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‘Traditional knowledge’ in the courtroom

SUMMARY

This article describes the Svartskog case, which was processed in two courts, the Uncultivated Land Commission for Nordland and Troms counties (ruling 1998) and the Supreme Court (ruling 2001). The case concerned property rights and the right to utilisation of uncultivated land. The two courts reached different conclusions. The lower court granted the local population limited right of use, while the Supreme Court granted the local population collective property rights. This article analyses the development of the legal philosophy that can be traced in a comparison of the two processes. This is also seen in a perspective of a more general anthropological debate on dualism and monism and how we should understand traditional usage or traditional knowledge. In anthropology, arguments in favour of a monistic approach have been given increasing emphasis. Many also claim that Western thinking is strongly characterised by dualism. The article shows that the legal argumentation shifts from a more dualistic to a more monistic perspective when moving from the lower to the higher court. One conclusion is that we cannot immediately take for granted that a Western institution such as a court of law will be guided by dualistic thinking when it comes to an understanding of the relationship between people and nature.

NORSK SAMMENDRAG*

Denne artikkelen tar utgangspunkt i Svartskogsaken, som ble behandlet i to rettsinstanser, Utmarkskommissjonen for Nordland og Troms (dom 1998) og Høyesterett (dom 2001). Saken handlet om bruks- og eiendomsrett til utmark. Utfallet i rettsinstansene var forskjellige. Den lavere instansen tilkjente lokalbefolkningen noen begrensede bruksrettigheter, mens Høyesterett tilkjente lokalbefolkningen kollektiv eiendomsrett. Artikkelen analyserer utviklingen i den juridiske tenkningen som kan spores når en sammenligner sakene. Dette er også vinklet opp mot en mer generell antropologisk debatt om dualisme og monisme og hvordan vi skal forstå tradisjonell bruk eller tradisjonell kunnskap. I antropologien har argumenter om en monistisk tilnærming blitt stadig mer vektlagt. Det hevdes også av mange at vestlig tenkning er sterkt preget av dualisme. Artikkelen viser at det er en dreining i den juridiske argumentasjon fra et mer dualistisk perspektiv til et mer monistisk perspektiv fra den lavere til den høyere rettsinstansen. En konklusjon er at vi ikke uten videre kan ta for gitt at en vestlig institusjon som rettsapparatet styres av dualistisk tenkning når det kommer til forståelse av menneske-natur relasjoner.

*Translated from Norwegian by Erik Hansen, Akasie språktjenester

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Introduction

In this article, I will describe a case – The Svartskog case – that was heard in two courts, the Uncultivated Land Commission for Nordland and Troms counties (ruling 1998) and the Supreme Court (ruling 2001).¹ The case concerned the property rights and rights of use of an uncultivated area in Kåfjord municipality, Troms county, where the position of the state was that the local users enjoyed no rights. The two courts reached different conclusions. The lower court granted the local population certain limited rights of use, while the Supreme Court granted collective property rights to the local population. Key deliberations in the courts are related to notions such as *consuetudinary rights* and *custom*. A development of the legal philosophy regarding how property rights can be established is traceable when comparing the court proceedings, and the purpose of this article includes an analysis of this development. I have also viewed this in light of a more general anthropological debate: How should we understand traditional use or traditional knowledge? The concepts of consuetudinary rights and custom encompass such notions. The way in which we conceive of people's relationship to nature thus also becomes relevant: Is it dualistic or monistic? This has for a long time remained a key debate in anthropology, which has tended to give increased emphasis to arguments favouring a monistic approach. There are many who claim that Western thinking is strongly characterised by dualism. I am asking whether a similar development towards a more holistic/monistic perspective can be traced within a (conservative) 'Western' legal institution. By way of an introduction I will give a brief account of features of the anthropological debate and the development in terminology before I turn to the concrete case and the analysis of it.

Relationships between people and nature

A key debate in the social sciences has concerned the relationships between different knowledge regimes or theoretical approaches to the study of the relationship between people and nature. Knowledge regimes are here associated with various areas of activity such as public administration, courts of law, user groups etc. Such a knowledge regime may over time be more or less rigid in terms of the extent to which it serves to guide the activity in question. In simple terms we can say that the theoretical understanding promotes a dualistic view on the one hand, while on the other hand it favours a holistic view that seeks to dissolve the culture/society-nature dichotomy. Arguments in favour as well as against both perspectives have been put forward in the *Norsk antropologisk tidsskrift* with regard to relevant issues. Gísli Pálsson argues against a dualistic perspective when it comes to solving environmental problems:

I hope to have shown that the dualism between nature and society, one of the cornerstones of the modernist perspective and the regime of the aquarium, is *part* of the environmental problem, since it counteracts the understanding of humanity's difficult position and the necessity of change in humanity's relationship to its natural environment. It is essential to develop an approach that fully integrates human ecology and social theory, and that addresses a monistic perspective that unites nature and society (Pálsson 2004:43).

A contribution to the dismantling of dualistic perspectives is found also in Ween and Flikke (2009), who use phenomenology and actor-network theory (ANT) to argue that we need to understand humans and nature in conjunction, as a practice where humans and other elements of nature interact (biotically/physically) as agents in the creation of the environment. This could at any rate be noted as a scientific, theoretical perspective that we as researchers may hold to be applicable in the study of nature-society relationships. Whether such an understanding exists as a knowledge regime for different groups of administrators/users is more of an empirical question.

Like Pálsson, Arne Kalland discusses environmental problems. Although claiming that his objective is not to defend dualistic anthropology, he is highly critical of non-dualistic world-views:

My objective is to question whether non-dualistic world-views will better enable us to live in a sustainable way. Quite to the contrary, I will claim that it is their non-dualistic qualities in particular that render them unsuitable for solving contemporary environmental problems (Kalland 2008:95).

The article by Kalland does not relate directly to Pálsson's article, which was published four years earlier, but the arguments appear to be conflicting. Both articles refer to indigenous populations. Pálsson refers briefly to animal-rights activists, who often distinguish sharply between 'indigenous populations and hunter-gatherers' on the one hand and Euro-Americans on the other, and similarly between nature/fauna and society/humans affected by an objectivist Western discourse as unfortunate. Kalland, on the other hand uses the example of 'small indigenous populations based on hunting and gathering' and refers to the use of terms such as *indigenous knowledge* (IK) or *traditional ecological knowledge* (TEK) as problematic, among other reasons because they are based on an alternative scientific perspective in which the nature-culture dualism has been suspended. According to Kalland, the problem is not the holistic perspective per se, but the risk of reification of conditions and properties inherent in religious creeds and indigenous communities. In line with this, we may also claim that a holistic approach that grants agency to dead objects may be applicable as a theoretical point of departure. However, we also see that this may serve as a disavowal of responsibility as a knowledge regime in certain situations for the people involved.

IK and TEK are often portrayed as holistic approaches to understand how groups of people by way of practices and spirituality relate to their environment by belonging to the environment, and not in terms of a dualistic society-nature paradigm (Berkes 1999). It is self-evident that such perspectives are relevant for anthropologists who seek to understand societies on these societies' own premises. Paradoxically, there are some who introduce a dualistic perspective with regard to various societies and different knowledge systems, especially between the Western and the other (or their own), applicable to different areas such as politics, economy, world view and academic thinking (Smith 2006). This implies that an optional non-dualistic or insider perspective is assumed for specific (own) societies that are

studied, while a sharply dualistic Western/non-Western perspective is applied for understanding people in the global context.

What may be present as a somewhat unclarified premise in many discussions concerning dualism/non-dualism is whether reference is made to a generally theoretical and analytical interpretation or to an existing knowledge regime among users in different societies. When Pálsson argues in favour of a non-dualistic perspective it is most likely as much on the basis of a general holistic approach to understanding as saying that the societies themselves have integrated such an understanding. What Kalland is pointing out, on the other hand, is that not all non-dualistic knowledge regimes are environmentally sustainable. His theoretical approach to arrive at such a conclusion may not necessarily be termed dualistic. It may also be assumed that groups within societies can integrate dualistic and non-dualistic modes of thought within the same knowledge regime. Gender represents dualistic thinking in most societies, and the relationship to nature is often similarly gendered.

What knowledge regime that societies have (more or less) integrated is an empirical question. Kalland (2008) says that instead of searching for any ecological interpretations of religion, we should rather study social institutions. This may obviously constitute a constructive approach, not only with regard to ecology and religion, when it comes to people's relationship to nature and their environment. Social institutions change as the context, motivations and environment change, irrespective of whether they are 'traditional' or 'modern', and today, all of these relate to global experiences and preconditions. Both dualistic and non-dualistic world-views may achieve acceptance and assert themselves. In this article I will start from institutions and show how Norwegian courts at two levels, the Uncultivated Land Commission for Nordland and Troms counties and the Supreme Court, in one and the same case related to 'traditional' or 'local' knowledge and adaptation to the utilisation of nature. The analysis shows that Norwegian courts of law, which can clearly be designated as a modern (Western) phenomenon, in this case change their understanding in a non-dualistic direction.

Conceptual flora

There is a number of concepts that are used about peoples' and cultures' knowledge of the world they live in and these have an approximately equivalent meaning. Ever since Franz Boas introduced his historical particularism more than 100 years ago (Boas [1911] 1965), anthropologists and other social scientists have been more or less aware of how all societies develop knowledge systems to understand the world and their own being in this world as it appears to them. This fundamental principle of cultural relativism thus presumes that local knowledge systems exist, even though they may not appear as consistent and shared among all members of society. Knowledge, irrespective of the label attached to it, is most likely unevenly distributed (Keesing 1987; Barth 1989).

Compared to knowledge in a local or traditional perspective, the ethnoscience school from the 1960s has emerged as one of the first attempts at a systematic mapping of the classification systems used by indigenous peoples (see e.g. Conklin 1969; Berlin and Kay 1970; Frake 1980). This could involve the way in which they

perceived colours, classified plants, types of food, kinship, nature types etc. Concepts such as ethnobotany, ethnozoology etc. were used to delimit taxonomies linked to specific fields. Criticism levelled against the ethnoscience school included its structural linguistic approach, as voiced by Geertz (1973), who claimed that ethnoscience represented a positivist approach and failed to bring forth the local population's own meaning appropriately. In his interpretive anthropology, Geertz (1983) used the concept *local knowledge* to emphasise that knowledge about the world that people live in had its basis in a local universe of meaning. Geertz's hermeneutic methodology presumed that local systems of meaning must be understood in light of the relationship between the experience-near and the experience-distant. In his book *Local knowledge* (1983) however, Geertz argues in favour of a virtually a-theoretical approach to the understanding of cultures, in that he abandons theory in favour of ethnographic description: 'the shapes of knowledge are always ineluctably local, invisible from their instruments and their encasements' (p. 4). Thus, local knowledge is invisible in light of the theoretical wrapping that has been provided to it, and only through ethnographic efforts can render it visible. In Norwegian social science, where concepts such as *bottom-up* and *top-down* perspectives are used, the lines can be clearly drawn back to Geertz and hermeneutics. Among the variants of such concepts we also find *practical knowledge* and *experiential knowledge*, but the reference for this usage most likely stems from Bourdieu (1977) and de Certeau (1984), rather than from Geertz. Bourdieu focuses on how practices, i.e. what people are doing, produce an unreflected knowledge about the world in which this practice is played out. Although Geertz and Bourdieu relate to quite different theoretical discourses, we may still say that in many ways they relate to the same fundamental topic: How should we understand local knowledge universes?

In the 1980s, the concept of traditional knowledge became ever more widely used (Berkes 1999), as a counterweight to knowledge regimes based on so-called Western science. The traditional knowledge of which people in different societies are carriers was assumed to be consistent and logical on its own premises and could be put on an equal footing with Western science. Especially those who were occupied with people's ecological adaptation started to use concepts such as *traditional ecological knowledge* (TEK). In Berkes' (1999:37-55) descriptions of the intellectual roots of TEK, Geertz, Bourdieu and de Certeau are absent. Instead, they point to ethnoscience and cultural ecology (Steward 1955), which was concerned with how cultural traits could be understood in light of livelihoods, organisational frameworks, technology and the knowledge people held about these conditions.

Based on the notion that scientific and other *Western knowledge* was not objective or true for every interpretation of a problem, the concept of *indigenous knowledge* (IK) was introduced.² IK is used in at least two senses, as local knowledge or as knowledge that can be defined as possessed by indigenous peoples. Berkes (1999:8) prefers to distinguish between these concepts, since he understands local knowledge to be knowledge of a more recent date, for example 'as in the nontraditional knowledge of some Caribbean region peoples...', while IK 'is more broadly defined as the local knowledge held by indigenous peoples or local

knowledge unique to a given culture or society'. This conceptual usage appears somewhat confusing. It presupposes that knowledge that has been developed in recent times cannot be unique to a group, while it also essentialises a type of knowledge that is virtually unsusceptible to changed conditions. This may undoubtedly be linked to the problem of what is implied by the concept of *tradition*, which is discussed by Berkes as well as others. Tradition is often linked to something authentic and unique that has existed and possibly continued. In this perspective, tradition is made into an -ism (traditionalism) (Bjerkli 1996). Thereby, no account is taken of the fact that life lived, which may well be perceived as traditional, takes place in a context of new relationships, new impulses and ever-changing general frameworks (changes can be slow as well as rapid). The traditionalist perspective can thus hit back at indigenous peoples in the form of accusations that they have left behind the authentic, traditional life that they might be asserting as a basis for political demands about rights to natural resources. Among other things, this is the background for Pálsson's (2004) concerns regarding the use of dualistic perspectives.

Returning to different definitions of tradition or traditional knowledge, we find examples of the use of a more 'authentic' form as well as a somewhat looser definition that opens for change. Pascal Boyer (1990) defined tradition and traditional knowledge as codified (material and immaterial) to distinguish this from other types of activities and knowledge acquisition in the following way:

...a very narrowly defined set of institutions, in which important truths are supposed to be expressed by licensed speakers, and attention-demanding ritual gestures are performed by special actors, all this being accomplished with reference to previous occurrences of the same statements and the same gestures (p. viii).

This provides a relatively rigid understanding of what constitutes traditional knowledge since it is linked to specific, ritually instituted and authoritative institutions and knowledge carriers that have existed over time. Such situations may surely occur, but if so, only associated with political, economic or religious (often intertwined) power structures.

Those who have been occupied with TEK and IK empirically beyond such institutionalised forms are aware, however, that the concepts have a complex content and are hard to define with any precision. A typical example in this regard is provided by Roy Ellen (1998:238), who operates with the following definition of IK, that may largely be applied to TEK as well:

Local, orally transmitted, a consequence of practical engagement reinforced by experience, empirical rather than theoretical, repetitive, fluid and negotiable, shared but asymmetrically distributed, largely functional, and embedded in a more encompassing cultural matrix.

On the basis of such a definition it appears difficult to maintain a distinction between local knowledge as non-traditional and indigenous knowledge (IK) as traditional, as done by Berkes. That this knowledge is 'fluid and negotiable' must

entail that it can develop and change, including in relation to the modern world in general. On the whole, the non-traditional/traditional dichotomy appears to be fraught with problems. This becomes very clear in Ellen (2007), who uses the concepts *indigenous knowledge*, *traditional knowledge* and *local knowledge* interchangeably. These forms of knowledge all refer to their 'provisional, dynamic and contingent character' (p. 33) and that they also routinely 'hybridize with new, often scientific, knowledge'. Nor is this explained as something new, except with regard to scale, but as something inherent and historically continuous.³

My concern in this article is not to make an issue of the various interpretations of TEK or IK. Nor would Norwegian courts, in the context of legal proceedings, be especially preoccupied with defining concepts such as tradition, TEK or IK. To determine rights of use, the court pegs its decisions to concepts such as *prescriptive title*, *consuetudinary rights* and partly also *custom*. What we may note here, is that TEK and IK and other conceptualised phenomena that are of interest to anthropologists are implicitly present in the legal concepts and can thus be deduced from and traced in the court's arguments for its decisions. I would like to state here that concepts such as TEK or IK were not discussed or used in the recommendation that I submitted in the role of expert. Various forms of utilisation of the area and conflicts associated with such utilisation were described and analysed to be able to describe cultural aspects of this utilisation. To the extent that this was conceptualised it was termed *custom*, which also has a legal meaning. In the following, I will attempt to trace the court's understanding of 'traditional knowledge', which I here will use as a concept, in the same case through courts at two levels. Although there are definitions of traditional knowledge other than those formulated by Boyer and Ellen (and that may be more applicable to the phenomenon in light of certain considerations), I will use these in the analysis as two different prototypical definitions that may elucidate the different understandings of the matters involved and discuss how this may impact on the solution of conflicts.

The Svartskog case

The Svartskog case was a litigation case between the Government, represented by the Ministry of Agriculture, and land owners/inhabitants of the Manndal valley, heard before two courts, The Uncultivated Land Commission for Nordland and Troms counties and the Supreme Court, in the period 1993–2001. The conflict centred on right of use and ownership to a 116 sq.km. uncultivated area at the upper end of the Manndal valley in Kåfjord municipality, Troms county. The area consists of a narrow valley with forest and pastureland, steep mountain slopes and adjacent mountain peaks rising to 1300 metres above sea level. The central part of the area goes by the name of Svartskog, or Čáhput⁴, which is the original Sámi name. Although the name originates from a smaller area, the extension of Svartskog is in many ways defined through the conflicts of interest regarding rights of use and ownership between the local inhabitants on the one hand and former owners and governmental authorities on the other.

The Manndal valley had been part of a major private estate since 1666, when the king sold Nordland and Troms counties to the industrialist Joachim Irgens, whose

possessions included Røros Copper Works.⁵ The freeholders on the farms gradually turned into tenant farmers. Over time, the estate was split into smaller units, and from the second half of the 18th century Manndal valley was part of the Skjervøy estate, which for the most part includes the present-day municipalities of Kåfjord, Kvænangen, Nordreisa and Skjervøy in northern Troms county. The last proprietor of the Skjervøy estate died in 1848. During the administration of the estate, the heirs disagreed over the form of settlement. As a result, the entire estate, with the exception of the Havnes property which was the seat of the proprietor, was sold by auction to a 'general partnership' that gave the highest bid during the execution sale. The estate was acquired by the 'Association for the Abolition of the Tenant Farming System in Skjervø' on 1 January 1851 (Friis 1965). The association's objective was to realise the individual properties by sale to freeholders or others. Within the Skjervøy estate there were a number of commons that were used by the local inhabitants jointly, partly under the landowner's control, but also through forms of use that had not been sanctioned by the landowner. When the Association started the sale of property after 1851, there were strict reactions to such unregulated use, including through lawsuits and the imposition of a ban on extraction of resources without an agreement with the Association (Bjerkli 2004:17; Bjerkli 2007:400).

In the process surrounding the sale of the individual properties of the estate, the larger commons were sold to the government. The commons in the upper part of the Manndal valley (Svartskog) were partitioned off and sold to the government in 1885. The government's justification for the purchase was to establish orderly relations between the reindeer herders and the farmers, and that Svartskog should be allocated to purposes of reindeer husbandry. The Uncultivated Land Commission (1999:47) added the rationale that the purchase took place to protect the lower part of the valley against damage caused by grazing reindeer, although only after pressure was applied by the Association, which had a vested interest in the sale.

The interests of the local population are associated with the fact that the natural resources in Svartskog have provided a livelihood for a great number of local people through the ages. Relatively intensive use can be documented from the time before the government purchased the area and acquired the title in 1885 (Bjerkli and Thuen 1998; Bjerkli 2004). In the lower part of the area we can today find a number of mountain goat farms. Before these were established in the mid-1950s, the area was frequently used as hayfields. Until today, Svartskog has also been used as a place to gather winter firewood and material for fence poles and construction. The area is also used as pasture for sheep, partly also for cattle. Furthermore, the area has been used for hunting and lake fishing. Today, Svartskog remains widely used for recreation. Its use has not been regulated through by-laws or permanent ordinances of any kind. In other contexts (Bjerkli 2010), I have described how this use appears with the aid of Tim Ingold's (1995) concept of *dwelling*. He writes that life forms 'rise within the current of their involved activity, in the specific relational contexts of their practical engagement with their surroundings' (p. 76). People have been active in a direct relationship with their environment, and acted varyingly and flexibly in response to available options and changing social contexts. In our report

as experts (Bjerkli and Thuen 1998) this was characterised through concepts such as *autonomy* (individual) *egalitarianism* (collective) and *flexibility*. One may say that this is also a feature of the local knowledge about resources, societal context and social relationships of which this use is part. Thuen (2003) refers to it as implicit and as functioning differently from the explicit one, which is made subject to self-reflection. It is often expressed only as 'our way of doing it' (Bjerkli 1996). In the context of the Svartskog case, Thuen (op. cit. p. 274) writes: 'Knowledge about the landscape and nature changes when technology and economy create new forms of utilisation, but inter-personal modes of behaviour, local moral values and fundamental beliefs may still be maintained'. In this way we can understand how the local practice is intertwined with a social ethos that jointly points towards how this traditional knowledge has been constituted. This corresponds largely with Roy Ellen's (1998) definition, described above.

It took 35 years from the government's purchase of Svartskog until the first attempts to control the local population's use of the area were made. In December 1920, the forest administrator of the Lyngen region posted a public announcement in the community, stating: 'For the future, it is strictly forbidden to cut trees and harvest hay on the property purchased by the government in Upper Mannal Commons without having obtained permission to do so from the forest administrator of the Lyngen region'. The announcement also informed the population that 'any contraventions will hereafter be subject to legal prosecution'. People took little notice of these orders and continued to use the area as previously, with the result that some were reported to the police. The reports had no effect, since no decisions to prosecute were made and so the cases never came before a court. The same events were repeated after the war in 1946-47, when a fairly comprehensive logging operation was reported to the police. Nor were the denounced persons brought to court on this occasion. Instead, the police in Troms county recommended that 'those concerned ... seek to have judicially established the material legal conditions in this forest area'⁶ (see Bjerkli and Thuen 1998:103). Such a clarification was not available until the case had been processed by the Uncultivated Land Commission and the Supreme Court had made its ruling in 2001.

Processing of the case by the Uncultivated Land Commission

The Uncultivated Land Commission for Nordland and Troms counties is a specialised court of law established by the Storting in 1985.⁷ Its purpose was to determine what land the state owned in these two counties. The court should establish the boundaries between state-owned land and other land, determine whether any rights of use were in effect on state-owned land, and identify the holders, if any, of such rights.

In the summer of 1993, the Office of the Attorney General⁸ subpoenaed landowners in Mannal valley to the Uncultivated Land Commission for Nordland and Troms counties. The government claimed property rights to the area and denied that people had any rights of use. In the subpoena this was formulated as follows: 'No rights of use can be derived from the right of access to commons, customary title or use since time immemorial'. This was consistent with the land survey and deed produced in association with the state's purchase in 1885, which established

that no liens rested on the property, meaning that the use that the local people previously had made of the area was deemed unlawful. The parties subpoenaed in Manndal valley, on the other hand, stated that ‘the state is not the owner of land in Manndal valley with adjacent mountains...’ (Utmarkskommisjonen 1999:32). This applied to Svartskog. The subsidiary claim included rights of use such as pasture, haymaking, mountain summer farms, logging, hunting, trapping and fishing in areas that otherwise might be delimited as government property. The justification was that the area had been continuously used by local people jointly from the early 19th century until today, and this use had never been regulated or contractual, but based on custom and consuetudinary right. Since most of the inhabitants of the Manndal valley are of Sámi origin, arguments pertaining to indigenous rights were also pleaded in the case and briefly assessed in the grounds of the judgement. ILO Convention no. 169 *concerning Indigenous and Tribal Peoples in Independent Countries* from 1989 was pleaded as a legal basis, since it was claimed that the convention intended to protect possession and use in the form exercised in Svartskog.

The case first came up in the Uncultivated Land Commission in the autumn of 1998 and a ruling was made on 5 March 1999 (Utmarkskommisjonen 1999). In the ruling, the state was granted property rights to the area. The Uncultivated Land Commission nevertheless found that the freeholders in the Manndal valley had acquired certain rights of use on state-owned land in Svartskog. Owners of farms were granted grazing rights for those animals that can be kept through the winter on the farm. This is probably the most widespread right to the use of commons held by Norwegian farms on uncultivated land not owned by the farm itself. Farms were also granted the ‘right to felling of trees for use on the farm ... material for fences and racks for drying of hay’ (op. cit. p. 54). In addition, it was determined that permanent residents had the right to logging in state-owned forests in Manndal valley for their own consumption. Local custom was the basis for granting this right. Since the logging had been undertaken by an undetermined group of people, the rights holder was not further specified, but encompassed all permanent residents of the Manndal valley. With regard to both grazing and logging, the scope, duration and continuity of use played a key role in the assessment. As regards the other rights of use, such as haymaking, mountain summer farms, hunting and fishing, the state was acquitted, but on varying grounds. Haymaking in outfields, which ceased in the first decade after World War II, was rejected as a valid right of use, since ‘this no longer is in accordance with rational agriculture, nor any longer a natural activity “in our time”’ (op. cit. p. 53). This means that if haymaking in the outfields still had been common, right of use would have been granted pursuant to established notions of customary title in parallel with grazing, in the Uncultivated Land Commission’s opinion. As regards mountain summer farms and equipment and installations in this context, all rights were rejected, for reasons including that this was a new activity that had been established after haymaking in outfields had ceased. The installations could not be ‘deemed as established in accordance with the right to the use of commons’ and ‘nor does any customary title exist ... since the users have been aware of the fact that the state as landowner demanded an application for permission...’ (op. cit. p. 53–54). Accordingly, since the users were

aware of the fact that the state as landowner demanded an application, people had not acted in good faith. In this context, explicit reference is made to the state-owned forests. Here, the time of establishment of the mountain summer farms in the mid-50s is deemed to coincide in time with the introduction of management responsibility in the state-owned forests in the early 1980s. The requirement for permission was specified at that time. As regards hunting and fishing, it was argued that such activities previously were open to everybody (the public right of access), and generally speaking have not served as a basis for establishment of rights, but exist as a right for landowners. A special feature of the ruling is that the right to cut firewood was granted to all inhabitants in the Manndal valley, irrespective of whether they were landowners or not, and that this was based on local custom. This use was deemed to have been undertaken in good faith, since the authorities had been aware of this logging at least since the 1920s, but without enacting any measures to bring the logging under state control. This helped 'further establish the notion in the local community that they undertook their utilisation in accordance with customary rights' (op. cit. p. 53). The Uncultivated Land Commission also noted that 'the rights to logging and grazing – in the form these are exercised in Manndal – are also in accordance with the exercise of rights of use protected by ILO Convention no. 169 on indigenous populations' (op. cit. p. 53).

The case goes to the Supreme Court

Altogether 146 freeholders⁹ in Manndal valley did not accept the ruling in the Uncultivated Land Commission and appealed to the Supreme Court. The appeal included references to international law and indigenous rights as basis for acquisition of an original title. In response, the government lodged an accessory cross-appeal regarding the right to logging, which was claimed to have been granted by the Uncultivated Land Commission on a wrongful basis. The Supreme Court accepted the freeholders' appeal¹⁰ for processing, but rejected the government's cross-appeal. The case was brought before the Supreme Court in the autumn of 2001, and the ruling was announced on 5 October the same year.¹¹ In its ruling, the Supreme Court upheld the demands made by the local population and declared that 'the state is not the owner of land in Manndal valley with adjacent mountain areas...'. This implied that the Svartskog area was deemed to be the property of the local population in some way or other. The Supreme Court underscored that 'throughout the period, the use has included all natural forms of utilisation ... and has changed in pace with what was most natural at any given time'. By way of a comment to the conclusion drawn by the Uncultivated Land Commission, a view of the fundamentals involved is voiced:

The Uncultivated Land Commission, which also concluded that the reports to the police in the 1920s and 1940s did not deprive the local people of their good faith, found as mentioned no legal basis for granting more than logging and grazing rights. In my opinion (as leading judge), the comprehensive use described above must entail greater legal consequences. If a similar use had been exercised by people of another background, it would have reflected that they claimed to be the owners of the area. ... Should acquisition of an original title by consuetudinary right be prevented by

examples of their having referred to right of use, their exercise of the de facto disposal, which in content is equal to exercise of property rights, would be placed in an unfortunate exceptional position in relation to the population in general.

The Supreme Court also underscores that the Manndal inhabitants' right to Svartskog has its basis in applicable Norwegian legislation: 'Irrespective of Norway's obligations through international law, this indicates that the use provides grounds for acquisition of an original title by consuetudinary right, and that the property right of the state ... is incompatible with the rights acquired by the population of Manndal'. Moreover, it is stated that the application of the law is 'in accordance with the rules in ILO Convention no. 169 of 1989 on indigenous and tribal peoples in independent countries, Article 14, no. 1, first point, and the concerns that this rule is intended to uphold'. The Supreme Court also comments on the difference between the conditions prevailing in Manndal and the way in which legal affairs pertaining to commons in general is organised in Norway:

Rural commons thus belong to agricultural land properties, while ... the use of Svartskog reflects a locally predominant notion that all inhabitants of the valley are entitled. How these questions will be solved internally, and how the area will be managed in the future, will not be decided by this case.

The Supreme Court is thus saying that the management of Svartskog after the government has been denied of any property right must be solved internally by the population of Manndal valley.¹²

Traditional knowledge in the Svartskog case?

The kind of knowledge that people had or applied in their utilisation of the natural resources in Svartskog was not directly relevant to the processing of the case by the courts, but we may nevertheless say that the issue of knowledge was implicitly present. Courts ask for what concrete acts people have engaged in and continue to engage in, or as it is frequently termed: actual use. Empirical data on forms of use and their exercise are very important. There is an implicit element of knowledge, because without any knowledge of how the use should be exercised in purely practical terms, the use could not have happened. Nor could this use have developed in the way in which it did without having been embedded in a cultural context. In addition, the court was especially concerned with whether people had acted in *good faith* in their utilisation of the area. If good faith is not demonstrated, people are deemed to have acted in contravention of norms and rules of which they are aware, meaning that they have acted contrary to their better judgement. Herein lies another knowledge element, not about the utilisation as such, but about the right of use in its various forms. By looking at the arguments underlying the rulings, we can thus say that that underlying views on how tradition or traditional knowledge should be understood come to light.

A key sequence in Roy Ellen's definition of IK says that it is 'a consequence of practical engagement reinforced by experience'. The longer the experience, the more thorough the knowledge becomes. We may add: irrespective of whether it is

conscious or exists in bodily form. Practical engagement through experience is expressed in the courts' rulings, for example: 'the right to logging for their own use on the basis of local custom', as noted by the Uncultivated Land Commission. The Supreme Court ruling also includes sequences indicating that local or traditional knowledge regimes are important. This is reflected in statements such as: 'the utilisation of Svartskog reflects a locally predominant opinion' which is associated with 'all relevant forms or utilisation'. In these and similar formulations we can say that the traditional knowledge or the traditional use that lies at the base of the acquisition of traditional knowledge has been formulated and understood by the courts involved in the case.

In law, traditional use and knowledge are largely codified through the concept of custom. In law, custom can be defined as 'what one usually does, a fixed practice or traditional mode of behaviour' (Bull, Oskal and Sara 2001). It is frequently added that this practice should be well established. This can be said to equal practical engagement through experience. Moreover, 'traditional mode of behaviour' must encompass practice as well as knowledge about the practice. If we understand this in line with Ellen (1998:238) as being 'embedded in a more encompassing cultural matrix', this implies a social component. Woodman (1999) says emphatically that if custom is to exist as a guideline (law) for activities and actions, it must '... derive(s) its existence and content from social acceptance' (p. 15). Social acceptance by a wider group is the feature that constitutes the ordered character of custom. Applied to the Svartskog case, we could say that whatever the group of users, consisting of people resident in the Manndal valley through the ages, has socially accepted as permitted and not permitted, constitutes custom. We can further say that this also constitutes the traditional knowledge involved. We can find this in Ellen's definition as 'fluid and negotiable, shared...'. This implies that a key component of traditional modes of behaviour must be linked to social acceptance. It is through social acceptance that new forms of utilisation can be understood as a traditional continuation of older forms.

Differing opinions in the courts

Even though the Uncultivated Land Commission and the Supreme Court both emphasise 'custom' and 'local opinion', we could also say that the reasons for the rulings reflect different views on how traditional or traditional knowledge is interpreted. It should be noted, however, that the courts themselves do not provide such a conceptual clarification. The Supreme Court arrives at a different conclusion from the Uncultivated Land Commission, but not as a result of a conceptual analysis as such; it undertakes a specific assessment of the utilisation and the framework for this utilisation (good faith) and what this should entail in terms of the legal situation. The differences that are traceable may nevertheless be related to the two different definitions presented, which serves to show that different understandings of tradition are implicitly present in the rulings.

A characteristic feature of the proceedings in the Uncultivated Land Commission is that the case is split into individual forms of utilisation that are assessed independently. Logging and grazing are assessed as forms of utilisation that are sufficiently clear and consistent over time until the present day to be interpreted as

customary. Haymaking is judged to be a tradition that has ceased, while summer mountain farming is of a more recent date and hence not an established tradition. By splitting up the forms of utilisation and assessing them in separation, we may say that the Uncultivated Land Commission fails to take into account that traditional knowledge is ‘embedded in a more encompassing cultural matrix’ (Ellen 1998:238), in which different activities, interests, interpersonal relationships and contextual conditions define the framework for what people do and what they may do. Instead, we can say that the Uncultivated Land Commission tends to regard traditional knowledge as associated with ‘a very narrowly defined set of institutions’ (Boyer 1990:viii) that need to comply with requirements to be regarded as established.

In its ruling the Supreme Court assumes a very different perspective. This comes to the fore in formulations such as: ‘the use ... encompassed all natural forms of utilisation ... and has changed in pace with what was most natural at any given time’. This adds perspectives that see all forms of utilisation in context, and not least a temporal perspective that gives allowance for change, without thereby concluding that the exercise of traditional rights of use has ceased. This contrasts with the Uncultivated Land Commission’s assessments, which are made separately and linked to continuity, time and cessation. When the Supreme Court also states that ‘the utilisation of Svartskog reflects a predominant local opinion...’ it becomes even more evident that this is assessed not only with regard to utilisation as such, but in light of the knowledge that people possess. We can say that this is consistent with an understanding of traditional knowledge as ‘... a consequence of practical engagement ...largely functional, and embedded in a more encompassing cultural matrix’ (Ellen 1998:238).

Levels of knowledge

Although it is very difficult to find any systematic differences regarding what could be deemed to distinguish between concepts such as traditional knowledge, local knowledge and indigenous knowledge, and although it can be argued that all knowledge in principle shares the same premises, certain applicable types of knowledge can be specified for different objectives. Arne Kalland (2000) states that local knowledge/IK (or traditional knowledge, as I have used it) can be related to three different levels of understanding:

Empirical knowledge: This is the kind of concrete knowledge that people possess about their environment, about the utilisation of this environment and how this utilisation can be undertaken in organisational and technological terms. In Svartskog, this would apply to knowledge about topography, the availability of biotic and abiotic resources such as exploitable forests, attractive pastureland, water sources etc., or that there are certain areas that for various reasons are best avoided. In addition, people need to know how to extract these resources in an efficient and profitable way.

Second, Kalland uses the concept of *paradigmatic knowledge*: People always assess their empirical knowledge in a wider context. Knowledge about the wider context thus functions as a paradigm (over a given period) for the empirical knowledge, and will thus also have an effect on the empirical knowledge. The

clearest example of such knowledge in Svartskog appears in the establishment of the mountain summer farms in the mid-1950s. This was closely associated with the development of physical (roads, enterprises) and organisational infrastructure (agricultural cooperatives, distribution channels, markets) in the region during the post-war years. In 1954, a dairy was established in the region, which provided opportunities for delivery of significantly larger volumes of milk than those that previously had been produced by what was largely subsistence farming. Without any knowledge of the market opportunities and frameworks for sales of large quantities of goat milk, the mountain summer farms in Svartskog would not have been established. The existing empirical knowledge had a new dimension added to it, which caused a rapid change in the utilisation of the area (ten mountain summer farms were established over just a few years), and new or transformed empirical knowledge was developed.

Third, Kalland uses the concept of *institutional knowledge*, which is knowledge rooted in social institutions. The social institutions assume numerous forms and can be overlapping or intertwined. It is, for example, this knowledge that tells people how they should relate morally to each other or to the environment in different situations. In Svartskog, there are examples of how unwanted utilisation of the area was chastised by means that included local gossip and active prevention of certain forms of utilisation (Bjerkli and Thuen 1998). When discussing custom and customary rights of use in Svartskog in an anthropological perspective, we can say that we refer to institutional knowledge, which is the type that sanctions utilisation and establishes social acceptance. When the new practice of mountain summer farming gained full acceptance locally, this is not only a matter of empirical and paradigmatic knowledge, but also goes to show that institutional knowledge existed, was tried out and developed.

The discussion of the legal fundamentals related to consuetudinary rights in the grounds for the Supreme Court's ruling undoubtedly provides the key to the Svartskog case. In general, this discussion is based on general Norwegian property law and not any instructions following from international law, for example those embedded in ILO Convention no. 169. But nor are the courts functioning in a vacuum. As institutions, we can say that they incorporate the same types of knowledge (empirical, paradigmatic and institutional) as societies in the cases in which they are given the authority to judge. They are influenced by new legal structures, such as those found in international law (paradigmatic knowledge) as well as new ways to give acceptance to phenomena within their institutional framework. The Supreme Court can also be said to have assessed the three levels of knowledge described by Kalland. It goes without saying that the empirical knowledge lies at the base. It is the concrete utilisation, its scope and continuity, which have been assessed. Without any empirical knowledge, people would not have been able to undertake any utilisation. The statement that 'all relevant forms of utilisation ... changed in pace with what was most natural at any given time' shows that paradigmatic knowledge has been taken into account. The fact that people have related to their historic time and the changes that it has involved does not alter the consideration that conditions pertaining to customary rights remain valid. An assessment of institutional knowledge is also included, even though no

explicit reference is made to how this is constituted in the local context. It is said that 'the utilisation of Svartskog reflects a locally predominant opinion'. This opinion must indisputably be rooted in local, social institutions. Moreover, the Supreme Court clearly states that it cannot be taken for granted that it is cemented in a permanent form. The court states: 'How these questions will be solved internally, and how the area will be managed in the future, will not be decided by this case'. It is left to local institutional knowledge to manage and develop traditional knowledge in Svartskog, which is also what has happened after the ruling with the establishment of the Čáhput siida (The Svartskog Association) in 2003.

Dualism vs. monism in the Svartskog case

In the introduction, I referred to a debate on dualism versus non-dualism (monism) as a theoretical basis for solving environmental problems. This article has not explicitly referred to environmental problems, although this was part of the set of issues involved in the Svartskog case. For example, Norwegian authorities have on several occasions claimed that the absence of state control has led to deforestation caused by excessive local logging (Bjerkli 2010). Dualistic and non-dualistic perspectives nevertheless appear in the legal proceedings. I have argued that the assessment made by the Uncultivated Land Commission is consistent with an understanding of tradition/local knowledge in line with Boyer's (1990) definition. With its focus on repeated patterns of action that can be clearly demarcated within specified activities managed by authorities, this appears as an objectification and similar to what we can find in a dualistic perspective on society/culture. The perspectives assumed by the Supreme Court, on the other hand, point towards a more holistic or non-dualistic understanding. It should be noted, however, that the Supreme Court does not discuss any such perspectives and does not use any concepts such as TEK, IK or *holism*. The court assesses the concrete utilisation of the area, how it has developed over time and in terms of local opinion (good faith). Thus, this is more consistent with the general type of knowledge that Kalland claims ought to lie at the base of our analyses. We may identify these in all types of societies; modern as well as traditional, Western as well as non-Western. Modern/traditional and Western/non-Western also represent assumed dualities that will serve to guide any attempt to define alternative states. This is in itself a paradox.

The concepts that we use represent cultural world-views. These are not closed. If an anthropologist is to appear as an expert adviser in legal proceedings, it makes little sense to insist on using concepts that to a little or no extent are applied in courts. One may well explain terms that are used by the people involved, but the ethnographic description of activities and actions over time, the context and social institutions, is the crucial factor. Whether it is referred to as *local*, *traditional* or *indigenous knowledge* is less important. As we have seen, even a *Western* institution such as a court of law may change its opinion. It does not operate automatically on the basis of an assumedly Western dualistic perspective. When Kalland (2008) states that it is not his intention to defend dualistic anthropology, I take it to mean that issues pertaining to dualism/non-

dualism are not his essential concern. Instead, all knowledge is historically rooted in its environment and in social institutions.

The Svartskog ruling – importance for other cases?

In many ways, the Svartskog case represents a new development in Norwegian jurisprudence, and the case is unique in that an unspecified group of persons were granted ownership of land on the basis of customary rights. The question is whether this has had or will have an effect for other cases, perhaps especially relevant in assessments of indigenous rights to land and water. We may say that as yet, the Svartskog ruling has not entailed any consequences for other cases. The ruling is particularly relevant, however, for the work of the Finnmark Commission. The Finnmark Commission's mandate specifies that legal precedents, for example as reflected in the decisions of the Supreme Court, should constitute its basis: 'Sámi customs and conceptions of justice should be taken into account as developed by the Supreme Court through long-standing legal custom and usage'.¹³ The Svartskog ruling is referred to in particular. In its first case, which concerned Stjernøya/Seiland in western Finnmark, the Finnmark Commission establishes that 'the utilisation has varied from one resource to another as well as in content and scope, and although it originally was crucial for subsistence, it has later changed in character towards being a secondary source of foodstuffs and a place for leisure activities. However, throughout this time the population has made use of local resources to the extent that this has been a natural option in light of the times and conditions' (Finnmarkskommissjonen 2012, see pp. 60–68 in particular). This refers to practices that go back to the time before the state established its management regime in 1775 through the resolution to redistribute the land. The utilisation thus corresponds to the assessment made in Svartskog, but in contrast to Svartskog, the population on these islands was only granted independent rights of use. The main argument against granting ownership was that people on Stjernøya and Seiland islands through the ages had accepted the state's right of disposal to a greater extent by abiding with state requirements and rules regarding leaseholds and expulsions; something that the people in Manndal had done to a lesser extent. At the same time, the Finnmark Commission states that the granting of rights must be assessed for each form of utilisation separately.¹⁴ It is thus questionable whether the Finnmark Land Tribunal has fully realised the implications of the legal philosophy that the Supreme Court applied in the Svartskog case.

However, the Finnmark Commission is not a court that can deliver legally enforceable rulings. Its rulings are more similar to reasoned proposals for solutions that the parties may endorse. If the parties accept the solutions, they remain in force. The rulings can be appealed to the Finnmark Land Tribunal and possibly to the Supreme Court. The Stjernøya/Seiland field has been appealed to the newly established Land Tribunal, but their rulings were not in favour of ownership rights. Whether the Svartskog case represents a new development in legal philosophy that entails consequences for other cases may not be clear until the Supreme Court has ruled in different cases concerning land rights in Finnmark county.

Notes

1. In the context of the processing of the Svartskog case in the Uncultivated Land Commission, the undersigned and Trond Thuen served as expert advisers and wrote a report: Bjørn Bjerkli and Trond Thuen 1998: *Om bruken av Svartskogen i Manndalen*. Stensilserie A no. 91. Faculty of Social Sciences, University of Tromsø. The undersigned was subsequently appointed expert adviser to the proceedings of the case in the Supreme Court, and a smaller additional report was written (Bjerkli 2004). The article is based on field work undertaken in association with the work as expert adviser and monitoring of the legal proceedings.
2. Agrawal (1995) argues against understanding Western scientific knowledge and indigenous knowledge as belonging to different knowledge systems. They are fundamentally structured in an identical manner. Both are based on practical or empirical knowledge. Theories must be empirically rooted in order to be valid.
3. The same argument is put forward with regard to the understanding of tradition in Bjerkli (1996). It also supports Agarwal's point that in principle, there is no difference between *Indigenous knowledge* and *scientific knowledge*.
4. Čáhput refers to something black.
5. For a more detailed account of the history of property relations in the area, see Bjerkli (2007).
6. Letter dated 24 January 1948 from Troms Police Authority to the Governor of Troms County.
7. Act of 7 June 1985 no. 51.
8. Regjeringsadvokaten: Stevning til Utmarkskommisjonen for Nordland og Troms. Oslo 16.06.1993.
9. Originally, more than 200 local people were subpoenaed in the case. Cf. the overview of parties to the case in the ruling passed by the Uncultivated Land Commission on 5 March 1999. Those who did not participate in the appeal were largely property owners in the same part of the community.
10. Supreme Court: Appeal case 340/1999.
11. Rt. 2001, p.1229.
12. In the winter of 2003, the population of Manndal valley established an association, *Čáhput Siida*, with the objective of formalising the transfer of property and implementing a management regime. All persons resident in the Manndal valley are members of the Association.
13. Innst.O.nr.80(2004-2005) (p.18-19).
14. The Finnmark Land Tribunal has up to now passed resolutions in in four fields. See <http://www.domstol.no/no/Enkelt-domstol/Finnmarkskommisjonen/Dokumenter/Rapporter>.

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