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**HUMAN AND DIVINE IN THE DIALECTIC OF POWERS
IN ANCIENT ROME****Definition of the relationship between human and divine**

The relationship between human and divine, i.e. between priesthood and empire, is one of the central themes of human history. This theme had many developments, both in the Roman and Greco-Roman subject matters. This theme had many developments, in the Roman and in the Greco-Roman world. In ancient Rome, from the age of the reign to the age of the republic and up to the constitutions of the Emperor Justinian in the new Rome, the relationship between human and divine is always in the middle of the institutional arrangements, whether internal to the city or shared among different populations.

**The issue of human and divine powers at the origins
of the Roman legal system**

Various are the concepts that emerge in the works of those who, in the contemporary age, have worked on qualifying the relationship between human and divine, with particular reference to the legal system of powers: they range from “separation” (Fustel de Coulanges and Mommsen)¹ to the “intersection” (Pais)², from “isolation” (Schulz)³ to “distinction” (Catalano)⁴.

Which of these concepts best represent this kind of relationship?

Let's have a look to the sources.

¹ N.-D. Fustel de Coulanges, *La cité antique*, rep. Paris 1908 (I ed. 1864), p. 293; Th. Mommsen, *Römisches Staatsrecht*, II-1, Leipzig 1874, p. 18 (*Le droit public romain*, III, Paris 1893, p. 19).

² E. Pais, *Le relazioni fra i sacerdoti e le magistrature civili nella repubblica romana* [in:] *Ricerche sulla storia e sul diritto pubblico di Roma*, I, Roma 1915, p. 271.

³ F. Schulz, *Prinzipien des römischen Rechts*, München–Leipzig 1934, p. 18

⁴ P. Catalano, *Contributi allo studio del diritto augurale*, I, Torino 1960, p. 237.

In Livy's text on the "growing city", new powers and new priesthoods are continuously instituted, although within a complex unity, such as the city-*res publica*⁵.

In a well-known passage of the oration dedicated to his own house, Cicero describes the relationship between human and divine within the same system, based on *mores*, whose singularity comes through the accessibility by the same people to the government of the republic and the interpretation of religion; these are two conceptually distinct activities, in the sense that they are carried out by the same people, but in distinct fields: empire and priesthood, indeed⁶.

Distinct are those fields, then, and this is clear in another passage of the same oration, where Cicero describes the relationship between pontiffs and laws⁷. In order to better understand this passage, we should think to the consecration of a temple, carried out by the pontiff on the basis of a law voted by the people, which is usually followed by a dedication, that it is carried out by the magistrate⁸ instead.

In that moment we are at one of the epochal moments in Republican history: the dedication of the Capitoline temple to Jupiter. Epochal, as it is full of significance from a juridical-religious point of view because that dedication was made by a consul the year after the expulsion of the kings⁹. The temple of Jupiter symbolically stands above the republic by the priesthood (that consecrates it) and the empire (that dedicates it).

⁵ Liv. 4, 4: *Quis dubitat quin in aeternum urbe condita, in immensum crescente nova imperia, sacerdotia, iura gentium hominumque instituantur?* [Who can question that in a city founded for eternity and of incalculable growth new powers, priesthoods, and rights of families and individuals, must be established? (trans. *The Loeb Classical Library*, 1976)].

⁶ Cic. *dom.* 1, 1: *cum multa divinitus, pontifices, a maioribus nostris inventa atque instituta sunt, tum nihil praeclarius quam quod eosdem et religionibus deorum immortalium et summae rei publicae praeesse voluerunt, ut amplissimi et clarissimi cives rem publicam bene gerendo religiones, religiones sapienter interpretando rem publicam conservarent* [Gentlemen of the Pontifical College: among the many divinely-inspired expedients of government established by our ancestors, there is none more striking than that whereby they expressed their intention that the worship of the gods and the vital interest of the state should be entrusted to the direction of the same individuals, to the end that citizens of the highest distinction and the brightest fame might achieve the welfare of religion by a wise administration of the state, and of the state by a sage interpretation of religion (trans. *The Loeb Classical Library*, 1979)].

⁷ Cic. *dom.* 136: *pontifices semper non solum ad suas caerimonias sed etiam ad populi iussa adcommodaverunt* [But let me return to the official rules that govern dedicatory ceremonies, rules which the pontiffs themselves have invariably adapted not merely to their own ritual, but also to the decrees of the people (trans. *The Loeb Classical Library*, 1979)].

⁸ Gai. 2, 5: *quod ex auctoritate populi Romani consecratum est, ueluti lege de ea re lata* [That alone is considered *sacrum* which has been consecrated under the authority of the Roman people, for instance by *lex* (trans. F. De Zulueta, *The Institutes of Gaius*, Oxford 1958)].

⁹ Liv. 2, 8: *nondum dedicata erat in Capitolio Iovis aedes; Valerius Horatiusque consules sortiti uter dedicaret. Horatio sorte evenit* [The temple of Jupiter in the Capitol had not yet been dedicated. Valerius and Horatius the consuls drew lots to determine which should do it. Horatius received the lot (trans. *The Loeb Classical Library*, 1976)].

Even in the centuries-old plebeian struggles, it is possible to see signs of the relationship between magistrates' power and the priesthood and, more generally, between the human plan and divine plans. It is possible to make reference to Sacred Mount's consecration, necessary from a juridical-religious point of view, to end the secession and to recompose the unity of the Roman people and, therefore, of the *res publica*¹⁰. Let us think about the *sacrosanctitas* of the tribunes and to the oath in sacred laws, in opposition to the auspicious power of patrician magistrates¹¹. And auspicious power is one of the cruxes of matters involving the relationship between empire and priesthood.

This power, common to magistrates and priests, could lead to the idea of "intersection". However, examining the republican system from a juridical and not just a historical perspective, it is necessary to point out the right value to the methods of choosing magistrates and priests, such as to make us better understand their distinction. The choice of magistrates, managed through the electoral power of the Roman people and, at the other side, the choice of priests managed through the 'elective' power of the priests themselves; all of that continued, even when the comitial electoral principle was introduced, in the choice of the pontiff maximum, and then even in the choice of some priests organized in colleges¹². This distinction, concerning the methods of choosing magistrates and priests, is reflected on the foundations of their own powers: human (with a divine contribution), concerning the magistrates; divine (with partial, conditioned, but not conditioning human contribution), concerning the priests¹³.

¹⁰ Fest., *De verb. sign.*, v. *Sacer mons*, 422 e 424 – ed. Lindsay: *sacer mons appellatur trans Anienem, paullo ultra tertium miliarum: quod eum plebes, cum secessisset a patribus, creatis tribunis plebis, qui sibi essent auxilio, descendentes Iovi consecraverunt* [The mountain beyond the Aniene river, right after the third mile, is defined sacred, because when the plebeians seceded from the patricians and created the tribunes in order to protect themselves, consecrated it to Jupiter, while they were descending from it].

¹¹ Liv. 3, 55, 10: *tribunos vetere iure iurando plebis, cum primum eam potestatem creavit, sacrosanctos esse* [Whereas the tribunes are sacrosanct in consequence of the ancient oath taken by the plebs, when they first created this magistracy (trans. *The Loeb Classical Library*, 1967)].

¹² See my book *Collegi sacerdotali ed assemblee popolari nella repubblica romana*, Torino 2008, *passim*.

¹³ A text by Cicero explains this distinction. Cic. *de leg. agr.* 2, 7, 17–18: *maiores nostros tam fuisse popularis ut, quem per populum creari fas non erat propter religionem sacrorum, in eo tamen propter amplitudinem sacerdoti uoluerint populo supplicari. Atque hoc idem de ceteris sacerdotiis Cn. Domitius, tribunus plebis, uir clarissimus, tulit, quod populus per religionem sacerdotia mandare non poterat, ut minor pars populi uocaretur; ab ea parte qui esset factus, is a conlegio cooptaretur* [Our ancestors had such regard for the people that, because on religious grounds it was considered unlawful for it to confer such an office, they nevertheless decided in his case, considering the importance of the priesthood, that candidates should humbly beg the people to grant them the office. And Gnaeus Domitius, tribune of the people, a man of distinguished family, passed a similar law with regard to the other priesthoods, which provided that, because the people, on religious grounds, could not confer the priesthood, the smaller half of them should be invited to attend, and the candidate chosen by that half should be co-opted in the college (trans. *The Loeb Classical Library*, 1984)].

On the base of these considerations, the structure of the Roman republic takes on a clearer profile, legally defined under the concept of “distinction”. From this perspective, we have to examine all those cases in which human and divine, as regards as the powers of priests and magistrates, seem to ‘intersect’, but actually they do not. In this context, just to mention a few cases, we can find the census of humans and the (juridical-religious) ceremony of *lustratio*; the dictatorship and its limitation over times as a guarantee towards the divine prohibition represented by *nefas*¹⁴; juridical science and its first protagonists, the pontiffs¹⁵; the priestly interpretation of the Sibylline Books and the related activities of magistrates and the senate, aimed at initiating and later giving effect to that interpretation¹⁶.

Distinction between human and divine powers, from the synthesis of the jurist Ulpian to the rejection of the Emperor Gratian

The perspective remained essentially the same even when Augustus began to hold the republic. It is well known that all emperors, from Augustus onwards, assumed the office of pontiff maximum, as well as, with rare exceptions, the role of priests organized in colleges¹⁷. It was thus replicated the republican model, which the same people could hold magistracies and priesthoods for. The question, however, had developed partially different characters: the emperors assumed, according to modalities that came from republican schemes, a various number of

¹⁴ Pomponius, D. 1, 2, 2, 18: *dictatores prodicti sunt... Hunc magistratum, quoniam summam potestatem habebat, non erat fas ultra sextum mensem* [(Accordingly) dictators were put in office ... It was not lawful for this magistrate to be kept in office longer than six months, since he had sovereign power (trans. *The Digest of Justinian*, Philadelphia 1985)].

¹⁵ Pomponius, D. 1, 2, 2, 6: *interpretandi scientia et actiones apud collegium pontificum erant* [knowledge of their authoritative interpretation and conduct of the actions at law belonged to the College of Priests (trans. *The Digest of Justinian*, Philadelphia 1985)].

¹⁶ See, for example, the event described by Frontinus (*aq.* 7, 5), which occurred in the years 144–143 BC: *eo tempore decemviri, dum aliis ex causis libros Sibyllinos inspiciunt, invenisse dicuntur, non esse <fas> aquam Marciam... in Capitolium perduci, deque ea re in senatu... actum* [It is said that, in that time the *decemviri*, while they were consulting Sibylline Books for other reasons, they found out that it was not admitted by Gods to bring the Marcio aqueduct to the Capitol... this issue was discussed in Senate ... it was then that the aqueduct Marcio was brought until the Capitol].

¹⁷ See the lists of priests in J. Rüpke, A. Glock, *Fasti sacerdotum: die Mitglieder der Priesterschaften und das sakrale Funktionspersonal römischer, griechischer, orientalischer und jüdischchristlicher Kulte in der Stadt Rom von 300 v. Chr. bis 499 n. Chr.*, II, Stuttgart 2005. Among the titles of the emperors, since Augustus, the maximum pontificate immediately appeared; see, for example, the dedicatory inscription on the arch of Augustus in Susa-Turin (dating back to 9–8 BC), in CIL V.2, 7231: *IMP(eratori) CAESARI AUGUSTO DIVI F(ilio) PONTIFICI MAXIMO TRIBUNIC(ia) POTESTATE XV IMP(eratori) XIII*.

priesthoods, obviously perpetual, and a various number of magistracies, obviously not perpetual; they also assumed powers, such as the power of tribunes and the proconsular empire, which were not only disconnected from magistrate offices, but they were perpetual also. This was in strong contrast with the constitutional structure of the free *res publica*; not for foundations and contents of the powers¹⁸, but because of their common life-long feature. This character had the prerequisites for undermining the distinctive model of relationship between empire and priesthood.

Here is the theorization of Ulpian about the tripartition of public law into institutes of sacred law, magistrates and priests¹⁹. Magistrates and priests (with their own powers) are parts of a unitary system, the public law which, in Ulpian's synthesis, is part of the legal system, to be understood as "the art of goodness and fairness"²⁰. Magistrates and priests contribute to the formation of the (living) organism which is the structure of Roman *res (publica)*, such as the priestly power and magistrates that reside in the living emperor.

Almost one hundred and fifty years after Ulpian's reflections (perhaps in 376), the irreparable happened; the crisis of the distinctive model of the relationship between empire and priesthood concretely realized: the (Christian) Emperor Gratian refused to impersonate the role of the pontiff²¹. The separation between priests and emperor represented the premise for the "separation" between priesthood and em-

¹⁸ Gaius and Ulpian indicated the basis of imperial power in a public law. Gai. 1, 5: *cum ipse imperator per legem imperium accipiat* [seeing that the emperor himself receives his *imperium* (sovereign power) through a *lex* (trans. F. De Zulueta, *The Institutes of Gaius*, Oxford, 1958)]; Ulpian, D. 1, 4, 1 (by first book of Institutions): *cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat* [the populace commits to him and into him its own entire authority and power, doing this by *lex regia* which is passed anent his authority (trans. *The Digest of Justinian*, Philadelphia, 1985)]. As regards the priestly powers, Augustus was elected pontiff maximum by the *comitium*, following the legally formed tradition since the third century BC (see *Res Gestae Monum. Ancyranum*, 6, 10, 2–4), and also his successors were elected to the maximum pontificate, also accessing the priestly colleges through co-optation (*Acta Arv.*, Galba Otho Vitellius, 1, 68–75).

¹⁹ Ulpian, D. 1, 1, 1, 2 (by first book of Institutions): *publicum ius est quod ad statum rei Romanae spectat ... Publicum ius in sacris, in sacerdotibus, in magistratibus consistit* [Public law is that which respects the establishment of the Roman commonwealth ... Public law covers religious affairs, the priesthood, and office of state (trans. *The Digest of Justinian*, Philadelphia, 1985)]. On the exegesis of the text, see F. Vallocchia, *Qualche riflessione su publicum-privatum in diritto romano*, "RISG" 2016, no. 7, p. 415.

²⁰ From Celsus to Ulpian, law is the art of goodness and fairness: (D. 1, 1, 1, 1 by first book of Ulpian's Institutions) *ut eleganter Celsus definit, ius est ars boni et aequi* [For, in terms of Celsus elegant definition, the law is the art of goodness and fairness (trans. *The Digest of Justinian*, Philadelphia 1985)].

²¹ It is probable that this refusal occurred as early as 376, shortly after the death of his father, Valentinian I, as Zosimo recounts (*Storia nuova*, 4, 36). A few years later, Graziano removed from the Senatorial Curia the *ara Victoriae*.

pire. It is not by chance that a few years later, in an imperial constitution, a Pope was called pontiff; it was the so-called Edict of Thessalonica (380), where the relationship between human (i.e. the population) and divine (i.e. the God of Christians) was mediated by two separate figures: the prince of the apostles and the prince of the Romans²².

The separation between priesthood and empire, from Epistle VIII of Pope Gelasius to Novella 6 of Emperor Justinian

A considerable confirmation of this separation comes from Epistle VIII, addressed by Pope Gelasius to Emperor Anastasius in the year 494²³. Authority and *potestas* are the powers given by God, respectively, to the priest and the emperor, who, however, is subject to the priest, as in the project of Augustus where the imperial authority is above all kind of powers²⁴.

On April 17 of the year 535, forty-one years after the Epistle VIII of Pope Gelasius, the Emperor Justinian issued a constitution addressed to Epiphanius, Archbishop of Constantinople; it will be later collected in the Novellas under number 6²⁵.

²² C.Th. 16, 1, 2 pr. This is the constitution with which, in 380, the *Augusti* Gratian, Valentinian and Theodosius had established that all the peoples of the empire followed the religion transmitted to the Romans by the Apostle Peter.

²³ Epistola VIII, A–B: *duo quippe sunt, imperator Auguste, quibus principaliter mundus hic regitur: auctoritas sacra pontificum, et regalis potestas ... subdi te debere cognoscis religionis ordine potius quam praeesse ... imperium tibi superna dispositione collatum* [Two are the powers that mainly hold this world: the holy authority to the pontiffs and the power of the king ... You know you are supposed to submit to the roles of religious order rather than exercising the command ... The imperial power has been given to you by order of God].

²⁴ *Res gestae Divi Augusti* (34, 3): *auctoritate omnibus praestiti, potestatis autem nihilo amplius habui quam ceteri qui mihi quoque in magistratu conlegae fuerunt* [After this time, I excelled all in influence (*auctoritas*), although I possessed no more official power (*potestas*) than others who were my colleagues in the several magistracies].

²⁵ Nov. 6, praef.: *maxima quidem in hominibus sunt dona dei a superna collata clementia sacerdotium et imperium, illud quidem divinis ministrans, hoc autem humanis praesidens ac diligentiam exhibens; ex uno eodemque principio utraque procedentia humanam exornant vitam. Ideoque nihil sic erit studiosum imperatoribus, sicut sacerdotum honestas, cum utique et pro illis ipsis semper deo supplicent. Nam si hoc quidem inculpabile sit undique et apud deum fiducia plenum, imperium autem recte et competenter exornet traditam sibi rempublicam, erit consonantia quaedam bona, omne quicquid utile est humano conferens generi* [The sovereign power and the *sacerdotium* are the highest gifts given to humans by the infinite mercy of God, the second one (*sacerdotium*) is at the service of divine matters, the first one rules human matter and takes care of them; they both come from an identical principle, they make better human life. As a consequence of that, priests' dignity is what the emperors will care more, due to the fact that they (the priests) pray even in favour of the emperors themselves. Indeed, if the *sacerdotium* will be

The path to follow in the reconstruction of the human-divine relationship, connected to the idea of power, after the affirmation of Christian monotheism, was differently traced by Justinian compared to the previous statements of Pope Gelasius. The *consonantia* (συμφωνία, in the Greek version of Novella 6) appears to be the principle of connection between the concepts of “separation” and “distinction”.

According to the concepts expressed in Novella 6, the two powers have in common origin and general purpose. Their distinction can be recognized: in instrumental actions, in characteristic and in the specific and exclusive purpose of the empire. And this leads to separation between people who exercise the priesthood and people who exercise the empire²⁶.

This made feel the need to reconstruct a single organized system of powers, based on the same ‘principle’ (divine), but different in terms of their (specific) purpose, activities and characteristics, and even more in terms of persons who exercised them. A system structured on the ‘(bona) consonantia’, which could recompose priesthood and empire as parts of the same legal system, even in front of a new concept produced by Christianity: the separation.

From Justinian’s Novella 6, the differences (and divisions) between Ancient Rome and New Rome increased, till the Great Schism, traditionally located in the year 1054.

But this is another story.

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without fault and full of faith in God, and the sovereign power will govern the *res publica* which has been assigned to it with probity and competence, then there will be the harmony between them, capable of giving to the humans everything may be useful for them].

²⁶ See some reflections on the legal contents of Nov. 6, into my article *Sul concetto giuridico di ‘consonantia’*, “BIDR” 2011, no. 105, p. 306.

Summary

The relationship between human and divine, i.e. between priesthood and empire, is one of the central themes of human history. In ancient Rome, from the age of the reign to the age of the republic and up to the constitutions of the Emperor Justinian in the new Rome, the relationship between human and divine is always in the middle of the institutional arrangements, whether internal to the city or shared among different populations.

Keywords: Roman law, human, divine, powers, priesthood, empire

BOSKIE I LUDZKIE SPRAWY W JĘZYKU WŁADZY W ANTYCZNYM RZYMIE

Streszczenie

Relacja między tym, co jest ludzkie, a tym, co jest boskie, czyli między kapłaństwem a władzą, jest jednym z głównych tematów historii ludzkości. W starożytnym Rzymie, od epoki królewskiej do epoki republikańskiej i aż do konstytucji cesarza Justyniana wydanych w nowym Rzymie, relacja między człowiekiem a boskością zawsze była istotnym elementem układów instytucjonalnych, czy to we wnętrzu władz miasta, czy też w relacjach między różnymi narodami żyjącymi w ramach Imperium.

Słowa kluczowe: prawo rzymskie, człowiek, boskość, władza, kapłaństwo, cesarstwo