Title: Legal Custom & Lex Castrensis?: Using Law and Literature to Navigate the North-Sea Neighbourhood in the Late Viking Age

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Legal Custom & *Lex Castrensis*?:

Using Law and Literature to Navigate the North-Sea Neighbourhood in the Late Viking Age

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Abstract:

In his *Lex Castrensis*, the thirteenth-century Danish writer Sven Aggesen tells the story of the creation of a law that he attributes to Knútr inn ríki (Cnut the Great) as a means of governing his substantial military following of retainers, known as the *hirð*. As unlikely as it is for Sven to claim that he preserves the law exactly as it was in Knútr's own time, the text's focus on process and punishment raises an intriguing question: in the late Viking Age's intense contact, interaction, and accommodation between Scandinavia and the British Isles, can evidence be seen for shifting punitive attitudes and legal exchange? This paper will offer a first step in considering the possibility for the exchange of legal ideas in this context and present a newly refined picture of England and its Scandinavian neighbours – one which points to sophisticated legal interchange happening much earlier than usually thought.

Introduction

In the introduction to his translation of Sven Aggesen's *Lex Castrensis* (hereafter *LC*), Eric Christiansen comments bluntly that the text is 'a strange production'.[1] It is a fair judgement. Sven claims the work is a short, contemporary Latin translation of a set of Danish legal provisions dating back to the time of Knútr inn ríki (Cnut the Great), promulgated for the purpose of keeping his military following in check and, despite its rediscovery, which still carried some form of legal force in Sven's own day.

However, *LC* is not a law text in the traditional sense. Precious little attention is paid in Sven's work to the provisions themselves and far more detail is given to the story of the events surrounding these provisions. *LC* states that the law at the heart of its discourse was a means by which Knútr, as king of England and its neighbours, Denmark and Norway, would be able to keep order in his substantial and diverse *hirð*. Due in part to this lack of attention to the legal provisions themselves, Christiansen argues that the text is a legal *tractus*, seeing it as something of a thinking exercise focussed on the stipulated origin of this set of rules, their subsequent modifications, the logistics of trial and punishment, and the ethics of these provisions, all set in a narrative frame.[2] However, in the context of the present volume, *LC* itself provides room for a new thinking exercise, namely: in the intense contact, interaction, and accommodation of the late Viking Age – something *LC* clearly recalls with some accuracy – can evidence be seen for shifting punitive attitudes and legal exchange between England and its Scandinavian neighbours? This paper will use Sven's text as a point of

[1] Christiansen, Eric, ed. and trans. *The Works of Sven Aggesen: Twelfth-Century Danish Historian*. Birmingham: Viking Society for Northern Research, 1992, 12.
[2] Christiansen, *Sven Aggesen*, 13.

departure from which to consider how legal ideological exchange might have been possible in Knútr's reign.

Lex Castrensis and Establishing Knútr's International Legal Legacy

> Although it is in the king's power to issue or change laws, we do not issue this law as a new one; rather, as a law established from ancient times, which has been obscured by the clouds of ignorance, and which we are recalling to the memory of man, darkened over by the passage of many years, which is the mother of oblivion.[3]

This short extract from the conclusion of Knútr VI's decree on homicide for Scania is highlighted by Christiansen as essential for considering the legal-historical context in which he situates *LC*. According to Christiansen, up until this decree in 1200 CE, 'kings had played little part in this business' of law-making, suggesting that they might attend assemblies, be entitled to fines and compensation, and be expected to swear 'to uphold "the good laws of King Harald" (i.e. Harald Whetstone, d. 1080)'.[4] However, one might reasonably ask how kings could have little part in the business of law-making before 1200 if Haraldr himself is remembered as making good law more than a century earlier,[5] especially given his short, four-year reign? While much has been made in recent years about early law in Scandinavia,[6] even these studies focus on the systems as recorded by the earliest provincial laws – systems based, as Christensen puts it, 'on collective responsibility and private prosecution, not on royal attempts at peace-keeping'.[7]

While there can be little doubt that the collective and customary nature of Scandinavian law remained a central component of even later medieval laws, Scandinavian and Icelandic historical sources point to the late Viking Age as a period in which kings were

[3] Christiansen, *Sven Aggesen*, 7. For a deeper consideration of legal terminology and articulation in these earliest surviving laws of Denmark, see Tamm, Ditlev and Helle Vogt. "Creating a Danish Legal Language: Legal Terminology in the Medieval Law of Scania." *Historical Research* 86, no. 233 (2013) 505-14.
[4] Christiansen, *Sven Aggesen*, 7.
[5] Harald Hen's legal promulgations are recorded, for example, Saxo Grammaticus's *Gesta Danorum*: Friis-Jensen, Karsten, ed. Saxo Grammaticus, *Gesta Danorum*: *The History of the Danes*, Vol. 2. Translated by Peter Fisher. Oxford: Clarendon Press, 2015, 826-29. Saxo goes even further to suggest that semi-legendary kings like Ragnarr loðbrók were also remembered as legal innovators, Friis-Jensen, *Gesta Danorum*, 640-41; and *Heimskringla* clearly points to Hákon Aðalsteinsfóstri inn góði as being remembered in association with good law-making, see Finlay, Alison, ed. *Heimskringla*, Vol. 1. Exeter: Viking Society for Northern Research, 2016, 96.
[6] Representative examples include Brink, Stefan. "Law and Legal Customs in Viking Age Scandinavia." In *The Scandinavians from the Vendel Period to the Tenth Century: An Ethnographic Perspective*, edited by Judith Jesch. Woodbridge: The Boydell Press, 2002, 87-117; Brink, Stefan. "The Creation of a Scandinavian Provincial Law." *Historical Research* 86, issue 233 (2013): 432-442; Riisøy, Anne Irene. "Eddic Poetry: A Gateway to Late Iron Age Ladies of Law." *Journal of the North Atlantic* Special Volume 8, *Debating the Thing in the North II: The Assembly Project* (2016) 157-171; Riisøy, Anne Irene. "Performing Oaths in Eddic Poetry: Viking Age Fact or Medieval Fiction?." *Journal of the North Atlantic* Special Volume 8, *Debating the Thing in the North II: The Assembly Project* (2016) 141–156; Ruiter, Keith and Steven P. Ashby. "Different Strokes: Judicial Violence in Viking-Age England and Scandinavia." *Viking and medieval Scandinavia* 14 (2018) 153-184; Sanmark, Alexandra. *Viking Law and Order*. Edinburgh: University of Edinburgh Press.
[7] Christiansen, *Sven Aggesen*, 7.

taking more and more of an active role in overseeing law-making.[8] Regardless of whether these laws are inherently related to the legislation recorded in the medieval provincial laws,[9] or even whether these had a certain royal character to them, is very much beyond the point: in the cultural memories of Scandinavians and Icelanders, kings indeed had a part to play in late Viking Age law-making, something that *LC* itself attests to.[10] If law in general, and customary law in particular, should be thought of as an extension of the 'the stories we tell ourselves',[11] it behoves us to stop and listen to the stories that medieval Danes were telling themselves.

Indeed, if we look to England, Knútr demonstrates himself to be a keen legislator, promulgating two codes with a range of innovations over those of Æthelred II and issuing a number of further legally interested documents.[12] While it is entirely possible that Knútr's legislative attitude may have been different in England from his approach in Denmark, the English evidence would suggest that we not be quite so hasty to count out Knútr as legally disinterested outside of England. After all, if he was disinterested in overseeing the governance of his other territories, it seems curious to instill his first wife, Ælfgifu of Northampton as his royal representative in Norway. In this light, it seems that Christiansen's suggestion that 'no other Nordic source of the twelfth or thirteenth century gives any hint that "old" Knut was remembered as a legislator' might be throwing the legal baby out with the source-critical bathwater, especially when he argues that it was likely bishop Absalon who attached Knútr's name to a new code in order to 'justify whatever innovations it contained'.[13] In fact, such a justification would itself have to rely on Knútr being remembered for his association with good law in Absalon and Sven's own time. So while Knútr's association with law-making might not be well-attested in other surviving twelfth and thirteenth century sources, Sven's *LC* and Saxo's *Gesta Danorum* themselves hint at precisely such an association being current.

It should also be pointed out that Christiansen is not entirely correct in suggesting that the record provided by Old Norse sources is without hints of Knútr as a legislator. Bolton has highlighted the likely existence of a whole range of legal innovations instituted by Knútr in

[8] Consider the case put forward by Saxo in Book x.16.2 for direct royal law-making on the part of Óláfr, Friis-Jensen, *Gesta Danorum*, 738-39, or *Heimskringla*'s account of Hákon, discussed above.
[9] Tamm, Ditlev. "How Nordic are the Old Nordic Laws?." in *How Nordic are the Nordic Medieval Laws? Proceedings from the first Carlsberg Conference on Medieval Legal History Second Edition 2011*, edited by Per Andersen, Ditlev Tamm, and Helle Vogt. Copenhagen: DJØF Publishing, 2011, 5-21.
[10] We can pause here to reflect on the situation in England in the late Viking Age for comparison. Levi Roach has convincingly synthesised a wide body of evidence to demonstrate that English legislation of the late Viking Age was also only partly under direct royal control and was most likely pragmatically negotiated by kings, their officials, and local assemblies in alignment with contemporary normative expectations. See Roach, Levi. "Law Codes and Legal Norse in Later Anglo-Saxon England." *Historical Research* 86, no. 233 (2013): 465-486. In light of these findings, it is not unreasonable to suggest that a similar model may have existed in Scandinavia at the same time, despite the source critical issues with surviving evidence. After all, such a model would explain the cultural memory of kings being involved in law-making while the earliest provincial laws maintain a distinctly collective character to them.
[11] Elkins, James R. "The Stories We Tell Ourselves in Law." *Journal of Legal Education* 40, no. 1 (1990): 47-66.
[12] For a detailed examination of the character of Knútr's laws, see Wormald, Patrick. *The making of English Law: King Alfred to the Twelfth* Century, Vol. 1. Oxford: Blackwell, 1999, 345-66. For a more recent consideration of Knútr's laws in an English legal and ideological context, see Lambert, Tom. *Law and Order in Anglo-Saxon England.* Oxford: Oxford University Press, 2017, especially 202-37 and 238-93.
[13] Christiansen, *Sven Aggesen*, 10-11.

Norway and overseen by Ælfgifu and their son, Sveinn.[14] Evidence of these legal changes is attested in *Ágrip*, *The Legendary Saga of St. Olaf*, and *Heimskringla*, all twelfth- and thirteenth-century sources.[15] Furthermore, Bolton has pointed out that, while the legal amendments included in the laws of the Gulaþing and Frostaþing do not explicitly mention Knútr, Ælfgifu, or their son, they do record the emendation of problematic laws that the saga evidence suggests were associated with Knútr's law-making.[16] The narratives of these Norwegian and Icelandic sources appear to unanimously agree that Knútr's law-making in Norway was harsh, punitive, and ultimately responsible for driving the Norwegian people to depose Sveinn in 1034. The details of these matters can be debated further,[17] but for our purposes here the association between Knútr and law-making is certainly present.

Encouragingly for the course of research here, this association between Knútr and law-making appears to have been used elsewhere in the twelfth century in a similar way, notably in the *Liber Landauensis*. In this twelfth-century compilation, Knútr's association with law and governance are used to lend legitimacy to a charter affirming the holdings of Llandaff, appearing along with the names of other administrative movers and shakers like King Rhydderch ap Iestyn of Morgannwg and Archbishop Æthelnoth of Canterbury.[18] Bolton ultimately argues that, despite the chronological accuracy of the document, the too-convenient way which the charter sits with twelfth-century Welsh politics makes the document a likely forgery; however, just like Christiansen's suggestion above with Absalon, it points again to a clear memory of Knútr as being associated with law and governance, an association that was so ubiquitous that it could be tactically deployed to lend force to legal novelties in both Wales and Denmark in the twelfth century. The fact that Christiansen himself points to the same attitude being demonstrated in the twelfth-century English sources *Constitutiones de Foresta* and *Consiliatio Cnuti* solidifies the fact that these associations were current in both Britain and neighbouring Scandinavia. Furthermore, the consistency of this association certainly suggests that it is not simple fabrication on Absalon's part. Knútr was, in all likelihood, a keen legislator and legal innovator.

Considered from this perspective, for this paper the veracity of the legal provisions within *LC* themselves are second to the association between Knútr, law-making, and his diverse following as king of England, Denmark, and Norway – all of which are corroborated by both Scandinavian and English sources, including those of the twelfth and thirteenth centuries. This opens an interesting new possibility for exploration: is it possible to see Knútr's reign as a unique moment where law and legal thinking were being exchanged

[14] For a full analysis of this evidence and its impact on the historical account of Knútr's reign, see Bolton, Timothy. *The Empire of Cnut the Great: Conquest and the Consolidation of Power in Northern Europe in the Early Eleventh Century*. Leiden: Brill, 2009, 275-88.
[15] For *Ágrip*, see chs. 28-9 in Driscoll, Michael J. ed. *Ágrip af Nóregskonungasǫgum: A Twelfth-Century Synoptic History of the Kings of Norway*. Exeter: Viking Society for Northern Research, 2008, 40-42; for the Legendary Saga, see ch. 71 in Heinrichs, Anne. *Olafs Saga hins Helga: die "Legendarische Saga" über Olaf den Heiligen* (Hs. Delagard. Saml. N. 8II). Heidelberg: Winter, 1982, 172-4; for *Heimskringla*, see *Óláfs saga Helga*, ch. 239 Bjarni Aðalbjarnarson. *Snorri Sturluson Heimskringla*, Vol. 2, Íslenzk Fornrit 27. Reykjavík: Hið Íslenzka fornleifafélag, 399-401.
[16] Bolton, *Empire of Cnut*, 278.
[17] See Bolton, *Empire of Cnut*, 278-88 for a fuller discussion of what he sees as the key issues and events leading up to the deposing of Sveinn.
[18] Evans, J. Gwenogvryn. and John Rhys, eds. *The Text of the Book of Llan Daw, Reproduced from the Gwysaney Manuscript*. Oxford: Oxford University Press,1893, 254.

between England and its Scandinavian neighbours like so many other ideas and commodities of the late Viking Age?

Knútr's Approach to Viking Age Problems

> Now he had brought together men of such divergent national customs into the one household, his task was this: how, within the army of so great a king, gathered as it were, from various peoples (that is, from all the kingdoms which had been subjected to his authority) and with a variety of usages that jarred against each other, the warriors were to put their quarrels and differences to rest, forbear mutual wrangling, and serve together with equal devotion, as befits honest messmates with the same lord… However, it was no easy matter to pacify a crowd of so many quarrelsome men unless he checked them by punishment from falling into misconduct, so that the correction itself should be severe enough to restrain their bold delinquency.[19]

It has been pointed out that Knútr's English reign was not unique in its requirement to bring diverse peoples under the rule of one law.[20] Patrick Wormald has convincingly shown that English kings since Edgar had been struggling with more or less serious attempts to accommodate the customs of and rectify the legal differences between the English and Scandinavian peoples under their power.[21] This should be seen however as an attempt to bring a heterogeneous population under *English* legislation. The passage from *LC* above does suggest that Knútr's successes may have exacerbated these problems beyond those experienced by his predecessors. *LC*'s narrative claims that Knútr had 'annexed England, Norway, Slavia, and Finland to his own kingdom' and, as such, had attracted such a diverse following to himself that he needed to seek legal innovations to ensure stability.[22]

This does genuinely seem to have been an issue in certain corners of Viking Age Scandinavia. Sven Kalmring, for example has pointed out that the rapidly urbanising spaces of Scandinavian proto-towns and proto-urban areas may best be understood as Special Economic Zones (SEZs), where extensive foreign investments and presences necessitate a somewhat non-local approach to governance.[23] I have argued elsewhere that to have the clearest legal messaging to their heterogeneous populations, these Viking Age SEZs would likely have required the use of clear, visible, and unambiguous punishments in order to discourage transgressive behaviour that would upset the peace of the SEZ.[24] Based on comparative findings in England and early medieval Poland, an increase in visible corporal and capital punishments would be one way that this could be achieved.[25] Intriguingly, Sven's

[19] Christiansen, *Sven Aggesen*, 33-34.
[20] Ruiter & Ashby, *Different Strokes*, 174; Wormald, *English Law*, 349-52
[21] Wormald, *English Law*, 131-33, 355
[22] Christiansen, *Sven Aggesen*, 32.
[23] Kalmring, Sven. "Early Northern Towns as Special Economic Zones." In *New Aspects on Viking-Age Urbanism c. AD 750-1100*, ed. by Lena Holmquist, Sven Kalmring, and Charlotte Hedenstierna-Jonson. Stockholm: Archaeological Research Laboratory Stockholm University, 2016, 11-22, at 16-17.
[24] Ruiter, Keith "*Mannjafnaðr*: A Study of Normativity, Transgression, and Social Pragmatism in Medieval Scandinavia." PhD thesis, University of Aberdeen, Scotland, 2018, 294-95.
[25] For a discussion of English material, see Reynolds, Andrew. *Anglo-Saxon Deviant Burial Customs*. Oxford: Oxford University Press, 2009; for the West-Slavic material, see Gardeła, Leszek. *Bad Death in the Early Middle Ages: Atypical Burials from Poland in a Comparative Perspective* (Collectio Archaeologica

LC makes precisely the same argument of Knútr's court and, notably, his English court in particular.

After all, it is 'when the army was all assembled in England' that Sven claims the new laws were promulgated. This is important contextual information that does smack of historical truth. While we know that the courts of English kings before Knútr were indeed diverse places that had active interests in the peoples, politics, and laws of elsewhere,[26] the breadth of Knútr's influence would have notably increased the existing heterogeneity of the English court. This may have necessitated precisely the approach that *LC* suggests: a reliance on severe and visible punishment to discourage transgressions.

The sticking point is that the judicial system in place in England was already markedly centred on judicial violence as a means to discourage transgression. Analysis of textual and archaeological evidence has pointed to a highly regimented system of visible, violent punishments being used and refined throughout the laws of early medieval English kings.[27] By comparison, the legal systems of Scandinavia remained much more reliant on compensatory payments and outlawry well into the high medieval period,[28] a system which seems to have provided room for legal negotiation and more restorative-justice approaches. In fact, compared to his predecessor, Æthelred II, Knútr's own English laws have far more of the decentralised features that Christiansen suggests are characteristic of early Scandinavian law.[29] Knútr's proclamation of 1020 for example demonstrates his interest in a decentralised approach to governance and punishment:

> 7 eac ic beode eallum minum gerefum, be minum freondscype 7 be eallum þam þe hi agon 7 be heora agenum life, þæt hy æghwær min folc rihtlice healdan 7 rihte domas deman be ðære scira biscopa gewitnese, 7 swylce mildheortnesse þæron don swylce þære scire bioscope riht þince 7 se man acumen mæge.[30]

This sentiment is even redoubled in his 1027 proclamation where he highlights the breadth of his influence by styling himself as the king of England, Denmark, Norway, and part of Sweden:

> Praecipio etiam omnibus vicecomitibus et praepositis universi regni mei, sicut meam amicitiam aut suam salute habere volunt, ut nulli homini, nec diviti nec

Ressoviensis Tomus 36). Rzeszów: Instytut Archeologii UR, 2017; for more on judicially violent punishment in the Viking Age, see Ruiter & Ashby, *Different Strokes*.

[26] Evidence of this can be seen in Alfred's inclusion of Ohthere's account in his translation of the Old English Orosius - see Bately, Janet, ed. *The Old English Orosius*. Oxford: Oxford University Press, 1980. – the movement of lay and religious officials from the courts of England to neighbouring courts and ecclesiastical positions, and even documents like the *Dunsæte Ordinance* providing the possibility of international and polyjuridical legal solutions – see Molyneaux, George. "The Ordinance Concerning the Dunsæte and the Anglo-Welsh Frontier in the Late Tenth and Eleventh Centuries." *Anglo-Saxon England* 40 (2011): 249–72. For a short and helpful synthesis of the English '*imperium*' before Knútr, see Bolton, *Empire of Cnut*, 107-09.

[27] Ruiter & Ashby, *Different Strokes*, 170.

[28] On these matters in Sweden, see Ekholst, Christine. *A Punishment for Each Criminal: Gender and Crime in Swedish Medieval Law* (The Northern World 67). Leiden: Brill, 2014; for the situation in Norway, see Riisøy, Anne Irene. *Sexuality, Law and Legal Practice and the Reformation in Norway* (The Northern World 44). Leiden: Brill, 2009.

[29] Christiansen, *Sven Aggesen*, 7.

[30] 'And likewise I enjoin upon all my reeves, under pain of forfeiting my friendship and all that they possess and their own lives, to govern my people justly everywhere, and to pronounce just judgments with the cognisance of the bishops of the dioceses, and to inflict such mitigated penalties as the bishop may approve and the man himself may be able to bear.' in Robertson, Agnes J., ed. *The Laws of the Kings of England from Edmund to Henry I*. Cambridge: Cambridge University Press, 1925, 142-43.

> pauperi, vim iniustam inferant, sed omnibus, tam nobilibus quam ignobilibus, et divitibus et pauperibus sit fas iusta lege potiundi, a qua nec propter favorem regium aut alicuitus potentis personam nec propter mihi congregandam pecuniam ullo modo devietur, quia nulla mihi necessitas est ut iniqua exactione mihi pecunia congregetur.[31]

Of course, these features are not inherently more Scandinavian or English. Kings before Knútr had similar articulations in their own laws, but the fact that these provisions are prominently foregrounded in both of Knútr's proclamations is suggestive of the fact that he may have been engaged in a wider attempt to integrate English and Scandinavian legal attitudes in his legislation. Knútr's second English law, for example, works hard to distinguish and legitimise the differences in the practices of wergild forfeitures in areas of the Danelaw as compared to other areas in his realm.[32] While allusions to different practices are included in the laws of Æthelred,[33] this overt attention to and express inclusion of English and the diasporic Scandinavian community's legal practices under one king's legislation is a novelty in Knútr's laws. His legal approach too is dramatically different from his predecessor. Æthelred seemingly attempted to disguise or gloss over the polyjuridical nature of these provisions by attempting to present a sort of equivalency between matters like wergild, *healsfang*, and *lahslit* under his legislation. By comparison, the approach in *II Cnut* is to distinguish these matters in geographical and cultural terms, highlighting and legitimising their polyjuridical authority under his law.[34]

This is an important revelation. Knútr's legislative approach in England largely appears to focus on respecting and supporting the differences in legal custom as traditionally practiced throughout his realm – be those English or Scandinavian – especially when it came to dispute settlement. But what about matters of national importance? This is where Knútr tips his hand as a keen and flexible legal innovator. Bolton has highlighted the subtle legal and political manoeuvres Knútr deployed in entrenching his own power in England and bringing the English church under his authority, making distinct power plays and using different strategies in different regions.[35] Jonsson has helpfully enumerated Knútr's similarly regional approach to coinage and minting in England, Denmark, and Norway, the first two seeing some clear, but independent, innovations during Knútr's reign.[36] Even regarding urbanisation, arguments have been made that Knútr employed distinct and discrete policies in

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[31] 'I enjoin likewise upon all the sheriffs and reeves throughout my kingdom that, as they desire to retain my friendship and their own security, they employ no unjust force towards any man, either rich or poor, but that all, both nobles and commoners, rich and poor, shall have the right of just possession, which shall not be infringed upon in any way, either for the sake of obtaining the favour of the king or of gratifying any powerful person or of collecting money for me; for I have no need that money should be collected for me by any unjust exactions.' in Robertson, *The Laws*, 150-51.

[32] Lambert, *Law and Order*, 94. Chapters 12-15 of *II Cnut* in particular (Robertson, *The Laws*, 180-83) detail some of the differences in legal practice between Wessex, Mercia, and the Danelaw.

[33] Note especially *V Æthelred* chapter 31 (Robertson, *The Laws*, 88-89), and *IV Æthelred* chapter 37 and 51 (Robertson, *The Laws*, 102-03 & 104-07).

[34] *II Cnut* is described by Mary Richards as 'a patchwork of secular and ecclesiastical legislation that borrows less from the archishop's own writings and more from an interesting range of earlier legal materials including the Kentish laws. It also contains "new" legislation perhaps emanating from the kings's advisors and, at least indirectly, from the Danelaw.' Richards, Mary P. "I-II Cnut: Wulfstan's *summa*." in *English Law Before Magna Carta: Felix Liebermann and Die Gesetze der Angelsachsen*, edited by Stefan Jurasinski, Lisi Oliver, and Andrew Rabin. Leiden: Brill, 2010, 137-56, at 138. Of course, central to these matters would likely be the innovations and syntheses of Knútr himself.

[35] Bolton, *Empire of Cnut*, 77-106.

[36] Jonsson, Kenneth. "The Coinage of Cnut." In *The Reign of Cnut*, edited by Alexander R. Rumble. London: Leicester University Press, 1994, 193-230.

Denmark compared to England, possibly importing English innovations into Danish urban development.[37] However, *LC* poses an interesting problem by highlighting one key area that Knútr would be unable to take a regional approach to law, the *hirð*.

Lex Castrensis: A Fictionalised Solution to a Factual Viking Age Problem?

Here is where close attention should be paid to the story – rather than the history – of *LC*. The scholarship of indigenous law highlights the importance of considering narratives and stories as expressions and articulations of customary law,[38] and there is much in this approach that can inform the study of early medieval law. Focussing on Sven's story in *LC* presents us with a number of key details that require unpacking.

First, the setting of Sven's narrative should be reflected on: 'the king was resting amid his warlike enterprises in the calm of peace'.[39] This places the legislative events to come in an ideal setting. Knútr is not making rash reactive decisions, but rather is a successful king without the distractions of war or uprisings. However, it would seem that this idle time is when his military following is most in need of governing. We are told that these events unfold in England, 'when the army was all assembled'; however, Knútr clearly has a problem before him that requires specialist guidance and counsel as he purportedly calls for a certain 'Øpi the Wise of Sjælland and his son, Eskil'.[40] So despite being in England with his diverse following and presumably his English legislative advisers, Sven importantly includes Danish legal specialists in these matters as well.

The problem to be solved is similarly international: how to govern the *hirð*. As mentioned above, if we accept Sven's story for its internal logic, this is not a problem that could be solved with a regional approach. Knútr's following would, true to form, follow him as he moved throughout his realm and, being full of heterogeneous people jockeying for position, he would indeed require a way to disuade members of his *hirð* from transgressing legal and social norms.

Sven presents the solution to this problem as a series of newly ratified provisions that are primarily based on punishing transgressors by displacing them in a highly stratified seating arrangement and thus a lasting and visible mark of dishonour. There are distinctions between greater and lesser transgressions, but the kernel of the system revolves around the proximity of Knútr's retainers to his person. Fittingly, in special cases the king would also be able to pardon the wrongdoer.

Knútr's Punitive Attitude & a Case for Legal Exchange in the Late Viking Age

Consulting Knútr's second English law, the facticity of these matters is up for some debate. On the one hand, it seems that fighting in the *hirð* may have been very harshly punished:

> Be ðam þe on cynincges hirde feohteð.

[37] Hill, David. "An Urban Policy for Cnut?" In *The Reign of Cnut*, edited by Alexander R. Rumble. London: Leicester University Press, 1994, 101-05.
[38] For a particularly vivid example, see Borrows, John. *Drawing out Law: A Spirit's Guide*, Toronto: University of Toronto Press.
[39] Christiansen, *Sven Aggesen*, 34.
[40] Christiansen, *Sven Aggesen*, 34.

> Gyf hwa on kynincges hirede gefeohte, ðolie ðæs liues, buton him se kynincg geárian wylle.[41]

Yet, on the other, there seems to have been room for minor violent transgressions of the king's peace to be pragmatically punished according to severity:

> Griðbryce.
>
> Gyf hwa on fyrde griðbryce fulwyrce, ðolie liues oððon weregyldes.
>
> §1. Gyf he samwyrce, bete be ðam ðe seo dæd sy.[42]

While it remains unlikely that this was done by way of seating arrangements, the bones of Sven's narrative remain strong enough to bear the weight of conceivability. It seems that governing the *hirð* was indeed likely accomplished by way of punishments that were 'severe enough to restrain their bold delinquency',[43] but also that the king had pragmatic ways of interpreting the law, as well as mitigating or nullifying these punishments. These details are important as, given the fact that the Scandinavian provincial laws prefer outlawry to judicial violence,[44] it would make sense that such legal details would leave a mark on the cultural memory of Danes associating Knútr with uncharacteristically punitive legal provisions, and it is to these that we should now turn.

From here, Sven's plot thickens. It turns out that Knútr himself is the first to break this new law and in spectacular fashion. While still in England and still in peacetime, Sven's Knútr kills one of his own retainers and the whole *hirð* flies into an uproar; first for justice, and then, once they realise the identity of the perpetrator, for a solution to a vexing issue:

> For their opinions were divided, and their verdict was doubtful and uncertain: whether to punish the king with death on account of the novelty of the crime, or was he entitled to pardon? For if the king were to undergo the prescribed sentence, they would be driven out of this foreign country as leaderless fugitives; but if they were swayed by their reverence for the king, the example of their corrupt indulgence would enable others to commit the same offence.[45]

Sven's legal narrative here presents a curious thought-experiment: how does an international following of an international king navigate an international legal solution when the king, who legitimised the law and grants legitimacy to his legally empowered *hirð* has, in a moment of weakness, undermined all these structures? The problem articulated by Sven is that if justice is passed according to the letter of the narrated law, the *hirð* will be responsible for the death of the king, making themselves fugitives, so how to solve the quandary?

Once more, the system presented in Sven's narrative appears to be rooted fairly convincingly in customary law. In fitting fashion, the *hirð* 'gathered into a body and made careful inquiry into what they were to do'.[46] Again, this is not a rash, reactive decision; rather, this diverse group of retainers comes together in a micro-assembly of sorts and renders

[41] 'Concerning those who fight at the king's Court. If anyone fights at the king's court, he shall lose his life, unless the king is willing to pardon him' in Robertson, *The Laws*, 204-05.
[42] 'Breach of the peace. If anyone is guilty of a capital deed of violence while serving in the army, he shall lose his life or his wergeld. §1. If he is guilty of a minor deed of violence, he shall make amends according to the nature of the deed' in Robertson, *The Laws*, 204-05.
[43] Christiansen, *Sven Aggesen*, 34.
[44] Ruiter & Ashby, *Different Strokes*, 172-73.
[45] Christiansen, *Sven Aggesen*, 38.
[46] Christiansen, *Sven Aggesen*, 38.

a communal judicial decision based on the king's provision that is in their best interest. It is, in fact, an extension of precisely the early medieval system of 'collective responsibility and private prosecution' Christiansen describes in his introduction, as discussed above.[47] Even more interesting is the fact that Knútr seems to willingly give himself over to the judgement of the collective in the narrative.

These details are illuminating from the perspective of early medieval law and it warrants a pause for momentary unpacking. Sven's version of events has Knútr, as king of England and its Scandinavian neighbours inviting legal specialists to join him and his *hirð* in England to pronounce legal innovations. His punitive strategy seems to lie within the actual English tradition of the late Viking Age – relying on severe and visible punishment to dissuade transgression – but he balances this with an apparent appeal to his Danish legal specialists.[48] And yet, when he himself transgresses the law while still in England, he gives himself over for judgement to the collective he has wronged. Despite a seemingly more English character to the prescribed punishments associated with these new laws, the process by which the case is tried is decidedly in the Scandinavian tradition, focussing not on centralised authority, but rather on diffusive legal decision-making in a collective assembly. The story certainly fits very well alongside the highly international character of Knútr's reign and with recent suggestions that especially his English reign was likely a nexus of Scandinavian and English legal practice.[49]

This interaction of Scandinavian and English legal ideas and practices is especially detectable in England where a larger corpus of texts survive. Sara Pons-Sanz, for example, has pointed to clear places in the vocabulary of English legislation where Norse-derived legal vocabulary was creeping into the English legal technolect.[50] While this process had already begun before the time of Æthelred and Knútr's famous legal advisor Wulfstan II, there is a distinctly high number of Norse-derived terms in *I-II Cnut*. Pons-Sanz herself argues that this is most likely due to their official character and the breadth and diversity of their intended audiences,[51] an observation that sits well with the discussion of that legislation above. We can also see sources like the *Anglo-Saxon Chronicle* presenting Knútr as having a rather distinct approach to punishment in his English reign. Æthelred, for example, is recorded in the *Chronicle* as potentially ordering judicially violent punishments in 993, 1002, 1006, 1014, and potentially 1015.[52] Knútr, by comparison, is only associated with violent punishment in the tumultuous years of his early reign, specifically 1016-1018 – where he appears to have been putting down an uprising[53] - and then again in 1021-1022 where he outlawed Þorkell and Leofwine only to reconcile with both of them.[54] Compared to his predecessor, Knútr's personal approach to punishment in England is actually less severe, potentially hinting at deference to the legal customs of local collectives, as is suggested in *LC*, rather than imposing a centralised punitive strategy of his own.

[47] Christiansen, *Sven Aggesen*, 7. Furthermore, it fits remarkably well within the contemporary English systems articulated by Roach, *Law Codes*, 479-86, as well as the Carolingian systems he compares his material to.
[48] For a detailed, interdisciplinary analysis of the Viking-Age approach to punishment in English legislation, see Ruiter & Ashby, *Different Strokes*, 157-70.
[49] Ruiter & Ashby, *Different Strokes*, 173-78.
[50] Pons-sanz, Sara. *Norse-Derived Vocabulary in Late Old English Texts: Wulfstan's Works, A Case Study*. Odense: University Press of Southern Denmark, 2007, see especially 193-230.
[51] Pons-Sanz, *Norse-Derived Vocabulary*, 228-29.
[52] Ruiter & Ashby, *Different Strokes*, 160-61.
[53] Bolton, *Empire of Cnut*, 37, 44-45, 69.
[54] Ruiter & Ashby, *Different Strokes*, 174-75.

The situation in Scandinavia is quite different. With only skaldic poetry and the runic corpus containing the most securely datable snippets of late Viking Age text,[55] it is much more difficult to piece together these matters. However, *LC* may provide us with an example of a tentative way forward.

Literary Approaches to the Customary Law of the Late Viking Age

Returning to the text of *LC*, the result of this private prosecution was a mutually agreed settlement that allowed the king to atone for his crime and 'in the end this sentence was passed by the whole cohort, and no wrong conclusion was to be drawn from it thereafter'.[56] Furthermore, according to Sven, the law itself was preserved for posterity; however, to better govern these matters in the future, it was agreed that the law was to be amended so that:

> any man who committed this kind of misdeed in future was to be disqualified from any dispensation, nor was he to make compensation for the crime. He was to expiate the gravity of the offence by submitting to an inexorable sentence of death, or at least, were the law to be relaxed, he was to depart from the whole association of warriors as an exile and a fugitive and an utter outcast, named by the shameful word of *Nithingsorth*.[57]

These matters are concluded in such a way that *LC* claims this law was not transgressed again through the reign of eight subsequent kings.

This immediate perscription of judicial execution or full outlawry and the ascription of the odious title of *níðingr* is somewhat out of place in Scandinavian legislation of this date.[58] The earliest Scandinavian provincial laws only ascribe capital punishment in very select cases, most commonly serious breaches of local social stability like murder, rape, adultery, and theft.[59] Notably, none of these is the least bit concerned with royal protection or the conduct of the king's retainers. Suddenly we are returned to Christiansen's suggestion that, seemingly, kings did not much factor in to the business of law-making in the late Viking Age.

But what if we take Sven at his word for just a moment? Just as Knútr would need to – and seemingly did – formally integrate some Scandinavian legal customs and ideas into his English legislation, so too would he need to bring English law to bear on certain areas of his wider realm, especially in his immediate following.[60] Adopting a more severe approach to judicially violent punishment in this setting, as was more common in English legislation, would have precisely the effect Sven suggests of tempering transgression, while also leaving a mark on the cultural memory of Danes as being a notably harsh punitive attitude, particularly is his successors to the Danish throne followed his legal examples – something which *LC* also seems to suggest.

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[55] Jesch, Judith. *Ships and Men in the Late Viking Age*. Woodbridge: The Boydell Press, 6-33.
[56] Christiansen, *Sven Aggesen*, 38.
[57] Christiansen, *Sven Aggesen*, 39.
[58] For more on the vocabulary of transgression and the specifics of níð, see Ruiter, Keith. "A Deviant Word Hoard: A Preliminary Study of Non- Normative Terms in Early Medieval Scandinavia." In *Social Norms in Medieval Scandinavia*, edited by Jakub Morawiec, Aleksandra Jochymek, and Grzegorz Bartusik. Leeds: Arc Humanities Press, 2019, 201-212.
[59] Ruiter & Ashby, *Different Strokes*, 156-57.
[60] For more information on the complex interrelationships between Knútr and English members of his retinue, see Cem Gülen, this volume.

While speculative and exploratory, this suggestion is not without evidence. Recall that Knútr's own English legislation stipulated that those who fought in the *hirede*, the Old English cognate of *hirð*, were to pay with their life unless the king pardoned them.[61] It seems highly unlikely and unnecessarily logistically complicated to suggest that Knútr had different laws for his *hirð* in different regions of his realm, especially given his remarkable mobility within the British Isles, Scandinavia, and beyond.[62] In fact, in the Scandinavian legal systems that were so focussed on collective responsibility, the *hirð* is one of the few areas that a king could most easily act as a legal innovator and directly oversee those innovations.

As already noted, the bulk of the specifics of Sven's *LC* are probably very firmly rooted in his own time and its treatment by scholars as a learned legal *tractus* is certainly the most secure. Nevertheless, it has been seen that some of the underlying details of the text seem to resonate with semi-remembered realities from Knútr's actual reign. Knútr's role in bringing diverse and heterogeneous people from the British Isles and neighbouring Scandinavia together under his rule, his associations with law-making and innovation, and possibly even his approaches to legal punishment and procedure all appear to be discernible in the background of *LC*'s narrative.

Working in exploratory directions with different types of historical documentation and literature, Bolton has done much clarifying of Knútr's reign and, in her discussion of Wulfstan's influence on Scandinavian legislation, Ponz-Sans has even used her linguistic analysis of texts to suggest that Knútr's reign over England and its Scandinavian neighbours might well have facilitated the movement of English legal vocabulary, especially the expanded senses of *grið*, into Norway and Denmark.[63] In the same way, it behoves us to work across law and literature in interdisciplinary and exploratory ways to consider ways that early medieval customary law might yet be detectable in the surviving corpus of stories.

Work by lawyers and modern legal scholars over the last three decades has embraced such an approach. James R. Elkins, writing in 1990, documents the then novel development in legal studies that law and stories helpfully engage with one another and can lead lawyers of all stripes to better understand how law intersects with human interests, culture, and history.[64] Nowhere has this approach been more manifestly successful than in the field of indigenous law where stories are viewed not as seperate from law, but implicit in, expressions of, and calls toward customary legal traditions that are intrinsically interwoven with other areas of indigenous lifeways and praxis.[65] Similarly, Viking Age law is customary law, and if we listen closely to and reflect on the stories that claim to remember it, we might just be able to piece together a little more of these practices that allowed neighbours to get on with each other in rapidly changing times.

[61] Robertson, *The Laws*, 204-05.
[62] On Knútr's mobility and international influence, see Bolton, Timothy *Cnut the Great*. New Haven: Yale University Press, 158-171.
[63] Ponz-Sans, *Norse-Derived Vocabulary*, 255.
[64] Elkins, *The Stories*, especially 63-66.
[65] Especially recent representative examples include Borrows, *Drawing out Law*; Napoleon, Val and Hadley Friedland. "An Inside Job: Engaging with Indigenous Legal Traditions through Stories." *McGill Law Journal* 61, no. 4 (2016): 725-54; and Napoleon, Val. "Did I Break it? Recording Indigenous (Customary) Law." *PER/PELJ* 22 (2019): 2-35.