A discontinuous processus of individuation in Western political thought ? Romans, medievals, early-moderns

Janet Coleman

My title is an assertion which I will not be able to prove to you today in the limited time each speaker has available. This paper, instead, is a beginning : it tries to elucidate what it meant to « be » a Roman, and what individuation could have meant for them. I shall only have time to refer briefly and comparatively, to what it meant to « be » an early-modern European. My medieval « individual », I am sorry to say, has been left out. I use three conceptualisations and the languages that expressed these concepts in ancient Rome, only indirectly referring to the changed meanings found by the 18th century. The three concepts are : the legal individual, the moral/political individual, and the ethical individual. In my view, these three conceptual categories of legal, political and ethical individuation do not substantively sustain stable meanings over the *longue duree* because the conditions in which they emerged and were applied varied enormously. Today I will spend my time on Rome because in my view, republican Rome and its law was *necessarily* misconstrued, not only by the already Christian Emperor Justinian in his 6th-century collections of the *corpus iuris civilis*, but even *more* necessarily so in the modern period by jurists like von Savigny, operating within modern states and within socio-economic conditions which were never the conditions experienced by ancient Romans when they thought about persons, law and government.

But let's begin with a theme that does seem to have resonated down the ages from pagan Rome to Judaeo-Christian Europe, that of a « fall » from a once-healthy condition and the remedies proposed for our amelioration. One finds a version of this theme expressed by Cato the Elder (d. 149BC). Cato came from humble, not aristocratic, beginnings and was hostile to Rome's hellenisation. During his career as a senior senator he made numerous appeals to a tradition of the farmer-soldier hero as a Roman's true self-image. Romans told themselves the story about how an early cooperative community with easy, unforced virtue revealed men who were rugged, pious, equal, valuing deeds over words, so that they were able to flourish by being content with little. (Tacitus *Annals* 3.26). But they fell from virtue, competed for dominion, cultivated faction and divisions, and needed curbing by LAW (Sallust *Cat.*6-13 ; Diod. Sic. 37.3.1-5). The theme that resonates from Cato (actually from Plato) down the ages is about the human appetite for just too much of everything : luxury, power. The theme concerns a now unregulated human desire for licence, and how true liberty is something else, necessarily to be found within the discipline of law. In short, we have a theme about uncontrollable desires and about the various socio-political strategies for managing these down the ages. At Rome, however, we do not see the modern, subjective, self-conscious, individuated individual condemned for expressing his own unique and excessive appetite for just too much of everything. We do not make the acquaintance of a someone who acts as an individual with his own will or with some self-conscious awareness of his pre-customary and pre-civil inalienable subjective individual right-for instance, to property or power, except perhaps when we encounter the type of the Tyrant. A Roman does not reveal his sense of being a private operator, deploying his own « free labour » and personalised will. Rome did not treat individuals as equal subjects either of law or of theatrical expression or literary reflection. Instead, in legal, ethical and political literature Romans spoke of character types, of a man's relation to the law as an objective, not subjective, *status* attribution and of ways in which characters were established and stabilised. In consequence, Romans had *status* selves, not radically individuated selves, even in ethical, interpersonal and moral/political relations.

If we look for the Roman individual when we consider the Roman citizen we turn to Justinian's *Institutes*. Like the earlier *Institutes* of Gaius, Justinian divides Roman private law into categories dealing with persons,

things, and actions. The *Institutes* deal with persons in terms of *status*. We are NOT given *per se* a law of persons or a conception of individuals' rights, but rather, a detailed set of taken-for granted, legally material, *status* distinctions between freemen and slaves. There is NO discussion of Roman citizenship *per se*. The freeborn Roman citizen is a classificatory concept not to be found in nature but rather, in cities : he is presumed male, of age, and of sound mind who is head of a family. Everyone else is legally inferior with a legally defined place. Roman private law divides citizens into two classes : those who are independent - *sui iuris* - and those dependent on another - *alieni iuris*. The central object of definition is the free male citizen *sui iuris*, the *paterfamilias* with paternal power, *patria potestas*, a life-long obligation to his familial dependents, children, slaves. His *libertas* was *not* the freedom of an individual *against* the authority of the community. It was, rather, a duty to respect what is due to others as well as a capacity to claim what is due to himself, IN LAW. Roman liberty was the sum of civic capacities granted objectively, not subjectively, to an individual, by the laws of Rome. It was attributive/ascriptive. Roman free *status* and disabilities were *in law* and there was never any presumption that agents had equality either of *status* or interests ; they had an equal access to the law but not to equal things. They emphasized equity or entitlements, recognised in law as to what was your due and everyone's due was not equal. Roman law's understanding of legitimate domination as *dominium*, was custodial, a sovereign duty of care, and where complete freedom of the master of a household contrasted with lesser freedoms of members of that household who had legal disabilities. The interests of anyone in Roman society, in law, did *not* depend on individual will and choice but rather were the consequence of *paternitas* and legal *status*.

This, I suggest, had evolved from an implicit understanding that power and *auctoritas* were grounded in custom and the *mos maiorum* rather than in law. Rome's government was without a written constitution. But law gave men a determinate personality and it was the citizen's objective status in law that alone protected him from being killed without trial. The customary practice of throwing dead men's bodies into the Tiber in lieu of proper burial marked them as being outside state protection, and a man who killed someone who was outside state protection was immune to prosecution for homicide. The legal individual and the moral/political individual were objective, paired concepts.

Ancient Roman categories did not deal with the individual *in se* or *per se* : instead they dealt with property, possession, succession after death, contract, obligations. Roman law in its time is grasped through the prior customary and political relations of *dominium* ; it is not grasped through the modern notions of market « neutrality » where individuals claim subjective right and self-directed wills. The objectivity of Romans' relations in law dealt not with individuals as such but rather with use value, itself determined by slave labour and land. Roman magistrates and jurists mediated the various kinds of permitted use and possession as these evolved over time. Roman law was *not* some fixed continuity with a super-transcendent life of unchanging rules. Rather, what we see even during the late republic is an evolving set of rules of exchange, with productive agents functioning in a cycle of the circulation of goods. If we look at Paulus (*Dig.*18.1.1 and on *restitutio*, *Dig.*19.4.1) we then see the development of formal determinations with formal instruments for reciprocity. These are new juridical models of exchange that have been superimposed on the older citizen *status* rights : something is sold, something is bought and there is a buyer and a seller, without being able to determine what is bought or sold or who the individual is who buys and sells.

> *Nam ut aliud est vendere, aliud emere ; alius emptor, alius venditor, sic aliud est pretium, aliud merx : quod in permutatione discerni non potest uter emptor, uter venditor sit.*

If we look for the individual as a self-directing, deliberating agent within the People's voting assemblies (*comitia*) we will not find him there either ; instead we observe that their decisions were politically manipulated by patronage and by a fairly stable, and closed, propertied elite. Roman government was controlled by a narrow oligarchy, to some extent permeable by new families, but even in popular voting assemblies, the top families were able through a prudential, utilitarian « friendship » that was defined by patronage and client obligations to engage in a competitive manipulation of power amongst rival top families. It was they who exercised control over elections, legislation, indeed over what was said to be common political objectives.

It is agreed in most scholarly literature that the Roman political system was dominated by the influence of a number of landowning, senatorial families from whom were drawn the *quaestors, tribunes, aediles, praetors, consuls* - *i.e.* the top magistrates who administered the

law, deliberated on that law and on policy in general in the Senate, and commanded the armies. Their power, in theory, was limited in that, say, the making of laws had to go to voting assemblies for their approval ; but Roman popular voting assemblies, unlike that of the Greeks, did not debate issues and could not raise concerns from the floor. Furthermore, decisions were determined not by individual votes but by the people voting in fixed tribal groups. Roman citizenship did not give most men a right to participate in governance, or indeed to participate actively at all. And when members of the elite did participate actively we shall see that they were not self-consciously representing themselves but rather, were adopting the *persona* of the city of Rome. The Roman oligarchy's entrenched institutional authority emerged from a relatively stable and hereditary inner elite whose own strategies for survival entailed bringing client families within their inner circle, and as easily removing them. And in Rome power, prestige, fame came from *status* in law and was thereafter activated through offices held, these being shaped by very selective entry into certain careers : the law, oratory, the army. Political power was not open to any equality of opportunity to acquire it. It was, instead, an exclusive domain of magistrates, senators, ex-magistrates, a military elite, and priests, all of whom controlled not only the ceremonial aspects of public law but monopolised both secular and religious authority. Here and elsewhere, the popular will of the Roman people could only find expression in the context of rivalry between oligarchic, and not simply individuals', interests. So the picture seems to be as follows : terms of debate were set by an elite social group and voters, also in groups, listened. The people did not actively engage in making law or policy : their tacit consent, spoken of as « commanding » or « ordering », was secured to policy and law made on their behalf by others. They deferred to traditional elites. There was no substantive response on the part of magistrates and senators to an expressed and deliberated popular will. I am arguing here that the people's sovereignty was in effect nominal. Their *libertas* meant, politically no more than freedom to vote in person in their own tribe ; and in Cicero's time he says they were « free » to jeer and applaud.

Let me remind you of Cato's farmer-soldier hero as the Roman self-image : this is a social type, not a reflective, self-determining individual. And in the development of Roman oratory we always find their concern with theatre masks and performances, with speakers or players or actors

aiming to charm, teach, move an audience by creating persuasive *personae* or character types : we have the outraged, traditional types of consul ; the sophisticated man-about-town, the gentle but firm father figure. Romans were engaged in the social and public construction of personality based on *status* differentials and expectations to an extraordinary degree (to us). They actualised their *status* selves through imitation and mentoring.

Cicero *De officiis* I.116 simply re-describes the normal situation : « Those whose fathers or ancestors won glory by outstanding performance in a particular field generally devote themselves to excelling in the same way themselves. Only a very rare few, born of unknown ancestors, aim for great things themselves. Most others become engaged on a fixed manner and course of life imitating, even unreflectively, those in one's *status* milieu. »

Now : While we are told of Hercules, half god half man, having independently reflected on choosing a path of life that is best, Cicero almost shouts : BUT IT IS NOT THE SAME FOR US. And when treating the duties of magistrates, of private individuals, of citizens and of foreigners, he says explicitly (I.124) « that it is the function of a magistrate to realise that he assumes the role or *persona* of the city and that he ought to sustain its standing and its seemliness, to preserve the laws, to administer justice, and be mindful of the things that have been entrusted to his good faith. On the other hand, the private person ought first to live on fair and equal terms with other citizens, neither behaving submissively and abjectly nor giving himself airs ; but most importantly he should want public affairs to be peaceful and honourable- [clearly leaving the whys and wherefores to others with such official roles, since he has none in this domain] ; and such a man is a good citizen ; the foreigner's or resident alien's duty is to do nothing except his own business asking no questions about anyone else and he is never to meddle in public affairs which are not his own ».

In his sketch of an idealised aristocratic *res publica* Cicero reveals what might be called an undeveloped sociological theory of the « orders » : he insists that most men do not seek active engagement in ruling ; they simply seek rather modestly not to be abused by those who in fact have power and who wished to, could and did, dominate. They live by revealing the *personae* they have acquired through the *status* attributions, in law, of their sociological group.

Cicero wants to explain that a mixed constitution as a fourth type is a certain kind of partnership where there is a division of contributions and rewards that highlight a disparity in the assessment of contributions and rewards amongst different social groups. It is a reality that is shaped by leaders who want to enforce, in law, a « fair » division as the best division. How can one unify the Senate and the people as a « one » ? There is no doubt that he thinks Romans favour and defer to Scipio's political experience and military success and this overrides any Greek philosophical tradition. So he has Scipio define what a *res publica* is. The Roman « state » is a story of accretions by experience and industry that seeks a *iuris consensus* and some kind of *utilitatis communione sociatus*. (I.39). The « concern » of the people must be united by a deliberative body, the Senate, to which they do not contribute - *populi res est, consilio quodam regenda est* (I.41). And that deliberative body secures a common agreement concerning the only thing that CAN be commonly agreed on : *law* that is applicable to all, including the procedures for its application, and a sharing of benefits. The agreement is to rules and how to abide by them. So we have a partnership of some kind IN LAW and it is this which fleshes out the partnership as to a differential set of contributions of property and work.

When one looks up Roman law on partnership/*societas* one discovers (*Institutes* of Gaius part 2 commentary, de Zulueta, p. 179) that a partnership in law is classified as a type of obligation based on contract (*ex contractu*) and it relies on a common agreement (*Institutes*, Gaius 3.135-8, p. 148-54b). A republic therefore is governed by the *iura societatis* in which the partners receive their respective share of profits related to their contributions revealed as equity or *aequabilitas*. And by tracing Roman history from first kings, one discovers the emergence of a principle that the greatest number must not have the greatest power. On this view : the wealthy with acknowledged *dignitas* and *status* have proved themselves most worthy, having got more votes because they have secured the state's well-being with the deployment of their resources. What unifies everyone, Senate and people, is the conception of the *res publica* as a *res*, a public entity, dependent on the deliberative body, the Senate, offering *consilium*, making policy on behalf of the people as a whole. The *res publica/res populi* is not defined in terms of its individual citizens, but rather, in terms of its operation as a public concern, a public enterprise with the equivalent of CEOs actively making decisions for a

communal *utilitas.* And the fair standard for measuring differential contributions and rewards is based on : *status*, wealth and the presumed devotion of the rich to rule.

The legal individual and the political individual coincide, as ascriptive *status* categories at Rome ; the behaviour of the *status* self is determined differentially by « knowing your place » and then activating the expected role performances that match « your place ». What can we say about the ethical individual ? Is there a language of individuated autonomy that encourages self-reflection concerning responsibility to oneself, a narrative self-construction that separates your expectations from mine ? What were the constraints on what any individual might consider was « up to him » ? What did Romans mean when they used the words *integer/integritas* (which is not quite what in modern English we mean by integrity) ? For Romans *integritas* preserves the community and acknowledges some kind of reciprocal awareness in personal and social interaction. From Cato to Cicero and beyond, being *integer* and having integrity is a crafted *persona* that suits your given *status*. Livy tells us what *integer* meant when applied to the Roman people : nothing more individuated than being loyal to the *boni* as leaders of the community, or by nothing more than their grateful memories of a patron's good deeds. [Livy 9.46.13- *aliud integer populus, fautor et cultor bonorum* ; also Livy 39.50.5-].

Here we need to examine what educated Romans meant about the processing of the « data » of life : they speak of the normative human capacity, not the individual's capacity, for perception (sensing and imagining) ; of evaluation (believing, judging, desiring) ; and of response (bodily, affective, pragmatic, expressive), all of which produce a particular type or kind of emotional consciousness as a developed, acquired and stabilised set of appropriate thoughts and feelings in one's circumstances. Words like *pudor*/shame are used to express one's pain at seeing oneself publicly devalued (Pliny, Livy, Cicero). *Verecundia* is the stabilised emotional disposition that animates the « art » of knowing your proper place in every social transaction and in crafting your behaviour on that knowledge. *Verecundia* affirms the social bonds in the playing of social roles whereby each player gauges his *status* with respect to others, crafting his improvised performances in the circumstances with the relevant *status* others. When Cicero, in *De officiis* I.107f., speaks of our four *personae*, the four roles we need to play, he refers to the first which

is common to all humans in their surpassing animals : all humans have a share in reason. The second *persona* however, is the only role uniquely assigned to individuals as one's unique emotional « disposition » that individuates each of us, temporarily. Emotional dispositions are tendencies or inclinations of which one needs to be aware in order that they may be crafted to *status* expectations. « Everyone ought to weigh the characteristics that are his own and to regulate them » (*De off.* I.113). Only in this way is an agent recognised *as* an ethical individual according to suitably playing the role of his ascribed *status* position. The third *persona* or role is imposed by some chance or circumstance : « Kingdoms, military powers, nobility, political honours, wealth and influence as well as the opposite of these are in the gift of chance and governed by circumstances ». And the fourth *persona* or role we assume for ourselves by our own decision. This however, and for the vast majority of men, is a matter of imitating one's ancestors, or mentors in one's family milieu (I.116).

All of these *personae* are consciously adopted or crafted in order « to win approval of those with and among whom we live ». *Iustitia*, for Cicero, is a stabilised tendency or inclination not to harm or violate other *status* selves, revealing *verecundia* so as not to offend them. Cicero proposes (*De off.* II.15) that « as a result of humans gathering in cities, customs and a formal law of equity were established and a fair system of justice and a regular, fixed way of life (*iuris aequem descriptio certaque vivendi disciplina*). These led to a softening of men's spirits and a sense of shame ; the result was that life became less vulnerable through reciprocal giving and receiving, through sharing our abilities and advantages ». But the sharing is differentiated and is most strongly felt amongst good men of similar conduct, bound by familiarity (*De off.* I.54). What we have here is a prescription not simply for « knowing your place » but knowing or learning how, given your place, you differentially craft your emotional dispositions under suitable *status* mentorship within your social milieu. What is not being revealed is your individuality as uniqueness. And this contrasts starkly with the self-regarding character of modern selves, which is an encouraged, more narcissistic perspective that has more to do with how « I » feel than about how « you » feel. For Romans, *verecundia* means that should I display a lack of suitable *status* modesty it would be as unpleasant for you as for me. And there is no doubt that Romans believed in virtuous dispositions having begun in family hierarchies which

thereafter were to be mirrored and repeated in civil society. In families one crafts emotional dispositions to feel *verecundia* for the old by the young, for the *maiestas* of magistrates by private citizens, and where the only attitude that the rich need acquire towards the poor was to respect them as a social group by not oppressing them.

It is the Roman elite that was thought to be most capable of feeling discomfited by shame, *pudor*, because they came into the world and into their family inheritance of *dignitas*, *existimatio*, valuing public honour more highly than other social groups. In the literature it is the people, the plebs, who are always, by contrast, inscribed in *utilitas* and never in *honestas/honorabilitas*.

« Being » a Roman individual was very different from being a modern self.

Let me close by returning to the specifics of Roman law. Romans did not work with the notion of « subjective » rights or, indeed, with a notion of what we mean by modern « human rights ». When they spoke of *ius in re* they referred to a determinate *ius* regarding such and such a thing or good. Of course, there can be a concrete manifestation in every act, case by case, of the single, individual person, but we should not be tempted to extend this to subjective rights or modern human rights as part of Roman legal reality. Gaius I.8 refers to a division in the matter of law : *ius quod ad res pertinet* – on the one hand, and *ius quod ad actiones pertinet*, a law of things and a law of actions. *Dominium*, quiritarian ownership of a thing requires a legal/juridical determination of the things which may be the objects of ownership, a legal/juridical determination of the power a man may have over such objects regarding duration of time and the extent of his enjoyment ; a determination of the modes in which ownership may be acquired or lost ; a determination of the « persons » who are legally and formally capable of acquiring, transferring or losing such ownership. *Res* is the name of anything that is the object of a legal act. *Res humani iuris* therefore concerns those things that can be objects of common property, be they *res publicae*- belonging to the state - or *res privatae* - belonging to individuals. Their law, in short, spoke of a juridical person that was separate from the physical person.

These concepts were only conflated and universalised when 18th-century Germans, followed by the 19th-century French specialised in writing commentaries on Roman law in the light of a modern state. It was then that the Roman reference to *res incorporales* came to be interpreted

as subjective rights. Gaius' *Institutes* 2.14 spoke of incorporeals as things that are intangible, such as exist merely in law, for example, inheritance, a usufruct, an obligation however contracted. He had said that it does not matter that corporeal things are included in an inheritance or that fruits gathered from land, subject to a usufruct, are corporeal, or that what is due under an obligation is commonly corporeal, for instance land, a slave or money. The right itself of inheritance, usufruct and obligations is incorporeal (*nam ipsum ius successionis et ipsum ius utendi, fruendi et ipsum ius obligationis incorporale est*). Incorporeals as intangibles (*quae tangi non possunt, qualia sunt ea quae iure consistunt*) were incapable of being transferred or delivered. As juridical things they referred to or pertained to juridical things - *hereditas, usufructus, obligationes, quoquo modo contractae*- and NOT to persons.

Incorporeals were only much later in European legal discourse interpreted as abstractions and attached to persons as voluntary, discrete agents. This is not Roman. Instead, when Gaius spoke of *res corporales*, it is clear that *dominium* is absorbed into them and then treated in terms of modes of acquisition of things (*Inst.*2.18-98). Then *res incorporales*, such as inheritance, obligations, are included under the ambit of *ius quod ad res pertinet* and this is in contrast to *ius quod ad personas pertinet*. Property for Romans was not therefore a subjective possession in personal and procedural relations. The bare fact of possession of a thing alone is a fact without any legal character. It does not therefore make a man a *dominus* nor does his lack of possession in fact deprive him of *dominium*. Possession precedes legal power and therefore *dominium* properly signifies a right/power IN LAW of dealing with a corporeal thing that is the object of a legal act, dealing with it as « pleases » a legal person with the legally objective *status* of *dominus*. His activity « as he pleases » is not some radically individual exercise of free will. If it were, this would presume the existence and legal acknowledgement of isolated intention and action. But Roman law does not recognise the intention of isolates. What was always being referred to in Roman law was a generic, individual active juridical position: to use the fruit of, bear arms, inherit the patrimony of others, a signaling of acknowledged legal function and nothing more.

In sum there is a huge terminological and methodological distance between ancient jurists and modern continental jurists. This is largely the consequence of the necessity of the latter having to consider the rights of

the individual who encountered the right of the modern state, and where 18th- and 19th-century jurists saw these as in opposition. *Subjectum iuris* as an expression does not appear before the 17th century. The subject AND the modern State are therefore two terms that are both necessary for the emergence of a theory of individual, subjective rights, this having been precisely what German jurists of the von Savigny school formulated during the 18th century.