Chapter 5
The Commons Regime: Everybody's and Nobody's

Et quidem naturali jure communia sunt omnium haec, aer, aqua profundus, et mare et per hoc littora maris
Institutes of Justinian, II.,I.,1.

I own a flower that I water every day. I own three volcanoes that I clean every week . . . The fact that I own them, is useful to [them]. But, you are not useful to the stars. . .
Antoine de Saint-Exupéry (1946)

5.1 Introduction

Article I of the Outer Space Treaty proclaims that the extraterrestrial realms – outer space, including the Moon and other celestial bodies – shall be "free for exploration and use by all States without discrimination of any kind, on a basis of equality", and that "there shall be free access to all areas of celestial bodies". The exploration and use of the extraterrestrial realms is declared as being the "province of all mankind". This norm effectively establishes among the States Parties an open access and free use regime on the Moon, making it a public good whose owner is everybody and nobody. Several other tenets of the Outer Space Treaty confirm and elaborate the above regime.

5.2 The Extraterrestrial Realms as a Commons

About 15 centuries ago, the *Corpus Juris Civilis* proclaimed that access to the seashore pertains to everybody on the basis that, "[b]y natural law itself these things are the common property of all: air, running water, the sea, and with it the shores of the sea" (Institutes of Justinian, II.,I.,1.). A few paragraphs later (II.,I.,5), the same norm stated that "seashores are regarded as the property of no one but being of the same legal status as the sea itself and as things lying under the sea, earth or sand".

While the number of public goods has increased over the centuries, the confusion between everybody and nobody has been perpetuated. As remarked by Grotius (1608), "in the legal phraseology of the Law of Nations, the sea is called indifferently the property of no one (*res nullius*), or a common possession (*res communis*), or public property (*res publica*)". Judith Fitzpatrick (1991) writes that,

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under Australian law, "fish are common property" and that "fisheries resources are publicly owned, being at once everybody's and nobody's", while Herman Haeruman (1995) speaks about natural resources that have always been "open-access resources (everybody's and nobody's property)". Andrzej Kaczmarczyk (2003, p. 3) considers that the Internet has neither a proprietor nor a ruler, belonging to "everybody and nobody as the society itself", while Ezio Manzini (2002) defines common goods as "goods' that belong to everybody and nobody in particular" and that, as long as they remain common, "cannot be reduced to marketable products and cannot therefore be bought or sold".

The category of goods above is known under different names: open-access resources, common goods, public property, public spaces, the commons, etc. Together with the oceans and atmosphere, the extraterrestrial realms are said to form part of the "global commons" – a misleading classification because these lie, physically, outside the globe. As explained by Hoffstadt (1994, p. 567), there is practically a consensus among scholars that the "province of all mankind" concept valid for the extraterrestrial realms draws upon the Roman property notion of *res communis* – i.e., "that States have rights of free access and use – but not rights of ownership – to the shared property of the community" – the same being the basis for the "freedom of the high seas". As new oceans and new shores, the outer space and the extraterrestrial realms belong to everybody and nobody or, in the convoluted Latinism of space lawyers, they are "*res communis rerum publicarum (omnium)*" (Wassenbergh, 1991, p. 61) or "*res communis omnium civicum*" (Magno, 1972, p. 165).

The *res communis*/*res publica*/open access regime pertains to many legal traditions. For instance, the 1839 Constitution of the Cherokee Nation provides in Article I.2 that:

> [t]he lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them.

The same common/public property regime exists in an anarchist society. As explained by the A-Infos Project – a group of "revolutionary class struggle social anarchists, anarcho-communists, libertarian communists, syndicalists and others who hold similar opinions", in an anarchist society "everybody and nobody" owns property:

> Land, houses, offices, machinery, factories and infrastructure are all held in common. These commodities are neither bought or sold, they are used by whoever needs to use them. . . . [I]f you don't use particular goods and property, those goods or property will become available to somebody who needs them (A-Infos News Service, 2002).

The commons regime is not monolitichal; the freedom of access varies from absolute to limited. On the right, it is bordered by *res nullius* – goods that belong to no-one and can be privately appropriated. As explained by L.F.E Goldie (quoted in Hoffstadt, 1994, pp. 567 and 588), the most lenient form of the commons is represented by *res communis*, whereby property is owned by the community as a whole,

and every member has the right to use the property without having exclusive ownership rights. A stricter approach is the *res publica*, whereby the common property is centrally enclosed and cannot be used without permission from the community. On the left, it is bordered by the Common Heritage of Mankind regime, or the *res communis humanitatis*, whereby users have to share with the community the benefits accrued from the use of the commons.

In the extraterrestrial realms, there are several regimes based on the commons paradigm. The most lenient form of *res communis*, as applied by most actors to the celestial realms and most of outer space, contains nonetheless several regulations and is not strictly an open access regime. According to Article I of the OST, the freedom of exploration and use of the extraterrestrial realms pertains to States. Article VI of the OST requires non-governmental entities to obtain authorization from the appropriate State Party in order to carry out activities in the extraterrestrial realms, and to consent to being continually supervised by same. States bear international responsibility for national activities carried out in outer space and on the celestial bodies, whether these are performed by governmental entities or by private enterprise. The regime is therefore a hybrid of *res communis* – at international level – and *res publica* at municipal level, given the need for a nationally issued license. Last, but not least, the celestial bodies are considered by several States as being the Common Heritage of the Mankind – a regime going beyond the commons paradigm.

5.3 The Celestial Bodies as *Res Communis*