

GLOBAL LEGAL POPULISM AND THE EROSION OF CONSTITUTIONAL DEMOCRACY: A COMPARATIVE POLITICAL-LEGAL ANALYSIS



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ABSTRACT

This article examines the critical need to decolonize legal politics in the Global South by interrogating the persistent colonial legacies embedded within contemporary legal systems and state institutions. Drawing on postcolonial legal theory, critical legal studies, and empirical case studies from Latin America, Africa, and Southeast Asia, this research explores how Western-centric legal frameworks continue to marginalize indigenous knowledge systems, customary laws, and local justice mechanisms. Through a qualitative comparative analysis of legal reforms in six countries, this study reveals that formal legal systems often perpetuate structural inequalities rather than advancing social justice. The article argues for an epistemic shift toward pluralistic legal frameworks that recognize multiple sources of legal authority and incorporate decolonial approaches to lawmaking, adjudication, and legal education. Findings indicate that successful decolonization of legal politics requires: (1) dismantling hierarchical relationships between state law and customary legal systems; (2) redistributing legal authority to communities historically excluded from formal legal processes; and (3) reconceptualizing the relationship between law and social justice beyond Western liberal frameworks. This research contributes to ongoing debates about legal pluralism, transitional justice, and the role of law in postcolonial societies, offering practical pathways for reimagining legal systems that serve diverse populations in the Global South.

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1. INTRODUCTION

The colonial encounter fundamentally transformed legal landscapes across the Global South, imposing European legal systems that displaced, subordinated, or eliminated indigenous and customary legal orders (Benton, 2002; Merry, 1991). More than half a century after formal decolonization, legal systems in many postcolonial nations remain structurally tethered to their colonial origins, perpetuating epistemic violence and reinforcing patterns of social, economic, and political exclusion (Santos, 2002; Anghie, 2004). This persistence of colonial legal frameworks raises fundamental questions about the relationship between law, state sovereignty, and social justice in contemporary Global South contexts. Legal systems inherited from colonial powers were never neutral instruments of governance; they were technologies of domination designed to extract resources, control populations, and legitimize imperial rule (Fitzpatrick, 1992; Chanock, 1985). These systems operated through what Santos (2014) terms "abyssal thinking"—creating binary divisions between metropolitan and colonial zones, between civilized and primitive law, and between subjects worthy of rights and those subjected to arbitrary power. Even after independence, the structural logic of these legal systems has proven remarkably resilient, often serving the interests of postcolonial elites while marginalizing rural communities, indigenous peoples, and other vulnerable populations (Mamdani, 1996; Comaroff & Comaroff, 2006).

Contemporary scholarship on decolonizing law has emerged from multiple intellectual traditions. Postcolonial legal theory, pioneered by scholars such as Anghie (2004) and Mutua (2001), interrogates how international law and domestic legal systems continue to embed colonial hierarchies. Critical race theory and Third World Approaches to International Law (TWAAIL) have exposed how supposedly universal legal principles often reflect particular Western experiences and serve hegemonic interests (Chimni, 2006; Gathii, 2011). Indigenous legal scholars have articulated the importance of recognizing Indigenous legal orders as legitimate systems of governance rather than mere "customary practices" subordinate to state law (Borrows, 2002; Napoleon & Friedland, 2016). Despite this rich scholarly foundation, significant gaps remain in understanding how decolonization can be operationalized within legal and political institutions. Most existing research focuses on either theoretical critiques of colonial legacies or single-case empirical studies, leaving underdeveloped the comparative analysis of

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decolonial legal reforms across diverse contexts. Furthermore, while legal pluralism has been extensively studied (Tamanaha, 2008; Griffiths, 1986), insufficient attention has been paid to power dynamics within plural legal orders and how they might reproduce rather than challenge colonial hierarchies. This article addresses these gaps by examining the complex relationship between law, state, and social justice through a decolonial lens, with three primary objectives. First, it analyzes how colonial legal structures continue to shape contemporary legal politics in the Global South, mapping the mechanisms through which these legacies persist despite formal decolonization.

Second, it explores alternative legal epistemologies and practices that challenge Western-centric legal paradigms, including indigenous legal traditions, community-based justice mechanisms, and hybrid legal innovations. Third, it evaluates the conditions under which decolonial legal reforms can advance substantive social justice, identifying both opportunities and obstacles in different political and cultural contexts. The article proceeds as follows: Section 2 outlines the methodological approach, including case selection criteria and analytical framework. Section 3 provides a discussion of findings organized around three themes: the persistence of colonial legal structures, emerging decolonial legal practices, and the relationship between legal reform and social justice outcomes. Section 4 concludes by synthesizing key insights and proposing directions for future research and practice.

2. METHODS

Research Design This study employs a qualitative comparative analysis (QCA) combined with critical discourse analysis to examine decolonial legal politics across six countries in the Global South: Bolivia, South Africa, Indonesia, Kenya, Ecuador, and India. The research design integrates three methodological approaches: (1) historical-institutional analysis tracing colonial legal legacies and postcolonial reforms; (2) comparative case study analysis examining contemporary legal pluralism and decolonial initiatives; and (3) critical discourse analysis of legal texts, policy documents, and judicial decisions.

2.2 Case Selection Cases were selected using maximum variation sampling to capture diverse colonial experiences, postcolonial trajectories, and contemporary legal reform efforts (Flyvbjerg, 2006). Selection criteria included: (1) experience of formal colonization by European powers; (2) presence of significant indigenous or customary legal systems; (3) constitutional or legislative reforms addressing legal pluralism since 2000; (4) availability of documentation in English, Spanish, or Indonesian; and (5) geographic diversity across Latin America, Africa, and Asia. Bolivia and Ecuador represent cases of "refounding constitutionalism"

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that explicitly embrace plurinationalism and recognize indigenous legal systems (Yrigoyen Fajardo, 2011).

South Africa and Kenya exemplify post-apartheid and post-independence contexts negotiating relationships between constitutional law, customary law, and indigenous governance (Bennett, 2008; Muigai, 2004). Indonesia and India represent postcolonial states managing extreme legal pluralism across diverse ethnic, religious, and customary legal traditions (Hooker, 1975; Galanter, 1989). 2.3 Data Collection Data collection occurred between January 2023 and December 2024 through multiple methods: Documentary Analysis: Analysis of constitutional texts, legislation, judicial decisions, policy documents, and legal scholarship from each country. Primary sources included constitutional provisions on legal pluralism, statutory recognition of customary law, landmark court cases, and government reports on legal reform initiatives (n = 347 documents).

Elite Interviews: Semi-structured interviews with 62 key informants including judges, legislators, legal scholars, indigenous leaders, civil society advocates, and government officials involved in legal reform processes. Interviews were conducted in person or via video conference, recorded with consent, and transcribed. Secondary Literature: Systematic review of academic literature on postcolonial legal studies, legal pluralism, and transitional justice, including peer-reviewed articles (n = 156), books (n = 43), and reports from international organizations. 2.4 Analytical Framework Analysis proceeded through iterative coding and thematic development using principles from grounded theory (Charmaz, 2006) while remaining grounded in postcolonial and decolonial theoretical frameworks. Initial coding identified patterns related to colonial legal legacies, recognition of customary law, conflicts between legal orders, and social justice outcomes.

Axial coding explored relationships between categories, particularly examining how power dynamics mediate interactions between state and non-state legal systems. Comparative analysis employed Ragin's (2000) configurational approach, treating cases as combinations of conditions rather than collections of variables. This allowed identification of multiple pathways toward decolonial legal reform and recognition that similar outcomes can emerge through different causal configurations. Critical discourse analysis examined how legal texts construct hierarchies between legal systems, define legitimacy and authority, and frame relationships between individual rights and collective autonomy (Fairclough, 2013). 2.5 Ethical Considerations Research protocols were approved by institutional ethics review boards. All interview participants provided informed consent and were assured confidentiality. Given the sensitive political nature of legal reform and indigenous rights in several research contexts, particular care was taken to

protect participant identities and avoid exposing individuals or communities to risk. Research partnerships with local universities and civil society organizations ensured culturally appropriate engagement and reciprocal knowledge exchange.

Limitations of Methodological Approach This methodological approach has several limitations. Language constraints limited direct engagement with legal materials in several indigenous languages and some national languages, requiring reliance on translations and secondary sources. The six-country comparative scope, while providing breadth, limited depth of analysis possible within each case. Elite interviews captured perspectives of those formally engaged in legal systems but may underrepresent experiences of marginalized communities with limited access to formal legal institutions. These limitations are discussed further in Section 5.

3. DISCUSSION

The Persistence of Colonial Legal Structures The analysis reveals that colonial legal systems have persisted through multiple mechanisms that extend beyond formal legal codes to encompass institutional cultures, professional socialization, and epistemological frameworks. Across all six cases, three primary mechanisms of legal-colonial continuity emerged: structural inheritance, epistemic dominance, and institutional isomorphism. Structural Inheritance refers to the direct transplantation of colonial legal institutions, procedures, and hierarchies into postcolonial states. In India, the Indian Penal Code (1860) drafted during British rule remains substantially in force, embedding Victorian-era morality and colonial administrative logic into contemporary criminal justice (Parmanand, 2004). Similarly, Kenyan law continues to rely heavily on English common law principles, with the Judicature Act explicitly incorporating English law as a source of authority (Ojwang, 1991). One Kenyan High Court judge interviewed noted: "We were trained to think like English barristers. The precedents we cite, the reasoning we employ, the very structure of our arguments—all trace back to Temple Bar, not to African jurisprudence." Legal education systems across the Global South reproduce colonial legal thinking by privileging Western legal philosophy, European legal history, and Anglo-American case law while marginalizing indigenous legal traditions (Twining, 2009).

Analysis of law school curricula in Indonesia revealed that customary law (adat) receives minimal attention compared to Dutch civil law traditions, despite constitutional recognition of customary legal communities (Soetjipto, 2015). This educational approach produces legal professionals socialized into viewing Western legal frameworks as inherently superior and modern, while perceiving indigenous or customary law as primitive, outdated, or

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illegitimate. Epistemic Dominance operates through the establishment of Western legal epistemology as the only valid way of knowing and doing law. This manifests in requirements that customary law must be "proven" in court using evidentiary standards derived from Western legal systems, effectively requiring indigenous legal knowledge to justify itself according to foreign criteria (Hellum & Derman, 2004).

South African courts, despite constitutional recognition of customary law, often require expert testimony to establish customary legal principles, treating living law as exotic knowledge requiring translation rather than as legitimate jurisprudence in its own right (Bennett & Pillay, 2003). The dominance of written law over oral legal traditions exemplifies this epistemic violence. As Ecuadorian indigenous legal scholar Mónica Mancero explained in an interview: "The state insists that for indigenous law to be valid, it must be codified, written down, systematized according to Western legal logic. But this fundamentally transforms the nature of our law, which is living, contextual, embedded in relationship and territory. Writing it down kills it." Institutional Isomorphism describes how international legal norms, development interventions, and transnational legal networks pressure postcolonial states to maintain legal systems aligned with Western models (Halliday & Carruthers, 2007). World Bank rule-of-law programs, judicial reform initiatives, and constitutional design advisors typically promote legal systems based on liberal constitutionalism, separation of powers, and individual rights—frameworks that may conflict with alternative conceptions of legal order (Santos & Rodríguez-Garavito, 2005).

This creates what Mignolo (2011) terms "coloniality of power," where formal political independence coexists with continued subordination to Western institutional models. Bolivia's experience illustrates tensions between transnational legal pressures and decolonial aspirations. Despite the 2009 Constitution's radical recognition of indigenous legal systems and collective rights, international investment treaties and trade agreements constrain actual legal transformation by prioritizing property rights and investor protections modeled on Western legal frameworks (Lalander & Ospina Peralta, 2012). One Bolivian constitutional court clerk stated: "We have this beautiful plurinational constitution, but when international corporations challenge our laws, they invoke treaties that essentially require us to maintain colonial economic law." 3.2 Emerging Decolonial Legal Practices Despite persistent colonial legacies, all six cases demonstrate innovative legal practices that challenge Western-centric legal paradigms and advance decolonial objectives. These practices cluster into three categories: constitutional plurinationalism, community-based legal systems, and hybrid legal innovations.

Constitutional Plurinationalism represents the most ambitious institutional recognition of decolonial legal principles. Bolivia's 2009 Constitution and Ecuador's 2008 Constitution recognize their nations as plurinational states, establishing indigenous peoples as constituent political communities with autonomous jurisdictions and legal systems (Schavelzon, 2012). Article 190 of Ecuador's Constitution grants indigenous authorities the power to exercise jurisdictional functions based on ancestral traditions and customary law within their territories, while Article 171 explicitly states that indigenous justice decisions cannot be reviewed by ordinary jurisdiction. These constitutional innovations transcend earlier multicultural approaches that recognized indigenous rights within a fundamentally liberal constitutional framework (Kymlicka, 1995).

Instead, plurinationalism challenges the monopoly of state law itself, recognizing multiple equally legitimate sources of legal authority (Yrigoyen Fajardo, 2011). As Bolivian Vice President Álvaro García Linera stated in a 2010 speech: "Plurinationalism is not about adding diversity to the existing state. It's about fundamentally transforming what the state is—from a colonial institution imposing homogeneity to a pluralistic confederation of nations." However, implementation of constitutional plurinationalism faces significant challenges. Constitutional courts struggle to define boundaries between indigenous jurisdiction and ordinary jurisdiction, often defaulting to limiting indigenous legal authority (Grijalva Jiménez, 2012). Analysis of Ecuadorian Constitutional Court decisions reveals that courts tend to expand ordinary jurisdiction at the expense of indigenous jurisdiction when conflicts arise, particularly in cases involving serious criminal matters or when indigenous authorities' decisions conflict with individual rights provisions (Santos & Exeni Rodríguez, 2012). Community-Based Legal Systems encompass diverse practices through which communities exercise legal authority outside or alongside state legal institutions.

These range from formalized customary courts in South Africa to informal dispute resolution mechanisms in Indonesian villages to indigenous justice systems in Bolivian and Ecuadorian communities. South African customary courts, while controversial, demonstrate one model of institutionalized legal pluralism (Claassens & Mnisi, 2009). The Traditional Courts Bill and subsequent reforms attempted to formalize customary dispute resolution while addressing concerns about gender equality and human rights protections. Research in rural KwaZulu-Natal province found that community members often preferred customary forums over state courts due to accessibility, affordability, use of local languages, and embeddedness in social relationships (Himonga et al., 2014).

However, critics argue that formalization of customary law tends to ossify dynamic legal traditions and empower traditional authorities at the expense of democratic community governance (Mnisi Weeks, 2011). Indonesian village justice mechanisms (*musyawarah desa*) represent more informal community legal practices. Ethnographic research in Javanese villages documented how communities resolve conflicts through deliberative processes emphasizing restoration of social harmony rather than punishment or vindication of individual rights (Vel & Bedner, 2015). These practices often contradict state law but enjoy legitimacy and effectiveness within communities. One village head explained: "State law tells you who wins and who loses. Village justice finds the path where everyone can live together again." The effectiveness of community-based justice depends significantly on power dynamics within communities. Where traditional authorities are unaccountable or dominated by elite interests, community legal systems may reinforce rather than challenge existing hierarchies (Oomen, 2005). In Kenya, women's rights advocates have long criticized customary law systems for perpetuating gender discrimination, particularly regarding land rights and family law (Kameri-Mbote, 2006).

This raises difficult questions about the relationship between collective autonomy and individual rights—questions that cannot be resolved through simple formulas but require ongoing political negotiation. Hybrid Legal Innovations refer to creative combinations of indigenous, customary, and state legal elements that resist easy categorization within conventional legal pluralism frameworks. The *Guardia Indígena* (Indigenous Guard) in Colombia exemplifies this hybridity, functioning as both a community security force rooted in indigenous cosmology and a recognized actor within Colombia's complex legal and security architecture (González Piñeros, 2020). Similarly, South Africa's Recognition of Customary Marriages Act (1998) attempts to protect rights within customary marriages while respecting customary legal principles, creating a hybrid legal regime that navigates tensions between individual autonomy and customary practice (Himonga, 2011). India's *gram nyayalayas* (village courts) represent another hybrid model, establishing formal judicial institutions at the village level that incorporate local knowledge and informal dispute resolution practices while remaining connected to the state judicial hierarchy (Baxi & Dhanda, 2014). Though implementation has been uneven, these courts attempt to bridge the gap between highly formalized state law and community-based justice.

Law, Social Justice, and Decolonial Transformation The relationship between legal decolonization and social justice outcomes proves complex and contingent. While recognition of customary and indigenous legal systems can enhance access to justice and cultural autonomy for marginalized

communities, it does not automatically advance social justice and can sometimes perpetuate exclusions. Access to Justice: In all six cases, recognition of non-state legal systems has improved access to justice for rural and indigenous communities historically excluded from formal legal institutions. Geographic proximity, cultural familiarity, linguistic accessibility, and lower costs make customary and community-based forums more accessible than distant state courts (Wojkowska, 2006).

Quantitative analysis of dispute resolution patterns in rural Bolivia found that 73% of conflicts were resolved through indigenous or community justice systems rather than state courts, primarily due to accessibility factors (Fundación Construir, 2011). However, accessibility alone does not ensure just outcomes. Research in Indonesia documented cases where village justice mechanisms pressured vulnerable parties to accept unfair settlements to preserve social harmony, privileging community cohesion over individual justice (Bedner & Vel, 2010). The accessibility of customary legal forums may conceal power imbalances that structure outcomes in favor of dominant community members.

4. CONCLUSION

This research demonstrates that decolonizing legal politics in the Global South requires far more than formal constitutional reforms or symbolic recognition of legal pluralism. While important, such measures remain insufficient without fundamental transformation of legal epistemologies, institutional practices, and power relations that continue to privilege Western legal frameworks and marginalize alternative legal orders. Three key findings emerge from this analysis. First, colonial legal structures persist through multiple mechanisms—structural inheritance, epistemic dominance, and institutional isomorphism—that extend well beyond formal legal codes to encompass legal education, professional culture, and international legal pressures. Second, despite these persistent colonial legacies, innovative decolonial legal practices are emerging across the Global South, ranging from constitutional plurinationalism to community-based justice systems to hybrid legal innovations that creatively combine different legal traditions. Third, the relationship between legal decolonization and social justice outcomes proves complex and contingent, neither automatically progressive nor inherently regressive, but dependent on how power operates within and across different legal systems.

These findings suggest several implications for theory and practice. Theoretically, the research challenges simplistic understandings of legal pluralism that treat different legal systems as neutral alternatives among which individuals choose. Instead, decolonial analysis reveals how power

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hierarchies structure relationships among legal systems, often reproducing colonial patterns even within ostensibly pluralistic legal orders. Future research should attend more carefully to power dynamics within plural legal systems and how these dynamics intersect with other structures of inequality including gender, class, and ethnicity. Methodologically, this research demonstrates the value of combining institutional analysis, critical discourse analysis, and empirical investigation of legal practices. Understanding legal decolonization requires examining not only formal constitutional and legislative texts but also how legal systems operate in practice, how legal actors interpret and apply legal norms, and how communities experience and engage with different legal systems.

Comparative analysis across diverse contexts illuminates multiple pathways toward decolonial legal transformation while respecting contextual specificity. Practically, several recommendations emerge for advancing decolonial legal politics: Legal Education Reform: Law schools must fundamentally transform curricula to incorporate indigenous and customary legal traditions as legitimate jurisprudence rather than anthropological curiosities. This requires not simply adding courses on customary law but reconceptualizing legal education to question Western-centric epistemological foundations. Institutional Redesign: State legal institutions must be redesigned to facilitate rather than obstruct recognition of diverse legal authorities. This includes creating mechanisms for coordination among legal systems, developing legal personnel with multilingual and multicultural competencies, and redistributing resources to support community-based legal systems.

Community Participation: Processes for developing legal pluralism frameworks must center participation by affected communities rather than being designed by legal elites. Indigenous peoples and rural communities must have genuine authority to shape how legal systems interact, not simply be consulted about reforms designed elsewhere. Gender-Transformative Approaches: Advancing gender justice within decolonial frameworks requires moving beyond binary debates between individual rights and collective autonomy. Approaches should support women within communities to transform customary legal systems from within while also ensuring access to state legal protections when desired. International Solidarity: Decolonial legal transformation requires countering international legal and economic pressures that enforce Western legal models. This demands solidarity among Global South nations to resist conditionalities attached to development assistance, trade agreements, and investment treaties that constrain legal experimentation. The decolonization of legal politics represents an ongoing process rather than a destination.

It requires sustained commitment to dismantling colonial legal structures, imagining alternative legal possibilities, and redistributing legal authority to communities historically excluded from legal power. While significant obstacles remain, the innovative practices documented in this research demonstrate that other legal worlds are possible—and indeed are already being created across the Global South. As Santos (2014) argues, decolonial legal transformation is fundamentally about cognitive justice—recognizing diverse ways of knowing and doing law as equally valid. This requires what he terms an "ecology of knowledges" that allows different legal epistemologies to coexist and dialogue without one dominating others. Achieving such cognitive justice demands not only legal reform but broader transformation of social, economic, and political relations that have historically privileged certain forms of knowledge and power. The path forward is neither simple nor uniform. Different historical experiences, cultural contexts, and political configurations will generate diverse decolonial legal trajectories. What remains constant is the imperative to center justice—not merely as formal equality before the law but as substantive transformation of relations of domination and exclusion. Only through such transformation can law serve social justice rather than reproduce colonial hierarchies in postcolonial guise.

5. LIMITATION

This research faces several important limitations that should inform interpretation of findings and directions for future research. **Methodological Limitations:** The six-country comparative scope, while providing valuable breadth, necessarily limited the depth of analysis possible within each case. More extensive ethnographic engagement within particular communities would provide richer understanding of how legal pluralism operates in everyday practice. The reliance on elite interviews captured perspectives of those formally engaged in legal reform but may underrepresent experiences of marginalized community members with limited access to formal legal institutions or literacy. Future research should prioritize participatory methodologies that center the voices of those most affected by legal systems. **Language Constraints:** Conducting research across linguistically diverse contexts required reliance on materials available in English, Spanish, or Indonesian, necessarily limiting direct engagement with legal texts and scholarship in many indigenous languages and some national languages. Translation inevitably involves interpretation and potential loss of meaning, particularly when translating concepts between legal systems with fundamentally different epistemological foundations.

This limitation is particularly significant given the research's focus on decolonization, as language constraints may inadvertently reproduce colonial patterns of privileging European languages. Temporal Limitations: The research captures a particular historical moment in ongoing processes of legal transformation. Legal systems are dynamic, and reforms that appear promising at one moment may prove unsuccessful or be reversed. Longitudinal research tracking legal reforms over longer time periods would provide better understanding of sustainability and longer-term impacts. Additionally, conducting fieldwork during the COVID-19 pandemic limited travel and in-person engagement, requiring greater reliance on video interviews and secondary sources than originally planned. Generalizability: While the research aimed for maximum variation sampling to capture diverse contexts, six cases cannot represent the full diversity of the Global South. Findings may have limited applicability to contexts with substantially different colonial histories (such as settler colonial societies), different legal traditions (such as socialist legal systems), or different relationships between state and society.

Case selection prioritized countries with active legal reform processes and relatively strong civil society engagement, potentially biasing findings toward more progressive contexts. Countries where colonial legal systems face less challenge or where state repression limits decolonial movements may present different patterns. Positionality: As researchers located within Western academic institutions, we must acknowledge how our own positionality shapes research design, data collection, and analysis. Despite efforts to engage in decolonial methodology, the research framework itself draws heavily on Western academic conventions and may reproduce certain colonial epistemological patterns. Our interpretation of indigenous and customary legal systems is inevitably filtered through our own conceptual categories and analytical frameworks. While local research partnerships and community engagement helped mitigate these limitations, they cannot entirely overcome the epistemic challenges inherent in cross-cultural legal research.

Complexity and Causation: The research identifies associations between legal reforms and outcomes but cannot establish definitive causal relationships given the complexity of social, political, and economic factors shaping legal systems and justice outcomes. Multiple factors beyond legal reform influence whether legal decolonization advances social justice, and isolating the specific impact of particular legal changes proves extremely difficult. The configurational approach employed helps address this complexity but cannot fully resolve causal uncertainty. These limitations suggest several priorities for future research: longer-term longitudinal studies

tracking legal reforms; deeper ethnographic engagement with particular communities; greater attention to digital and online legal mobilization; more systematic attention to conflicts and failures of legal pluralism; and development of decolonial research methodologies that further challenge Western academic conventions.

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