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Dianne Otto  
*University of Melbourne*

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## Guest Editor's Introduction

### POSTCOLONIALISM AND LAW?

Dianne Otto\*

Critical postcolonial theory presents new and foundational challenges to law with respect to questions of power, hierarchy, wealth, poverty, diversity, equality, and justice. The term 'postcolonial' can be used in many senses. In international law its meaning has primarily had a celebratory sense, whereby the 'post' has been understood as marking an end to the long period of legally sanctioned European colonialism. In this meaning, the recognition of the right of colonized peoples to self-determination heralded the possibility of a more equitable world based on independence and equality for Third World states. Since the 1980s, however, the term postcolonial has also come to assume a critical meaning, as the promise of a fairer world seems as far as ever from realization and scholars and activists begin to probe more deeply in their efforts to understand why.

The critical signification of the postcolonial grew from a body of interdisciplinary work that was concerned with examining the powerful hegemony of European modernity and contesting its universal knowledge claims.<sup>1</sup> This work has produced new tools of critical analysis which enable a reexamination of the self-determination narratives of international law and ask why the attainment of 'independent statehood' has changed only the guise of European domination rather than its substance. Without wanting to falsely dichotomize the celebratory and the critical histories of postcolonial theory and practice – because they are also interconnected – I would describe the contributions to this issue of *Third World Legal Studies* as falling within the latter category.

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\* Senior Lecturer, Faculty of Law, University of Melbourne, Australia. I would like to thank Penny Andrews who suggested I edit this volume and all of the contributors, each of whom responded generously and enthusiastically to my editorial comments and suggestions.

<sup>1</sup> For example, SELECTED SUBALTERN STUDIES (Ranajit Guha & Gayatri Chakravorty Spivak eds., 1988); HOMI BHABHA, THE LOCATION OF CULTURE (1994); Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM & THE INTERPRETATION OF CULTURE (C Nelson & L Grossberg eds., 1988).

Many texts grapple with the issues of definition of the now burgeoning body of postcolonial thought.<sup>2</sup> However, there is little disagreement that the brilliant work of Edward Said has been foundational<sup>3</sup>, although this is not to diminish the importance of the extensive anti-colonial work that preceded it.<sup>4</sup> Said's unique discursive analysis of colonial systems of meaning opened new ways of understanding the tenacity of colonial power and how it might be resisted. As Said has later described his approach:

Neither imperialism nor colonialism is a simple act of accumulation and acquisition. Both are supported and perhaps even impelled by impressive ideological formations which include notions that certain territories and people *require* and beseech domination, as well as forms of knowledge affiliated with that domination.<sup>5</sup>

He highlights the West's binary construction of the Orient as Europe's inverse or 'Other', as what Europe is not, in the development of the colonial discourse of European superiority. He suggests that this dichotomy provides an enduring ideological underpinning in the postcolonial era, enabling a continuing alliance between European knowledge and imperial power despite the ostensible 'independence' of postcolonial states.

It is important to recognize that Said's view of the Occidental/Oriental dichotomy is not one of stasis. Rather, he sees it as a dynamic interrelationship, between 'curiously interdependent territories', reliant on a two-way movement in the production of meaning. In other words, it is the discursive interaction between the knowledges of the colonizer and the colonized that provides the ideological legitimation for relationships of domination and subordination. Subsequent postcolonial work, notably that of Homi

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<sup>2</sup> For example, COLONIAL DISCOURSE & POSTCOLONIAL THEORY: A READER (Patricia Williams & Laura Chrisman eds., 1994); POSTCOLONIAL DISCOURSE & CHANGING CULTURAL CONTEXTS (Gita Rajan & Radhika Mohanram eds., 1995); CONTEMPORARY POSTCOLONIAL THEORY: A READER (Padmini Mongia ed., 1996); THE POSTCOLONIAL STUDIES READER (B Ashcroft, G Griffiths & H Tiffin eds., 1995); LEELA GANDHI, POSTCOLONIAL THEORY: A CRITICAL INTRODUCTION (1998).

<sup>3</sup> EDWARD SAID, ORIENTALISM (1978/1991), THE QUESTION OF PALESTINE (1979), COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD (1981).

<sup>4</sup> For example, FRANZ FANON, BLACK SKIN, WHITE MASKS (1967), THE WRETCHED OF THE EARTH (1961); MAHATMA GANDHI, THE COLLECTED WORKS OF MAHATMA GANDHI (1982); ALBERT MEMMI, THE COLONIZER & THE COLONIZED (trans. 1990).

<sup>5</sup> EDWARD SAID, CULTURE AND IMPERIALISM 8 (1993).

Bhaba, has stressed that the stereotypes or representations produced by the dichotomies of Europe and its 'Other' are not as stable or universal as Said's work may suggest. Instead, the dualisms of the colonizer and the colonized produce indeterminacies and ambivalences, making the colonial relationship a site that is potentially disruptive of the certainties and hierarchies that it purports to create. The question is how to draw on this insight, of the *two-way* contestation of power and resistance, in order to reinscribe the dualities of colonialism with emancipatory, rather than dominating and exploitative, political interests. How can the dualities of European knowledges be engaged to foster the deeply democratic and empowering forms of self-determination that many had hoped would result from decolonization? With different degrees of consciousness, all of the contributors to this volume utilize postcolonial methods in their questioning of the encoded dualisms that legitimate and sustain neocolonialism in its various forms, and in their common concern to expose and reject the disparaging representations of the Third World that have come to be the standard fare of the discourses of globalization. They also all strain to articulate new insights that reveal and contest the operation of dominating forms of power.

It must, by now, be apparent that critical postcolonial thinking draws on some of the insights of poststructuralist philosophy. The work of Michel Foucault and Jacques Derrida have been of particular importance in understanding how power and knowledge cooperate as productive rather than repressive forces<sup>6</sup>, and in comprehending the hierarchies and violence, as well as the codependence, of the binaries that create meaning.<sup>7</sup> While many postcolonial scholars are skeptical about the relevance of postmodernity to their work because of its Eurocentrism, I agree with the views that Balakrishnan Rajagopal expresses in this volume: that both bodies of work have much to offer the other, not least because Europe cannot be understood in isolation from its colonial/imperial 'Other'. Further, postcolonial and postmodern theorists share an interest in critiquing the grand narratives of modernity, in challenging the hierarchical relations of power that

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<sup>6</sup> Michele Foucault, *Two Lectures and Truth and Power*, in *POWER/KNOWLEDGE* 78, 109 (Colin Gordon ed., 1980).

<sup>7</sup> JACQUES DERRIDA, *POSITIONS* (Alan Bass trans. 1981); Jacques Derrida, *Force of Law: The 'Mystical' Foundations of Authority*, 11 *CARDOZO L. REV.* 920 (1990).

those narratives normalize, and in understanding how power operates once it is conceptualized as dispersed and productive rather than as, in the modern frame, centralized and repressive. Above all, postcolonial scholarship can make unique contributions to postmodern thought in its concern with the emancipatory possibilities that flow from asserting the epistemological value and agency of the non-European world, of those on the peripheries of power.

It should also be apparent that postcolonial theory does not confine itself to the 'postcolony' in the narrow sense of the Third World nation-state. Postcolonialism is as much a critique of the indigenous elites of the postcolonial state, who have uncritically embraced modernity and reproduced its hierarchical relations of power, as the elites of Europe. But even more expansively, a great deal of postcolonial thought concerns itself with all those who do not occupy dominant, elite or hegemonic positions of power, whom Marxist Antonio Gramsci earlier described as the 'subaltern'.<sup>8</sup> This general concern with those made vulnerable by dominating relationships, and with giving voice to what Foucault has described as 'subjugated knowledges', makes postcolonialism a particularly inclusive theoretical discourse that concerns itself with all systems that hierarchically arrange difference, whether according to class, gender, caste, religion, sexuality, age, office and so on. In fact, together, these vulnerable groups comprise the vast majority of the world's people, as Sylvia Wairimu Kang'ara observes in her critique of structural adjustment programs in Kenya in this volume. She notes that those identified as suffering, even dying, from the harsh effects of structural adjustment, include 'female headed households, children, rural small-scale farmers, landless rural workers, pastoralists, persons in the arid and semi-arid areas, women, the elderly poor, the handicapped and the unemployed'. The inclusivity of critical postcolonialism links it theoretically and practically with other struggles by marginalized groups, and releases it from the confines of the earlier anticolonial preoccupation with achieving independence from Europe through nation-statehood. As will quickly become evident from the contributions to this volume, postcolonialism is a deeply democratic project. It is concerned with understanding how power can operate as

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<sup>8</sup> ANTONIO GRAMSCI, *THE PRISON NOTEBOOKS* (Joseph A. Buttigieg trans. 1992).

an enabling form of resistance to hegemonic European forms and meanings, and aims to achieve the active participation of all those excluded and silenced by dominating regimes of power in social, political, economic, cultural and civil life.

In parallel with the different conceptions of 'postcolonialism' that I have referred to, the concept of a 'Third World' has also been attributed with a variety of meanings. At the celebratory end of this spectrum, the term marks a proud history of asserting a 'difference', a positive alternative, to both the capitalist and communist forms of Europe as they vied for dominance during the Cold War. At the other end, the notion of a Third World, when viewed critically, can be understood as animating a hierarchy of value, whether expressed in terms of 'civilization' or 'progress' or 'development', which affirms European superiority. As with other colonial stereotypes discussed by Said, the First World/Third World dichotomy has often functioned as a powerful symbol of First World supremacy and Third World deficiency. However, critical postcolonial theory looks to the possibility that the category of the Third World can be reimagined so as to empower and value non-European knowledges and, thus, to contest the hierarchical ordering that serves the interests of Europe.

Rajagopal, in the first article in this collection, examines the possibility of contesting the disparaging images of Third World deficiency and lack. He identifies and critiques four ways in which the term Third World has been understood: as an ideological position of nonalignment; as a geopolitical construct; as a historically determinist category related to colonization; and as a popular representational category of images of "poverty, squalor, corruption, violence, calamities and disasters, irrational local fundamentalisms, bad smell, garbage, filth, technological 'backwardness' or simply lack of modernization". He argues that the first three understandings point to 'nationhood' as the only choice for liberation, and that they are all informed by the fourth understanding of Third World backwardness. That is, that both European and Third World elites have relied on representations of the Third World as uncivilized and deficient. Drawing on the psychoanalytic work of David Sibley, in conjunction with the work of Ashis Nandy and Anthony Anghie, Rajagopal argues for the continuing relevance of the term 'Third World'. But, as he

insists, if it is to become a counter-hegemonic tool it must be released from its geographical moorings in the nation-state, where it leaves no room for emancipatory alternatives that empower the disempowered. He suggests that the term be redefined to recognize the multiple ways in which power is exercised and contested, so as to enable a focus on issues of “class, gender, sexuality, region, language and so on, which have been submerged by the totalizing power of the ‘national allegory’”.

Rethinking the taken-for-granted dualisms of Western knowledges, as Rajagopal does with the antithetical understanding of the First and Third Worlds, is a central strategy of postcolonial scholarship. The point to understand is that such oppositions, from which we derive meaning, are not neutral or objective counterpoints, but are generated by political imperatives. The binary relationships, as I have suggested already, are constantly renegotiated thereby reinforcing relations of domination but also creating spaces for change in the tensions between the binary terms. Several contributors to this volume locate their work, and the possibilities they suggest, within the tensions created by dualized thinking. For example, Celestine Itumbi Nyamu’s discussion of women’s land rights in the plural legal context of Kenya reveals how the binary juxtaposition of formal law and custom works against the recognition and protection of women’s interests in land. She critiques both the ‘legal imposition’ school of thought that defends custom, and the ‘women in development/human rights’ proponents who would abolish custom, for ignoring or silencing gendered relations of power. She argues that the way that custom is understood by the two schools of thought relies on the disparaging images of Third World systems that Rajagopal discusses. Instead, Nyamu insists that custom is not a static category, but exists in interdependence with formal systems of law, and that this symbiotic relationship must be recognized before the everyday contestation of women’s status in the realm of custom will become visible. In common with Rajagopal, she is concerned that legal strategies find ways to reveal, rather than disguise, relations of power. To this end she suggests a ‘critical pragmatic’ approach to legal pluralism in Kenya that engages the ‘politics of culture’ and focuses on the consequences for women,

particularly vulnerable women, rather than on a particular system of law.

In addition to their shared theoretical and methodological orientations, the contributors to this volume highlight many cross-cutting themes that are also central to critical postcolonial work more generally. The main themes are, first, a concern with economic and social justice in a world of deepening economic disparities; secondly, an interest in how the discourse of 'democracy' might be utilized to empower those on the margins of modernity rather than serve the narrow interests of the global free market; and thirdly, a desire to understand how the difference or distinctiveness of non-European knowledges can survive the global hegemony of Europe and be valued on its own terms. These three themes are, of course, interrelated, and they will also suggest many other themes to readers.

The first theme, the fate of the self-determination goals of global economic equity and social justice, is central to the concerns of three contributors: James Thuo Gathii, Sylvia Wairimu Kang'ara and Suzanne Wilhelm. They all describe how the benefits of economic globalization continue to flow disproportionately to the North, while the vast majority of the world's population endures increasing levels of deprivation. Despite this, postcolonial states continue to be forced by international economic institutions to withdraw from domestic promises to distribute wealth more equitably, to divest themselves of state-owned enterprises and to institute minimal neoliberal forms of democracy. The clarity provided by the post-WWII human rights regime, which placed the responsibility for ensuring that everyone is able to enjoy the basic necessities of life firmly on states, has been lost. Instead, free market ideology relocates this responsibility in the individual, moving it from the public to the private sphere. In this new framework, subaltern groups are expected to survive on their personal entrepreneurial skills and individual efforts and, in the process, systems of structural advantage and disadvantage based on race, class, gender, ability, sexuality and ethnicity become less visible, but are not dismantled. Inevitably, questions of economic disadvantage lead to questions of democratic participation, which is apparent in the work of all three of these contributors and links them with the second theme of democratic empowerment.



Gathii explores the neocolonial effects of economic globalization by critically analyzing the World Bank's 'good governance' agenda in the context of Africa. He deplores the replacement of the communitarian and solidaristic models of statehood based on Keynesian economics with individualistic Marshallian market governance. He highlights the way that this good governance agenda discredits not only the authoritarianism and corruption that emerged in the wake of colonialism, but also the positive aspects of African forms of government, like redistributive policies, social welfare guarantees and the public management of resources. Through the imposition of a neoliberal agenda of minimal state intervention, radical individualism and the discrediting of popular forms of democracy, he argues that disparaging stereotypes of Africa are deployed to again confirm the 'lack' of the Third World and thus the superiority of Europe. Gathii argues that this strategy of denigrating African institutions and practices ultimately works to suppress grass roots democratic forces, undermine African governmental authority and prevent the use of African identity as a form of anti-neocolonial resistance. Therefore the good governance agenda works to co-opt legitimate struggles for democracy and human rights so that they support market constitutionalism and leave existing distributive patterns and political hierarchies intact. As Gathii observes, questions of wealth, power and poverty cannot be addressed simply through notions of negative liberty. Instead, democratic control of the economy must be regained through 'populist statecraft' and positive assertions of African distinctiveness.

Kang'ara is concerned with the relationship between human rights and macro-economic reform in Kenya. She maps the results of structural adjustment policies as having increased poverty, diminished social protections, and increased the marginalization of already marginalized groups. She argues that human rights, for example the right to an adequate standard of living, must be made inseparable from development programs, and that the quest for development as a basic human right must be strengthened. She insists that the power of international economic institutions to disregard human rights in the formulation of economic policies must change and makes various suggestions about how this could be achieved. At the same time,

Kang'ara argues that constitutional protections for economic and social rights are essential at the domestic level and may ultimately prove to be more effective than international protections. Like Gathii, she argues for the revival of some of the initial goals of the postcolonial state, including the vision of state-led growth, and identifies popular participation as another measure that is necessary to ensure the realization of economic and social rights in Kenya.

Wilhelm discusses what she calls the 'catch 22' of Third World 'independence': that is, that independence is understood in terms of a development model that relies on open markets, foreign investment, privatization of public utilities and reduced public sectors, all of which *reduce* independence. Wilhelm bases her analysis on the example of Peru, a state that has in recent years been considered a model of successful Third World development. She notes that even in 1821, when Peru ostensibly gained independence from Spain, foreign interests maintained control of the Peruvian economy. And she argues that the ambitious privatization agenda of President Fujimori, which commenced in the early 1990s, marks a new era of colonial domination through foreign investment. In her discussion of the privatization of the telecommunications and petroleum industries, she highlights the undemocratic measures that were adopted by the government in order to quash oppositional popular opinion and pass legislation necessary to support the structural reforms. Wilhelm asks whether the costs outweigh the benefits to the Peruvian people, noting that while the economy has improved, absolute poverty has increased, the trade deficit persists and environmental degradation worsens. She wryly observes that the international community supports Fujimori, despite his dictatorial methods, and rightly asks whether 'participatory democracy is an outmoded value in the new order of market driven economic management'.

Wilhelm's question links to the second theme, how the post Cold War discourse on 'democracy' might provide a means for the empowerment of marginalized groups. While this is a potential raised by most contributors, it provides the focus for Julie Mertus' argument that democracy needs to be rethought and 'done differently'. She describes the market-driven, 'one size fits all' promotion of democratic institutions around the globe as 'cosmetic democracy' that legitimates

top-down control and suppresses grass roots bottom-up participation. While acknowledging that such minimalist forms of democracy are promoted by international economic institutions and Northern states, it is the co-option, acquiescence or even collusion of many human rights non-governmental organizations (NGOs) in these agendas and practices that is the focus of her critique. Mertus questions the primary strategies of many human rights groups which aim to shame governments, rather than to empower those whose rights are being violated. She also suggests that the loyalties of NGOs shift from the bottom to the top as they become increasingly involved in inexpensive service delivery and thus more reliant on state and institutional funding. While Mertus bases her critique on the activities of human rights NGOs in Eastern Europe, her goal is to promote the 'transformative' democratic potential of transnational civil society or, as Richard Falk has described it, 'globalization from below'. Her criticism of the counter-democratic operations of many human NGOs is intended to foster self-criticism and awaken them to the potential for transformative forms of democracy to emerge from the new spaces opened by globalization. These transformative forms could promote local and transnational participation, transparency and accountability.

Nyamu is also critical of human rights organizations in Kenya who, oftentimes, fail to notice what is happening 'from within' and therefore are unwittingly complicit in denying the local realities of women's lives and writing women's rights out of customary law. Further, Mertus' vision of transnational 'transformative' democracy is not unrelated to Gathii's concept of 'solidaristic' democracy that, in his view, would be more in keeping with African grass roots values and interests. Also reflecting similar concerns is Kang'ara's emphasis on promoting people-based development and Wilhelm's despair at the future of participatory democracy in a market-driven world. Finally, Simon Obendorf, who engages most consciously with postcolonial theory, adeptly sums up this common concern. As he concludes, with respect to developing a rights-based jurisprudence of sexuality rights, 'the best outcomes will be achieved when the multiplicity of voices and subject positions that postcolonial analysis empowers are heard and understood'.

The third theme, understanding how non-European knowledges might be valued on their own terms and survive the global hegemony of Europe, is at once the most critical and the most difficult theme to address. It is most critical because unless the multiplicity of Third World distinctiveness and difference is valued on its own terms, and not merely as Europe's 'Other', (European supremacy is always already conceded as the starting point), the goals of economic justice and solidaristic democracy will be shaped accordingly. It is the most difficult theme because, in my view, there is not 'outside' to Europe in the world of possibilities because all knowledge must engage with Europe or suffer inaudibility or immateriality. Therefore, what must be understood more fully is how to directly engage in the struggle with European hegemony, how to locate its inconsistencies and frailties, and how to mark Europe with its 'Other' in ways that disrupt its founding dichotomies.

Obendorf's contribution explores this theme most fully, although of course it runs through the entire volume. He argues that it is necessary to create spaces within human rights jurisprudence so that non-Western voices, experiences and epistemologies are heard, in order to address the long-standing tensions between the universal claims of human rights discourse and local specificities. He uses the example of rights for homosexual men and women to illustrate how European understandings can predominate and silence non-European difference, to the point that homosexuality has become conflated with the West. Further, his example of 'homosexuality' serves to effectively contrast the binaristic, oppositional frameworks of the West with the more fluid conceptions of sexuality in the non-West, indicating their incommensurability. The strategy he suggests is one of dialogue, in the encounters between global formations and local specificities, in the interactions between Western and non-Western forms of homosexuality, and in the formation and development of international law. Like Mertus, he emphasizes that globalization, especially the technologies that it relies upon, opens new possibilities for dialogic resistance that will disrupt and confound the privilege that European knowledges have taken for granted.

In conclusion, I want to emphasize the importance of this volume. While postcolonial theories and practices have received serious

attention in many disciplines, law has lagged behind, despite its centrality in constructing local and global hierarchies of meaning, and relations of social and economic power. We urgently need to understand how international and postcolonial domestic legal systems maintain and reproduce the hegemony of Europe, and how they might alternatively be used to counter the presuppositions and biases of this hegemony. We need to consider the implications of these new critiques for systems of law. What would law look like if it were to be unmoored from its European foundations? Would more dialogic and fluid conceptions of law still be 'law'? In this task, I believe it is important to make links between the earlier anticolonial work in international law<sup>9</sup>, as well as to do justice to the emerging body of critical postcolonial legal scholarship<sup>10</sup>, to which this volume of *Third World Legal Studies* makes a significant contribution.

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<sup>9</sup> For example, RAM PRAKASH ANAND, *INTERNATIONAL LAW & THE DEVELOPING COUNTRIES: CONFRONTATION OR COOPERATION?* (1987); MOHAMMED BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979); ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* (1986); BIN CHENG (ed.), *INTERNATIONAL LAW: TEACHING & PRACTICE* (1982); F E SNYDER & SURAKIART SATHIRATHAI (eds.), *THIRD WORLD ATTITUDES TOWARDS INTERNATIONAL LAW* (1987); Wang Tieya, *The Third World and International Law*, in *THE STRUCTURE & PROCESS OF INTERNATIONAL LAW* (R. St John MacDonald & D M Johnston eds., 1983); CHRISTOPHER WEERAMANTRY, *NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP* (1992).

<sup>10</sup> For example, M. JACQUI ALEXANDER & CHANDRA MOHANTY (eds.), *FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES* (1997); M. Jacqui Alexander, *Not Just (Any)Body Can Be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas*, 48 *FEMINIST REV.* 5 (1994); Anthony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 *SOCIAL & LEGAL STUD.* 321 (1996); Simon Chesterman, *Law, Subject and Subjectivity in International Relations: International Law and the Postcolony*, 20 *MELBOURNE U. L. REV.* 979 (1996); EVE DARIAN-SMITH & PETER FITZPATRICK (eds.), *LAWS OF THE POSTCOLONIAL* (1999); James Thuo Gathii (book review), *International Law and Eurocentricity*, 9 *EUR. J. INT'L L.* 184 (1998); RATNA KAPUR & BRENDA COSSMAN, *SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA* (1996); Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 *SOCIAL & LEGAL STUD.* 337 (1996); Jeannine Purdy, *Postcolonialism: The Emporer's New Clothes*, 5 *SOCIAL & LEGAL STUD.* 405 (1996); Annelise Riles, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 *HARV. L. REV.* 723 (1993).