Poenitentia et matrimonio*, Romae 1603, § 32, 204.

<sup>47</sup> SCAVO LOMBARDO, L., *Il concetto di buona fede nel diritto canonico...*, cit. p. 117.

<sup>48</sup> *Comp. IV 2.10. c.3*.

<sup>49</sup> With the maxim contained in the second of the *Regulae iuris*, the *Liber Sextus* explicitly acknowledges the existence of this new principle (again in gl., *Possessor*, ad VI, tit. *De regulis iuris, Regula II: “possessor malae fidei ullo tempore non praescribit”*).

<sup>50</sup> RUFFINI, F., *La buona fede...*, cit. p. 96 and PADOA-SCHIOPPA, A., *Hierarchy and Jurisdiction: Models in Medieval Canon Law*, in «Legislation and Justice», edited by PADOA-SCHIOPPA, A., Oxford 1997, pp. 3-15; today also in Italian as: *Gerarchia e giurisdizione, il modello canonistico medievale*, in «Cristianità ed Europe, Miscellanea di studi in onore di Luigi Prosdocimi», vol. II, ALZATI, C., (ed.), Roma-Freiburg-Wien 2000, pp. 107-121.

<sup>51</sup> This is an inevitable reference to the *Vigilanti* decretal, which represented the first legislative document to adopt the new ideas surrounding good faith after the *Decretum Gratiani*. It was included in the *Liber Extra* (X 2.26.5), and future decretalists and canonists would consider it the basis of any treatment of the matter, as it contained the moral and theological concept that would be definitively expressed in the IV Lateran Council. Indeed, the entire decretal is imbued with the idea that there cannot be good faith where there is sin – that in fact it is the *periculum peccati* that must lead us (“*vigilanti studio*”) to avoid a situation in which “*mala fidei possessores simus*”. Nonetheless, this text was never able to establish itself as an unequivocal rule that applied to everyone until the work of Innocent (SCAVO LOMBARDO, L., *Il concetto di buona fede nel diritto canonico...*, cit. p. 119) and PADOA-SCHIOPPA, A., «I limiti all'appello nelle decretali di Alessandro III», in *Proceedings of the Eighth International Congress of Medieval Canon Law*, San Diego 1988, Città del Vaticano 1992, pp. 387- 406 (Monumenta Iuris Canonici, Series C, Subsidia, 9); also in *L'educazione giuridica, VI, Modelli storici della procedura continentale*, GIULIANI E N. PICARDI, A., (ed.) Napoli 1994, pp. 35-57.

The decretal in question – which again, stated: “*omne quod non est ex fide, peccatum est*” – reaffirmed what had already been made explicit in the epistles, namely that no matter what the object of concern was, every canonical legal matter required title (“*Titulus autem hic dicitur omnis causa adquirendi*”) and good faith. Here, the idea of sin as the determinant factor in the canonical concept of good faith reached its utmost expression – in full accordance with the theological and moral principles that underpinned the Church’s legal system. On the other hand, there was the possibility of the same circumstance being characterized in two different ways – namely a legal characterization or a theological one<sup>52</sup> – thereby giving rise to the dual meaning mentioned previously.

Naturally, all of these developments did not take place without clashes along the way, or without reference to previous doctrine<sup>53</sup>. Likewise, there was a pre-existing mix of factors already in place, and the Lateran Council was the culmination of a long period of intense work that had been carried out with the aim of establishing the Church’s legislative authority as arbiter of the validity of secular law.

Thus, this analysis cannot help but be supported by those who witnessed the promulgation of the above-mentioned decretals at the height of their scientific prowess: the civil-law expert Accursius, and the canon-law expert Johannes Teutonicus.

As far as Accursius is concerned, two glosses in particular are worthy of reference: a gloss on the Code (“*sed iure canonum debet esse continua bona fides*”<sup>54</sup>), and one on the Authenticum<sup>55</sup>. It is reasonable to believe that Accursius worked on the glosses earlier, perhaps in 1220, and both portray the immediate impression that the Council’s new measures had on jurists.

On the other hand, Johannes was of a different opinion. In a gloss that he wrote a couple of years after the decretal issued by Innocent III, he limited himself to

<sup>52</sup> NAVARRETE, U., *La buena fe de las personas jurídicas en orden a la prescripción adquisitiva*, Roma 1959 e ALBISETTI, A., «Buona fede»..., cit. p. 5.

<sup>53</sup> Rufino had already addressed this point: “*Iura ecclesiae praescribantur sive ab Ecclesia sive a privatis personis, necesse est ut duo maxime concurrant, continua bonae fidei conscientiae et iustus titulus. Titulus autem hic dicitur omnis causa adquirendi, quo nostrum fiat, quod prius nostrum non erat*” (*Summa decretorum, causa XVI, quaest. 3, 159*). On the dating of the 1165 *Summa*, see GOURON, A., «Sur le sources civilistes et la datation des Sommes de Rufin et de Étienne de Tournai», in *Bulletin of medieval canon law*, 16 (1986), pp. 55-70, today in *Droit et coutume en France du XII<sup>e</sup> et XIII<sup>e</sup> siècle*, Aldershot 1993.

<sup>54</sup> ACCURSIO, *Glossa in Codicem...*, cit. gl. *Sed iure canonum*, C. 7.31.1, *De usucapione transformanda et de sublata differentia rerum mancipi et nec mancipi*, § 3, 435.

<sup>55</sup> ACCURSIO, *Glossa in Volumen*, Venetiis, 1489 (anastatic reprint Augustae Taurinorum, 1969), gl. *ut legum originem*, II. 4, 174.

reaffirming the following: “*si quaeris quomodo Papa possit aliquid statuere de praescriptione laicorum dico quod ratione peccati, quia omnis causa ratione peccati ad Ecclesiam spectat*”<sup>56</sup>.

On the relationship between the new canonical principle and secular law, both Geoffrey of Trani<sup>57</sup> and Innocent IV limited themselves to reaffirming what Peñafort would eventually conclude himself: “*Nec mireris, quia Ecclesia, et iura, et alia saecularia potest trahere indirecte ad forum suum ratione peccati, cuius iudicium et correctio secundum animam ad ipsam pertinet*”<sup>58</sup>.

In sum, there was a harmonious symbiosis between the ethical and the legal, which was typical of Innocent III’s interventionist policy, and which was clearly applied in *civilia negotia* (as suggested by Nacci<sup>59</sup>). And *transactio* is more than a worthy example of such applications.

#### 4. GOOD FAITH IN *TRANSACTIO*

The definitions of *transactio* provided by Paucapalea and the decretalists in general<sup>60</sup> were actually not so different from those formulated by civil-law experts based on the *l. qui transigit*. Canonical doctrine, too, held that *res dubia, lis* and *l’aliquid datum vel retentum* were necessary in order to have a *transactio*<sup>61</sup>. After all, there would have been no need to resort to a friendly settlement if the relationship

<sup>56</sup> GIOVANNI TEUTONICO, «Scholia ed Compilatio IV», in *Antiquae Collectiones Decretalium*, gl. *quam civilis*, Comm. al c. 13 (2.1).

<sup>57</sup> GOFFREDO DA TRANI, *In titulos decretalium, De praescriptionibus*, Venetiis, 1586, nn. 9-10, 109.

<sup>58</sup> SAN RAIMONDO DE PEÑAFORT, *Summa de Poenitentia*, cit., § 32, p. 204.

<sup>59</sup> I am referring to the speech delivered by Professor NACCI, M. at the International Congress *Innocent III and his time, From absolute Papal monarchy to the Fourth Lateran Council, Murcia (Spain) 9-12 December 2015*, entitled: «I rapporti Chiesa-Stato nel ‘governo teocratico’ di Innocenzo III».

<sup>60</sup> BERNARDO DA PAVIA, *Summa decretalium...*, (*infra*, nt. 62); OSTIENSE, *Summa Aurea...*, cit. *De transactionibus, Transactio quid sit*, 166v: “*Transactio est de re dubia et lite incerta non gratuita pactio*”; GOFFREDO DA TRANI, *In titulos decretalium...*, *De transactionibus*, nn. 1-2, 55: “*Transactio est de re dubia et lite incerta nec dum finita non gratuita pactio*”; PIETRO DA ANCHARANO, *Consilia*, Lugduni 1549, cons. 136, § 2, 50v “*Ecclesia vel monasterium de re dubia et lite incerta potest transigere*”; NICCOLÒ DE TEDESCHI (Abbas Panormitanus), *Secunda interpretationum in primum decretalium libri*, Lugduni 1547, *De transactionibus* Rubrica, n.1, 173: «*De re dubia et lite incerta non gratuita pactio non gratuita*»; ANTONIO DA BUTRIO, *Super secunda primi Decretalium commentarii*, Venetiis 1578, *De transactionibus* cap. VII, n.3, 98r: “*unum requisitum in transactione, quod fiat super questione dubia et lite incerta, re vel spe [...] et non dum finita*”; *Transactio diffinitio*, n. 5, 99v: “*quia est de re dubia, lite incerta, nondum finita, aliquo dato vel retento vel promisso facta pactio*”; n.3, 98r: “*unum requisitum in transactione, quod fiat super questione dubia et lite incerta, re vel spe [...] et non dum finita*”.

<sup>61</sup> Canonical doctrine agrees that there is a need for mutual concessions, or as Bernard of Pavia put it, that a compromise is reached *aliquo dato vel retento*, or to define it in the words of Geoffrey of Trani, that it is a *pactio non gratuita* (DE LUCA, *La transazione nel diritto canonico*, cit. pp. 92-94).



between the parties was absolutely undisputed. Nonetheless, it is interesting to examine how these requirements were interpreted by the doctrine, as it was none other than the interpretation of doubt that triggered one of the most heated debates on the existence or non-existence of a compromise agreement.

Given that the *res transigenda* was necessarily in doubt, as “*in claris non fit transactio*”, it becomes notably more difficult to undertake a *mapping* of the *incertum* that could be subject to compromise. Obviously, its most frequent manifestation was during those trials which aimed to arrive at a *compositio seu concordia*<sup>62</sup>. In those cases, doubt lay in the content of the dispute at the center of the trial, as it depended on the uncertain outcome of the trial. But a legal relationship could still have margin for doubt outside of a trial, even when there were no legal proceedings underway: in these cases, Roman law<sup>63</sup> held that it was possible to compromise<sup>64</sup>. What, then, was the predominant opinion among the canonists? While there are some passages in the *Corpus iuris civilis* which clearly reaffirm the need for legal proceedings<sup>65</sup> in order to have *transactio*, and other passages that seem to state the contrary<sup>66</sup>, the *Corpus iuris canonici* only contains decretals referring to litigation<sup>67</sup>.

<sup>62</sup> BERNARDO DA PAVIA, *Summa decretalium...*, cit. Tit *de transactionibus* Lib. 1, tit. XXVII: “*Transactio est de re dubia et per litem incertam decisio aliquo dato vel retento*”. It becomes immediately clear that the canonical definition was not so different than that provided by civil-law experts based on D. 2.15.1.

<sup>63</sup> Indeed, Cujas also wrote: “*quae fiunt transigendi causa non tantum de lite fiunt, sed etiam de omni iure dubio et incerto, ut puta de condicionis incerto*” (CUJAS, J., «Commentaria in quosdam Pandectarum titulos», in *Opera omnia*, (To. I), Lutetiae Parisiorum, 1658, *Ad L. I*, p. 967). In particular, the reference is once again to D.15.8, HOTMAN, F., «Disputationum iuris civilis», in *Operum* (To. I, pars I), Lugduni, 1599, *Disputatio De transactionibus*, 643-652, part. n. 23, 650 e CUJAS, J., «Commentaria...» cit. I, 971-974; to C. 2.3.1 HOTMAN, F., «Disputatio de pactis» in *Disputationum iuris civilis...*, cit. 621-625 e CUJAS, J., «Codex Iustinianus... recitationes solennes», in *Opera omnia* (To. V), Lutetiae Parisiorum, 1658, 28-37 and to C. 2.4.11 HOTMAN, F., «Scholae in LXX titulos Digestorum et Codicis», in *Operum* (To. II, pars II), Lugduni, 1599, *De transactionibus, lib. Cod. II*, 294.

<sup>64</sup> The notion that uncertainty was not limited exclusively to legal proceedings in Roman law had already been keenly supported by Bertolini at the beginning of the twentieth century, and more recent authors would come to espouse the idea as well. While Bertolini believed that litigation represented the broadest example of uncertainty, he did not think that there could be no uncertainty outside of litigation. Thus, those who supported the idea that a compromise could only be reached through litigation clearly contradicted themselves, as their thesis was only reinforced by one part of Ulpian’s formula: namely, on one hand they eliminated the inconvenient part of the fragment dealing with the *res dubia* – without providing a reason for doing so – while on the other hand, they limited the litigation itself exclusively to cases in which legal proceedings were in progress (BERTOLINI, *Della transazione secondo il diritto romano...*, cit. pp. 36, 44-46, 48).

<sup>65</sup> D.2.15.1;D.12.6.65; C.2.4.12;2.4.17;C.8.42 (43).6.

<sup>66</sup> C. 2.4.11;C.2.3.1;C. 2.3.16;C. 2.4.4; D. 2.15.8; D. 2.14.7.19.

<sup>67</sup> X 1. 36.11. Like the early jurists in Bologna, the canonists had supported the correspondence between litigation and *transactio*, thereby limiting the application of the latter exclusively to relations that were the subject of legal proceedings. “*Quamvis id ipsum quod petitur plerumque certum sit, tamen an te dare vel restituere oporteat incertum est. Incertum dico lite non iure. Nam ius fere semper certum est utrum oporteat dare vel non [...] et si nulla fuisset quaestio de iure, tamen res fuerat dubia lite. Et ideo valet*

Civil lawyers insisted on this requirement of subjective doubt because they believed that it corresponded to good faith, which was absolutely necessary in a compromise<sup>68</sup>. Thus, good faith was not only seen as a “*criterion and rule for the interpretation and fulfillment of the contract*”<sup>69</sup>, but also as a defining characteristic of its essential premises (*lis incerta*).

This idea stemmed from the problematic interpretation of l. *in summa* (D. 12.6.65.1)<sup>70</sup>, whereby litigation was considered groundless, and thus in bad faith, if the party who started the legal proceedings was certain of his claim (*lis certa*). With this as a premise, civil lawyers deduced that only litigation over an uncertain issue was in good faith, thereby obtaining the dual outcome of condemning the settlement of groundless litigation and at the same time demonstrating that the requirement of doubt/good faith was a necessary part of legal proceedings.

The early jurists in Bologna had supported the correspondence between litigation and *transactio*, thereby limiting the application of the latter exclusively to relations that were the subject of legal proceedings<sup>71</sup> and creating ‘*litigious*’ *res*<sup>72</sup>. As Odofredus wrote, “*Nam si peto a te X et tecum litem contestor debeas vel non incipit lis*

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*transactio*” in ROGERIO, *Summa Codicis*, in *Scripta Anedocta Glossatorum*, tit. *De transactionibus*, I, Bologna 1913, n. 2 p. 67ab. See also me, *Transactionis causa. Studi sulla transazione civile dal tardo diritto comune ai codici, La dottrina dei secoli XV e XVI*, Milano 2011, p. 77, and me, «La *res dubia* nella transazione dal Diritto comune ai codici: un problema aperto», in *Amicitiae Pignus: studi in ricordo di Adriano Cavanna*, PADOA SCHIOPPA, A., DI RENZO VILLATA, M. G., MASSETTO, G. P. (eds.), Milano 2003, pp. 1745-1793.

<sup>68</sup> ANTONIO DA BUTRIO, *Super secunda primi Decretalium commentarii*, cit. sedes materiae, caput si grave, n. 11, 97: “*sufficit dubium litis*”.

<sup>69</sup> MASSETTO, G. P., «Brevi note sull’evoluzione storica della buona fede oggettiva», in *Tradizione civilistica e complessità del sistema...*, cit. pp. 291-343, which is the source of the quotation in this article.

<sup>70</sup> D. 12.6.65.1 *De conditio indebiti* (l. *in summa Paulus libro septimo decimo ad Plautium*) *In summa, ut generaliter de repetitione tractemus, sciendum est dari aut ob transactionem aut ob causam aut propter condicionem aut ob rem aut indebitum: in quibus omnibus quaeritur de repetitio*. On the departure from litigation *a lite discedere*. See ARTNER, M., *Agere praescriptis verbis, Atypische Geschäftsinhalte und klassisches Formularverfahren*, Berlin 2002, pp. 232-233.

<sup>71</sup> “*quamvis id ipsum quod petitur plerumque certum sit, tamen an te dare vel restituere oporteat incertum est. Incertum dico lite non iure. Nam ius fere semper certum est utrum oporteat dare vel non [...] et si nulla fuisset questio de iure, tamen res fuerat dubia lite. Et ideo valet transactio*” (ROGERIO, *Summa Codicis*, cit. tit. *De transactionibus*, n. 2, 67ab). As can be deduced from the passage, the legal proceedings determined the uncertainty surrounding the mutual position of the parties, who did not agree on the recognition of their respective claims. Azo agreed, as did Albericus some centuries later: AZZONE, *Summa super Codicem*, (anastatic reprint Torino 1966), Papie, 1506, *De transactionibus*, 26; ALBERICO DA ROSATE, *In Primam Digesti Veteris Partem Commentarij*, Venetiis, 1585, Comm. ad D. 2.15.1, l. *qui transigit*, Venetiis 1585, *Rubrica De transactionibus*, 179v.

<sup>72</sup> “*est dubiam res per negationem [...] sive fiat extra iudicium sive incerta lite. Idest propter litem et sic transitive hoc est per iudicium [...] si quis ideo dic lite praesente vel futura. Sic per totum pro uno ponitur vel dic quod pro duobus*” (ACCURSIO, *Glossa in Digestum Vetus* (anastatic reprint Augustae Taurinorum 1969), Venetiis, 1488, gl. *qui transigit*, D. 2.15.1, *de transactionibus*, 45v).

*esse incerta, ideo quia dubius est litis eventus*”<sup>73</sup>. Thus, secular law would have to wait for exponents of the *scuola culta* to provide a well-thought-out analysis of the issue.

On the other hand, canon law approached the matter differently, based on the previously mentioned dual meaning of the good faith concept. Not only did canonists emphasize that the fear of starting legal proceedings (a fear brought on by the uncertain outcome of the litigation itself) had nothing to do with the soundness of the claim being asserted, but they also explained how good faith was an absolute non-issue when it came to the *res dubia* that had to exist in order to have *transactio*. In short, good faith was not a measure of uncertainty.

According to canon law, one acted in good faith whether or not one was certain of one’s own rights (“*bonae fidei est quis licet conscientiam habeat dubiam*”)<sup>74</sup>. The typical case of good faith would be when there was no uncertainty surrounding one’s claim. Doubt around the validity of one’s own arguments or claims – and obviously not around the outcome of the trial – was not a characteristic of good faith compromise. By its very nature, any litigation carried out in good faith was completely devoid of doubt, because under normal circumstances, the litigants above all others were not willing to yield at all when it came to the validity of their claims “*dummodo qui agit, vel defendit credat iustam causam se fovere*”<sup>75</sup>. The absence of doubt did not vitiate a compromise. Indeed, any concession made by one party was justified by the mutually offered concession of the other party. It was not important (*nec refert*) to be aware of the speciousness of one’s claims (*satis est causae*) in order to reach a compromise (*quod a lite discessimus*)<sup>76</sup>. In short, doubt and good faith were not corresponding concepts when it came to *transactio*.

The canonists insisted on the fact that compromising meant *resilire ab actione*. Thus, we can read the following: “*quod a lite discessum est, satis habet causae, ut calumnia tua excusetur*”. Normally, parties litigate in the absolute conviction that they are right and that the counterparty is wrong.

<sup>73</sup> Ibidem.

<sup>74</sup> GOFFREDO DA TRANI, *In titulos decretalium, De praescriptionibus...*, cit., n. 2, p. 107.

<sup>75</sup> This was an old interpretation that Accursius formulated by using his teacher’s words. (AZZONE, *Summa super Codicem*, cit., *De transactionibus*, 26, and ACCURSIO, *Glossa in Digestum Vetus*, cit., gl. *qui transigit*, D. 2.15.1, *De transactionibus*, 45).

<sup>76</sup> At that point, no measure of repentance was even allowed anymore: “*haud dubium est, quia alter alteri nequeat quod datum est, aut remissum, repetere*” (CONNAN, *Commentariorum juris civilis libri X*, Neapoli, 1724 Lib. V, *de pactis, Transactionibus et donationibus*, Cap. VI, n.4, 348C).

## 5. A FEW CONCLUDING REMARKS

Thus, did good faith not have any relevance when it came to compromise under canon law? On the contrary, it was extremely important.

Good faith was not expressed so much through recognizing the will of the parties as it was through ethical considerations. Sin was once again the determinant criterion in this specific branch of the *ius commune*, as the juristic act in itself had to be moral. If we take that reasoning a bit further, then we can assert and conclude with Innocent III that: “*omne, quond non est ex fide, peccatum est*”. Legal proceedings and *lis* were unavoidable requirements, and regardless of the objective validity of a party’s claims, the more deeply rooted their conviction, the less any party was willing to concede – and the extent of their concessions was the true measure of the litigants’ claims. Thus, in order to have a compromise, it was necessary and sufficient to start legal proceedings; doubt and fear were only connected with the outcome of the trial. And while this solution was not unanimously accepted by civil-law doctrine, it was undoubtedly valid under canon law. “*Non enim potest se qui obligare in praeiudicium animae suae*”<sup>77</sup>.

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<sup>77</sup> NICOLÒ TEDESCHI, *Commentaria secundae partis in primum decretalium librum*, cit., *De pactis*, cap. *pactiones*, 172v.

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