

The Social and
Political
Foundations of
Constitutions

The Authoritarian's New Clothes: Tendencies Away from Constitutional Democracy

Gábor Attila Tóth

Policy Brief

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The Foundation for Law, Justice and Society

The Social and Political Foundations of Constitutions

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented.

Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

Drawing on the research and literature of politics, economics, and sociology, the programme examines the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.

Executive Summary

- Modern authoritarianism, a form of government, is multifaceted. As a broad term, it refers to arbitrary governmental authority. The common feature of authoritarian states is the enforcement of obedience to a central authority at the expense of personal freedoms, rule of law, and other constitutional principles.
- Although contemporary authoritarians have not entirely abandoned the mechanism of their ancestors, authoritarianism has been undergoing a reinvention in recent years. The most salient new feature of authoritarianism is that, under a façade of constitutionalism, it claims to abide by democratic principles.
- Many authoritarian regimes, from Azerbaijan and Russia to Turkey and Venezuela, feign to be normal constitutional democracies, legitimizing themselves through popular elections and referenda. Incumbents are typically elected leaders who adopt constitutions and laws that apparently correspond to legal systems in democratic countries.
- In such systems, the seemingly democratic constitutional norms are merely protective camouflage, designed to create systematic advantages for the incumbents. The practice of voting is controlled by those in power, and rival political parties are either non-existent or severely constrained. As a result, citizens are not offered a free and fair choice among various competitors in elections.
- Given the lack of legal importance and applicability of authoritarian constitutions, which are political declarations only, existing institutional checks within the constitutional system are illusory. Constitutional courts, for example, may play a legitimizing role instead of fulfilling their task as final guardians of fundamental rights.
- Authoritarian governments do not necessarily prohibit civil society organizations, preferring instead to impose administrative burdens and found pro-government quasi-NGOs to oppose them.
- Authoritarian leaders typically exercise their constitutional power arbitrarily, disrespecting both other branches of government and independent civil organizations. The key indicators of a developing authoritarian government may include degrading the role of parliament by reducing it to mere decorative status; attacking the independent judiciary; limiting the powers of the constitutional court; curtailing civil liberties and freedom of the press; and introducing arbitrary emergency measures by invoking threats posed by financial crisis or terrorism. Therefore, authoritarian power holders are difficult to replace in a democratic way.
- The prospects for a culture of constitutional democracy currently in peril depend not only on institutional checks and balances but also on the dynamic of a strong civil society.

The Authoritarian's New Clothes

Tendencies Away From Constitutional Democracy

More than half of the countries in the world are far from what we would consider 'normal' constitutional democracies. Many of them are under authoritarian governments or even tyrants. One-third of the population of the globe has never experienced constitutional democracy within open and free societies. What is more alarming is that, in contrast with previous waves of democratization that have spread across the globe, authoritarian tendencies have led to the disintegration of liberal democracies. Numerous thinkers warn that the twenty-first century could become a century of authoritarianism as a result of the institutional erosion of democracy (Diamond, Plattner and Walker 2016). The cases of Russia, Turkey, Hungary, Poland, and many other countries epitomise this phenomenon, in which the country in question adopts constitutional transformations that moves it ever further from, rather than toward, democratic principles. Countries from Azerbaijan to Venezuela demonstrate that, when a populist leader gains concentrated power, a reshaped constitution may serve authoritarian aspirations. What's more, as the emerging Trump administration in the United States shows, even a democratic system with a long pedigree of democratic traditions has not been entirely immune to the outbreak of authoritarian political ideas and practices.

In reaction to unsettling constitutional developments allied with the decline of global freedom, a new school of thought has emerged to account for the fact that many such emerging regimes ostensibly behave as if they were constitutional democracies, but, in fact, are majoritarian rather than consensual; populist instead of elitist; nationalist as opposed to cosmopolitan; or religious rather than secular.

Historically, authoritarian leaders murdered or violently suppressed opponents, imprisoned

journalists, suspended legislation, and abolished courts. Autocracy as a political system meant nothing more than the limitless and arbitrary powers of a single ruler. The power holder is not constrained either by legal norms, institutional checks, or the will of citizens at the ballot box. There might, however, be de facto limits, such as tyrannicide, coup, revolt, or foreign intervention.

In comparison with its despotic or tyrannical predecessors, modern authoritarianism is a multifaceted phenomenon. The twentieth century gave birth to totalitarianism, a new type of autocracy, both in Nazi Germany and in the Stalinist Soviet Union (Arendt 2004). While identifying a totalitarian system might seem straightforward (a ruler with absolute power, coercion imposed through violence, strong mobilizing ideology, the people fully subservient to the state, single-party regime, and militarism), authoritarianism, as a weaker form of autocracy, can be much more difficult to distinguish from weaker forms or practices of democracy (Linz 2000; Borejsza and Ziemer 2006; Levitsky and Way 2010). Although authoritarian constitutional systems vary enormously in terms both of their political background and legal features, some common elements of authoritarian transition can be detected.

Façade constitutions

The constitutional rules and institutions in authoritarian systems are often not fundamentally different from those to be found in constitutional democracies. A good example might well be the Syrian Constitution, which reads as follows: '1. Freedom shall be a sacred right and the state shall guarantee the personal freedom of citizens and preserve their dignity and security'. In contrast with constitutional democracies, typical authoritarian

constitutions are solely paper constitutions often characterized as 'semantic camouflage' or 'façade constitutions'.

As regards key legislative, executive, and judicial bodies, authoritarian constitutions typically do not serve as normative benchmarks; they are only descriptive maps of powers (Ginsburg and Simpser 2014). Moreover, in authoritarian systems, the constitution may lack legal relevance, because all political power, including that of revising the constitution, resides with the leader(s) of the ruling party. It is thus political practice rather than constitutional regulation as such which distinguishes the one from the other. Examples of such convergence include the extensive use of executive powers to legislate by emergency decree, the unwillingness of the legislature and the courts to check this practice, and the broad interpretation of constitutional limits on free speech to prosecute journalists and other vocal opponents. For instance, the 1993 Russian Constitution is not fundamentally different from the 1958 French Constitution (whose presidential form of government it has adopted), yet it functions entirely differently; for this reason, in order to understand how an authoritarian system is really governed, the actual political practice must be examined, rather than the constitutional text.

Besides being a descriptive map of powers, the constitution of an authoritarian system — if not technocratic — indicates ideological or religious commitments. It may find its foundations in religious considerations. The Constitution of Egypt is illustrative: it declares that 'Islam is the religion of the state', and 'the principles of Islamic Sharia are the principle source of legislation'. The Hungarian Constitution mentions that 'we are proud that ... our country became part of Christian Europe', and 'we acknowledge the nation-preserving role of the Christian faith'. Such a declaration does not simply recognize the historical role of religion, but expresses that the Constitution is based upon a traditional faith. Consequently, it identifies itself with the moral and political foundations of a certain faith, in spite of the fact that citizens may be a plurality of ethical and religious division.

Authoritarian constitutions may also reflect racial or ethnic preferences. The constitutional concept of the nation, the very subject of a constitution, may be

identified as an intellectual and spiritual community in many instances. As an example, the South African Constitution under apartheid ensured fundamental political, liberty, and equality rights — not for all, but for certain racial groups only. A different characteristic can be that the constitutional text insists that there is one single ethnic nation that belongs together, regardless of the habitual residence and effective link to the state of other groups, while those resident citizens who belong to national minorities of the given state are not included in the category of nation. These concepts of the nation diverge from those egalitarian constitutional standards that admit that modern nation states are multi-ethnic societies.

Ruler(s)

Authoritarianism can be frequently identified with the name of the person exercising dominion. At the dawn of the twenty-first century, many potentates control constitutional systems across the globe. Examples of states which are frequently depicted as authoritarian systems include Azerbaijan under Ilham Aliyev, Belarus under Alexander Lukashenko, the Philippines under Rodrigo Duterte, Russia under Vladimir Putin, Syria under Bashar al-Assad, Turkey under Recep Tayyip Erdoğan, and Zimbabwe under Robert Mugabe. Hungary, an EU Member State led by Prime Minister Viktor Orbán, can be seen as an example of rising authoritarianism. However, in Poland, Jarosław Kaczyński, the authoritarian leader of the governing Law and Justice Party and de facto leader of the country, occupies no key position with constitutional competences. This kind of personalized regime can be easily identified in terms of a charismatic leader whose authority derives from the force of personality. Charismatic domination rests on the general belief that the leader is endowed with exceptional powers or qualities, not accessible to the ordinary person, and public officials are required to show personal devotion to the ruler.

In contrast to the personalistic rule of authoritarian individual leaders, a new type, bureaucratic-military authoritarianism, emerged in Latin America in the 1960s: first in Brazil and Argentina, then in Chile and Uruguay. The main feature of these systems was that the military as an institution led the country, frequently by a rotation of presidency. This type of system lacks the dominion of ideology or

nationalism, but entails fierce repression. The bureaucratic-military system has its roots — with personalistic supremacy — in interwar period Poland (Józef Piłsudski, First Marshal) and Hungary (Miklós Horthy, Admiral and Regent) as well as in Francoism (Spain) and Kemalism (Turkey). Secular, military-led authoritarianism also appeared strikingly in Greece, the Middle East, North Africa, and the Asia-Pacific region. Although bureaucratic-military authoritarianism had almost vanished in South America by the early 1990s, new forms of secular, populist authoritarian systems, sometimes with military leadership, have appeared in many regions of the world.

Another type of an authoritarianism exists in the People's Republic of China, a 'socialist state under the people's democratic dictatorship led by the working class', where single-party rule by the Communist Party stands in for a single commanding leader. Finally, the authority of the Kim dynasty, three generations of rulers in North Korea, is closer to totalitarianism, a stronger form of autocracy, than to authoritarianism. The Preamble of the Constitution, by way of illustration, mentions the 'great leader Comrade Kim Il Sung' no less than sixteen times.

The leadership of an authoritarian system is complex, but, in essence, two subtypes and their amalgam can be differentiated. One of them is charismatic authority, whereby apparent exceptional personal superiority qualifies a politician as the ultimate leader of a state. Under certain circumstances, another subtype can be traditional authority, whereby institutionalized practices (for example, dynastic succession, a true balance of power within the ruling clique) confer public power on the leader.

Hegemonic voting practices

Modern authoritarian systems rarely reject decision-making processes by which the people choose individuals to be members of legislative bodies or to hold other public offices. On the contrary, many contemporary authoritarianisms legitimize themselves as 'democracies' through elections. However, voting practice in authoritarian constitutional systems is hegemonic by nature, meaning that such systems are without, or deficient in, many constituting elements of free, fair, and

competitive elections required by both international law and principles of constitutionalism. By virtue of this, authoritarian heads of government may keep the process and outcome of the vote under strict control.

'Elections without choice' are commonly associated with harsh authoritarianism. For example, Soviet-type Central and Eastern European countries were characterized by a single-party system (Hungary, Romania) or a dominant-party system (Czechoslovakia, Poland) without the possibility of competitive elections. Citizens with voting rights were allowed to vote, but only for the candidates of, or a party-list dominated by, the ruling party. As for contemporary constitutional systems, the People's Republic of China's Constitution proclaims that the country is ruled 'under the leadership of the Communist Party of China'. The parliament of China, the highest level of constitutional institution, is meant to be the National People's Congress, which is not an elected body, but composed of delegates from provinces, autonomous regions, municipalities, and the armed forces. Only Local People's Congresses at the lowest level are elected directly by the voters. Although, ostensibly, China is a multiparty state, in reality, minor parties and independent candidates cannot form a democratic opposition because of governmental intervention.

Today, many authoritarian systems constitutionally retain multiparty elections and provide scope for activities of opposition movements. What makes them distinctive is that the election is managed so as to deny opposition candidates a fair chance. Legal norms and practices ensure the dominance of the ruling party. The governing party may enjoy undue advantage because of partisan changes in election law, unequal suffrage, gerrymandering of electoral districts, a rise to the electoral threshold, restrictive campaign regulations, far from independent assessment of the election, and biased media coverage that blurs the separation between political party and the state. The constitutional struggle against authoritarianism, particularly in Africa and Latin America in recent decades, has often focused on the introduction of presidential term limits, and the attempts of autocrats to have these term limits removed, by constitutional reform and/or by reinterpretation of the term limit by the

constitutional court (e.g. Peru). This scheme has been used in Burundi and Rwanda, where controversial third terms entrenched the position of the incumbent presidents. Modification of voter identification and registration laws may result in de facto disenfranchisement (e.g. Zimbabwe under President Mugabe). Electoral laws may unfairly promote voting by the diaspora (e.g. Senegal), or hinder the voting ability of émigrés (e.g. Venezuela under Chavez). Even landslide victories for authoritarian leaders, or their parties, may be attributed to a range of tools at the disposal of incumbents, such as manipulation of the public by mass media (Russia), open electoral fraud, or strategic delays to scheduled elections (Lebanon).

Authoritarianism often goes hand in hand with populism. In many countries, the relative popularity of the ruling party derives from the global trend toward populist leaders who exploit popular anti-system and anti-establishment sentiments; but it is also typical that a significant section of the mass media is de facto captured, including *de jure* takeover of public media, and the general public is systematically manipulated by the government. Leaders of the opposition parties and social movements are frequently characterized as betraying their nation, or agents of external powers. As a consequence, while many authoritarian systems appear to be majority backed by the electorate (through both popular votes and referendums), this electoral success is often based on one-sided modifications to the constitution and electoral laws, and subsequently, unfair elections.

Shortfall of institutional checks

Although the constitutional structures of authoritarian states inevitably consist of the three main parts — the legislative, the executive, and the judicial branches of government — they are not based upon the principles of separation of powers and the rule of law. Modern authoritarianism may establish the entire set of formal institutions associated with constitutional democracy, yet these serve as either a tool of authoritarian imposition, or a façade of representation (Schedler 2013: 54–61).

Structurally or in practice, constitutional powers are utterly unbalanced. The executive branch —

especially the head of the executive: the monarch (e.g. in Saudi Arabia), the generalísimo (e.g. in Spain under Franco), the president (e.g. in Turkey under Erdoğan) or the prime minister (e.g. in Hungary) — is superior in power. Formal and actual power may differ significantly, as in Russia under the presidency of Medvedev, or formal governmental dominance may be subordinate to informal party dominance, as in the People's Republic of China. Another typical example of this is the far-reaching influence of the politburo, the principal policymaking body of the Communist Party in Soviet-type communist regimes.

Clearly, constitutional democracy may take various institutional forms. It may be a monarchy or a republic; it may have a presidential or a parliamentary system; it may be a federal or a unitary state. Nonetheless, comparative surveys of governmental systems reveal that some presidential systems have difficulties sustaining democratic practices. Under a range of cultural and social conditions, a parliamentary system is more democratically robust than a presidential one. Depending on political traditions, culture, and the electoral system, the transformation of the executive and the legislative branches into a presidential system may lead to authoritarianism, yet this is not necessarily the case. To illustrate: although both the 1958 French and the 1993 Russian Constitutions were seen as reactions to parliamentary paralysis, with aspirations for a strong executive, French political and constitutional practice managed to maintain constitutional democracy over the long term; whereas, by contrast, since the relatively liberal beginnings of Jelzin era Russia, the country under Putin has moved dramatically toward the authoritarian practices of the post-Glasnost era, although there have been minimal changes to the constitutional text itself.

An important stepping stone to authoritarianism seems to be the broad and/or ill-defined powers, including emergency powers, of the executive, the 'guardian of the Constitution'. In a constitutional democracy, a state of emergency should provide only temporary conditions for exercising otherwise legitimate power. A temporarily modified constitutional democracy means that some constitutional rights are restricted, but the main purpose of the state of emergency is to restore the

democratic legal order and the full enjoyment of human rights. In a regime that seeks to distance itself from liberal democracy, the ruler's declaration of a state of emergency serve to institutionalize an arbitrary executive power unhampered by legal constraints, thus creating a long-standing special power beyond the rule of law. As the constitutional developments in Turkey show, by referring to terrorist threats and other imminent dangers, the head of the executive can successfully initiate a wide-ranging constitutional amendment, leading to a sovereign-led authoritarian system.

Populist authoritarian leaders often invoke the 'will of the people' to undercut the role of the constitutional judiciary, the institutional safeguard to protect the rule of law and individual freedoms. Weaker legal ties mean, however, that it is not only the judiciary but also other democratic institutions that are undermined. It becomes possible to sidestep representative government if the popular will is not legally constructed or channelled, but rather the echo chamber of a dominant leader. Consequently, populist authoritarian leadership emerges at the expense of not only constitutional judiciary but also of parliamentarism.

As an alternative to representative democracy, several authoritarian forms of government prefer corporatism to competitive multiparty systems. Although authoritarianism has never availed itself exclusively of a corporatist model, and corporatism has never been exclusively an authoritarian attribute, in many cases, non-democratic constitutional systems grant large interest groups such as business corporations, trade unions, professional organizations, churches, or universities a representative constitutional function.

Some transforming systems reportedly replace the role of the constitutional judiciary with parliamentary sovereignty. In practice, constitutional and statutory regulations, as well as constitutional conventions, are 'reformed', and result in politically expedient modifications to anything from the personal composition ('court packing'), competences, and institutional and financial independence of the constitutional court in question (Landau 2013; Tushnet 2015). By way of example, this is precisely how the Hungarian and the

Polish Constitutional Courts were neutralized. Decisions of the constitutional Justices, appointed according to the will of the authoritarian leader, may contribute to the reinforcement of the system. The only exception is Kyrgyzstan, where the Constitutional Court was abolished with the adoption of the Constitution of 2010, when some of its powers were transferred to the Supreme Court.

As the record of the Russian Constitutional Court demonstrates, altered but not abolished tribunals may serve as a tool of authoritarian imposition. Vladimir Putin deployed constitutional review to help centralize and consolidate his authoritarian power. Moreover, authoritarians occasionally tolerate painful judgments to construct a façade of constitutionalism, provided that the judiciary does not threaten the core of authoritarian institutional design (as was the case with the judiciary in Egypt under President Mubarak). Invariably, the aim behind such constitutional changes is to safeguard and promote the interests of a particular political force without constitutional balances (Varol 2015: 1689).

Restricted individual and collective rights

Many authoritarian constitutions formally declare fundamental rights for their citizens, but these are rarely legally enforceable. A common tactic is to construct a constitutional catalogue of fundamental rights, ostensibly based upon the international standards arising from the UN's Universal Declaration of Human Rights and regional human rights treaties. Yet the constitution will in fact contain a number of sections in direct contradiction with international human rights law, typically, recognizing certain fundamental rights, but only to the extent that these rights serve the interests of the ruling political group or class.

Democratic transitions go hand in hand with the recognition of constitutional liberties. As a representative case, the protection of individual rights and democracy demands more and not less free speech after a successful constitutional transformation. Comparatively, authoritarian leaders tend to restrict it by capturing media. Although criminal prosecution is still a tool for authoritarianism, political leaders often opt for a less

blunt approach, opting to sue journalists and civil rights activists for defamation to silence dissent, rather than resorting to imprisonment, or blatant prohibitions or suppressions of journals, books, films, or websites. Freedom of speech and the press can be denied or restricted in the name of any one of the ruling class, the dominant religion, or protection of the head of state. It seems clear that, where restrictions on free speech protect the ruler(s) in particular or the executive in general, or indeed members of the majority (citing, for example, the dignity of a nation, a country, or a dominant ethnic group), instead of members of vulnerable social groups, such regulations constitute one aspect of an authoritarian approach. In this way, the general public is subject to systematic manipulation by the government.

Similarly, racial or ethnic exclusions as well as repression of civil society are among the characteristics of authoritarian constitutional systems. Although civil society organizations are rarely prohibited, many regimes from Algeria to Venezuela have adopted discriminatory, inflexible, and costly requirements for the registration and reporting of civil society groups. Likewise, 'foreign agent' laws have been used as a tool of authoritarianism; their primary aim being to curb cooperation between international and domestic NGOs (Belarus, Israel, Russia). Moreover, in many regimes, government-organized non-governmental organizations (GONGOs) have been set up and/or financed by the executive in order to imitate civil society, promote authoritarian interests, and hamper the work of legitimate NGOs (Egypt, Hungary, Russia, Syria, Turkey).

Comparative assessment

Contemporary authoritarianism can be positioned between totalitarianism and democratic constitutionalism. Although authoritarian governments often pretend to be democratic, their main features are incompatible with the principles of democratic constitutionalism and of limited constitutional government. In other words, authoritarianism can be characterized by chronic shortcomings: narrowed political pluralism, absent or inadequate democratic institutions, denied or unenforceable fundamental rights, lack or shortfall

of constitutional checks and balances, and oppression of non-governmental organizations.

Many states considered to be on the road from authoritarianism to constitutional democracy appear to be turning back toward an authoritarian state architecture. Even though Europe is today considered to harbour the most democratic constitutional systems, during the past century, this continent experienced the most inhuman, totalitarian forms of autocracy. What is more, after many waves of democratic transitions, authoritarian tendencies have emerged once again in Central and Eastern Europe. Russia, having abandoned steps to implement parliamentary design after the collapse of the Soviet Union, has become unquestionably a presidential autocracy. Azerbaijan, Belarus, Russia, Tajikistan, and some other post-Soviet states, indeed, much of Eurasia, constitutes an authoritarian stronghold. In Turkey, following Kemalism and a chapter of secular, military coups, a set of institutions associated with constitutional democracy were implemented, yet in recent years, the country has been turning toward a form of authoritarianism with some attributes of religious fundamentalism.

In the Arab world, in line with revolutionary methods of constitution-making, secular dictatorships were not replaced by democratic constitutionalism, but by regimes closer to religious fundamentalism. In the Middle East, Islamic absolute monarchy means hereditary autocracy along Islamic lines, as can be seen, for example, in Saudi Arabia. The constitutional record of Latin America may be characterized by both bureaucratic-military authoritarianism and peaceful transitions out of it. At present, Venezuela is just one of a number of states in the region in which populist heads of government are misusing the constitutional system so as to remain illegitimately in power. There is a long-standing authoritarian constitutional regime in China under the rule of the Communist Party, while a different ideology-based authoritarianism — theocracy — has been established in the Islamic Republic of Iran.

The birth of the confederal United States of America, subsequently replaced by a federal but constitutionally limited government, is seen as a reaction to European monarchical and church-based

authoritarianism. Nevertheless, the democratic system of the US has not been entirely immune to the outbreak of authoritarian political ideas and practices.

The decay of liberal democracy and the rise of authoritarianism are often associated with the spread of populism across the globe. Contrary to conventional wisdom, populism — as political concept and worldwide tendency — is not only anti-elitist or anti-liberal but also anti-democratic. By rejecting political pluralism, deliberative procedures of democracy, and institutional checks, populist leaders claim exclusive moral representation of ‘the people’ (Müller 2016). If a populist achieves the desired aim — a strong executive power, unhindered by legal constraints — the system will unavoidably become an authoritarian state.

Far beyond constitutional order, many authoritarian systems fall as a consequence of violent upheaval. Constitutional transformations rarely come without personal consequences for those at the helm. Authoritarian heads of states stand to lose not only their constitutional power and political influence but also their personal freedom through imprisonment or exile, or, indeed, their lives, through assassination or execution. Yet despite clear empirical evidence of authoritarian tendencies on each continent, it is also clear that peaceful, coordinated transformations from authoritarianism to constitutional democracy can occur. The future of democratic constitutionalism depends not only on institutional checks and balances but also on the continued efforts of a strong civil society and the commitment of an international community of stable democratic nations.

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Gábor Attila Tóth is Associate Professor of Constitutional Law and Human Rights at the ELTE University, Budapest and the University of Debrecen, and Alexander von Humboldt Research Fellow at the Humboldt University, Berlin. Previously, he gained visiting fellowship to the New School for Social Research, New York; a DAAD research fellowship to the Humboldt University; and an Oxford scholarship from the British Council. Between 2000 and 2010 he worked as adviser to the Constitutional Court of Hungary. In 1994 he was founder of the Hungarian Civil Liberties Union. He is author of numerous articles and eight books, including the edited volumes *Constitution for a Disunited Nation* (CEU Press, 2013) and *Human Rights* (Osiris, 2003).

For further information please visit our website at www.fljs.org or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD

T · +44 (0)1865 284433

F · +44 (0)1865 284434

E · info@fljs.org

W · www.fljs.org

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