Étienne Balibar

Is a Philosophy of Human Civic Rights Possible? New Reflections on Equaliberty

I would like to propose here some "new reflections" concerning the notion of equal liberty (*aequa libertas*), a notion that has persisted across the entire republican political tradition from antiquity (Cicero) to contemporary debates around the work of John Rawls and Amartya Sen, and that I have previously presented in the compressed form of the portmanteau word *equaliberty* (*égaliberté*, *igualibertad*, *Gleiche Freiheit*, or *Gleichheit/Freiheit*, etc.).[1] These reflections are intended to contribute to the discussion of a classical problem in political philosophy, that of the democratic *foundation* of the rights of the citizen. In philosophy, *foundation* is to be understood as meaning the explanation of a principle, particularly a constitutive principle. If we presume that the "rights of the citizen" themselves form the heart and the goal of the constitutional order, whether written or unwritten, formal or material, normative or structural, then what we will be concerned with is something like a constitution of the constitution, following a philosophical-political wordplay deeply rooted in our history (but variably apparent in different languages: thus in French, *constitution de la constitution*, but in German, *Konstitution der*

The *South Atlantic Quarterly* 103:2/3, Spring/Summer 2004.

Verfassung). Here I would like to treat this constitution of the constitution in the spirit of a "deconstruction," understood not as a destruction or pure and simple disqualification, but as an *Ab-bau*, a critical analysis of presuppositions. Deconstruction in this sense brings out problematic elements and negative, antinomical, or aporetic aspects and therefore helps us understand the necessity of recastings, displacements, or even reversals (as I will be led to suggest in conclusion, taking a free inspiration from certain considerations of Hannah Arendt).

In order to get a grasp on the problem we are working with, I would like briefly (and, I hope, in a noncontroversial way) to recall what constitutes the philosophical revolution inherent in modern citizenship that is democratic in essence, and why it raises a difficulty of principle. It is in fact not the *invention* of the democratic principle that distinguishes modern citizenship as progressively instituted by the political transformations that began in the classical age, moving through the popular insurrections and constitutional reforms of the seventeenth, eighteenth, and nineteenth centuries, and that is widely acknowledged to constitute an infinite task, from the citizenship of antiquity, the Middle Ages, and the Renaissance. Aristotle and Cicero already had said that the principle of the *politeia* or *civitas* referred to an *ius communis* and a *consensus populi* that was essentially democratic. What is distinctly characteristic of modern citizenship, at least by right or in principle, is the *universalization* of the status of the citizen. In other words, this status ceases to be a privilege and instead comes to be conceived in terms of universal access, or a universal right to politics: a right not only to *political rights* (a "right to have rights," as Arendt said), but also to effective political participation.[2] What is at stake in this conception, which for us represents both the incontestable and uncomfortable heritage of modernity, is in the first place an *extensive* universality—that is, a cosmopolitical horizon, approached in different degrees by various national or federal citizenships, or, better yet, by the articulation of national citizenship and international law. But even more important is what I would call an *intensive* universality, which gives as a support or "subject" for political participation *common humanity*, the *Gattungswesen* or "species-being" as Hegel and Feuerbach called it, the man without particular qualities (if not without properties). This intensive universality *excludes exclusion*, forbids the denial of citizenship in the name of determinations of condition, status, or nature. We should take note of the element of negativity or "negation of the negation" that is, of course, inherent in the conceptualization of the universal.

Ideally (or normatively, if you prefer), modern citizenship thus institutes an equation, a reciprocity of perspectives, a coextensivity of the predicates of humanity and those of citizenship: *Homo sive Civis*, to parody a famous philosophical formulation. And this is precisely what is expressed, in a mode that is both constative and performative, by the great Declarations that found political modernity and whose trace is visible in most of our constitutional preambles. As I have argued elsewhere following other scholars, the heart and kernel of these declarations, as well as the Bills of Rights that preceded them and hold a similar place in the Anglo-American constitution tradition, turn out to be constituted by the proposition of equal liberty or "equaliberty." This proposition poses, in the characteristic form of a double or simultaneous negation, that equality is impossible without liberty and liberty impossible without equality, and *therefore* that liberty and equality stand in a relation of mutual implication. It thus equates in principle generic humanity and citizenship, implying a juridical adequation of the "rights of man" and the "rights of the citizen." It is thus, if you will, the principle of democratic constitution of the constitution in its typically modern universalist conception.

Whence then comes the difficulty—a persistent, probably unsolvable difficulty, that of course should not lead us to abandon or overturn democratic universalism, but to develop a *critique* of its constitution? It seems to me that we can identify at least three sources or sets of reasons whose concatenation I would like to sketch out in such a way as to allow us to put back into question or reformulate the constitutive proposition itself.

First (here I am of course making no claim to originality), these difficulties stem from the duality of interpretations of the idea of a democratic constitution of rights, expressed in the competition between the notions of fundamental rights (the *Grundrechtsdemokratie* evoked in the title of Gerald Stourzh's major work) and that of popular sovereignty or legislative and constituent "general will."[3]

Second, and I will attempt to show that this aspect is in fact not independent of the first, and even provides a more satisfactory interpretation of it than the opposition between an abstractly normative viewpoint and a historically and politically concrete viewpoint, the difficulty comes from the fact that the concept of man to which the universalist foundation refers is a fundamentally equivocal concept. We can express this by recalling the "metaphysical fact" that, in the historic substitution of an anthropological perspective for a cosmological or theological (or cosmotheological) perspec-

tive—a substitution that is precisely characteristic of modernity—the term *man* that comes to occupy the position of ultimate reference previously figured by *God* or the *world* is immediately *divided* into two opposed significations or ways of being understood. *Communitarian man* is not identical to *man as proprietor* or, in the terminology I would like to introduce, man as "subject" is not identical to man as "individual," even though both of them are *generic*, and both are destined to coincide with the citizen and to determine the constitution of the citizen's rights from within. In reality, this duality has never ceased to be at work within the always-conflictual attempts and procedures of institutional realization of equal liberty or the effective democratization of politics.

Finally, *third*, the difficulty comes from the fact that not only the idea but also the very process of "foundation" is essentially and irreducibly *antinomical*—that is, destined to contradict itself, to turn around into the *negation of the principle* that it institutes. Here I am thinking in part of the classical antinomy of the notion of constituent power, whose theological roots are well known, which makes the ultimate point of institution of the law or order necessarily also represent a point of *dissolution* of all order and all legality, a point of *exception* with respect to its universality and of *liberation* with respect to its legal constraint (a problem to which I will return). But I also am thinking of the fact that *universalization* as such appears to be inseparable from procedures of exclusion and, I would even say, of *inner* exclusion. This represents something quite different from a simple empirical limitation or particularization of principles by historical circumstances and the contingent difficulties of their realization; it affects the idea of constitution or refoundation itself, from within.

We must now pose the question, which is obviously a paradoxical one, of the sort of "finitude" that is proper to the universal itself, the "finitude" proper to the *infinite* or *unfinished* character of the process of emancipation whose political name, in fact, is "democracy" or "citizenship." Allow me to return, schematically and partially, to each of the points I have just evoked. In each case my goal will be, always in a different perspective, to emphasize the aporetic elements inherent in the idea of a democratic constitution of rights that we take as our guiding principle.

The first difficulty I evoked concerns the duality of perspectives from which one can envisage, in a metajuridical discourse that we know is inseparably political and philosophical, how a continuous "foundation" and consequently a *guarantee* for the democratic constitutional order can be provided.

For historical reasons of which everyone here is well aware, the formulation of this difficulty took on a particularly clear and explicit form in the German context after 1945. But we also know that the problems it raises are of a particular import today as we are faced with the question of the *extension* of the constitutional perspective and if possible the democratic constitution of powers, of public authority, to postnational or supranational spaces and in particular to the space of Europe. But, to tell the truth, the two aspects (the extensive aspect—passage to supranationality—and the intensive aspect—the democratization of public powers) are not separable.

I will borrow formulations from two contemporary German authors, the philosopher Jürgen Habermas and the jurist Ernst-Wolfgang Böckenförde, who resolve the difficulty in different ways but do, at least to my thinking, pose it in fairly similar terms.

In a central chapter of his recent *Between Facts and Norms*, Habermas proposes that the "system of rights" that gives the political order its internal regulation can be "reconstruct[ed]" in one of two directions. He speaks of an "internal tension" at work within the process of mutual recognition of citizens who legitimately aim to "regulate their common life by means of positive law,"[4] and philosophically refers this "ambivalent mode of legal validity" on the one hand to a Rousseauist and on the other to a Kantian descent—and thus (and this point is important) to two different ways of understanding the *principle of autonomy*. (While I cannot enter into such a debate here, this in fact means that for Habermas the discourses of Rousseau and Kant are not simply exterior to one another.) Habermas's entire discussion of the foundation of the system of rights, and thus of the intrinsic relation between a *juridical* aspect, a *moral* aspect (related to the idea of subjective self-determination and mutual recognition of subjectivities), and a properly *political* aspect, tends to bring forward what he calls a relation of "unacknowledged competition" between a perspective that sees the constitutional order as founded on the Rights of Man considered as fundamental rights (*Grundrechte*), and one that sees it as founded on *the principle of popular sovereignty*.[5] Habermas calls these the "sole ideas that can justify modern law."[6] Indeed they are the only two ideas by means of which it is possible to both produce and give a norm to, or regulate, *consensus*, or as Habermas puts it in a remarkable formulation, "the first-person plural" (*us, nous, wir*)[7] presupposed by an effective process of self-determination or mutual recognition of rights.

But these two ideas are not so much complementary as competing, as

is shown in particular by the recurrent debate between "liberal" and "civic republican" conceptions of democracy, which can be schematically attached to a Kantian representation (although I personally would emphasize the Lockean element) and a Rousseauist one. The former tends to found consensus and the reciprocity of subjective rights, or the equal liberty that constitutes its essential content, upon the universality of a norm that is to be found "upstream" from the politico-juridical order properly speaking, that is, in the *moral* sphere where individuals ideally are capable of substituting for one another and thus of neutralizing their differences of opinion or conflicts of interests. The latter tends to *incorporate the egalitarian norm*, usually called the "general will," into *the concrete* (Habermas even calls it "existential"[8]) *political act* that realizes the socialization of individuals—that is, incorporates individuals into the institutions of a historical society, with or without state coercion, even as it imposes on them—once again at least in an ideal fashion—the transcendence of private and particular interests in a general public interest.

As is well known, the solution Habermas poses in response to this dilemma, which he sees as coextensive with the entire modern constitutional tradition, takes a transcendental form in that he introduces a *third notion* that would allow one to remain precisely at the level of the constitution of rights, without displacing it in the direction of a moralization *or* a politicization. For Habermas this term is to be found in the "communicational" sphere or "sphere of communicative activity" in which "the illocutionary binding forces of a use of language oriented to mutual understanding serve to bring reason and will together," which means that "as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected."[9] *Equal liberty* would thus be neither simply imposed or postulated, nor instrumentalized by a body politic that sees it as the expression of its sovereignty. We might naturally wonder whether this "solution" is not in fact circular, since the communicative procedure is quite likely to be the *effect rather than the source* of "consensus" or mutual recognition. But above all we might have the feeling that Habermas's solution is in reality much closer to the Kantian moral perspective, and thus to foundation in terms of *Grundrechte*, or the universalization of individual guarantees of right, than to the republican, Rousseauist perspective of foundation in terms of popular sovereignty or autonomy of the collective.

Things are quite different, and for practical purposes the opposite, in

the perspective developed by Ernst-Wolfgang Böckenförde.[10] I regret that I cannot enter into detail here, but I would like to recall that Böckenförde interrogates alternatively the difficulties of the idea of "constituent power" inherent in the democratic tradition (in fact *properly belonging to it*) and the problems posed by the idea of an *immediate validity* of *Grundrechte* or the fundamental liberties of the individual, which posttotalitarian constitutions have once again insisted on with great force in order to take into account and guard against the possibility—devastating for the universalism and rationalism of modernity—of an expression of popular sovereignty becoming exclusionary and even annihilating minorities.

Constituent power only has its full sense to the extent that it grounds sovereignty, not only in the "people" considered as a collective entity actively constituted by direct political participation, particularly in the properly constituent moments of liberating insurrection, but also in what Böckenförde calls the *unorganized people*, which always remains subjacent to its own incorporation in a system of guarantees and constitutional controls or, if you prefer, to its own transformation into a simple *organ* of the constitution (in the exercise of universal suffrage, for example).

On the other hand, the idea of an *immediate validity* of *Grundrechte* appears to be inseparable from that of a *distribution of these rights among all citizens*, and from an effective realization of this distribution. I personally would read in this idea a strong expression of the idea of equal liberty. Now, this question of distribution sets in motion, if not a tendency to identify political rights with social rights—a tendency explicitly rejected by Böckenförde even as he acknowledges that the question of their coincidence will inevitably be posed—at least an uncontrollable movement (*"fuite en avant"*) of normative conceptions of fundamental rights toward an institutional or axiological theory or conception. Böckenförde calls this process "functional democracy," in which it is not abstract norms but *the democratic process as such*, a fundamentally political process, that governs the distribution of rights and duties.[11]

In the end it would seem that the way Böckenförde conceives the transcendence of the antithesis between the two foundations, whose existence he too recognizes, moves in the opposite direction of Habermas by emphasizing the *political dimension over the moral dimension*. But he conceives this political dimension as a process of *self-regulation* or *self-limitation* of the constituent power of the people. This allows him to pass from the stage of "power" (or "energy"[12]) to the stage of the norm and normativity precisely to

the extent that he incorporates into his definition of the conditions or rules for the exercise of constituent power (and into its exercise itself) prescriptions and guarantees formulated in terms of "fundamental rights," which in the final analysis come from a universalist cultural tradition.[13] We could thus here again speak of a quest for equilibrium between the two principles, or of a *reciprocal limitation* of the democratic idea of (popular) constituent power and of the democratic (in a different sense) idea of "fundamental rights." But in this reciprocal limitation the idea of constituent power or popular sovereignty retains primacy and continues to be determining, as is shown in particular by his considerations on the *national* character of citizenship,[14] that is, on the *difference between citizenship and humanity* that must subsist *in practice* in order for the "people," even "unorganized," to remain a political subject, a community of belonging, and not be dissolved into a multitude of individualities who are simply bearers of a demand to be governed by authorities of their choice and under their control, as it could be formulated by an abstract individualism or cosmopolitanism.

I have dwelt upon these well-known positions in order to bring forward a double hypothesis. *On the one hand*, it seems that it remains impossible to provide an unequivocal foundation for the democratic order, or what I call *equal liberty*, *at the properly juridical level*, even though equal liberty is incontestably a juridical concept or *idea*, a "form of right." But in a sense this should not surprise us in the least since what is at stake is precisely the possibility of assigning the "metaphysical point" at which the juridical order might be able to found itself. In this sense, every autofoundation inevitably provokes the appearance, from within, of an alterity, an essential impurity of right, which must be backed up by a moral or historico-political origin, both of which are more or less inevitably *idealized*. The fact that we are considering a democratic order not only does not abolish the difficulty, but in fact brings it forth in its purity and makes a confrontation necessary. In this sense, it would be appropriate to say not only, with Böckenförde, that "constituent power" is a limit-concept, but also that "fundamental rights" *are every bit as much a limit-concept*, and therefore always in search of determinate content and formalization. The limit of these limits is precisely the coincidence or *adequation* of these two perspectives. But *on the other hand*, we also could say that if, considered as a question of principle, this adequation is properly speaking unavailable, or the object of an infinite quest, it appears as an immediate given when considered as a question of *consequences*, that is, as equaliberty itself. Equaliberty is nothing other than the

demand for a popular sovereignty and autonomy *without exclusions*, which implies that it occurs in conformity with the rules or principles of universal reciprocity.[15] Equaliberty requires realizations of the fundamental rights of individuals to political participation and decision-making, whose concrete manifestations include precisely the rights of freedom of conscience and expression, juridical guarantees, even "social rights" to education and professional status. In this sense equal liberty is the name of a *double bind*: it names what makes it *impossible to choose* between different expressions of the democratic idea, or the idea of emancipation, but also what makes it *illegitimate to choose* without dissolving the political link between the individual and the community. It denotes *both* a universality of principles posed (and declared) within the horizon of humanity, and an autonomy of decision that is instituted as "popular sovereignty."

I will have to be much briefer, even telegraphic, in discussing the final two points I announced, and will therefore limit myself to programmatic formulations.

First (this was my second thesis), I believe that we can try to relate the irreducible duality of the two "foundational" discourses to a *philosophical* duality that is coextensive with the entire modern history of the problem of "man." At the least we can try to use the two dualities to illuminate one another. Each of the two discourses, or rather the two sides of democratic discourse, "liberal" and "republican," or "individualist" and "communitarian" if you prefer, *in some sense implies its own anthropology*. Rousseau once again, and Locke rather than Kant, can serve as reference points here, each of them being at the origin of a problem and a transition. On the one hand, we have a tendency toward an *anthropology of the subject*, whose horizon is the constitution of the community as "intersubjectivity" and whose central problem, blindingly clear in Rousseau's work, is *the problem of the relation to the law*, inseparably individual and collective, "particular" and "general." If, beyond all "secularizations," an indelible trace of the theologico-political concept of sovereignty remains at the very heart of modern anthropology, it is because the fundamental question lies in the seemingly impossible project of integrating the transcendence of the law within the immanence of politics, or making the "subject" cease to be the *subjectus* or *subditus subordinated* to an exterior, absolute, and sublime authority that itself is absolved from obedience, but rather become *his or her own legislator* and own constituent authority. As we know, Rousseau resolves this dilemma by means of the *egalitarian*, absolutely reciprocal construction of the general will or commu-

nity of rights. The citizen then is no longer, as he was in Aristotle's *Politics*, alternatively "ruling" and "obeying,"[16] but always *both* ruling and obeying, a "reduction of verticality" brought about by the way the democratic conception of the law places the citizen in a constitutive "two-fold relation" to him- or herself.[17] On the other hand, we have a tendency toward an *anthropology of the individual* or, better yet, an "individualist" anthropology of the *agent* and *agency*. The foundation of the individual's autonomy requires a simultaneous foundation of responsibility for one's actions, *accountability*. Locke, and a whole tradition following him, was able to accomplish this in a decisive way by renewing the old idea of *oikeiosis*, the "conservation" and "care of the self," in order to create the modern idea of "property in one's person" (later "translated" as *self-ownership*).[18] The anthropological problematic inaugurated by Locke does not ignore the collective and communitarian dimension, but does view it as *secondary*, conceptualizing it essentially in terms of "commerce," the social bond of exchange and communication on the basis of the interests and autonomous enterprise of individuals.

Finally (and this was my third question), it would be worth asking whether each of these two anthropological foundations does not reproduce within itself what we must call the aporia or antinomy of "foundation" as such. I think that they do, and I believe that this could be demonstrated by working through the question of the *negative dimensions of the democratic constitution*. One such negative dimension is represented by the "necessary impossibility" of *limit-concepts* such as the "right to resistance" or "right to insurrection," which in a way inscribe within the juridical order of the state itself the moment of its own abolition or exception. Perhaps an even more important object of study at the current moment would be the *forms of exclusion* (exclusion from citizenship, even exclusion from the "human condition" itself) that are inherent in every procedure of definition of the intrinsically political import of the universalism of human rights. Something like this is happening in Rousseau through the idea of a "coercion to be free,"[19] which clearly imposes a certain normality of the social body. In Locke the exclusion of the *criminal* outside of humanity in order to exclude him from citizenship and legislative power plays a similar role. Those who betray or forfeit their human nature, that is, their personality, are thus destined by their own deed to slavery or the status of a public enemy.[20]

And this is precisely why the perspective drawn by Arendt—not so much in *The Human Condition* as in *The Origins of Totalitarianism*—a perspective of *illimitation of rights* founded on the *reversal* of the historical and theoretical

relationship between "man" and "citizen," a perspective that dissolves the idea of foundation by explaining how *man is made by citizenship* and not citizenship by man, that intrinsically conjoins the problematic of equal liberty (or of the "universal right to politics" *wherever* one is "thrown" by history) with that of the inclusion of the excluded, or the exclusion of exclusion, seems to us in so many ways decisive and unavoidable.

—Translated by James Swenson

Notes

1 This essay was first presented at the colloquium "Droits de l'homme, Civil Rights, Grundrechte" at the Centre Marc Bloch in Berlin, June 2002. [For Balibar's introduction of the term *equaliberty*, see Étienne Balibar, "'Rights of Man' and 'Rights of the Citizen,'" in *Masses, Classes, Ideas: Studies on Politics and Philosophy before and after Marx*, trans. James Swenson (New York: Routledge, 1994), 39–59.]

2 See Hannah Arendt, *Imperialism*, book 2 in *The Origins of Totalitarianism*, 2nd ed. (San Diego: Harcourt, 1968), 294.

3 See Gerald Stourzh, *Wege zur Grundrechtsdemokratie: Studien zur Begriffs- und Institutionengeschichte des liberalen Verfassungsstaates* (Vienna: Böhlau Verlag, 1989).

4 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: The MIT Press, 1996), 82.

5 Ibid., 94.

6 Ibid., 99.

7 Ibid., 97. This is reminiscent of Hegel's astonishing formula at the beginning of chapter 4 of the *Phenomenology of Spirit*: "'I,' that is 'We' and 'We' that is 'I'" [*Ich, das Wir, und Wir, das Ich ist*] (G. W. F. Hegel, *Phenomenology of Spirit*, trans. A. V. Miller [Oxford: Clarendon Press, 1977], 110).

8 Habermas, *Between Facts and Norms*, 102.

9 Ibid., 103–4.

10 See Ernst-Wolfgang Böckenförde, *Le Droit, l'État et la constitution démocratique: Essais de théorie juridique, politique et constitutionnelle*, ed. Olivier Jouanjan (Paris: Bruylant L.G.D.J., 2000).

11 Ibid., 268.

12 Ibid., 214.

13 Ibid., 222.

14 Ibid., 284–85.

15 This is exactly what Gerald Stourzh contests when he regrets the contempt for "fundamental rights" displayed by the French sovereigntist tradition *in the name of equality*.

16 Aristotle, *The Politics and the Constitution of Athens*, ed. Stephen Everson, trans. Benjamin Jowett (Cambridge: Cambridge University Press, 1996), 1277b.

17 Jean-Jacques Rousseau, *Of the Social Contract*, book 1, chapter 7 in *The Social Contract and Other Later Political Writings*, ed. and trans. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), 51. See Étienne Balibar, "Apories rousseauistes: Subjec-

tivité, Communauté, Propriété," *Les Cahiers philosophiques de Strasbourg* 13 (Spring 2002): 13–36.

18 The expression *self-ownership* was introduced by Robert Nozick in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), and subsequently taken up by G. A. Cohen in *Self-ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995). On the contrary, in the work that launched the discussion on "possessive individualism," *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962), C. B. Macpherson keeps Locke's original terminology: "Property in one's Person," "Proprietor of one's Person."

19 See Rousseau, *Of the Social Contract*, book 1, chapter 7: "Hence for the social compact not to be an empty formula, it tacitly includes the following engagement which alone can give force to the rest, that whoever refuses to obey the general will shall be constrained to do so by the entire body: which means nothing other than that he shall be forced to be free" (53).

20 In chapter 4 (paragraphs 22–24) of the *Second Treatise on Civil Government*, Locke justifies slavery—which would seem to contradict "property in one's person" as a fundamental human right—not by a specific "nature" of the slave, but by criminal behavior: "Indeed having, by his fault, forfeited his own Life, by some Act that deserves death; he, to who he has forfeited it, may (when he has him in his Power) delay to take it, and make use of him to his own Service, and he does him no injury by it" (John Locke, *Two Treatises of Government*, ed. Peter Laslett [Cambridge: Cambridge University Press, 1988], 284).