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COMMON (AND COLLECTIVE) PROPERTY – A HISTORICAL PERSPECTIVE

INSTITUTE OF COMPARATIVE LAW
in collaboration with
DEPARTMENT OF LAW OF THE UNIVERSITY OF NAPLES "FEDERICO II"

International Scientific Conference

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Proceedings from the International Scientific Conference
26 June 2024, Belgrade, Serbia

Editors:
Prof. Dr. Samir Aličić
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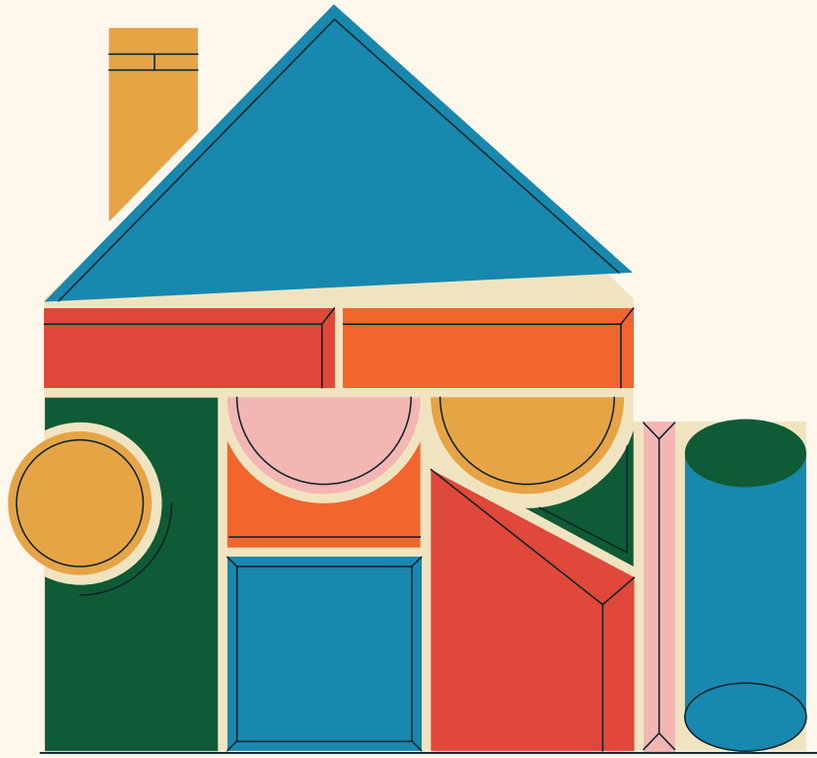

Beograd, 2024.

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CONTENT

Domenico Dursi* DOI: 10.56461/ZR_24.CCP.05

RES COMMUNES OMNIUM: AROUND THE USE OF NATURAL RESOURCES IN ROMAN LEGAL EXPERIENCE. BETWEEN INCLUSION AND EXCLUSION

Abstract: *The paper analyzes the Marcian category of res communes omnium to outline its legal status, which shows that no one can be excluded from enjoying the resources that nature makes available to all.*

Keywords: *common goods, res communes omnium, natural law, fishing, hunting, water, air, public goods.*

1. The status *of res communes omnium*

The study of *res communes omnium* has long been influenced by the Mommsen's judgment in a letter addressed to Vittorio Scialoja[1], concerning an epigraphic text, in which the distinguished antiquarian defined the *res communes omnium* as a category without head or tail. Given the authority of the definition, for a long time, no importance was assigned to the category, to the point of including it even in the title of a weighty volume on the subject: I refer to Ubaldo Robbe's monographic work *La differenza sostanziale tra res nullius, res nullius in bonis e la categoria pseudomarcianea delle res communes omnium che non ha né capo né coda*[2]. It is worth emphasizing that it was thanks to Giuseppe Branca that a trend reversal and reevaluation of the notion began. In 1942, the author published a monographic work on *res extra commercium humani iuris*, focusing on Marcian's dogmatics, demonstrating its classicism[3].

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[1] T. Mommsen, "Sopra una iscrizione scoperta in Frisia", *Bullettino dell'Istituto di diritto romano*, (BIDR) 2/1889, 129-135.

[2] U. Robbe, *La differenza sostanziale tra 'res nullius' e 'res nullius in bonis' e la distinzione delle 'res' pseudomaricanee "che non ha né capo né coda"*, Giuffré, Milan 1979.

[3] G. Branca, *Le cose extra patrimonium humani iuris*, Edizioni Universitarie, Trieste 1941. More recently, *ex multis* see M. Fiorentini, *Fiumi e mari nell'esperienza giuridica romana*, Giuffré, Milan 2003; M. Fiorentini, "L' acqua da bene economico a «res communis» a bene collettivo", *Analisi giuridica dell'economia*, 9.1/2010, 39-78; M. Fiorentini, "Spunti volanti in margine al problema dei beni comuni", *Bullettino dell'Istituto di Diritto Romano* (BIDR), 111/2017, 75-103; M. Fiorentini, "Res communes omnium e commons. Contro un equivoco", *Bullettino dell'Istituto di Diritto Romano* (BIDR), 113/2019, 153-181; P. Lambrini, "Alle origini dei beni comuni", *Iura*, 65/2017, 394-416; P. Lambrini, "Per un rinnovato studio della tradizione manoscritta del Digesto: il caso di aer nell'elencazione delle res communes omnium", *KOINΩNIA*, 44.1/ 2020, 817-827; G. Santucci, "Beni comuni". Note minime di ordine metodologico", *KOINΩNIA*, 44.2/2020, 1395-1406.

The fundamental texts belong to the jurist Marcian[4], who, in his *Institutions,* first asserts that there are things common to all by natural law, things of collectives, things of no one, and things of individuals, which are the majority[5]. He then continues to affirm that the air, the flowing water, the sea, and, in consequence, the seashores are common goods of all by natural law[6].

First of all, it is necessary to clarify how Marcian distinguished this category from that of *res publicae*, in which, for the jurist, rivers and ports, among others, are included[7]. The problem arose because Marcian's enumeration reported in the Digest does not mention *res publicae*, which are, however, used by the jurist in the continuation of his exposition. On the other hand, the text of Justinian's *Institutions*[8] on the division of things, unequivocally derived from Marcian's *Institutions,* due to the almost total coincidence between the texts[9], includes the category of *res publicae* juxtaposed to that of res *communes omnium*. Essentially, it is clear that Marcian distinguished the *res communes omnium* from the *res publicae*. The lack of mention of the latter in the Marcian division of things reported in the Digest, although difficult to explain, could find reason in the conjecture that the Justinianeans omitted the reference to *res publicae* because in the chain of texts in which the Marcian's passage is embedded, the reference to them appeared a few lines above. This intervention did not alter the Severian jurist's thought on goods, considering that in another passage by the same jurist, presumably placed

[4] Among this jurist and his works see L. De Giovanni, *Giuristi Severiani. Elio Marciano*, D'Auria, Napoli 1989; D. Dursi, *Aelius Marcianus. Institutionum Libri* I- V, L'Erma di Bertschneider, Rome 2019.

[5] D. 1.8.2 pr. (Marc. 3 *inst.*): *Quaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur*.

[6] D. 1.8.2.1 (Marc. 3 *inst.*): *Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris*

[7] D. 1.8.4.1 (Marc. 3 *inst.*): *Sed flumina paene omnia et portus publica sunt*.

[8] I. 2.1. pr.: *Superiore libro de iure personarum exposuimus: modo videamus de rebus. quae vel in nostro patrimonio vel extra nostrum patrimonium habentur. quaedam enim naturali iure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur, sicut ex subiectis apparebit.*

[9] On this point, I would like to refer to D. Dursi, *Res communes omnium. Dalle necessità economiche alla disciplina giuridica*, Jovene, Naples 2017, 7; Dursi (2019) 80 and 151 ff. and also D. Dursi, "Res communes omnium e outer space. Qualche riflessione", *Bullettino dell'Istituto di diritto romano* (BIDR) 116/2022, 144 ss. In these works, I suggest that the text of the Justinian Institutes could align more closely, than the text of Digest, with the original Marcian's text. A different opinion comes from R. Basile, "Res communes omnium: tra Marciano e Giustiniano", ΚΟΙΝΩΝΙΑ, 44.1/2020, 119 ff. Basile argues that in Marcian's text, there is no conceptual difference between common goods and public ones, as the jurist would have dissolved the category of *res publicae* and divided them into the category of *res communes omnium* and the category of *res universitatis*. Various arguments, in my opinion, oppose this view. Setting aside other arguments, it is sufficient to consider that if the jurist had intended to eliminate the category of *res publicae* from the classification, it would be highly impossible that he would have used it shortly after to specify the nature of rivers and ports. Moreover, it would also be difficult to explain the examples cited (considering them together: sea, air, running water, shore, theaters, and city stadiums) compared to other examples, such as public roads, which are much more significant. Finally, although it is not a decisive argument, it should be noted that Ulpian, who also refers to *res communes omnium* including almost the same res as Marcian, identifies a different regulation for *res publicae*. It seems almost improbable that in the same period, a clear divergence in the regulation of the two categories of *res* would emerge from the writings of two jurists. Furthermore, among all the jurists who deal with the matter - even those who classify them as *res publicae* - the shore and the sea have a different regulation from that of the other *res publicae*.

a few lines after the enumeration of the different types of *res*, there is indeed an unequivocal reference to *res publicae*[10].

The further question to be answered is whether Marcian's category of *res communes omnium* - including air, flowing water, sea, and because of the sea, the shore - should be considered a closed or merely exemplary enumeration. I seem[11] to have found the answer in the analysis of a passage from the third book of Marcian's Institutions, preserved in the Digest just after the one under consideration, and concerning the res universitatis. Marcian states that this category includes theaters, stadiums, and other similar things, et similia. This latter specification clearly indicates that the jurist was describing an open list in this instance, a characteristic that is completely absent in the case of the res communes omnium. Furthermore, the fact that Marcian considered the shore a common good only because it includes the sea reinforce this point of view. The jurist's precise terminology suggests that the list of res communes omnium was closed and exhaustive, which is also consistent with the unique nature of such goods.

It has also been noted how the category was often used by emperors to settle disputes between fishermen and owners of seaside villas. We read of imperial rescripts in both Ulpian[12], for whom they intervened frequently, and in Marcian[13]. These were measures aimed at preventing owners of seaside villas from prohibiting access to the shore for fishing purposes. This highlights how *res communes omnium* had a well-defined practical, far from being - as it has also been argued - a category without practical relevance and resulting from philosophical influences of the jurists who recalled it.

From the reading of the referenced texts, here emerges a precise profile: no one could be prevented from fishing in the sea, although fishing in private pools could be prohibited. Moreover, the same applies to bird hunting. Ulpian relates the common nature of the air specifically to bird hunting, stating that no one can be prohibited from hunting birds, although to someone else's field can be obstructed. In this case, too, there is the memory of an imperial rescript by Antoninus Pius that asserts it was unreasonable - not forbidden - to hunt birds on private property[14].

[10] Dursi (2017), 9.

[11] Dursi (2017), 10-11.

[12] D. 47.10.13.7 (Ulp. 57 *ad ed.*): […]: *si quem tamen ante aedes meas vel ante praetorium meum piscari prohibeam, quid dicendum est? me iniuriarum iudicio teneri an non? et quidem mare commune omnium est et litora, sicuti aer, et est saepissime rescriptum non posse quem piscari prohiberi: sed nec aucupari, nisi quod ingredi quis agrum alienum prohiberi potest. usurpatum tamen et hoc est, tametsi nullo iure, ut quis prohiberi possit ante aedes meas vel praetorium meum piscari: quare si quis prohibeatur, adhuc iniuriarum agi potest. in lacu tamen, qui mei dominii est, utique piscari aliquem prohibere possum.*

[13] D. 1.8.4 pr. (Marc. 3 *inst.*): *Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen villis et aedificiis et monumentis abstineatur, quia non sunt iuris gentium sicut et mare: idque et divus Pius piscatoribus Formianis et Capenatis rescripsit.*

[14] D. 8.3.16 (Call. 3 *de cogn.*): *Divus Pius aucupibus ita rescripsit: οὐκ ἔστιν εὔλογον ἀκόντων τῶν δεσποτῶν ὑμᾶς ἐν ἀλλοτρίοις χωρίοις ἰξεύειν*

If we add the other *res* falling into the category, of flowing water, a central aspect emerges. These were goods that nature (hence the reference to natural law, which also a broader perspective, which we might call Roman natural law, echoed in Marcian)[15] had made available to all men, to allow them to procure the primordial elements for survival. Hence the economic needs these goods responded to[16].

An additional reflection is warranted on the mechanism set up by Roman jurists to achieve this goal. It is noteworthy that the sources indicate that everything found on a *res communis* was *res nullius*, allowing free appropriation by whoever physically acquired it. Fish in the sea were *res nullius*, as were birds in the air and gems and pebbles on the shores. This was due to the common nature of the place where these goods were found. The sources clearly state that if a fish was found in a private pool, it would belong to the pool owner, and the same applies to gems found on private property.

Now it is time for a coup de théâtre in the strict sense: the regime just described is first enunciated in a comedy by Plautus, in a text rich in legal references, showing how the statute and scheme discussed by Roman jurists likely pre-existed their elaboration. This is a passage from *Rudens*[17], which narrates a shipwreck and the subsequent finding of a chest full of jewels among the wreckage. The chest is accidentally found by a fisherman in his net.

The shipowner claims the jewels, asserting the ownership. However, the fisherman, with crafty reasoning, argues that it is unthinkable to claim that a fish caught in the sea, belongs to the one who catches it, because the sea is common to all. For the same reason, no one could claim the chest. The argument is evidently specious. The chest has a specific owner and is found in the sea by chance. Beyond these aspects, our interest is on Plautus' precise use of legal terminology (expressions like *adserere manum, occupatio, res nullius*) and the emergence of

[15] Dursi (2019) 5 ff. Around the so-called Roman jusnaturalism, see A. Schiavone, *Ius. L'invenzione del diritto in Occidente*, Einaudi, Torino 2017[2], 275 ff.., who dwells, in particular, on the following texts: D. 1.1.4 (Ulp. 1 *inst.*): *Manumissiones quoque iuris gentium sunt. est autem manumissio de manu missio, id est datio libertatis: nam quamdiu quis in servitute est, manui et potestati suppositus est, manumissus liberatur potestate. quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis. et cum uno naturali nomine homines appellaremur, iure gentium tria genera esse coeperunt: liberi et his contrarium servi et tertium genus liberti, id est hi qui desierant esse servi*.; D. 50.17.32 (Ulp. 43 *ad Sab.*): *Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt*. D. 1.5.4.1 (Flor. 9 *inst.*): *Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.* D. 12.6.64 (Tryph. 7 *disp.*): *Si quod dominus servo debuit, manumisso solvit, quamvis existimans ei aliqua teneri actione, tamen repetere non poterit, quia naturale adgnovit debitum: ut enim libertas naturali iure continetur et dominatio ex gentium iure introducta est, ita debiti vel non debiti ratio in condictione naturaliter intellegenda est.*

[16] Dursi (2017) 64 ff.

[17] *Rud*. 969 – 975: [Grip.]: *Dominus huic, ne frustra sis, nisi ego nemo natust, hunc qui cepi in venatu meo.*

[Trac.] *Itane vero?* [Grip.] *Ecquem esse dices in mari piscem meum? Quos cum capio, liquide cepi, mei sunt; habeo pro meis, nec manu adseruntur neque illinc partem quisquam postulat. In foro palam omnes vendo pro meis venalibus. Mare quidem commune certost omnibus.*

the argument in the 3rd/2nd century BC that since the sea is common to all, fish are appropriable by anyone, i.e., *res nullius*, which, as we have seen, appears in the jurists active between Hadrian and the Severans between the 2nd and the 3rd centuries AD[18].

It should be noted that the comedy was not aimed at legal audience; rather, to evoke humour, it had to allude to notions and concepts familiar to the audience: otherwise, the play on words and ambiguities would not have worked[19]. Given this, we can advance the well-founded hypothesis that the category of *res communes omnium* existed well ahead of the jurists' elaboration during the peak of Roman jurisprudence. One can also assume that this category and its rules sprung in a customary way and only later they were refined by some jurist who created a very precise statute. It emerges, therefore, that since archaic times, the configuration of the sea as *res communis omnium* aimed to guarantee freedom of fishing and thus to meet this specific economic need.

The discussed scheme is confirmed by the regime of constructions on the shore and the sea. These constructions become the property of those who built them, but the jurists' texts emphasize that this is a peculiar form of occupation, as these buildings are considered *res nullius*. In other words, for the jurists, and especially for Pomponius, the act of building constituted the occupation of the structure, through which the builder became the owner[20]. This is particularly relevant because the construction was not of natural derivation. Thus, these goods aimed to protect specific economic needs.

The issue of constructions also raises the question of the legal status that arose over the structure and the surface on which it rested. Various Roman jurists' texts addressing the issue provide significant clues. Firstly, there is never a reference to *dominium ex iure Quiritium*. Instead, expressions like *eius fiet, meum fiat,* and others indicating a factual situation are used[21].

[18] Dursi (2017) 139 ff.

[19] O. Diliberto, 'La satira e il diritto: una nuova lettura di Horat., sat. 1,3,115-117', *Annali del Seminario Giuridico dell'Università di Palermo* (*AUPA*), 55/2012, 387-402; O. Diliberto, „Ut carmen necessarium (Cic. leg. II 59). Apprendimento e conoscenza della legge delle XII Tavole nel I sec. a C.", in *Letteratura e civitas. Transizioni dalla Repubblica all'Impero* (M. Citroni ed.), Pisa 2012, 141-162.

[20] D. 1.8.10 (Pomp. 6 *ex Plaut.*): *Aristo ait, sicut id, quod in mare aedificatum sit, fieret privatum, ita quod mari occupatum sit, fieri publicum*.; D. 41.1.50 (Pomp. 6 *ex Plaut.*): *Quamvis quod in litore publico vel in mari exstruxerimus, nostrum fiat, tamen decretum praetoris adhibendum est, ut id facere liceat: immo etiam manu prohibendus est, si cum incommodo ceterorum id faciat: nam civilem eum actionem de faciendo nullam habere non dubito*

[21] *Ex multis*, D. 41.1.14pr. (Ner. 5 *membr.*): *Quod in litore quis aedificaverit, eius erit: nam litora publica non ita sunt, ut ea, quae in patrimonio sunt populi, sed ut ea, quae primum a natura prodita sunt et in nullius adhuc dominium pervenerunt: nec dissimilis condicio eorum est atque piscium et ferarum, quae simul atque adprehensae sunt, sine dubio eius, in cuius potestatem pervenerunt, dominii fiunt*.; D. 43.8.3.1 (Cels. 39 *dig.*): *Maris communem usum omnibus hominibus, ut aeris, iactasque in id pilas eius esse qui iecerit: sed id concedendum non esse, si deterior litoris marisve usus eo modo futurus sit*; D. 39.1.1.18 (Ulp. 52 *ad ed.*): *Quod si quis in mare vel in litore aedificet, licet in suo non aedificet, iure tamen gentium suum facit: si quis igitur velit ibi aedificantem prohibere, nullo iure prohibet, neque opus novum nuntiare nisi ex una causa potest, si forte damni infecti velit sibi caveri.*

Furthermore, it is often emphasized that the surface on which one built returned to its original state, if the structure collapsed, unlike land where ownership was acquired, which persists regardless of the presence of a building on it[22]. Moreover, the jurist Pomponius[23] informs us that no civil law actions, such as *rei vindicatio*, were available to protect such constructions, but one could also resort to physical means. The jurist Cervidius Scaevola deals with of a house built on the shore as a possessed house[24]. Again, the jurist Paulus[25] informs us that one could resort to the interdict *uti possidetis*, a remedy granted by the praetor to protect possession.

Thus, a peculiar possessory form seems to emerge, as – as we also learn from Papinian[26] - it did not lead to *praescriptio longae possessionis*, a procedural remedy with the consequences of usucapion. It was a possession that never resulted in ownership. The reason for this lies, once again, in the necessity to prevent anyone from being excluded from enjoying such goods.

Regarding constructions, the statute of the category has been established through a progressive differentiation within *res publicae*. Construction on public land was prohibited unless authorized[27], unlike construction on the shore, which was generally free. However, where allowed, construction on *res publicae* imposed an obligation on the builder to pay a periodic *vectigal* to the treasury, as the construction adhered to the land and became *res publica*[28]. Conversely, as we observed, the building on the shore belonged to the builder, as the accession principle did not apply, precisely because there was no owner of the land. Thus, some aspects of *res communes omnium* are defined by differentiation from *res publicae*.

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[22] D. 41.1.14.1 (Ner. 5 *membr.*): *Illud videndum est, sublato aedificio, quod in litore positum erat, cuius condicionis is locus sit, hoc est utrum maneat eius cuius fuit aedificium, an rursus in pristinam causam reccidit perindeque publicus sit, ac si numquam in eo aedificatum fuisset. quod propius est, ut existimari debeat, si modo recipit pristinam litoris speciem.*; D. 1.8.6pr. (Marc. 3 *inst.*): *in tantum, ut et soli domini constituantur qui ibi aedificant, sed quamdiu aedificium manet: alioquin aedificio dilapso quasi iure postliminii revertitur locus in pristinam causam, et si alius in eodem loco aedificaverit, eius fiet.*

[23] D. 41.1.50 (Pomp. 6 *ex Plaut.*). See *supra*.

[24] D. 19.1.52.3 ((Scev. 5 *resp.*): *Ante domum mari iunctam molibus iactis ripam constituit et uti ab eo possessa domus fuit, Gaio Seio vendidit: quaero, an ripa, quae ab auctore domui coniuncta erat, ad emptorem quoque iure emptionis pertineat. respondit eodem iure fore venditam domum, quo fuisset priusquam veniret.*

[25] D. 47.10.14 (Paul. 30 *ex Plaut.*): *Sane si maris proprium ius ad aliquem pertineat, uti possidetis interdictum ei competit, si prohibeatur ius suum exercere, quoniam ad privatam iam causam pertinet, non ad publicam haec res, utpote cum de iure fruendo agatur, quod ex privata causa contingat, non ex publica. ad privatas enim causas accommodata interdicta sunt, non ad publicas.*

[26] D. 41.3.45pr. (Pap. 3 *quaest.*): *Praescriptio longae possessionis ad optinenda loca iuris gentium publica concedi non solet. quod ita procedit, si quis, aedificio funditus diruto quod in litore posuerat (forte quod aut deposuerat aut dereliquerat aedificium), alterius postea eodem loco extructo, occupantis datam exceptionem opponat, vel si quis, quod in fluminis publici deverticulo solus pluribus annis piscatus sit, alterum eodem iure prohibeat.*

[27] D. 43.8.2pr. (Ulp. 68 *ad ed.*): *Praetor ait: "Ne quid in loco publico facias inve eum locum immittas, qua ex re quid illi damni detur, praeterquam quod lege senatus consulto edicto decretove principum tibi concessum est. de eo, quod factum erit, interdictum non dabo".*

[28] D. 18.1.32 (Ulp. 44 *ad Sab.*): *Qui tabernas argentarias vel ceteras quae in solo publico sunt vendit, non solum, sed ius vendit, cum istae tabernae publicae sunt, quarum usus ad privatos pertinet.*

2. A Final Consideration

Lastly, from the textual reading, it appears that natural goods, or, more specifically, natural resources, belong to everyone, allowing each person to have the minimum necessary for survival. However, this also means that no one could use them in a way that excludes others or even deteriorates the conditions of usability for others. Therefore, no ownership rights could exist over such goods, only forms of *de facto* belonging, compatible with the *usus omnium hominum*.

In conclusion, with due caution, it seems that the category of *res communes omnium* was a legal concept developed by the Romans to prevent the abuse of natural resources.

Perhaps, unintentionally, and despite the lack of modern environmental awareness, it also helped maintain a balance between humanity and nature. To achieve this goal, the Romans forged a category based on the paradigm of inclusion, the opposite of the idea of exclusion on which private property is founded.

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