# Law Reform in Early Modern England

## 1500–1740

*Crown, Parliament and the Press*

Barbara J Shapiro

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# 1

# Introduction

The term 'law reform' has been closely associated with the English politics of the period from 1640 to 1660 both in recent times and the period itself.[1] Certainly there was a very high volume of voices for various legal changes which, for their proponents, would have been reforms and for their opponents anything but. The press provided a new channel for these voices. Most strikingly for all the almost constant voices for a catalogue of changes, many of which continued for years on end, few changes in English legal institutions and processes were actually accomplished.

An explanation of this paradox readily comes to mind. If there were loud voices for change, there might have been such voices against change as well. Certainly this explanation seems to be sufficient for some of the sluggishness of change. We will examine opposition as well as change enthusiasms. However, the main thrust of my argument here is that the stasis that is more remarkable than the actual changes was not so much the result of opposition to 'reform' as of the institutional incapacity of Crown and Parliament to enact proposed changes. This incapacity is the major theme of what follows and will, I believe, be fully shown by a detailed examination of 'law reform.'

This book seeks a better understanding of law reform in the early modern era. It views law reform broadly and looks at a variety of efforts to improve English law and legal institutions in the context of changing forms of government and the pressing issues of the day. Unlike earlier studies, it looks at law reform interest and efforts over a long stretch of time, from the beginning of the reign of Henry VIII in 1509 to the mid-eighteenth century. It charts the effort of kings, parliaments and others to improve the law and legal institutions, and explores the body of literature supporting law reform that would emerge with the growth of printed media. It seeks to reassess the place of the well-known law reform efforts of the revolutionary era in the context of earlier and later efforts. Given that legal institutions are part of a governmental structure, it will examine the extent that Crown aims furthered or limited the success of law reform and how law reform efforts were affected by government instability.

[1] See, eg, Donald Veall, *The Popular Movement for Law Reform 1640–1660* (Oxford, Clarendon Press, 1970); Stuart Prall, *The Agitation of Law Reform during the Puritan Revolution* (The Hague, Martinus Nijhoff, 1966); *An Experimental Essay touching the Reformation of the Lawes of England* (London, 1648); Henry Parker, *Reformation in the Courts and Cases Testamentary* (London, 1650).

A key question for anyone studying law reform is what is to be counted as 'reform'. For the most part, historians dealing with the mid-seventeenth century have been inclined to praise as reforms those changes individuals or groups sought to make if they were developments that that modern observers would consider beneficial. I examine what sixteenth-, seventeenth- and eighteenth-century actors wished to change in their laws and their legal institutions, whether we like those changes or not. Therefore, I include efforts at making adultery a capital offence as well those aimed at ending capital punishment for theft. My study also includes proposals raising the property qualification for jurors as reforms. What counts as reform depends on the eye of the beholder. Those eyes not only differ between modern and early modern observers but also among the latter. Proposals praised by their proponents were often considered by others to be ill-informed, injudicious or even dangerous. I use the term 'law reform' to include not only what contemporaries wished to change in the common law and the statutes, but also their efforts to reduce the cost of litigation and improve the courts, the legal profession and the literature of the law.[2] Although political trials for treason and impeachment cannot themselves be considered reforms, comments made during the trials, and in the very considerable public discussion that followed, will be discussed if they include criticism or suggestions for change in the law or legal procedure.

'Change' too is a slippery concept. It can be used to mean a change offered by a conscious agent, such as a king, a Lord Chancellor, a member of parliament or an anonymous pamphleteer. However, a good deal of change that takes place in legal systems cannot be attributed to particular individuals. Some of these changes were noted by contemporaries, while others, less visible, were not. Some are easy to date, others are not. We do not know exactly when witnesses became part of the jury trial. There was no legislation that initiated or approved of their introduction.[3] Trial by battle was abolished only several centuries after it had become obsolete. The crime of witchcraft was abolished by legislation in 1734, but prosecutions had been few and far between for a long time before that. Should we consider the gradual change in prosecution to be a reform or should 1734 be considered the appropriate date? Many legal practices changed over time with no legislation to mark the changes. The decline of jury participation in civil trials, for example, suggests yet another problem. Some consider the reduced role of the jury to be a good thing and thus a 'reform', arguing that jurors were not competent enough to decide complex legal issues. Others opposed the change as an erosion of the jury trial. Responses to 'change' as well as to clearly initiated reform proposals depended on the outlook and interests of the commentator.

Still another kind of change that is difficult to place in the narrative of law reform is dramatic fluctuation in litigation rates and overall utilisation of

[2] See Joanna Innes, '"Reform" in English Public Life: the Fortunes of a Word' in Joanna Innes and Arthur Burns (eds), *Rethinking the Age of Reform: Britain 1780–1850* (Cambridge, Cambridge University Press, 2003) 71–97.

[3] Occasional use of witnesses can be found in fifteenth-century civil cases.

the courts. Did greater use of courts and lawyers increase the likelihood that they would be the subject of complaint and reform? Developments of this type no doubt helped to shape expressions of interest in law reform, though it is difficult to establish a causal connection.

For the most part, I will use 'reform' and particularly 'law reform' to suggest that some person or group criticised some aspect of the legal system and proposed remedies, including those that might or might not be in keeping with what modern observers would consider reform. Generally, I will refer to 'change' or 'changes' when ideas and legal practice changed without obvious advocates or agents. Both 'law reform' and 'change' are slippery terms, but both are part of our established vocabulary. My attention is focused on agents of change, that is, the Crown and its officials, parliament and the authors of publications favouring changes in the law or the legal system, but I also include changes that were less visible to contemporaries.

The opportunity to use the press varied over time due to the growth of printed media on the one hand and the efforts of early modern governments to control what was published on the other. We know a great deal about criticism of the law during periods when press control was least effective and opportunities for publication were greatest. The revolutionary decade witnessed a breakdown in the government's ability to control the press. The short-lived revolutionary governments continued press control measures, with greater and lesser success. Because the revolutionary-era law reform publications are so varied, counting these publications does not get us very far. It is difficult to weigh the significance of a single-page broadside as opposed to a lengthy, frequently reprinted work or a brief mention in a newsbook. It is even more difficult to determine how representative or how influential each voicing might have been. Reformers who used the press were more visible than those who did not. Judges, who initiated reform in their respective courts, for example, were unlikely to be noticed. Legislative proposals that became law were better known than those that failed.

Research on the history of law reform in England has been concentrated on two periods: the revolutionary era 1640–60 and the nineteenth century. Because there has been so little attention to law reform either before or after the revolutionary era, it has been difficult to get a sense of what were thought to be continuing problems and what kind of reform proposals were offered exactly when to alleviate or end them. I suggest that law reform in England was a long-term concern and that such a long-term study is necessary to understand the developments of the mid-seventeenth century. I will attempt to show that there were two law reform movements: one focused on improving existing law and legal institutions that had a lengthy history, and another, more radical one, concentrated in the revolutionary decades, which sought to overthrow existing law and courts and replace them with alternatives based on different visions of law and policy.

Past studies that focus on the seventeenth-century era of civil war and interregnum for the most part concentrate on the burst of law reform publications that emerged between 1640 and 1660. On the whole, this body of work has been

sympathetic to the reforms, viewing them as moving in the right direction. Several suggest that they were 'before their time' and were defeated by greedy lawyers. Some have treated mid-century law reform as the work of 'the people'. Previous studies have been less interested in what reform measures had been aired earlier or continued to be offered in the post-revolutionary decades. The earlier studies by Robert Brown, R Robinson, Goldwin Smith, Mary Cotterell and GB Nourse,[4] as well as later ones by Christopher Hill, Stuart Prall and Donald Veall, Wilfrid Prest, Desmond Brown and the unfortunately unpublished work of CR Niehous were largely in this vein.[5] Most recently there has been more specialised work on Quaker and Leveller contributions.[6] Unsurprisingly, the Restoration and the eighteenth century have largely been ignored.[7]

A second scholarly tradition, that of parliamentary historians engaged in the history of particular parliaments, has also given attention to law reform. For the Henrician period, there are Stanford Lehmberg's volumes on the parliaments of Henry VIII and Geoffrey Elton's extensive work on parliamentary and administrative pursuit of changes during the sixteenth century[8] David Dean's study of Elizabeth's Parliament devoted an entire chapter to law reform. Several of the parliamentary studies of the early Stuart period have also included material on law reform. Among these are TL Moir's study of the 1614 Parliament, and Robert Zaller's study of the Parliament of 1621. Mid-seventeenth-century parliaments have been well served by David Underdown and by Blair Worden, who has an insightful

[4] R Robinson, 'Anticipations under the Commonwealth of Changes in the Law' in JH Wigmore, E Freund and WE Mikell (eds), *Select Essays in Anglo-American Legal History* (Boston, Little Brown, 1907–08) 467 ff; Goldwin Smith, 'The Reform of the Laws of England, 1640–1660' (1941) 10 *University of Toronto Quarterly* 469; GB Nourse, 'Law Reform under the Commonwealth and Protectorate' (1959) 75 *Law Quarterly Review* 512; Robert Brown, 'The Law of England during the Period of the Commonwealth' (1931) 6 *Indiana Law Journal* 359; Mary Cotterell, 'Interregnum Law Reform, The Hale Commission of 1652' (1958) 83 *English Historical Review* 689.

[5] Stuart Prall, 'The Mid-seventeenth Century Movement for Law Reform' (1980) 25 *American Journal of Legal History* 332; Barbara Shapiro, 'Law Reform in Seventeenth Century England' (1975) 19 *American Journal of Legal History* 280; Veall (n 1); Wilfrid Prest, 'Law Reform and Legal Education in Interregnum England' (2002) 75 *Historical Research* 112; Wilfrid Prest, 'William Lambarde, Elizabethan Law Reform, and Early Stuart Politics' (1995) 34 *Journal of British Studies* 464; Robert Zaller, 'The Debate on Capital Punishment during the English Revolution' (1987) 31 *American Journal of Legal History* 126; Desmond Brown, 'Abortive Attempts to Codify English Criminal Law' (1992) 11 *Parliamentary History* 1; CR Niehaus, 'The Issue of Law Reform in the Revolution 1640–60' (PhD dissertation, Harvard University, 1957). Niehaus gives some attention to the pre-1640 period.

[6] R Michael Rogers, 'Quakers and the Law in Revolutionary England' (1987) 22 *Canadian Journal of History* 149; Ann Hughes, 'Gerrard Winstanley, News Culture and Law Reform in the Early 1650s' (2014) 36 *Prose Studies* 63.

[7] But see Barbara Shapiro, 'The Restoration Chapter in English Law Reform' (2016) 10 *Law and Humanities* 31; Wilfrid Prest, 'Law Reform in Eighteenth Century England' in Peter Birks (ed), *Life of the Law* (Proceedings of the 10th British Legal History Conference, Oxford, Oxford University Press, 1991) 113–23.

[8] Stanford Lehmberg, *The Reformation Parliament, 1529–36* (Cambridge, Cambridge University Press, 1970); Stanford Lehmberg, *The Later Parliaments of Henry VIII, 1536–1547* (Cambridge, Cambridge University Press, 1977); GR Elton, 'Tudor Government: The Points of Contact: Parliament' (1974) 24 *Transactions of the Royal Historical Society* 183; GR Elton, 'Parliament in the

chapter on the law reform of the Rump Parliament.[9] There is also the older work on the Barebones Parliament.[10] While these historians explore the law reform interests of the particular parliament or parliaments studied, they typically ignore the law reform measures of the periods that preceded or followed them. The history of law reform therefore requires connecting the dots between various parliaments. One of the emphases of this study will be parliament's continuing involvement with reform legislation.

Lack of attention to Restoration and eighteenth-century law reform can partly be attributed to traditional divisions of scholarly labour. Few historians of the revolutionary era have been interested in the Restoration and beyond. It is almost as if the seventeenth century ended for them in 1660. On the other hand, the concept of a long eighteenth century informs the work of many post-revolutionary historians. If one's research and mindset is shaped by an eighteenth century that begins in 1660 and marks the beginning of a new era, one is unlikely to examine earlier times. Continuities tend to be overlooked or minimised. Because the Restoration and the early eighteenth century are frequently depicted as reactionary, there has been little inclination to look for long-term continuities in the area of law reform. Yet another reason for the neglect of the length and breadth of law reform may be the eighteenth-century legal historian's focus on crime. We know a great deal more about crime than we do about other items of the law reform agenda.

Another reason for slighting pre-revolutionary efforts to improve the legal system is the long and dominant tradition of scholarly concern with constitutional conflicts between Crown and parliament.[11] The exclusion of religious legislation from the topic of law reform should also be rectified because such legislation had an enormous impact on the legal status of a great many people over a long period of time. While historians have given a great deal of attention to the difficulties of Roman Catholics and non-conforming Protestants, laws generated by such difficulties are not typically treated as a significant element of the legal system.

I will argue that there were two law reform movements: one that I label moderate and the other radical. I trace the moderate reform throughout the period under review, focusing on the efforts of Crown and parliament to improve the legal

Sixteenth Century; Frustrations and Fortune' (1979) 22 *Historical Journal* 255; GR Elton, *The Parliaments of Elizabeth 1559–1581* (Cambridge, Cambridge University Press, 1980); GR Elton, 'Reform by Statute' (1970) 50 *Proceedings of the British Academy* 177; GR Elton, 'English Law in the Sixteenth Century Reform in an Age of Change' in *Studies in Tudor and Stuart Politics and Government*, 4 vols (Cambridge, Cambridge University Press, 1983), vol III, 274–88.

[9] David L Dean, *Law-Making and Society in Late Elizabethan England: The Parliaments of Elizabeth 1584–1601* (Cambridge, Cambridge University Press, 996); TL Moir, *The Addled Parliament of 1614* (Oxford, Clarendon Press, 1958); Robert Zaller, *The Parliament of 1621* (Berkeley, University of California Press, 1971); David Underdown, *Pride's Purge: Politics in the English Revolution* (Oxford, Oxford University Press, 1971); Blair Worden, *The Rump Parliament 1648–1653* (Cambridge, Cambridge University Press, 1974).

[10] HA Glass, *The Barebone Parliament and the Religious Movements of the Seventeenth Century* (Oxford, Oxford University Press, 1899).

[11] While revisionists have emphasised harmony more than conflict, they have not been particularly interested in law reform.

system by reducing costs and delay, competing jurisdictions and what was felt to be 'corruption' in the system. I suggest that the moderate movement, which I trace from the sixteenth century until at least the mid-eighteenth century, was promoted first by the Crown and parliament, and then largely by parliament. I also discuss more radical efforts, voiced primarily during the revolutionary decades, to replace rather than reform existing law and legal institutions. The radical movement itself was not unified, being composed of political and religious individuals and groups with differing visions of a just society and good laws. Radical law reform rose and fell with the groups that supported it. It was promoted primarily by those who were not in the social and political elite and were unlikely to be members of parliament.

Organisation of the chapters that follow is chronological. My starting point is somewhat arbitrary since all periods exhibit some degree of dissatisfaction with law and the legal system. I begin with the reign of Henry VIII, which enjoyed a well-established set of legal institutions and then experienced major changes in those institutions. It focuses first on the efforts of Lord Chancellor Wolsey, then on the impact of the Reformation and the creation of new courts. The legal system looked quite different at the end of Henry's reign than it did at the beginning. The chapter also examines the reform measures introduced during the Edwardian and Marian periods. It is followed by a chapter on the lengthy Elizabethan period in which we can see the formation of a moderate reform agenda. It emphasises the role of the queen, her Lord Chancellors and the reform measures introduced in parliament. Chapter 4, which examines law reform under the early Stuarts, focuses on individual parliaments in order to illustrate how more immediate parliamentary issues affected the possibilities for completing law reform legislation. It also discusses the reform views of Sir Francis Bacon and Sir Edward Coke.

The revolutionary period is discussed in two chapters because of the rapid changes in government structure, the introduction of a second reform movement and the proliferation of printed commentary on law reform. Chapter 5 covers the period from the calling of the Long Parliament to the execution of Charles I. Chapter 6 covers law reform from the creation of the Commonwealth to the Restoration in 1660. Both chapters explore the difficulties experienced by revolutionary-era governments that stemmed from the competing claims of Crown and parliament to legal authority and the absence of a stable government that could claim the loyalty of most subjects. They also examine the problems that the ever-changing governments experienced with the judiciary and the legal profession.

The two revolutionary-era chapters are followed by one that examines law reform interest between the restoration of the monarchy in 1660 and the Revolution of 1688. It primarily deals with the efforts of the Cavalier Parliament to continue the tradition of moderate reform, the less well-known publications that supported law reform, the growing role of political parties, and the place of religion in shaping the legal system. Chapter 8 takes the narrative of law reform from the Revolution of 1688 to the mid-eighteenth century, focusing on parliament and several lesser-known reform publications.

The final chapter will attempt to draw conclusions about the two early modern reform agendas, with particular emphasis on the continuity of the moderate reform initiatives. It will also examine some of the unresolved or partially unresolved issues in the study of early modern law reform as well as the problems which are to be found in the study of most legal systems. It speculates on the nature of criticism of the law and law reform more generally in the hope that these speculations and unanswered questions will be of use to scholars concerned with law and law reform in other times and other places.

Each chapter follows roughly the same pattern. Chapters typically begin with an indication of the chief political and religious concerns of Crown and parliament so as to place law reform efforts in that context, drawing particular attention to the insufficiently recognised role of Lord Chancellors and Lord Keepers as spokesmen for reform. Parliamentary interest and activity in law reform are examined, as are parliament's institutional difficulties in completing legislation.

A good deal of each chapter is focused on specific areas of reform sought by parliament. These include reducing the costs and delays in litigation, and eliminating corruption in the legal process. They involved criticism of judges, lawyers and court officials as well as criticism of the common law courts, Chancery, the conciliar courts, the ecclesiastical courts and admiralty and the reform issues associated with the jurisdictional conflicts among them. Some chapters, but not all, consider issues of centralisation and decentralisation of legal administration in the context of law reform, noting the decay of local courts, the demand for new courts and issues relating to appeal. Most chapters also point out parliamentary concern with reforming juries and justices of the peace. Several also investigate the interest in and efforts taken to rationalise the common and statute law.

Although parliament was more focused on court reform than law reform, several types of law are highlighted. Most chapters consider parliamentary concern with religious law, criminal law, and laws relating to credit and debt, bankruptcy and moral behaviour, particularly adultery, sodomy, blasphemy and perjury. Although legislation on religious questions is not usually treated as a law reform topic, it is included because its changing provisions had such a substantial impact, especially on the legal lives of Roman Catholics and Protestant dissenters. For many, religion was probably the most important part of the law reform agenda.

Parliamentary interest in improving the execution of the criminal law is noted, as well as its concern with particular crimes. The disconnect between the harshness of the criminal law and the discretion exercised in its execution is considered in several chapters. Some changes in criminal punishments are linked to moving certain crimes from the ecclesiastical to the secular courts. Some, but not all, discuss interest in improving land law, that is, questions relating to tenure, leases, uses, statutes of limitation, fraudulent conveyances and land registration.

I will also refer to several of the more famous trials. Although trials, particularly political trials (and especially those for treason), do not easily fit under the rubric of reform, some of these elicited comments that sought reform in criminal procedure.

Publications dealing with law reform are given considerable attention in several chapters. Discussion is divided between polemical and professional writing. Polemical writing concentrated on attacks and defences of the common law, the courts and the legal profession, appropriate punishment for various crimes and the best way to reform individual items on the law reform agenda. Publications of legal professionals aimed at the reform of the corpus of legal materials. Although this large body of professional writing has not usually been associated with law reform, a good deal of it was designed to remedy the uncertainty and confusion that contemporaries, both lay and professional, associated with the law. The publications of Sir Francis Bacon, Sir Edward Coke and Sir Matthew Hale are discussed at some length.

However, several kinds of law will not be examined. Since judge-made law has such an important place in English legal history, my lack of attention to it requires some explanation. I have given it a reduced role in this study because defenders of the common law, both judges and lawyers, were committed to the ideology that judges merely informed their courts as to what the law was. They were to be interpreters not makers of law. While the view that the common law was unchanging was not accepted by the entire legal profession, it was nevertheless an important element in common legal thinking. Judges rarely admitted that they were agents of legal change, even though it was obvious to many that their decisions had changed the substance of the law. The myth of the unchanging common law thus underlined judicial reluctance to frame their decisions as reform. Judges then and now are reluctant to admit their law-making. Despite their widely held view that legislation often caused more damage than the abuses it was designed to correct, legal professionals openly participated in drafting and supporting change in the statutes.

This study also slights the constitutional conflicts traditionally at the centre of constitutional history. While tension and conflict between Crown and parliament certainly existed, and there were varying views of the appropriate sources of law and the role of Crown and parliament in law-making, such differences were largely, if not completely, absent in the debates over law reform. This study therefore includes little discussion of such familiar topics as purveyance and monopolies.

Before beginning my chronological march through English history from 1509 to 1740, I will provide a very brief sketch of major institutions in the legal system in existence at the beginning of the sixteenth century. It characterises the major courts that made up the legal system, beginning with the common law courts. While the common law was the dominant and most revered kind of law, it was not the only form of law. Its origins are to be found in feudal law and it dealt primarily with land tenure, inheritance and related topics. Initially its primary litigants were feudal lords, but other substantial landholders were soon added. Copyhold tenure and other lesser tenures were not initially litigated in the common law courts. The common law did not deal with all areas of law and for the most part did not move quickly into new areas of law. Because the common law was not a written law, it was open to charges of uncertainty and confusion. The language of the common law courts was Latin and Law French, a residue of the law's Anglo-French origins. Cases at common law were tried by local juries.

There were three common law courts: the Court of Common Pleas, King's Bench and the Exchequer. Although originally they were respectively to handle disputes between subjects, cases involving the monarch and royal revenue, the divisions were not rigidly adhered to and the business of the common law courts shifted from time to time. Legal culture was predominantly an oral culture absorbed by observation, osmosis and attendance at the Inns of Court, though manuscript yearbooks and writers such as Littleton also had a role in legal learning. Though the common law courts were considered the centrepiece of the English legal system, they were slow to respond to economic and other changes. Other institutions developed to fill these needs.

Chancery, a court of 'equity' rather than a court of 'law' also had a lengthy history. It, like the common law, developed from the king's duty to provide justice. The Lord Chancellor, as head of Chancery, was the keeper of the king's conscience and adjudicated matters not covered by the common law. Since these grew in number, the business of Chancery increased over time. Its legal procedure differed from that of the common law courts, relying on written depositions. Decisions were made by legally trained professionals rather than juries.

There were also ecclesiastical courts which, unlike the common law courts and Chancery, were not derived from the monarch. They operated at several levels arranged in hierarchical fashion, with final appeals to Rome. The law of these courts, which governed the behaviour of both clerics and laymen, was canon or church law. They adjudicated a wide variety of cases including disputes over tithes, wills and testaments, marriage and the many fees laymen owed the church. Regulating moral behaviour was also part of their jurisdiction. They dealt with cases involving adultery, sodomy, heresy and blasphemy, as well as defamation and perjury. The church courts administered punishments of several kinds, including fines and shaming rituals, but not capital punishment. The Court of High Commission, although not under the jurisdiction of the church, became an important court.

Composed of the king's most important advisors, the Privy Council performed judicial as well as administrative functions. It might take on issues that were unavailable in the common law courts as well as some that might have been litigated elsewhere. Over time, these functions became institutionalised in the Court of Star Chamber, the Court of Requests, the Council of the North, the Council of Wales and the Marches, and the Council of the West.

Local courts and local justice are less easy to characterise, since they consisted of a mélange of older hundred and county courts in various states of decay. Courts leet and baron were courts attached to particular manors. Justices of the peace appointed by the Crown performed both administrative and judicial functions. They were responsible for petty sessions in which they dealt with minor matters. At quarter sessions, several justices held jury trials for somewhat more serious offences. Some boroughs also had been given the right to hold courts.

The legal profession had several branches. There were the common lawyers, whose most-esteemed members were the sergeants at law who pleaded in the common law courts and from whose ranks judges were chosen. The distinctions

between lawyers (today we would call them barristers) and attorneys and solicitors who served clients in their legal affairs but did not plead in court was not very clear; both were sometimes included under the rubric 'lawyers'. There were also lawyers trained in the civil and canon law who practised in the ecclesiastical courts, Chancery and Admiralty courts, none of which employed juries. Justices of the peace, that is, the local magistrates, were not legal professionals, although they exercised many judicial functions in their petty and quarter sessions.

Although one might draw a fairly simple diagram of these courts, it would be deceptive. The Crown's duty to provide justice meant that it was in some (although vague) sense the source of law. The courts had their origin in the Crown. But courts, and especially the common law courts, developed law and practices that the legal profession saw as separate from the Crown. The Crown had created these courts, which in turn created the common law, a law that claimed jurisdiction over the entire country. Over time, litigants came to prefer decisions of the common law judges over local justice because they were removed from the control of powerful local figures. The appointment and dismissal of the judges who sat in Westminster was in the hands of the Crown. When on the assize circuit, trying both civil and criminal cases before local juries, judges were agents of the Crown and the common law, bringing the common law to the counties of England.

Statute-making, the creation of new law or changes in the law, was the business of Crown and parliament. The Crown was a necessary component of statute-making and was often the source of legislative proposals. Parliament was not a regular part of government, coming into being intermittently at the will of the monarch. It was most often called when the monarch required financial support, normal revenues being insufficient to support war or other expensive endeavours.

Parliament, which was necessary for the approval of taxes, was also necessary for legislation. Monarchs might issue proclamations from time to time, but these did not have the status of law. Parliament was composed of two bodies, both entirely male: the House of Commons and the House of Lords. The elected House of Commons was largely composed of landed gentry and typically included a substantial contingent of lawyers. For part of the period, there was a considerable presence of privy councillors. The House of Lords was composed of hereditary noblemen, those ennobled by the Crown, bishops and heads of religious houses. Legislation required approval of both houses and the assent of the monarch. Parliament, like so many other English governmental institutions, performed judicial as well as legislative functions. It often decided individual cases by private legislation. Members of the upper house were tried by their peers in the House of Lords rather than in the regular courts.

The commonly invoked modern distinctions of executive, legislative and judicial branches do not serve us well in describing the early modern English governmental structure. Many, if not most, legal institutions combined judicial and administrative duties. What the appropriate roles were for the Crown, parliament and the courts was never very clear. Nor was the jurisdiction of particular courts. Jurisdictional boundaries were a frequent law reform topic.