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Reclaiming the Radical in Universal Human Rights: Universality as Universalisation

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Abstract

The universality of human rights has been a fiercely contested issue throughout their history. This article contributes to scholarly engagements with the universality of human rights by proposing a re-engagement with this concept in a way that is compatible with the aims of radical politics. Instead of a static attribute or characteristic of rights this article proposes that universality can be thought of as, drawing from Judith Butler, an ongoing process of universalisation. Universality accordingly emerges as a site of powerful contest between competing ideas of what human rights should mean, do or say, and universal concepts are continually reworked through political activity. This leads to a differing conception of rights politics than traditional liberal approaches but, moreover, challenges such approaches. This understanding of universality allows human rights to come into view as potentially of use in interrupting liberal regimes and, crucially, opens possibilities to reclaim the radical in rights.

Keywords

Universal Human Rights, Universality, Universalisation, Politics of Rights, Radical Politics, Judith Butler

1. Introduction

The universality, or otherwise, of human rights discourse has been a persistent staple in scholarly engagements with human rights, as well as in the everyday politics of rights more generally. Indeed, universality is arguably one of the most important issues human rights have faced, and continue to face, in the contemporary era. This is an era of declining universality, where human rights represent perhaps one of the last discourses still conceptualised in the universal terms of modernity.¹ The issue of universality has been tied to the legitimacy and authority of human rights, to their scope and remit as well as to the way in which human rights can be thought to operate at the grassroots level. A myriad of divergent views have been expressed on the universality of human rights; some embracing a strict universalist approach, others highlighting the dangers

¹ C Douzinas, 'The Poverty of (Rights) Jurisprudence' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights* (Cambridge, Cambridge University Press, 2012) 56 at 57.

this represents and seeking to offer alternative positions, some even going so far as to abandon the idea of universal human rights altogether. In this context a number of questions emerge. How can we conceive of the universality of human rights in the contemporary political and legal landscape? Can the universality of human rights be revisited in a productive way capable of meeting the politico-legal challenges of our current time? Moreover, what is the relationship between this contested universality of human rights and the everyday politics of rights?

In this article I engage in a reconsideration of the universality of human rights. What this reconsideration seeks to do is propose a convincing way to conceptualise universal human rights which is compatible with, and useful for, scholarship and activism challenging liberalism and urging towards radical social transformation.² I assert that instead of abandoning universal human rights as a discourse incapable of furthering radical political aims, it is possible to return to the universality of human rights in an alternative way which works human rights beyond their current limitations within liberalism – reinforcement of ideas of rational individualism, formal equality and already existing regimes of power, for example – and facilitates the aims of radical politics. I consider this is possible through conceiving the universality of human rights as not a static attribute or characteristic of rights, but, drawing from the work of Judith Butler,³ as an *ongoing process of universalisation* whereby the meaning, content and remit of universal human rights is constantly made and remade in political engagement and activity.

This approach visibilises the universality of human rights as a ‘not yet’, a site of powerful contest between competing understandings of universal concepts within which the exclusions of the dominant universal are continually challenged and reworked. In this view, a final and fully inclusive closure of what universal human rights mean and who their subject is, as well as their ultimate realisation, always

² Throughout this article I will use the terms ‘radical’ and ‘radical politics’ in the sense of a form of leftist politics which involves a profound challenge to existing relations of power for those who are marginalised or excluded, in particular within liberalism, using a range of post-Marxist and poststructuralist resources.

³ See generally, J Butler, *Gender Trouble Gender Trouble: Feminism and the Subversion of Identity* 2nd ed, (London, Routledge, 2006); J Butler *Bodies That Matter: On the Discursive Limits of ‘Sex’* (New York; London, Routledge, 1993); J Butler, *Precarious Life: The Powers of Mourning and Violence*, 2nd ed, (London, Verso, 2006); J Butler, *Frames of War: When is Life Grievable?* (London, Verso, 2009).

remains a futural attainment; one we can never achieve but which draws us into striving towards it nevertheless. In contrast to liberal understandings of universality, this alternative approach to the politics of universal human rights fundamentally foregrounds both the unfixity of human rights and the relations of power shaping their current articulations, allowing allows us to visibilise, and indeed *challenge*, the way in which liberal approaches to human rights and their universality may foreclose such unfixity and further restrictive regimes of power. It is this aspect of reconsidering the universality of human rights as universalisation which allows a potential compatibility between universal human rights, conceived in such an alternative way, and radical politics seeking to challenge liberalism and its regimes of power more generally to come into view. Understanding the universality of human rights as a site of ongoing contest maintained through the challenge of those currently excluded from dominant universal concepts or understandings allows radical politics to see how human rights may be used to interrupt liberal regimes of power and, in turn, opens possibilities to reclaim the radical in rights.

2. Traditional Approaches to Universality

Beginning to consider the context within which the reconsideration of universality I am proposing here is located, it is necessary to understand how the universality of human rights has been traditionally approached. General discussion surrounding human rights demonstrates both the importance of universality to contemporary human rights politics and the stumbling block that universality has posed to human rights throughout their history. In scholarly literature much of this discussion has intersected with one of the most fundamental debates on human rights; the deep-seated divide between universality and cultural relativity which has dominated discussion over recent decades.⁴ The universality/cultural relativist binary can be regarded as framing traditional approaches to the universality of human rights. It would be amiss to engage with the universality of human rights without reference to this key divide, and this

⁴ See, eg, AD Renteln, *International Human Rights: Universalism Versus Relativism*. (London, Sage, 1990); F Halliday, 'Relativism and Universalism in Human Rights: the Case of the Islamic Middle East' (1995) 43(1) *Political Studies* 152-167; E Brems 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) 19(1) *Human Rights Quarterly* 136-164; B Ackerly, *Universal Human Rights in a World of Difference* (Cambridge, Cambridge University Press, 2008).

debate indeed forms the marker which the re-engagement of universality I am proposing emerges from, and seeks to move beyond. While the debate on universality/cultural relativity forms a starting point for discussion on universality, as will be elaborated below, it is not necessarily an ending point for contemporary engagements with the universality of human rights, in particular those which seek to recover human rights as a truly radical discourse not necessarily confined within liberalism and capable of meaningfully challenging current regimes of power. In what follows below these traditional approaches to the universality of human rights will be explored as a prelude before introducing how we can begin to think about the issue of universality anew to allow a more radical view of universal human rights to emerge.

Discussion on the universality of rights has taken on a particular importance, and indeed a new direction, following increasing globalisation of the international system in the latter half of the twentieth century. The coming together of diverse nations, cultures and socio-religious viewpoints under the umbrella of ‘international human rights’ has brought particular challenges to the fore.⁵ However, as Chris Brown highlights,⁶ the question of universality is one that has a longer pedigree, and the historico-theoretical foundations of rights provide a deeper context to this debate. Human rights have traditionally asserted, firstly, universality in relation to the subject of rights. Stemming back to their natural law underpinnings in work such as that of Hobbes and Locke,⁷ the Universal Declaration of Human Rights asserts in its opening Article that ‘all human beings are born equal in dignity and rights’. All possess rights, it is advanced, because of their basic humanity; human rights protection extends universally across humankind. In addition to a universal subject, secondly, the content of human rights is also presented as universal. This universality combines the natural law underpinnings of rights, in terms of certain core protections which reflect a common conception of human

⁵ See, e.g., B Ibhawoh, ‘Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State’ (2000) 22(3) *Human Rights Quarterly* 838-860; S Engle Merry, ‘Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)’ (2003) 26(1) *Political and Legal Anthropology Review* 55-76; H Dahan Kalev, ‘Cultural Rights or Human Rights: The Case of Female Genital Mutilation’ (2004) 51(5-6) *Sex Roles* 339-348.

⁶ C Brown, ‘Universal Human Rights: A Critique’ (1997) 1(2) *International Journal of Human Rights* 41-65 at 41.

⁷ For deeper discussion on the philosophical underpinnings of rights see C Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford, Hart Publishing, 2000) at 23-84; P Jones, *Rights* (MacMillan, London, 1994); H Steiner, *An Essay on Rights* (Oxford, Blackwell, 1994); S Shute and S Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (New York, Basic Books, 1994); J Waldron (ed), *Theories of Rights* (Oxford, Oxford University Press, 1984).

flourishing, with positive law in the contemporary international context. From the mid-twentieth century international human rights law positivised particular rights content, upholding protection from certain harms, or access to certain values or goods deemed important within liberalism, as universal provisions. The current international human rights regime, for the most part, represents ‘a contemporary, internationalised and universalised, version of the liberal position on rights’.⁸ The content of human rights, especially the foundational first generation civil and political rights, has been enshrined in treaties and declarations applying across borders, nations and cultures.

The assertion stemming from the position outlined above – that human rights apply to all human subjects and consist of a set core content of protections applicable across borders and contexts – broadly summarises the universalist position on human rights.⁹ This has been the general starting point from which human rights law and politics progressed from 1945 onwards. However, in the latter decades of the twentieth century concern began to emerge, particularly from voices in the Global South, that this universalist approach, and its associated politico-legal crusade to extend the profile and reach of human rights in the post-World War II era was problematic. Such a position was increasingly articulated as representing, as Conor Gearty puts it,

a new form of imperial aggression, with the assertion of human rights fulfilling the function of Christianity and civilisation in bygone ages namely the latest way in which a rapacious west covers its selfish tracks, hiding its naked self-interest in a shabby ethical coat.¹⁰

The subject of human rights in this view is not a universal human but a Western construct and the universal content of rights articulated in international law appears as an all too familiar assertion of colonial power, inattentive to cultural particularities, promoting a Eurocentric approach to human life and its flourishing.¹¹ In this view,

⁸ Brown, *supra* n. 6 at 43.

⁹ For further discussion on the universalist approach see J Donnelly, *Universal Human Rights in Theory and Practice* 3rd ed, (London, Cornell University Press, Ithaca, 2013) at 94-97.

¹⁰ C Gearty, ‘Are Human Rights Truly Universal?’ (2008) Available at: <http://www.conorgearty.co.uk/pdfs/Chapter_29_UniversalityFINAL.pdf> (accessed 12 October 2015) at 5.

¹¹ See W Twining, ‘Human Rights: Southern Voices; Francis Deng, Abdullahi An-Na’im, Yash Ghai and Upendra Baxi’ (2007) *Law, Social Justice & Global Development Journal*, available at: <http://www.go.warwick.ac.uk/elj/lgd/2007_1/twining> (accessed 12 October 2015); R Wilson,

human rights cannot take a universal form and, indeed, to assert a universalist position renders rights not only of limited utility but also potentially damaging to the cultures they are seeking to embed themselves in.

This traditional binarised perspective on the universality of rights will be familiar to anyone with even a cursory knowledge of human rights discourse and politics. However, many alternative perspectives have been taken on the universality/cultural relativity debate and, it should be noted, in more recent times engagement with the universality of human rights in mainstream literature has veered away from a strictly binarised approach to this debate in favour of more nuanced articulation of the nature of the universal and particular in rights.¹² Much scholarly engagement has considered how the universality of human rights can be approached in a way which eschews the binarisation of universality-relativity. Some have sought to maintain the universality of human rights while simultaneously seeking to temper the colonisation and more sinister elements it can give rise to.¹³ Others have taken a contrasting route, rejecting the universality of human rights as of any use in the contemporary era, and urging towards alternative perspectives on rights.¹⁴ Others still have proposed a return to the universality of human rights albeit in a new form, one which is quite different from the universality envisaged by liberal, universalist approaches.¹⁵ Indeed, while the universality/cultural relativist debate has done much to highlight the imperialistic

'Introduction' in R Wilson (ed), *Human Rights, Culture and Context: Anthropological Perspectives* (London, Pluto Press, 1997) 1.

¹² For example, Jack Donnelly explores how rights are 'relatively universal', asserting that 'the crucial work, then is to identify the ways in which human rights both are and are not relative and universal – and to avoid either treating the universal as if it were relative or falsely universalizing [sic] the particular', Donnelly, supra n. 9 at 104.

¹³ To provide some examples; Conor Gearty advances a re-narration of human rights, 'one that is more convincing and better able to appeal to the global community as a truly universal discourse', Gearty, supra n. 10 at 6; Jack Donnelly advances a recognition of human rights as both universal and relative in various ways, Donnelly, supra n. 9 at 104; Abdullahi Ahmed An-Na'im has worked to show how universal human rights may be compatible with Islamic law and how the latter can be reworked to produce a better relationship between the two; AA An-Na'im, 'Universality of Human Rights: An Islamic Perspective' in N Ando (ed) *Japan Past, Present and Future: International Symposium to Mark the Centennial of the Japanese Association of International Law* (The Hague; London; Boston, Kluwer Law International, 1999) 311.

¹⁴ These authors include Douzinas, supra n. 7 at 12; Brown, supra n. 6 and R Rorty *Truth and Progress: Philosophical Papers Volume 3* (Cambridge, Cambridge University Press, 1998) at 170.

¹⁵ See D Otto, 'Rethinking the "Universality" of Human Rights Law (1997) 1(1) *Columbia Human Rights Law Review* 1-46; D Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' (1997) 18 *Australian Yearbook of International Law* 1-36; D Otto, 'Everything is Dangerous: Some Poststructuralist Tools for Rethinking the Universal Knowledge Claims of Human Rights Law (1999) 5(1) *Australian Journal of Human Rights* 17-47.

tendencies of liberal human rights, it has nevertheless tied the discussion of human rights and their universality closely to liberalism. From this perspective, the universality of human rights appears as a fixed attribute to be either endorsed or contested. Much of the return to universality in ways that seek to reject the liberal dominance of human rights discourse has drawn sustenance from the poststructuralist and critical re-evaluation of universality in recent years which, as Linda Zerilli states, represented ‘a homecoming to Enlightenment ideals – purified of their more poisonous elements, of course – and a reconciliation of sorts between those who refuted those ideals and those who sought to realise them’.¹⁶ It is this latter category which is of interest to the aims of this article, introducing how the universality of human rights may be used as a starting point to envisage an alternative conception of universal human rights and one, specifically, that may begin to reclaim the radical in human rights. While liberal understandings of universality as a fixed or static attribute of human rights serve to bolster current regimes of power – who is the subject of human rights, what central ideas such as equality and non-discrimination mean, for example – and often present such as timeless and taken for granted, critical approaches have revealed how universality may not necessarily be tied to a bolstering of such regimes.¹⁷

While some work staying with universality and re-evaluating it in a new way has clearly taken place in critical literature, it has not yet taken hold or, apparently, proved fully convincing. What discussion in the present article aims to do is to remedy this situation; to offer a convincing alternative account of the universality of human rights that resonates with current understandings of human rights and also holds potential to propel human rights forward into a more radical practice which is accessible to both mainstream understandings of human rights – convincing them that such a re-engagement will lead to a better practice of rights – and more critical approaches – convincing them that the liberal shortcomings of human rights, in terms of reifying as opposed to radically challenging current power relations, can be addressed by starting from this perspective. This offers an alternative to staying within the parameters of the

¹⁶ L Zerilli, ‘This Universalism Which Is Not One’ (1998) 28(2) *Diacritics* 28 3-20 at 1. See also J Butler, ‘Poststructuralism and Postmarxism’ (1993) 23(4) *Diacritics* 3-11.

¹⁷ For example, Otto, *supra* n. 15 at 3, demonstrates how universality can be a site that facilitates marginalised voices, ‘transformative’ critiques of rights emerging from ‘non-elite scholars and activists on the “margins” of modernity, such as feminists, postcolonial and subaltern groups, lesbians and gay men, critical race theorists and indigenous groups’.

universalist/cultural relativist binary, as has been the case in many mainstream liberal understandings, and giving up on human rights as a site for radical politics, as has been the temptation in some critical understandings. Universality can be re-evaluated anew in productive ways which go beyond its usages within liberal modernity, but this re-evaluation must be compelling, and must draw us towards a natural and accessible radical account of human rights that is useful in realigning human rights with the interests of the marginalised. It is to introduction of such an approach that attention will now turn.

3. Re-considering the Universality of Human Rights: Universalisation

3.1 Universality as Universalisation

From the above, the present article seeks to offer a convincing re-engagement with the universality of human rights which retains a perception of human rights as universal, but asserts that this must be a universality which is radically re-conceived, facilitating the move from liberal to radical in a way that has not been achieved to date, and that allows alternative possibilities for human rights to come into view through this re-engagement. The new conception of universality I am advancing rejects the universalising mission dominating Western, liberal conceptions of rights, but it goes further than this alone. Instead of viewing the universality of human rights as a static, inherent characteristic of rights – as both universalist and cultural relativist perspectives do – I seek to think through the possibility of exploring the universality of human rights as a process of *ongoing universalisation*. This approach considers universality not as a static attribute or characteristic of human rights to be either endorsed or rejected, but as a *process, an action, a doing* which takes place through politico-legal engagements with rights and is the very lifeblood of human rights.

The approach to universality I am outlining here fundamentally draws from Judith Butler's work and aims to redeploy it in the context of human rights; to take this work as the starting point to develop and propel a more radical theory and practice of

universal human rights.¹⁸ For Butler, while static conceptions of universality may be comforting, they are problematic. The problem emerges ‘when the meaning of “the universal” proves to be culturally variable, and the specific cultural articulations of the universal work against its claim to a transcultural status’.¹⁹ In this respect, the universal proves itself to be less than universal. However, this is not a reason to abandon all recourse to universality for Butler, ‘on the contrary. All it means is that there are cultural conditions for its articulation... and that the term gains its meaning for us precisely through these less than universal conditions’.²⁰ It follows that any universal concept is ‘only partially articulated, and that we do not yet know what forms it may take’ and, as Butler continues,

the contingent and cultural character of the existing conventions governing the scope of universality does not deny the usefulness of the term *universal*. It simply means that the claim of universality has not been fully or finally made and that it remains to be seen whether and how it will be further articulated.²¹

Thus, the universal always emerges within cultural contexts, is shaped by them, and is necessarily limited and always haunted by its own alterity. However, importantly, where the one who is outside of the legitimating structure of universality nevertheless speaks in its terms ‘such a claim runs the good risk of provoking a radical rearticulation of universality itself’.²² This process of rearticulation is an ongoing necessity, maintaining universality as a permanent site of contest, of the ‘not yet’.²³ In Butler’s words, ‘the excluded, in this sense, constitutes the contingent limit of universalization [sic]. And the universal... emerges as a postulated and open-ended *ideal* that has not been adequately encoded’.²⁴ From this outline Butler asserts that it would be a mistake to think that ‘conventional formulations exhaust the possibilities of what might be

¹⁸ Butler’s comments on universality are mainly outlined in J Butler, ‘Universality in Culture’ in M Nussbaum with Respondents, J Cohen (ed), *For Love of Country?: A New Democracy Forum on the Limits of Patriotism* (Boston, Beacon Press, 1996) 45; J Butler, *Excitable Speech: A Politics of the Performative* (New York; London, Routledge, 1997) at 86-92; and J Butler, E Laclau and S Žižek, *Contingency, Hegemony, Universality* (London, Verso, 2000).

¹⁹ Butler, ‘Universality in Culture’, *ibid.*, at 45.

²⁰ *Ibid.*, at 45-46.

²¹ *Ibid.*, at 46, emphasis in original.

²² *Ibid.*

²³ *Ibid.*, at 48; Butler, Laclau and Žižek, *supra* n. 18 at 47.

²⁴ Butler, ‘Universality in Culture’, *supra* n. 18 at 48, emphasis in original.

meant by “the universal” and that insisting on more expansive reformulations of universality cannot hold a commitment to honouring only the ‘provisional and parochial versions of universality’.²⁵ Instead, exposing the parochialism and alterity characterising the universal is part of extending and rendering substantive the notion of universality, indeed, such is the process of universalisation itself.

Crucial to this ongoing rearticulation of the universal through exposure of its limits is what Butler outlines as the ‘performative contradiction’ posed by those who speak in the name of the universal while being excluded from it; ‘claiming to be covered by that universal, they expose the contradictory character of previous conventional formulations of the universal’.²⁶ The performative contradiction not only exposes the limits of current notions of universality, but performatively reworks such limits in more expansive and inclusive ways. In this way, ‘the universal begins to become articulated precisely through challenges to its existing formulation, and this challenge emerges from those who are not covered by it... but nevertheless demand that the universal as such ought to be inclusive of them’.²⁷ Through this process the universal emerges as an open-ended ideal which can be rearticulated anew and is not restricted to its current legal or normative form. In this process of universalisation the universal ‘can be articulated only in response to a challenge from (its own) outside’, from the unspeakable that it has produced through exclusion.²⁸

Drawing from Butler to articulate the universality of human rights as universalisation means starting with already existing approaches to and understandings of human rights, but – in contrast to liberal approaches – viewing current universal human rights concepts at the international level as not static or fixed but as constantly worked and reworked anew in an ongoing process of universalisation; politico-legal work taking place in various locations and contexts to seek to fix the subject, content and remit of rights through constant articulation and rearticulation in contexts of power. This process takes place, for example, when current human rights concepts are challenged by those excluded from these concepts. Through utilising the language of human rights when

²⁵ Ibid, at 47.

²⁶ Ibid, at 48.

²⁷ Ibid.

²⁸ Ibid, at 49.

not entitled to do so, and thereby asserting alternative conceptions of what rights look like, such individuals pose a performative contradiction which exposes the limits of the current universal and reworks it in a new, more expansive, way.²⁹ Because the universal is articulated within culture, competing accounts of universal concepts always exist at any one time.³⁰ The assertions made by those with alternative conceptions as to what universal human rights should mean, say and look like, who appropriate the language of human rights to challenge its current limits, are advancing a competing universal which enters into translational dialogue with the currently dominant universal in the process of universalisation.³¹ This dialogue between existing universal concepts and people or groups viewing such concepts as inadequate in some way, advancing new understandings of them, characterises human rights politics and is the working out of the universality of human rights.

Using Butler's comments as the starting point to ground a new approach to universal human rights means understanding the universality of human rights as not defined by or contained in a universal subject or content which transcends contexts and borders, but by a constant fixing and unfixing of what human rights are, what they can be used to do and say, and what they represent which takes place in the diverse politics of rights. This process of universalisation is constantly ongoing, will never reach an end. Aiming towards an ultimately unachievable final settlement of human rights in some kind of perfect, all-inclusive form through contestatory political engagement emerges as indeed the *raison d'être* of universal human rights when we conceive of their universality as universalisation. While liberal approaches may recognise that there is a certain amount of fluidity within universal human rights concepts to respond and adapt over time and context, this is not the same as understanding the universality of human rights as universalisation. The reason for this is that such liberal approaches are not located within a radical critique of power – where the exclusions and alterity haunting universal human rights concepts emerge from the limits and restrictions of liberal regimes of power. Understanding universality as universalisation draws our attention to the

²⁹ Butler discusses this idea in terms of lesbian, gay, bisexual and transgender rights politics in 'Universality in Culture', Butler, *supra* n.18. The same has also been discussed in relation to the politics of women's human rights. See, eg, K McNeilly, 'International Human Rights and Gendered Violence: Thinking Non-discrimination Beyond the Sex Binary' (2014) 22(3) *Feminist Legal Studies* 263-283.

³⁰ Butler, Laclau and Žižek, *supra* n. 18 at 136-181.

³¹ This is a process that Butler terms 'cultural translation'. For further discussion on this idea see Butler, Laclau and Žižek, *supra* n. 18 at 35-41.

exclusions of human rights, and how these exclusions are linked to current regimes of power, and allows such exclusions to become the focus of human rights politics, returning human rights to those on the margins.

It is obvious, therefore, that the approach to the universality of human rights I am outlining here begins with what we currently understand about universal human rights but appears counter-intuitive to mainstream, liberal understandings of human rights in a significant way. This is entirely intentional. Understanding universality as universalisation is offered as the first step in engaging with an account of human rights which goes beyond liberalism.³² Approaching the universality of human rights as a process of ongoing universalisation provides an accessible way to move towards a more radical approach to human rights by starting with already existing understandings of rights and highlighting the inevitability that they will never be fully complete or fixed, but, unlike liberal approaches, highlighting this unfixity as a space for challenge to the ways in which current universal human rights concepts are linked to restrictive regimes of power. This is a point that we will return to in the final section. For now, in further articulating what it means to embrace the universality of human rights as universalisation, it is important to explore more of how the reconsideration of universality I am posing here naturally departs from liberal understandings of universal human rights.

3.2 Distinguishing Universality as Universalisation from Liberal Approaches

The conception of universal human rights as an ongoing process of universalisation requires us to approach core aspects of human rights in a fundamentally different way than liberal-based approaches to universal human rights and their politics. In what follows below three points of divergence will be considered which visibilise how considering the universality of human rights as universalisation renders an important shift in how we understand and approach the politics of human rights. The first moment

³² For wider literature on human rights beyond liberalism see, for example, I Wall, *Human Rights and Constituent Power: Without Model or Warranty* (London; New York, Routledge, 2012); J Blau and A Moncada, *Human Rights Beyond the Liberal Vision* (Lanham; Oxford, Rowman and Littlefield, 2005); D Ingram, 'Between Political Liberalism and Postnational Cosmopolitanism: Toward an Alternative Theory of Human Rights' (2003) 3193 *Political Theory* 359-391.

of divergence to note is in relation to the *subject* of rights. If we conceive of the universality of human rights as not a predetermined given but as current content that stands to be re-worked based upon that which it currently excludes in processes of universalisation, we can no longer unquestionably accept the assertion that ‘all human beings are born equal in dignity and rights’. The subject of human rights cannot be taken for granted as a universal human subject conceived in a straightforwardly biological sense. Rather, the human subject comes into view as a constructed category which has been exposed, and continues to be exposed, as limited and exclusive. When we reject universalist accounts and their liberal origins, human rights cannot be viewed as possessions granted to an already fully formed subject who is born human and born equal, but human rights are part of the constant creation and re-creation of the human as subject. Here Wendy Brown’s comments are salient; rights operate to produce and regulate subjects and in their very promise to protect individuals and to facilitate sovereign choices for them rights discourse produces a certain kind of subject in need of a certain kind of protection.³³

Approaching the universality of human rights as universalisation involves engagement with and visibilisation of the fact that the subject of human rights, as a creation of power, is not a fixed or natural entity and is one key site for contestation, ongoing making and remaking. There is no universal subject of rights, rather the universality of human rights is a site to debate the meaning of this subject and reveal, in a way that liberal conceptions of human rights currently cannot, the role of power in the creation of notions of the human. The finally fixed human subject must also always remain a ‘not yet’ and a site of contest. This assertion that there is not, and can never be, a settled and straightforwardly universal subject of universal human rights does not take away the protection contained in the assertion that all humans have rights. On the contrary, it seeks to enhance the position of those subjects who are often on the margins – women, ethnic communities, those identifying as lesbian, gay, bisexual or transgender, disabled communities – by highlighting the universality of human rights as a place able to contest the current power regimes shaping and restricting such subjects, power regimes which are hidden in the straightforward assertion that ‘all humans are born equal in

³³ W Brown, “‘The Most We Can Hope For...’ Human Rights and the Politics of Fatalism’ (2004) 103(2-3) *South Atlantic Quarterly* 103 451-463 at 459-460. See also W Brown, ‘Suffering Rights as Paradoxes’ (2000) 7(2) *Constellations* 230-241.

dignity and rights'. In this sense, the alternative approach to universality I am articulating here allows human rights to be seen and utilised as a vehicle to reveal and challenge subjectifying relations of power in a way currently impossible within liberalism. It highlights the politics of human rights as a space centred on the ongoing contestation of such power and its definition of the subject of rights and thus allows the politics of human rights and its relation to the subject to go beyond what Illan Wall describes as their current 'relatively predictable and limited power to reshuffle positions within the given distribution [of power]'.³⁴

Secondly, the approach to universality as universalisation differs from liberal approaches to universal human rights in relation to the *content* of human rights. The specific content of universal human rights provisions can no longer be viewed as universal in the sense of timeless provisions positivised in international law and applicable across borders, nations and contexts. Viewing the universality of human rights as an ongoing process of universalisation fundamentally highlights the fact that the content of human rights is never settled, never timeless, but is always made and remade in local contexts through politico-legal engagement with what human rights are, what they mean and what they can be used to achieve. The politics of human rights is in essence about making and remaking temporarily dominant ideas about what the content of international norms and treaty provisions mean in the varied contexts in which people are seeking to draw upon them. Viewing human rights and their politics in this way moves focus from the need to apply or adapt timeless universal content – as advanced in the universalist and cultural relativist positions respectively – and realigns focus on universality as a *process* working out the contingent meanings of rights.

In the approach to universality which I am engaging here, any universal is articulated within specific cultural contexts. This is why the universality of human rights in the sense of universal content must be constantly made and re-made given that competing assertions of such content always exist alongside one another within cultural contexts. Commentators, including those from a liberal background, have acknowledged the

³⁴ I Wall, 'On a Radical Politics for Human Rights' in Costas Douzinas and Conor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge, Cambridge University Press, 2014) 106 at 108.

culturally contingent nature of the content of human rights. For example, Jack Donnelly rightly points out that the provisions contained in international treaties reflect,

a contingent response to historically specific conditions... An authoritative list of human rights emerges out of an ongoing series of political struggles that have changed our understanding of human dignity; the major threats (both old and new) to that dignity, and the institutions, practices and values necessary to protect it.³⁵

However, while Donnelly posits this historical specificity in the content of universal human rights as part of the relativity of what he terms the ‘relative universality’ of human rights, the new approach to universality I am asserting differs in that it points not to some element of relativity within rights, but to the *ongoing nature of the universalisation process*. Characterising how we view such contextual articulation and rearticulation of human rights content in this way allows us to move from the tendency to view universality as a thing towards viewing it as a doing. Moreover, it also allows us to pay more attention to the way in which contextualised processes of articulation and rearticulation are related, and respond to, regimes of power. In foregrounding the inherently cultural nature of any universal the aim is not to merely observe or accept the results of a given articulation, but to highlight and use the alterity within the current universal articulation in culture to rework it beyond its present limits, to drive the process of universalisation in response to particular relations of power. In this sense the cultural nature of any universal does not point towards a hybrid form of relative universality, but to the ‘not yet’ which defines the universal and urges us towards an understanding of universality as a process of universalisation within the context of a critical relation to power.

The third way in which universality as universalisation departs from liberal universalist approaches is in relation to the *realisation of rights*. From the perspective of human rights as an ongoing process of universalisation, the realisation of universal human rights can never be achieved, but remains fundamentally *futural*. Just as we must continually strive towards a fully inclusive approach to the subject of rights and a fully

³⁵ Donnelly, *supra* n 9 at 97-98.

formed and robust content of rights but can never finally achieve either, so too must we always strive towards the achievement of a world where human rights are fully realised but yet always fall short of such achievement. Rather than a utopian vision similar to that underpinning liberal human rights, however, this view promoted by foregrounding the process of universalisation as an ongoing struggle highlights that human rights are in many ways a self-critical or self-refuting ideal; they must remain open as a guiding concept but one which can never fully be grasped.³⁶

Much of the pressure placed upon the discourse of human rights in their liberal form is linked to the fact that despite extensive positivisation, international endorsement and development of a robust international human rights regime since the mid 1940s, human rights violations are still widespread. A plethora of conflicts, famines, poverty, abuse and death has not been prevented by the protections of the liberal human rights regime.³⁷ This has led to assertions that human rights are impotent, a discourse that is inadequate in eradicating human suffering in the contemporary era, and one that is not truly universal. However, if we depart from the traditional, liberal approach to human rights and their universality in favour of human rights as a process of ongoing universalisation whereby human rights cannot ever be fully realised or fully grasped, such assertions can be re-engaged.

Universal human rights have not failed because human rights violations still exist, nor because human suffering still proliferates in various locations across the globe. If the point of human rights is to encourage engagement in an ongoing process of universalisation, continual making and re-making of human rights in a way that can never achieve a perfect realisation, we see that it is *engagement in this process in itself* which holds possibilities for those on the margins, rather than the (impossible) output of a final realisation or fully complete concept of universal human rights. Human rights can never be finally ‘achieved’ in the sense of an answer to the diverse political, social and economic problems facing world populations. They are not possessions which can

³⁶ Here I am drawing on Jacques Derrida’s idea of the ‘to come’ outlined in, for example, J Derrida, *Rogues: Two Essays on Reason* (trans P Brault and M Nass) (Stanford, Stanford University Press, CA, 2005).

³⁷ See, eg, E Hafner-Burton and K Tsutsui, ‘Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most’ (2007) 44(4) *Journal of Peace Research* 407-425.

straightforwardly emancipate or juridically guarantee liberty, security and equality in the liberal sense. But the process of contesting and continually rearticulating the subject and content of human rights to challenge the limits of currently dominant universal concepts and discourses does hold emancipatory potential, differently conceived. Entering into this process of ongoing contest offers the possibility to work towards a better vision of our living and being together, to performatively bring such into being, albeit this is a vision that can never be *fully* realised or pinned down. This view, rather than leading us into inertia, should push us towards a never-ending striving for the enhanced concretisation of the values that universal human rights represent and the conception of our lives together that they promote which is achieved through an ongoing working and reworking of universal concepts and ideas.

From considering these divergences between mainstream, liberal understandings of rights and the approach of universality as universalisation we can see that the key elements of human rights and their politics comes into view in a very different way. The essence of such politics becomes not the positivisation of rights, nor work towards enhanced human rights compliance in a measurable sense, but the promise of the world that human rights represent – where power relations are radically re-envisioned beyond that possible within liberalism – which, while always unachievable and ungraspable in full, draws us into a striving towards it. This futural element emancipates human rights politics from the ‘failures’ of ongoing rights violations and attempts to uphold a static and timeless notion of the subject and content of human rights. Instead, attention may be directed towards the possibilities which the discourse and politics of human rights offer through understanding universality as a site of ongoing contest within contexts of power; the promise of alternative ways of living and being together which address the shortcomings of current liberal regimes worked towards through processes of universalisation. In this sense, the re-consideration of universality I am advancing here offers an approach to human rights and their politics which cannot merely be differentiated from current mainstream liberal understandings, but radically *challenges such liberal understandings*, and thereby offers new possibilities for rights to be part of wider political activity to rework liberal regimes more generally. It is to elaboration of this important assertion that our attention must now turn in order to explore why considering universality as universalisation naturally leads us to a radical approach to human rights.

4. Universality as Universalisation: Radical Possibilities

As I stated at the outset, the purpose of this article in returning to the universality of human rights and re-engaging it in an alternative way is to contribute in particular to a conception of human rights which is compatible with, and useful to, contemporary radical politics seeking to challenge liberal regimes and work towards social transformation stemming from a reworking of restrictive regimes of power. In this final section we will consider further, or more explicitly, the particular elements of approaching the universality of rights as universalisation which render it capable of this task; the way in which it encourages a critical engagement with power. In doing so, we can begin to understand how considering universality as universalisation may help reclaim the radical in rights.

As will be clear from discussion so far, when we approach universal human rights through the lens of universality as universalisation we come to view human rights as a discourse which is inherently fluid, always resisting final achievement, and rights politics as characterised by incessant, vivacious activity to this end within a scene of power. In this view the meaning, remit, subject and interpretation of human rights can never be finally fixed but are constantly made and remade in a variety of contingent local and global locations responding to particular situations of exclusion or restriction. This making and remaking of universal content is the very purpose and substance of rights politics. From the perspective of universality as universalisation, the politics of human rights is a fundamentally hegemonic politics, a politics that resists final closure and foregrounds a constant struggle with power, a constant striving towards enhanced realisation of the values human rights seek to promote through capitalising on the inherent unfixity which characterises the universality of human rights. Starting from a conception of human rights as inevitably unfixity, and conceiving this with a critical eye to power, reveals human rights as being capable of being worked beyond their current hegemonic conceptualisation within liberalism to achieve challenge to, as opposed to reinforcement of, liberal regimes.

This working of human rights beyond liberalism is made possible because the process of universalisation begins with the limitations of, and alterity within, current liberal

universals flowing from liberal regimes of power, using this as a starting point to stage a performative contradiction. Accordingly, the universality of human rights, as well as emerging as the site where the politics of human rights plays out, may also be a powerful site for radicalisation of what human rights mean or can be used to say, do and achieve. Approaching the universality of human rights as a process of universalisation not only radically departs from traditional liberal approaches to universality but reveals, feeds from, the concrete exclusions and restrictions of liberal concepts and regimes and the need to rework such. In foregrounding universality as a site of contest worked and reworked by the performative contradiction of those on the margins of the current universal this way of approaching human rights lends itself to more radical possibilities for how we conceive, use and understand universal human rights, encouraging workings of human rights which are more amenable to the aims of radical politics. Therefore, at its core, understanding human rights and their politics as characterised by an ongoing process of universalisation involves interrupting the liberal parameters of rights, foregrounding those excluded or on the margins of current regimes of power as at the centre of rights politics, the driving force of universalisation.

Approaching the universality of human rights as a process of universalisation taking place within particular regimes of power, and understanding the politics of human rights as driven by the alterity within current liberal understandings of rights, is important in terms of facilitating engagement with something often obscured in rights – it allows us to *return to the radical in rights*. While rights have an undoubtedly liberal heritage, and their mainstream use throughout most of the twentieth century and into the twenty first has been to further discourses of liberal individualism, autonomy and choice in a way that converges with liberal democracy, free trade, market economy and current distributions of power,³⁸ it is important to remember the radical potential that rights and their politics do contain. Illan Wall highlights the double sense of human rights; the fact that rights are too often part of, reading Jacques Rancière, ‘the configuration of the given’ while also holding a second irruptive character.³⁹ Wall notes that ‘traditional international human rights law frameworks, by their nature, miss the fact that historically rights were often the tools of sedition’.⁴⁰ While this radical

³⁸ Brown, *supra* n. 33 at 445, 461; Douzinas, *supra* n 7 at 1, 11; Gearty, *supra* n. 10 at 7.

³⁹ Wall, *supra* n. 34 at 107.

⁴⁰ *Ibid*, at 113.

underpinning of the politics and discourse of rights is often hidden by their current liberal articulations, Wall asserts that the radically political shadow cast by human rights can be detected in senses such as rights being often collective before they are individual, often being collective even after they have been established, and the fact that rights can often help draw attention to the ‘we’ and the question of being-together.⁴¹

Thus, while universal human rights in their current liberal and internationalised form can be a conservative force, concealing discourses of power and preventing more than a mere reshuffle of current power relations shaping our living and being together, human rights have at their heart an impetus towards radical social transformation which is amenable to the aims of radical transformation of existing relations of power. The politics of human rights has not always been a process of liberal consensus-building and tentative engagement with rights within already established parameters, but has also been a disturbing of consensus, ‘a dissensus, rupturing and tearing through the pacifying tedium of everyday relations, with the demand that things should and could be otherwise’.⁴² This act of dissensus, we can recall from Rancière, is essential to disruption of current liberal regimes, a ‘division put in the “common sense”’: a dispute about what is given, about the frame within which we see something as given’.⁴³ This has been made possible when the discourse and practice of human rights allows those on the margins to have a voice, to speak back and thereby challenge the exclusions haunting current socio-political relations and power regimes.

When we re-engage with the universality of human rights and rethink it as an ongoing process of universalisation, a making and remaking of the subject and content of human rights in a way which begins with the performative contradiction of those on the margins and directs towards a socio-political vision challenging the present order, a

⁴¹ Ibid, at 112-113, 115. Wall’s assertion as to how to capitalise on the radical in rights is explored via the concept of ‘right-ing’, which he draws from the work of Douzinas, supra n. 7, articulated using re-engagement with the idea of constituent power.

⁴² Ibid, at 109.

⁴³ J Rancière, ‘Who Is the Subject of the Rights of Man?’ (2004) 103(2-3) *The South Atlantic Quarterly* 297-310 at 304. In referencing Rancière’s work in this way it is important to note that the consensus-driven politics of liberal human rights would be regarded as inherently anti-political for Rancière (see further P Tambakaki, *Human Rights, or Citizenship?* (London, Birkbeck Law Press, 2010) at 88-93). In contrast, for more on the way in which Rancière views radical potential in rights as dissensus see L McNay, *The Misguided Search for the Political: Social Weightlessness in Radical Democratic Theory* (Cambridge, Polity, 2014) at 148-160.

way to reignite the radical, dissensual potential in human rights becomes apparent. If the aim is no longer to apply universal concepts belonging to an already existing and fully formed subject but to engage in a conflictual politics which constantly challenges and reworks the very understanding of these concepts via encounters with their own alterity, the politics of human rights can be conceived as a space for radical political activity which is at its heart about maintaining contest over current hegemonic power relations. It is starting from such a new perspective on universality that the politics of human rights can break free from conservative tedium and can be part of a project towards radical social transformation, beyond the restrictions of liberalism. Indeed, such is not only a possibility, but following the view of universality as universalisation is the *very impetus of* human rights politics.

The universality of human rights, therefore, is not just a fundamentally important issue for rights in the contemporary era, when re-engaged in the alternative way outlined above it offers possibilities to understand and approach human rights anew. Re-engaging with the universal foundations of human rights in a way which neither endorses nor rejects such foundations but approaches universality as a site of contest allows the unsettled, and potentially unsettling, nature of rights to come into view, *contra* liberalism. The productive possibility for radical politics from this emerges when activists visibilise and capitalise on the fluid, incessant lack of stability inherent in universal human rights, existing within power relations, in order to advance the claims of those currently marginalised, to challenge the coincidence of human rights and capitalist liberal democratic regimes, and utilise the performative contradiction at the heart of universality as one vehicle to rework liberal regimes of power. From such re-engagement with the universality of human rights a different type of rights politics may be facilitated with more radical possibilities to, in Rancière's words, 'dispute what is given'⁴⁴ than the politics of human rights currently conceived within liberalism.

5. Conclusion

The universality, or otherwise, of human rights remains a contested issue within contemporary discussion and debate on rights. Without doubt forces of globalisation

⁴⁴ Rancière, *ibid.*

and the ever-expanding reach of the international human rights system have mounted new challenges to how the universality of rights can be conceived. Approaching the universality of human rights as an ongoing process of universalisation, of ongoing contest between competing understandings of what rights are, can do say and achieve, is by no means being offered here as a solution to settle these challenges currently facing universal human rights or to straightforwardly transition to a smoother, less complicated rights politics. Understanding universality as universalisation will indeed often lead to the contrary, will foreground contest, will forestall a final conclusion on what human rights are and how they can be understood. However, it is only through embracing such an unsettled and conflictual understanding of the universality of human rights that we can hope to unshackle rights from their current limitations and restrictions within liberalism and can begin to see how it may be possible to think of and engage with rights in alternative ways in the contemporary era.

This is an understanding particularly pertinent to contemporary activists and scholars who aim to disrupt liberal regimes and relations of power in a way that will benefit those on the margins, that will work towards radical social transformation. In contrast to abandoning human rights as too engrained in liberalism to be of use in such political projects, understanding universality as universalisation allows parallels to begin to emerge between the politics of human rights, characterised by contest and rearticulation of current liberal limitations, and the aims of radical work. Rights may once again be imagined as a site for staging dissensus, for articulating claims otherwise invisible and inaudible within liberal regimes. In this view, work for radical activists and groups becomes about not just using that which liberal human rights currently offer, or do not offer, but about using the language of rights even when excluded from it to articulate claims currently unimaginable within current universal concepts in order to stage a performative contradiction and contribute to the continual rearticulation of rights. This rearticulation is aimed towards a view of living and being together which must necessarily remain as ‘not yet’ as the universality of rights itself, but draws us into striving towards it nevertheless. The universality of human rights, then, is an important site to revisit, one that holds promising potential for radical activists and thinkers to remember, and begin to reclaim, what is radical about human rights.