



# *Honos alit artes*

Studi per il settantesimo compleanno  
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LA FORMAZIONE  
DEL DIRITTO COMUNE  
Giuristi e diritti in Europa (secoli XII-XVIII)

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# **Reti Medievali E-Book**

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## ***Liber Extra* 5.6.17 (*Ad liberandam*)**

### **A Surprising Commentary by Hostiensis\***

by Uta-Renate Blumenthal

When Pope Gregory IX dispatched the *Liber Extra* with the famous bull *Rex pacificus* to faculty and students of the University of Bologna on September 5, 1234, he commanded with great precision that this particular collection of papal decretals was to be the only one to be used in the future in schools and courts to the exclusion of all earlier decretal collections<sup>1</sup>. The collection had been compiled at Gregory's request by the papal penitentiary, the Dominican Raymond of Peñafort<sup>2</sup>. According to Gregory's letter to the University of Bologna, it was the aim of the new compilation to eliminate «all that was repetitious, superfluous, contradictory, verbose». But Raymond went considerably beyond these instructions in his compilation<sup>3</sup>. The *Extra* was extremely successful and very quickly largely supplanted earlier canonistic sources in teaching and practice, precisely as the pontiff had required. Around the year 1245

\* For generous advice and assistance I am very grateful to Martin Bertram and Kenneth Pennington. All remaining errors are my own.

<sup>1</sup> Potthast 9694 = *Decretales Gregorii P. IX.*, ed. E. Friedberg, *Corpus Iuris Canonici*, II, Leipzig 1879 (reprint Graz 1959), pp. 2-3, concluding: «Volentes igitur, ut hac tantum compilatione universi utantur in iudiciis et in scholis, districtius prohibemus, ne quis praesumat aliam facere absque auctoritate sedis apostolicae speciali». An English translation of the bull is found in *Prefaces to Canon Law Books in Latin Christianity*, ed. R. Somerville, B.C. Brasington, New Haven and London 1998, pp. 235-236. See also the discussion *ibidem*, pp. 225-230.

<sup>2</sup> See the extensive discussion and bibliography by K. Pennington, *Enrico da Susa*, in *Dizionario biografico degli italiani*, 42, Roma 1993, pp. 758a-763b as well as E. Vodola, *Hostiensis*, in *Dictionary of the Middle Ages*, 6, New York 1985, pp. 298-299.

<sup>3</sup> For the characteristics of Raymond's work see S. Kuttner, *Raymond of Peñafort as Editor: The 'Decretales' and 'Constitutiones' of Gregory IX*, in «Bulletin of Medieval Canon Law» 12 (1982), pp. 65-80 (reprinted with *Retractiones* in S. Kuttner, *Studies in the History of Medieval Canon Law*, Aldershot 1990 [Variorum Collected Studies Studies 325]); M. Bertram, *Die Dekretalen Gregors IX.: Kompilation oder Kodifikation?*, in *Magister Raimundus. Atti del Convegno per il IV centenario della canonizzazione di San Raimondo de Penyafort (1601-2001)*, ed. C. Longo, Rome 2002, pp. 61-86; T. Wetzstein, *Resecatis superfluis? Raymond von Peñafort und der Liber Extra*, in «Zeitschrift der Savigny Stiftung für Rechtsgeschichte» (abbreviated «ZRG» below), Kan. Abt., 92 (2006), pp. 355-391. See also A. Reno, *The Authoritative Text: Raymond of Penyafort's Editing of the 'Decretals of Gregory IX' (1234)*, at <<http://academiccommons.columbia.edu/catalog/ac:132233>> (last accessed 2/10/13). For earlier decretal collections see the survey by K. Pennington, *Decretal Collections 1190-1234*, in *The History of Medieval Canon Law in the Classical Period, 1140-1234*, Washington D.C. 2008 (History of Medieval Canon Law, ed. W. Hartmann, K. Pennington), pp. 293-317.

Bartholomew of Brescia went so far as to revise the ordinary gloss on Gratian's *Decretum*, correlating the references given by Johannes Teutonicus to the old law with the allegations as they were now found in the *Liber Extra*, the *ius novum*<sup>4</sup>. Bartholomew was perhaps unusually precise in taking the pontiff literally, but it is a fact that the material gathered and thoroughly edited by Raymond became the foundation for much of later canonistic work. This meant that whatever he had omitted from among the decretals and canons of the *Liber Extra* played no further role at schools and courts in the future – at least in theory. This paper in honor of Mario Ascheri will discuss the reaction of Cardinal Hostiensis to the omission by Raymond of most of the text of the constitution 71 of the Fourth Lateran Council of 1215. Hostiensis' gloss to X 5.6.17 (*Ad liberandam*) in his *Lectura* has never been evaluated in its entirety, although it adds considerably to what is known about the famous canonist (†1271). To begin with, it should be noted that Hostiensis did not hesitate to contravene Gregory IX' prohibition to go beyond the texts of the *Liber Extra*. The gloss furthermore provides explicit evidence for the cardinal's vision of the relationship between the college of cardinals and the papacy, the evolution of plenary indulgences, and last not least supplies the long missing date for the promulgation of the legislation of the Fourth Lateran Council in 1215.

Among the legislation of the great medieval papal councils a special place is held by the Fourth Lateran Council, celebrated in November 1215 by Pope Innocent III shortly before his death in July 1216. «No conciliar text of the Middle Ages made such an impact on the canonists as the Lateran constitutions of 1215», concluded Antonio García y García, the editor of a critical working edition of the legislation<sup>5</sup>. Even in the 1917 edition of the *Codex iuris Canonici* the Fourth Lateran Council is found in second place behind the Council of Trent among the conciliar sources<sup>6</sup>. Together with an extensive list of the names of participants<sup>7</sup> all of the constitutions – including c. 71 *Ad liberandam*, the final decree arranging for the Fifth Crusade – were found in the register of Pope Innocent III, in a volume now lost as Stephan Kuttner has shown<sup>8</sup>. All of the decrees had been

<sup>4</sup> Somerville, Brasington, *Prefaces* (as in note 1 above), pp. 228-229.

<sup>5</sup> A. García y García, *The Fourth Lateran Council and the Canonists*, in *The History of Medieval Canon Law* (as in note 3), pp. 367-378, here p. 370. The edition is A. García y García, *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum*, Città del Vaticano 1981 (Monumenta Iuris Canonici, series A, vol. 2), pp. 41-118; for c. 71 see pp. 110-118. An older edition can be consulted in *Conciliarum Oecumenicorum Decreta*, Bologna 1973, c. 71, pp. 267-271. For the council in general see also A.J. Duggan, *Conciliar Law 1123-1215: The Legislation of the Four Lateran Councils*, in *History of Medieval Canon Law* (as in note 3 above), pp. 318-366, here pp. 341-366.

<sup>6</sup> H. Wolter, *From the High Middle Ages to the Eve of the Reformation*, in *History of the Church*, ed. H. Jedin, IV (New York 1982), p. 172.

<sup>7</sup> Regarding the more than 1200 ecclesiastical and lay participants see especially G. Tangl, *Die Teilnehmer an den Allgemeinen Konzilien des Mittelalters*, Weimar 1932 (repr. Darmstadt 1969), pp. 219-232, and J. Werner, *Die Teilnehmerliste des Laterankonzils vom Jahre 1215*, in «Neues Archiv», 31 (1906), pp. 575-593.

<sup>8</sup> A. Haidacher, *Beiträge zur Kenntnis der verlorenen Registerbände Innocenz' III.*, in «Römische Historische Mitteilungen», 4 (1960-61), pp. 37-62; García y García, *Constitutiones* (as in note 5

recited at the final session of the council on November 30, 1215. Their official promulgation by the curia occurred slightly later, apparently on December 14, 1215, as can now be confirmed on the basis of Hostiensis' gloss to X 5.6.17 *Ad liberandam* in the *Lectura*, as will be seen. Kuttner had noted that Potthast dated his no. 5012 precisely to December 14, 1215, remarking that the chief source of Potthast's reference was Cherubini's *Bullarium Romanum*, but adding that the «source of Cherubini's text is (...) unknown; all other traditions are undated»<sup>9</sup>. In the *Retractiones* to this paper, Kuttner agreed with C.R. Cheney's suggestion that «between the general notice [of the council] and the list of signatories present, the seventy-one decrees themselves (...) were entered as nos. 163-233» in the Arch. Vat. *Indice* 254, which records the entries of the 18<sup>th</sup> year of the register of Pope Innocent III<sup>10</sup>. In other words, both scholars agreed that the complete official record of the Fourth Lateran Council was found in the papal register. Hostiensis' gloss in his *Lectura* to *Liber Extra* 5.6.17 provides the very welcome proof for this assertion as well as the hitherto missing dated tradition.

Given the significance of the legislation of 1215, it was naturally included in the *Liber Extra* by Raymond of Peñafort. However, Raymond omitted three of the 71 constitutions that were promulgated: 42, 49, and practically the entire text of 71, the crusading decree *Ad liberandam Terram Sanctam*. Constitution 42 *Sicut volumus* prohibits unjustified intervention of clerics in secular lawsuits, constitution 49 *Sub interminatione* prohibits the imposition of unjust excommunications as well as their revocation, specifically in conjunction with extortion<sup>11</sup>. Did Raymond consider these texts as too general, morally too negative or too imprecise? It is impossible to say. It is even more difficult to speculate even hypothetically why Raymond omitted most of the text of *Ad liberandam*. He excerpted only the sliver of the complete text found in the *Liber Extra* at 5.6.17. The excerpt prohibits Christians under pain of excommunication and severe civil penalties from trading weapons, iron, wood or ships with Muslims, or to lend them any kind of assistance or advice<sup>12</sup>. The main purpose of constitution 71 of

above), p. 19; S. Kuttner in collaboration with A. García y García, *A New Eyewitness Account of the Fourth Lateran Council*, in «*Traditio*» 20 (1964), pp. 115-178, reprinted in S. Kuttner, *Medieval Councils, Decretals, and Collections of Canon Law*, no. IX and *Retractiones*, Aldershot 1992 (Variorum Collected Studies 126), pp. 7-8.

<sup>9</sup> *Ibidem*; my references are to the 1992 reprint, here p. 133 note 25.

<sup>10</sup> Kuttner, *Eyewitness* (as in note 8), *Retractiones*, p. 7 with bibliography. For the *Indice* see Heidacher, *Beiträge zur ... Registerbände* (as in note 8), p. 47 and p. 61, note 1.

<sup>11</sup> See García y García, *Constitutiones* (as in note 5), p. 82 for c. 42 and p. 90 for c. 49.

<sup>12</sup> X 5.6.17, ed. Friedberg (as in note 1), reads: «Ad liberandam terram sanctam. (*Et infra*:) Excommunicamus praeterea et anathematizamus illos falsos et impios Christianos, qui contra ipsum Christum et populum Christianum Sarracenis arma, ferrum et ligamina deferunt galearum; eos etiam, qui galeas eis vendunt vel naves, quique in piraticis Sarracenorum navibus curam gubernationis exercent, vel in machinis aut quibuslibet aliis aliquod eis impendunt consiliorum vel auxilium in dispendium terrae sanctae; ipsosque rerum suarum privatione mulctari, et capientium servos fore censemus, praecipientes, ut per omnes urbes maritimas diebus dominicis et festivis huiusmodi sententia publice innovetur. Et talibus gremium non aperiatur ecclesiae, nisi totum, quod ex commercio tam damnato perceperint, et tantumdem de suo in subsidium terrae sanctae transmiserint, ut aequo iudicio in quo deliquerint puniantur. Quodsi forte solvendo non fuerint, sic alias reatus talium castigetur, quod in poena ipsorum aliis interdicatur audacia similia praesumendi».

the Fourth Lateran Council was of course the proclamation of the Fifth Crusade, but in doing so the great pontiff not only specified particulars for the anticipated departure in 1216, he also summarized traditional elements linked to the crusading movement since 1095 and introduced features that laid the foundations for later crusades of any type. In the long run of even greater historical significance was the decree's introduction of papal taxation of churches and monasteries, its stipulations regarding the right to income from benefices for crusading clergy, the protection of crusaders and their property, as well as last not least its detailed regulations regarding indulgences as well as commutations – full or partial – of penances and even crusading vows. These are only some of the most important aspects of constitution 71. It is hard to overestimate the importance of indulgences in the history of the Church. The decree of 1215 was the impetus for the gradual coalescence of ideas expanding the concept of indulgences and distancing it from the sacrament of penance<sup>13</sup>. The new policy of ecclesiastical crusading taxation, to mention a second significant example, led for instance to the creation of a new group of officials, the *collectores*. Nothing touching on these major issues was included in the *Liber Extra* by Raymond of Peñafort and thus – in accordance with the instructions of Pope Gregory IX – never played a role in canonistic jurisprudence after 1234. That is until Henricus de Segusio, since 1262 cardinal of Ostia and known as Hostiensis, discovered the complete text of the decree *Ad liberandam*. Castigating Raymond of Peñafort, Hostiensis «il canonista più importante e brillante del s. XIII»<sup>14</sup>, the cardinal commented in his *Lectura* to the Decretals at X 5.6.17:

Ad liberandam terram sanctam et infra. In hac decisione continetur pars quaedam in qua ponuntur indulgentie sive privilegia cruce signatis concessa, de qua et fit mentio quotidie in litteris apostolicis (...) Et ideo cum practicatoria sit et utilis et necessaria nullatenus debuit removeri (...) Ut ergo quod textus omisit glossa suppleat, quia et multi quotidie ipsam querunt nec inveniunt eadem, quatenus tangit hunc articulum duximus hic apponendam. Et est talis<sup>15</sup>.

<sup>13</sup> See in general M. Purcell, *Papal Crusading Policy 1244-1291*, Leiden 1975 (Studies in the History of Christian Thought 11), pp. 36-51.

<sup>14</sup> Pennington, *Enrico* (as in note 2), p. 758a.

<sup>15</sup> My discussion is based on the two volume Strasbourg edition of the *Lectura* of Hostiensis: *Lectura sive apparatus domini domini Hostiensis super quinque libris decretalium*, dated January 19, 1512 (impensis Georgij Übelin, Joannes Schottus impressit). The text of X 5.6.17 is found in vol. 2, ff. 275r-276v. For a detailed description and further analysis of the edition see M. Bertram, *Handschriften und Drucke des Dekretalenkommentars (sog. Lectura) des Hostiensis*, «ZRG», Kan. Abt. 75 (1989), pp. 177-201, now reprinted as essay no. XII in M. Bertram, *Kanonisten und ihre Texte (1234 bis Mitte 14. Jh.)*, Leiden-Boston 2013, pp. 319-341, here pp. 332-334; the Paris 1512 edition is discussed *ibidem*, pp. 334-338, and the edition Venice 1581 – based on the Parisian edition – on pp. 338-341. The Venice edition of 1581 was recently reprinted with an introduction by J. Müller, *Commentaria et lectura in decretalibus von Henricus de Segusio Cardinalis Hostiensis (gest. 1271)*, Frankfurt am Main 2009 (Ius Commune: Rechtstradition der Europäischen Länder, Kanonistische Literatur 6), 2 vols. All printed editions are based on the longer revised late edition of the *Lectura*. For an earlier recension of the text see K. Pennington, *An earlier recension of Hostiensis's Lectura on the Decretals*, «Bulletin of Medieval Canon Law», 17 (1987), pp. 77-90. Pennington analyzed there the text as found in MS Oxford, New College 205. He has recently identified a second MS of the early recension in MS Durham, Cathedral C II 7 and 8. Both of these mss also include Hostiensis' gloss on X 5.6.17, but in

Hostiensis accordingly proceeded to transcribe almost the complete text of c. 71 of the Fourth Lateran council in his gloss, omitting only the details regarding the assembly of the crusading army in 1216 as well as the brief section that had been included in the *Liber Extra* by Raymond<sup>16</sup>. His extensive commentary, however, covers the entire text, again except for the details referring exclusively to the Fifth Crusade which had turned into a failure best forgotten when Hostiensis picked up his pen to criticize and amend *Liber Extra* 5.6.17.

Scholars are agreed that Hostiensis began to work on his enormous commentary on the Decretals, now best known as *Lectura*, ca. 1235 and that he continued to add to the material until the end of his life in 1271<sup>17</sup>. In the late version as found in the Strasbourg edition of 1512 as well as in the earlier recensions, he divided the actual commentary that followed in his gloss upon the text of the 1215 decree into eight sections, but without counting his initial gloss on *Ipsis autem clericis*, which precedes the first part *Cupientes*<sup>18</sup>. This oddity has perhaps an explanation. While canonists working after 1234, when the *Liber Extra* was promulgated with the bull *Rex pacificus* as we have seen, never discussed the omitted sections of *Ad liberandam*, this is not true for the canonists writing earlier, at the time of the Lateran Council itself. Together with the text of the 1215 legislation Antonio García y García published rubrics, *Casus* and three early commentaries on the legislation, those of Johannes Teutonicus, Vincentius Hispanus and Damasus Hungaricus<sup>19</sup>. Damasus seems to have decided to leave well enough alone and simply wrote, when commenting on the final decree of the Lateran council: «Hec est quedam dispositio temporalis et ideo eam non curo glosare»<sup>20</sup>. More concerned than Damasus were Johannes Teutonicus and Vincentius Hispanus, especially the latter, whose extensive commentary nearly covered every word of c. 71 *Ad liberandam*. It will not come as a surprise that the regulations in the constitution regarding the taxation of churches and monasteries were of great immediate interest to both Vincentius and Johannes, an interest perhaps intentionally echoed by Hostiensis a generation later in his ini-

a briefer form. My edition of the later gloss used in this paper was published as *A Gloss of Hostiensis to X 5.6.17 (Ad liberandam)*, in «Bulletin of Medieval Canon Law», 30 (2013), pp. 89-122.

<sup>16</sup> The text is given above in note 12.

<sup>17</sup> Pennington, *Early Recension* (as in note 15), suggested that the early form of the *Lectura* in the Oxford manuscript «could not have been written earlier than 1254 and not later than ca. 1265» (p. 81). Perhaps the Durham codex will provide different dates. See *ibidem*, pp. 78-79 and note 7 for the date of the late recension.

<sup>18</sup> García y García, *Constitutiones*, p. 111, lines 23-25: «Ipsis autem clericis indulgemus ut beneficia sua integre percipiant per triennium ac si essent in ecclesiis residentes et, si necesse fuerit, ea per idem tempus pignori valeant obligare». The section *Cupientes* begins on p. 113, line 3. The other divisions in the Hostiensis gloss X 5.6.17 are: *Nos autem*; *Sane quia*; *Si qui vero*; *Ceterum*; *Excommunicamus*; *Quia vero*; *Nos ergo*. An older edition of the text of c. 71 of 1215 is *Conciliarum Oecumenicorum Decreta*, cur. J. Alberigo et alii, Bologna 1973, pp. 267-271, here p. 267, lin. 38-40 (*Ipsis autem*); p. 268, lin. 39ff. (*Cupientes*); p. 269, lin. 6ff. (*Nos autem*); p. 269, lin. 10ff. (*Sane quia*); p. 269, lin. 20ff. (*Si qui vero*); p. 269, lin. 37ff. (*Ceterum*); p. 270, lin. 2ff. (*Excommunicamus*); p. 270, l. 24ff. (*Quia vero*); p. 270 lin. 35ff. (*Nos igitur [ergo]*).

<sup>19</sup> García y García, *Constitutiones*, pp. 175-270 (Joh. Teutonicus), 273-384 (Vincentius) and 387-458 (Damasus).

<sup>20</sup> *Ibidem*, p. 458; see pp. 387-412 for his biography.



tial excerpt *Ipsis autem clericis*. Even more concerned, though, were these early commentators with the precise interpretation of Innocent's declaration in c. 71 that canons who accompanied the crusaders should receive the entire income from their benefices for three years and that they were permitted if necessary to pawn the benefices for the same length of time<sup>21</sup>. Johannes and Vincentius focused here in particular on the term *integer* in relation to bishop, chapter and daily distributions (*victualia* or *manualia*), as well as the effective time limitations. Both agree that clerics who have taken the cross and have begun their pilgrimage – this point in time is precisely defined – do not need to engage a vicar during their absence. However, all canons on crusade at the command of their bishop are not to receive daily *victualia*. Although they are legally to be considered as present and their absence should not be a disadvantage, they also should not be favored in comparison to stay-at-home canons. Johannes is especially emphatic that despite the self-evident meaning of *integer* necessary expenses of the chapter as a whole have first to be deducted from the value of the benefice whose income the crusading canon is to enjoy<sup>22</sup>.

Hostiensis might have been influenced by these earlier discussions, when he selected for more detailed commentary the phrase *Ipsis autem (...) obligari* as Johannes and Vincentius had done before him. He not only specified that the canons referred to were secular canons, but also included a discussion of monastic clergy as *crucesignati* who were in charge of administrative duties. Such monks were to receive from their lands the crusading tax of a twentieth which had been collected for the Holy Land. Arguing differently from Johannes and Vincentius, Hostiensis is adamant that *integer* means precisely what it says and that the term, therefore, included daily distributions although theology students and servants of the bishop at home did not receive those. He did not hesitate to point out that not all relevant decretals were in agreement on this point, in particular regarding theology students, but insisted that his interpretation remained nevertheless valid, adding an important caveat: «nisi papa aliud declararet, ad quem et non ad magistrum spectat declaratio dubiorum». Hostiensis concluded this introductory comment with a defense of his emphasis on the lack of clarity in Innocent's phraseology which he refused to abandon<sup>23</sup>, «for it is better in a case of doubt that I do not depart from the actual words which one had better consider rather than to come up with fantastic guesses».

These comments of Hostiensis are found in both the early and the later versions of the *Lectura*, where the cardinal merely added remarks concerning complications that had arisen by the time he himself was writing. Disregarding minor modifications, the same can be said for much of the text of the Eight Parts of his gloss to X 5.6.17. However, Part Two *Nos autem* of this gloss differs pro-

<sup>21</sup> See above, note 18 for the text.

<sup>22</sup> *Ibidem*, p. 269, lines 16-17.

<sup>23</sup> «Nec insultes et dicas, quare ergo declaras hoc dubium? Respondeo ei quod ego nullum declaro dubium, sed verum est quod in dubio a verbis edicti non recedo, quibus melius est deservire in tali casu quam aliud phantastice divinare».

foundly in the two versions that have been identified up till now<sup>24</sup>. *Nos autem* provides an example of the cardinal's method to expand his commentary – by himself described as *Commentum libri decretalium* or occasionally as *Apparatus* – through additions, which he added until the end of his life in 1271. In Part Two (*Nos autem*), under the term *Sancte Romane ecclesie* of the text of c.71, Hostiensis inserted in the late version (reproduced in all printed editions) an extraordinary passage praising the characteristics of the college of cardinals and defended their rights as a corporation. He skillfully takes apart the argument by some that cardinals had to be treated as individuals, because they lacked the institutions that were essential to corporations, such as a common treasury and a syndic. The cardinals, he argued to the contrary, had both a common treasury and in place of the syndic a special treasurer (*camerarius*) who divided the income equally between all. Moreover, they gathered daily to deal with world-wide issues. That is why, Hostiensis wrote, they are known as a single entity, the *sacrum collegium*. Legally they are called «ecclesie Romane gremium (...) estque summum et excellens collegium super omnia alia, unicum adeo cum papa, quia cum ipso unum et idem est»<sup>25</sup>. The supposition that Hostiensis composed this segment of the gloss after his elevation to cardinal bishop of Ostia in 1262 is confirmed by the manuscripts Oxford, New College 205 and Durham, Cathedral C II 7 and 8, containing the early recension as identified by Kenneth Pennington<sup>26</sup>. Both of them lack this description of the college of cardinals.

This segment has already attracted the attention of Roberto Grison among others in conjunction with Hostiensis' constitutional theories as represented in the body of his writings, against the background of the opposing viewpoints found in earlier historiography<sup>27</sup>. In isolation, Hostiensis' declaration regarding the unbreakable unity between pope and cardinals could not be any clearer: «cum ipso unum et idem est». The very same gloss to *Ad liberandum*, however, reveals the ambiguity in the ideas of Hostiensis, something noted hesitantly by Roberto Grison in the much wider context of *plenitudo potestatis*. The scholar concluded nevertheless «l'impressione che però si ricava da un confronto critico tra i testi è che egli realmente intendesse incorporare anche il collegio cardinalizio nella nozione di 'plenitudo potestatis'»<sup>28</sup>. Such a conclusion seems debatable in the context of the gloss to *Ad liberandam*, and following Hostiensis' remark that he would prefer to point out obscurities rather than fantasize, it should be noted that at least Part Eight *Nos ergo* of the gloss to X 5.6.17 *Ad liberandam* emphasizes the limits placed on the concept of identity of pope and cardinals, even in the face of what the cardinal as depicted earlier so clearly in

<sup>24</sup> See above note 15 for the different versions.

<sup>25</sup> *Lectura* (1512 ed. as in note 4), f. 275va.

<sup>26</sup> See above note 15.

<sup>27</sup> R. Grison, *Il problema del cardinalato nell'Ostiense*, in «Archivum historiae pontificiae», 30 (1992), pp. 125-157, here especially pp. 136-137 and more recently A. Fischer, *Kardinäle im Konklave. Die lange Sedisvakanz der Jahre 1268 bis 1271*, Tübingen 2008 (Bibliothek des Deutschen Historischen Instituts in Rom, 118), pp. 256-263.

<sup>28</sup> Grison, *Il problema del cardinalato nell'Ostiense*, pp. 143-151, here p. 145.

the gloss to *sancta ecclesia romana*<sup>29</sup>. In Hostiensis' final section of the gloss to X 5.6.17 he addressed in detail different forms of indulgences<sup>30</sup>. Relying on Mat. 18.18 and Joh. 20.20, Hostiensis elaborates Innocent's reference to the power of the keys by pointing out that

these words were not only addressed to Peter but to all disciples, although significantly it was said to you [Peter] that you would be called rock, that is, head of the Church (...) in order to designate the unity of the Church, and because you have the entire principate.

Nevertheless, the cardinal continues, it is to be understood that Peter received this power on behalf of himself as well as of others. The power of the keys is common to all priests, concludes Hostiensis. Despite this clearly defined fact Hostiensis declares somewhat illogically that nevertheless even in this regard «sicut summus pontifex super omnes est, sicut pre omnibus potestatem habet», and that he [the pope] therefore can grant a full indulgence of sins in accordance with constitution 71 of the Fourth Lateran Council, something that is allowed to no one else, for the priestly powers of all others are limited. It is to be reasoned, Hostiensis continues in his argument, that because he is called pope with plenitude of power, that is power beyond the power of all others, he can grant a plenary indulgence. Others, however, share *plenitudo potestatis* only in part, and therefore their abilities are only partial and *sempilena*. It would be unreasonable to argue that Hostiensis, the stalwart defender of the episcopate, would differentiate with regard to the sacrament of penance between cardinals and ordinary priests after his argument concerning the power of the keys which they all have in common with the pope. There is an undeniable contradiction in the argument that pope and cardinals are one and the same, the *Sacrum collegium*, and his discourse on plenary indulgences which he exclusively reserves to the pope<sup>31</sup>. Cardinals as well as other clergy enjoy only a *potestas semiplena* according to Hostiensis' gloss to X 5.6.17:

Et est ratio quia ipse papa vocatus est in plenitudinem potestatis ideoque plenam indulgentiam potest facere. Alii vero in partem sollicitudinis, ideoque ad ipsos particularis tantum pertinet et semiplena<sup>32</sup>.

One has to accept at the least a tension between Hostiensis' enthusiastic equation between the pontiff and the college of cardinals and his analysis regarding *plenitudo potestatis* and plenary indulgence that remains unresolved in this particular gloss<sup>33</sup>.

<sup>29</sup> *Lectura* (1512 ed. as in note 4), f. 276rb-va.

<sup>30</sup> García y García, *Constitutiones* (as note 4 above), pp. 117-118, lines 144-160.

<sup>31</sup> «sicut in his omnibus summus pontifex super omnes est, sicut pre omnibus potestatem habet; unde et ex causa plenam indulget veniam peccatorum ut sequitur; quod nulli alii licitum est immo limitatur potestas» (1512 ed., f. 276b: *Nos ergo*).

<sup>32</sup> *Ibidem*, continuing from the text in note 30.

<sup>33</sup> See the excellent summary of Fischer, *Kardinäle* (as in note 26), pp. 256-263 who also notes the ambiguities in the thought of Hostiensis regarding the relationship between papacy and cardinalate, in particular during a vacancy.

As discussed at the beginning of this paper Hostiensis criticized and amended Raymond of Peñafort's omissions in *Liber Extra* 5.6.17 *Ad liberandam*. The cardinal added almost the entire text of constitution 71 of the Fourth Lateran Council of 1215 to the brief excerpt at X 5.6.17. He concluded that transcription with the following words:

Datum Lateran. xix kal. Ianuarii Pontificatus nostri anno octavodecimo.

He refers to this source once again at the very end of his commentary: *Datum lateran. etc. que considerata est in rescriptis*<sup>34</sup>. This date, December 14, 1215, corresponds exactly to the entry Potthast 5012 discussed by Kuttner<sup>35</sup>. Antonio García y García counted 64 extant manuscripts with the complete text of the constitutions of 1215, including c. 71 *Ad liberandam*<sup>36</sup>. Not a single one of them indicated the date for the promulgation as Stephan Kuttner noted, when he tried to determine the original source for Potthast's entry based on Cherubini's *Bullarium*<sup>37</sup>. Perhaps Hostiensis' gloss was this source. At any rate, the formal dating clause in the gloss proves the promulgation of the 1215 decrees by Pope Innocent III on December 14, 1215. Moreover, the text of constitution 71 as transcribed by Hostiensis in the gloss lends substance to the calendar of *Indice 254* for the eighteenth year of Innocent's pontificate with its entries from the Fourth Lateran Council.

There is little doubt that the cardinal of Ostia did indeed use and excerpt the register of Innocent III. Hostiensis, Henry of Susa, who studied at Bologna in the 1220's under the patronage of Count Raymond Bérenguer V of Provence, began his ecclesiastical career ca. 1235 as prior of Antibes, was bishop of Sisteron from 1244 to 1250, when he became archbishop of Embrun. In 1244 he was named papal chaplain by Pope Innocent IV, became a cardinal under Pope Urban IV in 1262, and died at Lyon in 1271<sup>38</sup>. In 1244 Innocent IV had moved the entire *curia* – taking along the papal registers – to Lyon, seeking safety from Hohenstaufen pressure. A year later he celebrated the First Council of Lyon, best known for the deposition of Emperor Frederick II<sup>39</sup>. But the council addressed other issues as well, including the problems of the Holy Land, and promulgated among others the constitution *Afflicti corde*<sup>40</sup>. The texts of the decree *Ad liberandam* from the

<sup>34</sup> Lectura, 1512 ed., fol. 275rb and 276va.

<sup>35</sup> Kuttner, *Eyewitness* (as in note 8), p. 133 and note 25.

<sup>36</sup> García y García, *Constitutiones*, p. 20.

<sup>37</sup> See note 8 above.

<sup>38</sup> See note 2 above.

<sup>39</sup> See references and summary description in *Lexikon des Mittelalters* 6, München 1993, pp. 46-47 (B. Roberg) as well as B. Roberg, *Zur Frage des oekumenischen Charakters der beiden Lyoner Konzilien von 1245 und 1274*, in «Annuaire historiae conciliorum», 40 (2008, appeared 2011), pp. 289-322.

<sup>40</sup> Alberigo (ed.), *Conciliorum* (above note 18), pp. 273-301, here no. 5, pp. 297-301. For the canonistic distribution of *Afflicti corde* see M. Bertram, *Die Extravaganzen Gregors IX. und Innozenz' IV. (1234-1254)*, in «ZRG», Kan. Abt., 92 (2006), pp. 1-44, here p. 23, no. 29 for the single transmission of the complete text of the decree and no. 29a for the 17 manuscripts transmitting the excerpt «Sane quia iusto iudicio celestis imperatoris (...) in sortem expensis deductis necessariis computare». See

Fourth Lateran Council of 1215 and the text of *Afflicti corde* are so closely related that the dependence of the 1245 text on the text of 1215 appears certain. Maureen Purcell published both decrees in parallel columns. Differences are readily explained by changes in the fortunes of the papacy<sup>41</sup>. According to Kenneth Pennington, it is uncertain whether Hostiensis participated in the council, since his name does not appear in the lists of participants, nor in any of the primary sources<sup>42</sup>. However – Pennington agrees – it is probable that the new papal chaplain, elevated by Pope Innocent IV a year earlier, participated in the council. Hostiensis' gloss to X 5.6.17 *Ad liberandam* shows clearly that the cardinal used the register of Innocent III for the restoration of the crucial passages of the text of constitution 71 of 1215. Given the verbatim agreements between *Ad liberandam* and *Afflicti corde* promulgated at Lyon in 1245 we have to assume that the council also relied on the register of Innocent III for its text. However, there is certainly no proof that Hostiensis used this register at the time of the curia's stay at Lyon. To the contrary, it must be noted that according to the careful and detailed dating of the early version of the *Lectura* by Kenneth Pennington on the basis of MS Oxford, New College 205, Hostiensis did not begin his huge commentary until after 1254<sup>43</sup>. Accordingly we have to consider the fact that both Hostiensis and the First Council of Lyon relied on the register of Pope Innocent III for the text of constitution 71 from the Fourth Lateran Council as no more than a coincidence. Nevertheless, reading the gloss on Liber Extra 5.6.17 has been very revealing.

J.E. Sayers (ed.), *Original papal documents in England and Wales from the accession of Pope Innocent III to the death of Pope Benedict XI (1198-1304)*, Oxford 1999, p. 285 for an original transmission of *Afflicti corde*.

<sup>41</sup> Purcell, *Papal Crusading Policy* (as in note 13 above), pp. 187-195 and pp. 24-27.

<sup>42</sup> Pennington, *Enrico* (as in note 2), p. 762b, with bibliography.

<sup>43</sup> Pennington, *Lectura* (as in note 15), pp. 79-81; a late date is also suggested by Fischer, *Kardinäle im Konklave*, especially p. 257.