PART I

# ESTABLISHING THE STATE – THE SUPREMACY OF POLITICS

Aren't efforts to personify a state – attributing to it a "personality," age, character, and even territorial limbs – misleading about the essence of this social institution?[1] We would like to start by saying that a discussion of the state and its political systems does not suggest their omnipotence, nor assume that they exhaust the richness of human endeavor. Politics should be the handmaid of society, not vice versa. This does not contradict our view that there is a critical formative period in the history of a state, a period whose impact can be felt in both short- and long-term political patterns.

Political life in Israel in the twenty-first century cannot be grasped without an in-depth understanding of the pre-state (Yishuv) and early state periods. By this we mean that the history of every group contains chapters with formative elements, whose influence abides from generation to generation. For the Jewish public, the Holocaust and the state-making process are such chapters; for the Arab public, the Zionist enterprise and establishment of Israel were formative. Therefore, common to the chapters in Part I is the effort to glean from the pre-state and early state periods those elements that continue to influence the political system in Israel. We omit the historical descriptions during this period, which can be found in other works, and focus only on issues that can help elucidate what took place in later years.

Chapter 1 presents the influence of the political institutions – British, Zionist, and Yishuv – on Israel's post-1948 parliamentary system, and sums up what remains from the pre-state heritage. Retrospectively, despite elements of continuity, 1948 was clearly a watershed for the state and its political leadership: internationally – the attainment of legitimacy for the Zionist movement; and internally – the attainment of exclusiveness for the political system. This chapter discusses the founding of the state and the shaping of its institutions and patterns of political behavior during the first five years. The discussion concludes in 1953, not because of the significance of this year (though it marked Prime Minister Ben-Gurion's first retirement), but because the matters under discussion had stabilized: the founding of institutions, the consolidation of state authority in security and foreign affairs, the holding of democratic elections, and state involvement in new internal areas. Chapter 1 closes with a

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[1] On different approaches to the institution of the state, see Galnoor 1995, 8–16.

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discussion of the meaning of the state's victory over its rivals, and its emergence as the institution with the greatest influence on society, its groups, and its people.

Chapter 2 describes the events around creating a constitution at the time the state was founded, but extends the discussion to the issue of a constitution in contemporary times. Had the leadership of those years managed to forge a written constitution out of the diverse views, as had many states in their early years, this period would have had an even greater formative influence. Nevertheless, we believe that what exists and what is missing in Israel's unwritten constitution ("the 1949 constitution") are rooted in that early period: the actual constitutional status, the standing of the Basic Laws, recourse to the Supreme Court's constitutional rulings, and the controversial issues that largely remain extra-constitutional. In this chapter we also ask whether a written constitution would have helped surmount the internal divisions in Israeli society, and perhaps even prevented some of the troubles and crises that have beset Israel over the years.

Part I of this book also lays the groundwork for two threads that weave their way throughout the volume: the primacy of politics in Israeli public life; and the ongoing tension between the relatively broad representation in the elected bodies of the political system and its steering capacity.

# 1 The Formative Early Years of the State (1948–1953)

## 1.1 The Yishuv Period – The Beginning of Israeli Democracy?

It is encouraging to observe veteran democracies because the longer they maintain a democratic system, the better their chances of remaining a democracy. Does this apply to Israel? How many years before a state can be called a "veteran democracy"? And what do the years of democratic experience imply – in addition to the longevity, is there a qualitative component to this experience?

Efforts to infuse the pre-state institutions with a democratic character – the Zionist Congress elections held from 1897 in Diaspora Jewish communities, the campaigns for these elections, and the functioning of the Zionist institutions – all set a fairly democratic course for the state-in-the-making. This gradual and extended process meant that, by 1948, it was virtually axiomatic that Israel would have a democratic system of governance. But were the obstacles that plague Israeli politics and democracy in the twenty-first century already planted during this period?[1]

The period preceding establishment of the state holds many secrets that could help make sense of Israel's contemporary political system. First, the Zionist institutions of the Jewish community (the Yishuv) continued to operate for a long time: the Histadrut Labor Federation, the Jewish Agency, and some of the political parties began under Ottoman rule, while others – the Chief Rabbinate, the Civil Service, and the courts – originated during the British Mandate. Second, Yishuv patterns of political behavior continued in the state, such as the electoral system and the "religious status quo." Most importantly, the violent conflict between Jews and Palestinians, which affects virtually all aspects of the two nations, was rooted in the historical events of pre-1948 Palestine (E.I.).[2] In this book, we discuss the formation of the Jewish political system, but not the parallel development of the Palestinian political community, because, among other reasons, all efforts failed to establish a

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[1] On the formation of the Jewish community's political system during the British Mandate, see Horowitz and Lissak (1978) and Galnoor (1982). On *economics*, see Barkai, Gross, and Metzer. On *institutions, parties, and movements*, see Akzin, Goldstein, Heller, Reuveni, Sager, and Shapiro. On *significant individuals*, see Bilski, Miller, Pappe, Porath, Segev, Shaltiel, Teveth, and Zahor. All the documents from this period have now been made public.

[2] In this book, we use the official British designation "Palestine (E.I.)" to indicate the Mandatory area west of the Jordan River. In referring to the geographical area, we use the term "Land of Israel" (Eretz Israel) or "Palestine," as appropriate.

joint political framework, and the Palestinian institutions had no direct impact on the Israeli political system (Horowitz and Lissak 1977, 19–46; Porath 1974). The discussion below is based on the following assumptions about the period of the state:

- The foundation of the Israeli political system was laid prior to establishment of the state, and well before most of the Jewish population made an appearance after 1948.
- To understand much of Israeli foreign and internal affairs, their roots in the Yishuv must be examined – from the conflict with the Palestinians to issues such as the religious–secular rift, the multi-ethnic structure, the ideological debate over the state, territories and borders, and relations with Diaspora Jewry.
- Political patterns of activity during the Yishuv period are important, whether in the finding of continuity (as in the coalition structure) or discontinuity (as in managing social conflicts).
- The establishment of the state of Israel in 1948 was an historic watershed in terms of the international standing of the Zionist movement. There is a fundamental difference between a national movement striving for independence and a sovereign state. With respect to the political system itself, however, there is considerable continuity (Sager 1971, 29–49; Rubinstein 1976, 284).

The political system of the Zionist movement and the Jewish Yishuv achieved its main goal. Within a relatively brief span of eighty years, from the end of the nineteenth century to the middle of the twentieth, the framework of a state was erected, largely through political activity. Not all nationalist movements that strive for independence ultimately succeed, and not all that succeed accomplish their goal by displaying a rather advanced capacity of their political system.

Thus some seven decades after the founding of Israel, and a century since the beginning of the political system, it can be said that the establishment of Israel did not take place *ex nihilo* because existing political institutions provided vital continuity and context. The implications of this are numerous. Israeli parliamentarism has a long history, for example, dating back to the first Assembly of Representatives in 1920. This history holds out hope for continuity, but also dismay over the faults that remain uncorrected for such a long period.

The issue of continuity is also relevant for the dispute within Israel over the source of the Israeli–Palestinian conflict: Shouldn't the establishment of the state mark the dividing line between how a voluntary national movement conducts itself (e.g., bending the rules) and how the government of a properly run country operates, one that is presumably cautious about the legality of its actions, both domestically and internationally? In any event, one cannot fully grasp contemporary Israeli politics without digging into its roots in the Yishuv period. The political system that evolved during the pre-state period showed exceptional capability (to be called "steering capacity") in achieving its main goals. Under objectively trying conditions, it successfully attained the goal of establishing a state; and its skill at navigation won legitimacy and a willingness to participate from most of the Jewish population, hence its decisions were accepted as binding.

In retrospect, that political system no longer exists in the twenty-first century, even though some institutions and patterns of behavior survived the journey. The Yishuv system showed great vitality in the first decade of the state, but began to

wane, institutionally and functionally, in the 1960s, as will be seen. The basis for dem-ocratic political participation was laid, but some components – which did not exist or could not be built during the pre-state period – were still missing. On the eve of the Six Day War (1967), the political system had already advanced well beyond the starting point of democratization.

At that point, the "Yishuv period" seemed to be drawing to a close, and an opportunity arose of launching a new stage – of stabilizing the system and filling in the missing pieces. Things, however, worked out differently.

## 1.2  Establishment of the State

In a seminar of the Dror Zionist youth movement held in a Displaced Person camp in Germany in 1947, youth who had survived the Holocaust met with emissaries sent from Palestine. One of the young women participants described the encounter as follows:

> [We were] convinced that after the atrocities of the war, it would be impossible not to build a new world, one more just and pure, in which all inhabitants would be equal. On this fertile soil of hopes and expectations, the emissaries from Eretz Israel, bearers of the tidings of redemption, were fervently welcomed …
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> They appeared to be the sons of the gods and were idolized, with no connection what-soever to whom they were personally, simply because they belonged to the land of dreams – the Hebrew Kibbutz in Eretz Israel, which embodied an image of the Jewish future in its best and most beautiful incarnation, more noble and just than anything imaginable.

And the author adds:

> This was the atmosphere in 1945–1948 … Those who did not experience it would be hard pressed to understand the pathos of the era, life on the ideological edge, lofty words that were real and self-evident, but sound today like a collection of flowery phrases. (Holtzman 2002, 227)

The land of dreams, an image of the future – these are not flowery phrases when one describes, even retrospectively, the yearning for a state. The founding of Israel released a flood of emotion that had been building up since November 29, 1947 with the UN decision to establish a Jewish and an Arab state, and reached a crescendo in the Declaration of Independence on May 14, 1948. The state was born in a turbulent war on the heels of the Holocaust, and was perceived as an era of genesis, the launch of a social and cultural revolution, raising expectations of redemption in all its forms. Even a staid civil servant like Ze'ev Sherf (later cabinet secretary), who oversaw arrangements for the new government mechanisms, writes emotionally more than a decade later (1959): "We were as dreamers. Joy and fear were bound together. Present and past were interwoven; vision and reality intermixed; the messianic era had arrived, the end of subjugation by foreign rulers" (1959, 56).

On May 14, 1948, the five Hebrew-language, morning newspapers issued a joint edition called "Day of the State," which carried the text of the Declaration of Independence and a manifesto issued by the Provisional State Council rescinding the British White Paper that had restricted Jewish immigration to Palestine. Were these the harbingers of redemption? A glance through the newspapers in the early years of the state reveals that all symbols of Israeli sovereignty became the source of enormous

pride – the flag of Israel flying at the UN, Herzl's remains brought for reburial in Jerusalem, foreign ambassadors presenting their credentials to the president of the state, Israeli athletes in international competitions, the Hebrew encyclopedia, El Al's first flight, etc. How many speeches were given that began, "For the first time in two thousand years…," an expression so overused it became an example of a stock phrase.

In a meeting of intellectuals with Ben-Gurion in 1949, the question arose of whether creation of the state could be termed – figuratively, of course – "the coming of the Messiah." Ben-Gurion's reply:

> The moment he [the Messiah] arrives, he will cease to be the Messiah. When you find his address in the telephone directory, he will no longer be the Messiah … The Messiah is needed so that he will not arrive. Because waiting for the Messiah is more important than the Messiah himself and the Jewish people lives awaiting him and believing in him. Which is the reason why the Jewish people exists at all. (quoted in Segev 1986)

In a high school civics text from the early 1950s, the author expressed his concerns about education "in a new state such as Israel, whose rules and life are not the product of a long civic or political tradition, and in which many inhabitants come from regions of the world that have no democratic civic tradition." The author was even willing to forego the older generation, writing that civics must be taught in schools "so that a common citizenship framework will be created at least for the younger generation" (Fishman N.d., 7).

What was understood by the concept "state," or at least what did the leaders understand by it? Two issues stand out in the confidential protocols of Mapai's Central Committee as they discuss the longed for sovereignty. The first was the ability to bring immigrants into the country without asking anyone else's permission – hence the rush to cancel the Mandate regulations that forbade immigration, and the concern about control of the ports as soon as the British had evacuated. And the second was the appearance of uniformed Hebrew soldiers and policemen as a symbol and perhaps pledge to withstand external threats (Avizohar and Bareli 1989, 306–7). Ben-Gurion, however, was focused on security matters; after proclaiming the state, he entered two sentences in his journal: "At four in the afternoon Jewish independence was proclaimed and the state was established. Its fate is in the hands of the defense forces" (ibid., 512).

These ideological leaders, who spoke and argued incessantly about everything, provided few details about the meaning of the long desired state. And it was surprising to find – even among seculars – that redemptive, quasi-messianic terms became buzzwords, such as "establishment of the Third Temple" (Sherf 1959, 226). And some humorists managed to capture the trepidations, as well: "For two thousand years the Jews prayed in vain for a state; why does it have to happen in my generation?"

The debates were ultimately channeled into what was then defined as an aspiration for "statism" – giving priority to overall national rather than particularistic considerations. Statism was presented as diametrically opposed to "sectarianism" and factionalism, and a remedy for the social and partisan divisiveness of the Yishuv period (Yanai 1982, 63–66; Yanai 1987, 169).[3] We will return to this at the end of the chapter.

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[3] Horowitz and Lissak (1978) emphasize the role of legitimacy in this debate: The statist view is that government legitimacy derives from public support, while the class view asserts that legitimacy is conditional and derived from social movement frameworks.

The definitions of "state" in the twenty-first century differ from those used in the previous century in the era of the territorial nation-states. The state is still the main organizing framework, but alongside the previous exclusive approaches and the continuation of national struggles, global perspectives and even indications of a post-state era have appeared. See, for example, a definition that already carries intimations of transience: "The state is a geographically delimited segment of human society united by common obedience to a single sovereign" (*The International Encyclopedia Social Sciences* 2001, vol. 15, 150). In other definitions, the "state" is one of three institutions, along with "the market" and "civil society" (*The International Encyclopedia Social Sciences* 2001, 14962). In earlier definitions in international law, a state is characterized by a permanent population, a defined territory, a government, and its relations with other states (international legitimacy) (Montevideo Convention 1933). When these components exist over time, a state is considered "sovereign" vis-à-vis other states. A state is also a "nation-state," if it is intended to realize the right to self-determination of a specific group (a nation) that has distinctive characteristics such as ethnic origin, language, religion, history, or other relational qualities. In Israel as a new state that expresses Jewish national aspirations, these common characteristics exist, but unlike other states, it is also a new fusion of nation and territory.

The story of the state of Israel begins with a group of Jews who called themselves "Zionists" and began to see themselves as belonging to a nation that lacked a state of its own. Initially, the main challenge was the need for territory, unlike other national movements that emerged in a struggle against conquest, or strived to overcome an internal schism. The special challenge of the Zionist movement was the very conceptualization and definition of this old-new nation – was it Jewish? Hebrew? Israeli? Over one hundred new states were established after World War II, but the Zionist national movement that created Israel in 1948 was unique from another perspective. It was a movement of national renaissance, European in its world view and concepts, which had come too late for the European "spring of nations" in the nineteenth century, and too early for the Asian and African liberation movements in the twentieth century. As a result, the creation of Israel resembled, but also differed from, those of other new states. Regarding the newborn state as virtually sacred is familiar from other new states (Binder et al. 1971; Geertz 1963). However, the ongoing external threat has made the very preservation of Israel not just its primary challenge, but also a defining feature of Israel's Jewish national identity.

Of the four characteristics of the state cited above, territory and population were still vague in 1948, while international legitimacy was relatively more assured due to the UN approval of the Partition Plan of 1947 and recognition of the new state by the USA and the USSR. The government stabilized very quickly, followed by recognition of the sovereignty of the state. Despite the many internal divisions during the Yishuv period, it was patently clear in May 1948 that the new state would have one government over one army, one police force, and one civil service. Israel was from the outset a "strong state" vis-à-vis the society it served (*The International Encyclopedia Social Sciences* 2001, 14978–82). This strength is apparent in many states at their inception, but it was surprising, considering that most of the early leaders were socialists and, in theory at least, professed a belief in the gradual disappearance of the state. Furthermore, some of its leaders held liberal views, including perception of the state as a social contract rooted in natural rights, i.e., a mere

tool for realizing social goals. Even Jabotinsky, who placed the state above all fac-
tional interests, including class, was a true liberal who wrote, "I, too, have a blind
hatred for the idea that the state is everything" (Bilski Ben-Hur 1993, 30). A weak
state, however, was not the predominant concept, and the fact remained that little
attention was given to clarifying the essence of the state; and some were fearful
of sanctifying statehood or were concerned about its enormous power.[4] An étatist
view of the state as the be-all and end-all appeared later in political and security
considerations, and heavily influenced Israeli history after 1967. In the period imme-
diately after the founding of the state in 1948, Israel displayed "stateness" according
to both Fukuyama's (2004, 7–9) criteria – the scope of its activity and its institutional
capacity.

### 1.3 Transitional Institutions and the Legal Infrastructure

The Partition Plan with Economic Union approved by the United Nations in 1947
included details about the transition arrangements and governance in the Jewish
and Arab states to be established. The UN plan even defined the democratic form of
governance (parliamentary), the electoral system (proportional representation), and
various rights (religious, minority, and women's suffrage). The role of the Constituent
Assemblies would be to "draft a democratic constitution."

The Jewish institutions prepared themselves by setting up the transition bod-
ies in accordance with the partition proposal, and in March 1948, the leadership of
the Jewish Agency and the Va'ad Leumi (the Jewish National Council) agreed to
establish a provisional council. This was preceded by intense negotiations among the
parties, concluding in an unwritten "inter-party covenant" in which the existing bal-
ance of power would serve as the basis for constituting the council, as follows: twelve
Yishuv members of the Jewish Agency executive, fourteen executive members of the
Va'ad Leumi, and another nine representatives of parties not included in these two
institutions (Avizohar and Bareli 1989, 363–69). On April 18, 1948, the Provisional
State Council and the Provisional Government were established, but these names
were soon changed to the People's Council and the People's Administration due to
the opposition of the Mandatory government. The members of these provisional
bodies had not been elected to them, but most had been elected earlier to the Zionist
or Yishuv institutions. The Provisional Government was established with an agreed
upon political makeup of thirteen members that was not elected or approved by
the Provisional State Council, but wielded great power and did not require a vote
of confidence by the council (Medding 1990, 14). It was a coalition government, and
a threat of resignation by some of its members carried enormous weight, as would
become clear to Ben-Gurion and his party during the Altalena affair (see below).

These provisional bodies served for a short period, but were of signal importance
as the transition institutions of the new state, established with inter-party agreement.
They operated successfully until the first elected government took its place in March,
following the January 1949 election. Institutional continuity from the Yishuv period

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[4] On messianic expectations, see Segev 1986; on the influence of western liberalism on Chaim
Weizmann, see Dowty 2001, vol. 1, 16; on the views of those who negated the state, see Galnoor
1995, 124–129.

was preserved in these temporary bodies, as mentioned, but particularly noteworthy was the effort to be inclusive even of parties not previously represented – for different reasons – in the leadership of the Jewish Agency and the Va'ad Leumi: the ultra-Orthodox, Revisionists, and Communists. Thus the Provisional State Council scored an extraordinary achievement by securing the participation of most of the political groups, with the exception of the Arabs, the Civil Union Party, the Irgun, and Lehi (the small opposition pre-state military organizations).[5] The Provisional Government was a broad coalition, comprising no fewer than eight out of thirteen parties in the Provisional Council. The efforts at inclusion were made primarily at the expense of Mapai, which was left without a majority in the Provisional Government (five out of thirteen including a representative of the List of Sephardim). Mapai's representation in the Provisional Council (some 30%) was just under its proportion in the Assembly of Representatives (1944) and the Zionist Congress (1946). Even the two workers' parties combined (Mapai and Mapam) did not control a majority of the Provisional Council. However, whatever Mapai lost in representation in the provisional institutions, it gained by winning broad public legitimacy. The authority of the provisional institutions was undisputed by the vast majority of the Jewish public, even on sensitive issues like the induction orders issued in April 1948, or administrative matters such as taxes or car licensing.

The makeup of the provisional institutions, though the members had not been elected, also influenced the character of the future parliamentary system. In practice, a division of function emerged between the legislative and executive branches, and the fact was established that the executive branch is based on a coalition.

## A. Declaration of Independence

The Declaration of Independence was a moment of jubilation. The governance issues raised by the Declaration and the accompanying documents concerned the international standing of the newly created state and its functioning vis-à-vis its citizens.[6] The Declaration strives to give external, international validity to the sovereign state of Israel by citing the Balfour Declaration of 1917; the Mandate of the League of Nations of 1922, which recognized the right of the Jewish people to rebuild its national homeland; the contribution of the Jewish Yishuv during World War II, which earned it the right to be counted among the founders of the United Nations; and, above all, the decision of the General Assembly to establish a Jewish state. In this brief Declaration, the United Nations is cited no fewer than seven times, the most important being: "By virtue of our natural and historic right, and on

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5 The original decision about membership in the institutions states that a place would be reserved for an Arab representative in the People's Council. See discussion in the Mapai Central Committee dated March 6, 1948 in Avizohar and Bareli (1989, 379). The Declaration of Independence included an appeal to the Arab inhabitants of Israel to "participate in the building of the State" based on "due representation in all its provisional and permanent institutions." The Civil Union Party boycotted the elections to the Assembly of Representatives and the Zionist Congress, and was felt to be represented by the General Zionists. There was no desire to give the Irgun or Lehi leaders direct representation in the provisional institutions – the three members of the Revisionist movement were considered their representatives.

6 On the legal validity of the Declaration, see *Kol Ha'Am v. Interior Minister* 1953 as well as *Yardor v. Central Elections Committee to the Sixth Knesset* 1965 (Rubinstein and Medina 2005, vol. I, 39–55).

the strength of the resolution of the United Nations General Assembly, we hereby declare the establishment of a Jewish state in Eretz-Israel, to be known as the State of Israel." Note that "Eretz-Israel" is not a territorial term; the Declaration, like other Provisional Government decisions, refrained from defining the borders of the state of Israel.

With regard to gaining internal legitimacy, several sources are cited in the Declaration – beyond the "natural and historic right" – drawn from the actions that led to independence: Jewish settlement in the country; the contribution of the Zionist movement; Jewish efforts in the Diaspora; and the necessity of resolving the problem of the Jewish people in the wake of the Holocaust. Members of the Council who signed the Declaration felt the need to emphasize that they were representatives of the Yishuv and the Zionist movement. The Declaration asserts the responsibility of the state toward its present and future citizens: first, a commitment to immigration and the ingathering of Jews in the Diaspora, which expands the state's responsibility to Jews who are not citizens; second, development of the country for the benefit of all its inhabitants; third, the foundations of freedom, justice, and peace as envisaged by the prophets of Israel; and, fourth, equality of rights to all its inhabitants irrespective of religion, race, or sex, and freedom of religion, conscience, language, education, and culture. This is the credo of the Declaration, and two issues are absent: "equality" as a value in and of itself, as opposed to "equality of rights" – which is surprising considering the socialist ideology of the key leaders; and the terms "democracy" or "democratic regime," which are not directly cited. In the last chapter of this book, we discuss the question of whether democracy was at the time perceived as self-evident.

With regard to the structure of the government, the Declaration adhered closely to the directives of the UN Partition Plan, calling for provisional transition institutions, elections, a constitution drafted by the Constituent Assembly, and elected authorities in accordance with the constitution.

## B. Early Legislative Acts

The first legislative act of the Provisional State Council, in parallel with the Declaration of Independence, was to issue a Manifesto in what was then called the Official Gazette, conferring upon itself the role of legislative authority, and even bestowing a measure of legislative power upon the Provisional Government for purposes of emergency legislation (Article 1). This act of circular authorization may be understood because of the need for transition arrangements, which were also explicitly cited in the UN decision. Article 3 of the Manifesto is of particular importance, as it states that the law extant in Palestine prior to establishment of the state shall remain in force, subject to any modifications that ensue from laws and amendments enacted after establishment of the state and its authorities. It thus stipulated that not only would the Mandatory courts continue to function in their previous format, but that the legal norms in Palestine (E.I.) would continue in Israel, unless otherwise decided. In other words, Israel perceived itself to be part of the British legal family (together with the crown colonies) with all this implies about its legal culture and underlying values. This continued for many years until independent Israeli legislation had sufficiently accrued and the legal umbilical cord was finally severed by the Foundations of Law Act (1980) (see Chapter 6).