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Property rights and forest management: Legal constraints for the use of various forest products in two different countries

Abstract

Forest management and forest use are influenced by various factors. Law plays a great role in this context. Thanks to the user oriented institutionalism approach it is possible to analyse the influence of private and public law on forest management. The analysis of the institutional regime will encompass the legislation of two different European countries, namely Italy and Switzerland.

Introduction

Forest management and forest use are influenced by various factors. Besides economic, ecological, technical and cultural aspects the institutional rules and norms and political instruments are decisive for the behavior of the user of natural resources in general and of the forest in particular. In constitutional states these limits and possibilities for owners and users are fixed in legal acts, such as constitutions, laws, decrees etc. In the context of natural resources the regulation of property is crucial: In general the owner of a resource decides on the destiny of his object! In democratic states, such as for example all western European countries, property rights are explicitly guaranteed at constitutional level. These property rights provide the owner with means of defence against private and state interventions and guarantees him or her the free use of an owned object. But property rights are not unlimited; they can be restricted by the legal

system, both the private and the public law. These restrictions can differ according to objects, times and places.
Property rights have a general validity and therefore they apply to forests also: Forest owners generally enjoy guaranteed property rights and they can freely dispose of them. In general, subjects of the property rights are private owners but public owners are not excluded from this constitutional guarantee. It includes not only property in a strict sense (property law or right *in rem*) but also other forms of possession, such as tenure or lease, and it is valid for all kind of properties, i.e. land, chattels, real rights, fortune etc.

With respect to the forest a tense relationship between guaranteed property rights and the various legal restrictions implemented at different levels for public and private purposes can be observed. Together with the various forms of possession and the manifold objects belonging to a forest the so-called institutional regime of the forest becomes very complex.
In this paper we are going to reduce this complexity by elaborating an analytical framework which is based on the so called user oriented institutionalism approach[1]. It mainly consists of a distinction between private law (above all right in rem) and public law (sectoral laws such as forest, spatial planning, nature and landscape protection, water protection, hunting law etc.). These laws will be investigated with regard to the forest in general and to the various products or components (timber and non timber forest products) of the forest in particular. The analysis of the so called institutional regime will encompass the legislation of two different European countries, namely Italy and Switzerland. The aim is to find out similarities and differences in these countries. The findings should form the basis for an evaluation of the impacts of institutional settings on a sustainable use and management of private and public forest on the one hand, and for comparing the two countries on the other hand.

Switzerland

Constitutional level

Property rights and their constitutional guarantees seem a matter of course to us. In fact, property rights have only recently been guaranteed by the Federal Constitution of Switzerland. At the end of the 18th century, property rights were listed as one of the freedom rights based on natural law; likewise, the Swiss cantons included the guarantee of property rights in their

[1]Knoepfel, P. et al (2001), Institutionelle Regime für natürliche Ressourcen: Boden, Wasser und Wald im Vergleich. In P. Knoepfel/I. Kissling-Näf/F.Varone (eds), Ökologie und Gesellschaft, , Helbing & Lichtenhahn, Basel-Genf-München, 44.

constitutions in the 19th century. But explicit guarantee was not given until 1969 when spatial planning was introduced into the Constitution (article 22ter of the former Swiss Constitution). The total revision of the Constitution in 1999 left the provision unchanged.[2]

Property is guaranteed in article 26 of the Swiss Constitution[3], hence listed as one of the fundamental rights. As such, it has two functions: On the one hand, it forms an important basis allowing an individual to live a free and independent life[4]. It establishes possession of property as well as rights and prevents the state from intervening with a private person's property[5]. 'Property contributes to securing a person's existence, to circumscribing privacy as well as to establishing the basis for a free and self-determined life.'[6]

On the other hand, the guarantee of property rights is fundamental to the economic order. Property is both a tool and a product of private economic activities. The guarantee of property rights protects the right of acquisition, the right of disposal and the right of use and selling and enables economic transactions involving resources and products. Thus, the economic order acquires the necessary stability and predictability.[7]

The guarantee of property rights comprises three components:

- First, article 26 paragraph 1 of the Federal Constitution stipulates that private individuals can own property and rights. It prevents the state from abolishing or depleting private property.
- Second, the article protects the individual, concrete legal property in the goods from state intervention. It enables the owner to acquire, to keep, to use and to sell his property.[8]

Restrictions of ownership are only permitted within the framework of article 36 of the Swiss Constitution, which states the prerequisites for limiting fundamental rights. Limitations require a basis in laws, they need to be in the public interest and must be proportional.

- Third, paragraph 2 of the same article 36 prescribes compensations if the owner is injured in his property rights by the state. There are three cases of expropriations. In a formal expropriation property rights are fully or partially transferred from the former owner mostly to the dispossessor. Formal expropriations are fully compensated. In a material expropriation ownership is left with the owner but his right is restricted to such an extent that he can no longer use his property in the appropriate way. Material expropriations are fully compensated too.

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2 Riva/Müller-Tschumi, 48/2f.; Vallender, 26/1ff.

3 (1) The right to property is guaranteed.
(2) Expropriation and restrictions of ownership equivalent to expropriation shall be fully compensated.

4 Rhinow, 2001, 35/30.

5 Riva/Müller-Tschumi, 48/1.

6 Riva/Müller-Tschumi, 48/7.

7 Rhinow, 2001, 35/31; Vallender, 26/72ff.

8 Vallender, 26/26ff.; Riva/Müller-Tschumi, 48/8; Rhinow, 2000, S. 136.

Restrictions of a lesser intensity have to be endured without compensation. They can be regarded as limited expropriations.[9]

It is not nature that has given property rights to human beings. Property rights are a creation of the legal system requiring further shaping. This is the task of the legislator and hence a result of the political process. Ownership is not what is written in the Constitution but what the whole legal system constitutes. In this context, both private and public law have a tremendous importance.[10]

In general unrestricted ownership does not exist. The constitutional guarantee of property rights does not take priority over other ownership-related provisions in the constitution[11].[12] In contrast to other countries Switzerland defines ownership only in private law. The latter does not make a differentiation between private and public property. The Civil Code is based on the standard of private property and states some special regulations for other forms of property. Thus also the state can be the owner of private properties. But for the fulfilment of its tasks, administration uses the so called public goods. What is critical for the qualification of a public good is not property itself, but purpose and domain. Property does not become public good by transfer of ownership but by being declared public by the state ("dedication") or by virtue of its nature. Public goods are divided into three groups:

- financial property (Finanzvermögen),
- administrative property (Verwaltungsvermögen) und
- public property in common use.

Financial property indirectly serves administration by its asset and income. It can be sold and handled under the rules of private law. Financial property can be regarded as private property of the public bodies. Administrative property directly serves authorities for the fulfilment of administrative tasks. They cannot be sold to privates and underlay to the public law. Public goods in common use also directly serve to fulfil public tasks and cannot be sold. They do not only serve a small or restricted number of users but all private persons. [13] Public goods in common use are subjects both to private and public law.

There are only little regulations about the form and content of property on constitutional level. The rules and norms concerning property rights are distributed in several private and public legal acts. The conceptual fundament of the property regime is anchored in the Civil Code (ZGB) under the Part Four entitled with property law ("Sachenrecht").

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9 Riva/Müller-Tschumi, 48/16ff., Vallender, 26/26ff, Häfelin/Müller, N. 2157ff.

10 Rhinow, 2000, p. 136, Riva/Müller-Tschumi, 48/9f.

11 BV 41, Social Goals; 73, Sustainability; 74-80, Protection of the Environment; 74-107, Economy; 108, Promotion of Construction and Ownership of Housing.

12 Riva/Müller-Tschumi, 48/10.

13 Häfelin/Müller, N. 2326ff.

Regulations in the Civil Code

According to article 122 of the Federal Constitution legislation in the field of civil law is a federal matter. The Confederation fulfiled this task by enacting the Civil Code in 1907.
Part 4 of the Civil Code is concerned with property. It begins with a fundamental article regulating ownership. Article 641 of Swiss Civil Code goes as follows:
"The owner of a property can dispose of it within the limits of the legal system".
It is evident that the content of ownership is defined by the whole body of rules and regulations contained in the legal system. In general, the owner can use, enjoy and dispose of his property as he wishes. He can acquire, possess, use, change, destroy, or burden it.[14] However, these rights of disposal and use are subject to a number of restrictions stipulated in private and public law.
This fundamental mechanism is also valid for all kind of forest property. Landed property is the most important one for the legal assessment of forests. The most relevant norms are embodied in Title 19 (art. 655 ff.) of the Swiss Civil Code. This part of the Civil Code is valid both for private and public forests, this means that the owner of a forest is the owner of the land where the forest stands on. According to article 667 of the Swiss Civil Code landed property extends to the air and to the subsoil as far as the owner has an interest in using it. Thus e.g. mineral resources like gravel belong to the owner of the forest.
The Civil Code imposes numerous restrictions to the real estate owners. The restrictions are threefold: First, when using his property, the owner has to take into consideration his neighbours. Excessive impacts must be avoided (article 684). Second, there are restrictions in favour of everybody, implying that landed property fulfils a socio-cultural function. The most important article concerning the forest is article 699 of the Swiss Civil Code, which stipulates that everybody is entitled to enter forests and pastures. Special regulations apply to hunting and fishing. The owner is not entitled to stop or prevent other persons from entering the forest. In so far fences above a certain height principally are not allowed by law.[15] Third, the state can apply further restrictions legitimated by public interests. These restrictions are derived from public law (articles 641 and 702 of the Swiss Civil Code).
Speaking of forests means to speak of several elements which can be called forest products. Beside the soil plants, animals and water are of special interest not only from an economic but also from a legal point of view. In the next paragraph we raise the question if landed property

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14 Tuor, p. 814.

15 Rey, Zürcher Kommentar, article 699 N. 5.

encompasses also these components of the forest or if separate property is possible. We focus on the three different products flora, fauna and water.

Plants, especially trees and mushrooms are inherent parts of the land and belong to the owner of the forest (article 667, the so called principle of accession). Due to this article forest owners have the exclusively right to use the trees growing on their forest land. With respect to trees article 641 of the Civil Code has its full validity. Similar but with certain variations are the property rights on non timber forest products such as e.g. herbs, fruits, mushrooms etc.: In principle they belong to the owner of the forest too (article 643), but everybody has the right to collect them in volumes customary to the place (article 699). Thus this non timber forest product can be denominated as private property in common use!

More complex are the regulations in the Civil Code concerning the property of water. On the one hand, public water, i.e. rivers cannot be owned by private individuals unless proven otherwise.[16] Exploitation and common use of water and riverbeds are subject to cantonal legislation[17]. On the other hand, springs and groundwater are subject to accession[18]. They are part of the landed property and cannot be owned separately[19]. Springs are defined as water resources that seep out regularly, are enclosed naturally or artificially and do not immediately flow into a riverbed. Otherwise, they would be considered as a public water.[20] Groundwater is subject to similar principles: Large groundwater streams are considered public water in order to ensure water supply. Private water is subject to detailed regulations characterized partly by public law (article 704 ff of the Swiss Civil Code); these regulations are concerned with jointly used springs, usage by neighbours, emergency wells and the transfer of water to the canton if it is not used by the owner.

From a socio-economic, political and legal point of view game as part of the fauna is of special interest. In Switzerland opposite to other countries game does not belong to the landowner. The principle of accession is not valid for the game because wildlife is not inherently connected to a real estate.'According to article 664 of the Swiss Civil Code, game is a res nullius (a thing that does not belong to anybody) placed under control of the state in whose territory it is located … Thus, game is not subject to common use but only to special use based on concessions.'[21] An animal in captivity, which is a private good, becomes res nullius again when abandoned.[22] The cantons have a traditional "regalian" right over the appropriation and the use of the game

16 Article 664 Abs. 2 ZGB.
17 Article 664 Abs. 3 ZGB.
18 Superficies solo cedit.
19 Article 667 Abs. 2, article 704 ZGB.
20 Article 667 Abs. 2, article 704 ZGB.
21 VEB 24/68.
22 Article 719 of the Swiss Civil Code.

animals.[23] In practice this regalian right of the cantons is similar to private property, but it is dominated by a public hunting legislation regulating i.a. who is entitled to hunt and which is the relevant hunting system (licence-based, renting-based or state monopoly system).
To sum up one can say that the legal situation concerning the property rights of forest and its products is much more complex than a simple separation between public and private forests. The general principle that "the owner of a property can dispose of it within the limits of the legal system" is valid also for forest owners. The Civil Code guarantees the forest owner a considerable portion of rights concerning the use of his property. But the limits of the legal systems are manifold as well. There are some restrictions, esp. in favour of the neighbours, of the public (open access) and of the state (wildlife, water). The widest space of activities exists in the field of utilizing timber and mineral resources, the lowest in benefiting from the wildlife. But the freedom of movement of the forest owners is designed by the entire set of private and public regulations. In the next paragraph the focus will be laid on some public law legislations relevant for the use of forests.

Regulations in selected public laws

Forest legislation

Switzerland has a long tradition in forest legislation dealing with aspects of public interests in forests and forestry. The Swiss Constitution gives the Confederation the competence to issue regulations on the conservation and protection of the forest on the one hand, on the promotion of forestry on the other hand. As the protecting and conserving factor is predominant the forest law encompasses numerous restrictions for the forest owners and users. This is in contrast to forest legislations in other countries (e.g. A, D, F) and in other fields (e.g. agriculture) where economic aspects prevail. The most important restrictions for the forest owner stated in the present Federal Law on Forests are the following:
There is the general rule in article 3 that 'forested area must not be reduced.' Article 5 of Forest Law establishes a ban on deforestation and rigorous conditions for exemptions. The consequence of this provision is that forest area can not be transformed into an economically more interesting area for buildings, agriculture or sports arenas. Clear-cutting and other types of utilisation having similar effects are also banned (article 22). Natural or artificial clearings, undermining the stability or protective function have to be replanted (article 23). For the harvesting of trees, the owner needs an authorisation through mandatory tree marking by forest rangers (article 21). The forest owner has to respect the principle of sustainability (article 20).

[23] Nahrath, p. 1ff.

Article 14 specifies the rule of the Civil Code concerning free access to the forest. It even obligates the cantons to ensure this right of the public. Hence, enclosure of forest areas is only permitted if specific (ecological) reasons legitimate such a restriction of the public access to a forest. This inhibits or restrains the exclusive use of non timber forest products by the forest owner.
The use of fertilizers and pesticides is forbidden (article 18). In order to improve the forest management conditions the sale and partitioning of forests are restricted. In principle, motor vehicles are prohibited from entering the forest, apart from sivicultural reasons.[24] In general forest owners are obliged to establish management plans according to the mandatory regulations of each canton (article 20).
This short list of regulations which influence the property right of forest owners shows that the attribute "within the limits of the legal system", stated in article 641 of the Civil Code may have severe consequences. It is mainly the Forest Law which determines in detail the space of manoeuvre of the forest owner.
All these restrictions and obligations are not directly connected with financial compensations of the state to the forest owners. The private and public forest owners have to bear the financial consequences resulting from these legal restrictions. These have nothing to do with a material expropriation and are conceived as a social duty inherent to forest property. The state (Confederation and cantons) allocates financial indemnities and supports for measures listed in article 35 ff. of the Federal Forest Law (especially for forest protection, forest tending, forest infrastructure and structure, forest training, biodiversity in forest). But these financial contributions are not conceived as compensations for legal restrictions of the forest property right. They are rather conceptualized as incentive means for steering the behaviour of forest owners in a direction of public interest.[25]

Legislation on spatial planning and landscape protection

The Forest Law is focused on the protection and conservation of the forest area and in so far it is the special legal act of the spatial or area planning. Nevertheless forests are also object of overarching and trans-sectoral laws such as the Federal Law on Spatial Planning, the Federal Law on Nature and Landscape Conservation, the Federal Law on the Swiss National Park etc.[26] All these legislations may comprise further aspects with impacts on the property rights of forest owners.

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24 Article 15 WaG.

25 Schmithüsen /Zimmermann (1999), p. 415 ff.

26 Zimmermann, (1991).

Forests are part of the area of a country and of the landscape. Forests are affected by the rules concerning spatial planning, development and management of the area. The main purpose of the Swiss spatial planning system is 'an appropriate and moderate use of the land and its ordered inhabitation' (article 75 Federal Constitution). One of the concrete aims of spatial planning is to prevent natural areas from further buildings and infrastructure. Forests are conceived as one of these natural areas which should be protected i.a. by measures of the general area planning.
The Federal Law on Spatial Planning distinguishes three types of zones (article 14 ff.): Building zones, agricultural zones and protected zones. The cantons have the competence to complete these three zones by 'further zones and areas' (article 18). The forests are mentioned in the article on further zones and areas but they can also be object of the protected areas (as areas for wildlife habitats). The zones are connected with special regulations stating which activities are admitted in which zones and which are interdicted. Instruments aiming to steer the development in theses areas are the legally binding spatial plan, rules and norms, inventories, contracts etc. With regard to the forests inventories are of special interest: Landscape sites, natural monuments and biotopes (highland and lowland wetland biotypes, wetland and alluvial areas, waterfowl and migratory bird reserves, etc.) are often located in the forest. The restrictions may consist of a limited use or even in a ban of the use of forests. If financial indemnities are attributed depends on the individual case but in general the forest owner has no legal claim for payments of the state.
A special case for legal restrictions of property rights is the Federal Law on the Swiss National Park: According to this Federal Law principally every economic activity in the area of the national park is forbidden. Interventions are allowed only to maintain the park.[27] The land continues to be owned by the municipalities but the nature reserve is protected contractually. [28]

Regulations on wildlife protection and hunting

As seen above, according to article 664 Civil Code there is no property on game *(res nullius*). Unlike many other European countries (e.g. I, F, G, A, B, NL etc.) there is no legal relation between landed or forest property and hunting rights.[29] Article 79 of the Federal Constitution in connection with article 664 Civil Code states, who has the right to decide about the use of game. The historical concept of the "regalian" right leads in fact to a quasi property of the

27 Article 1 paragraph 1 Law on National Park.
28 Leimbacher, p. 163.
29 Nahrath, p. 1ff.

cantons on the game. They are authorised to "regulate and organize hunting".[30] These broad cantonal competences are restricted by some federal rules.
The Confederation has the competence to establish principles on the exercise of hunting and fishing.[31] The Federal Law on Hunting and on the Protection of Mammals and Birds living in the Wild obligates the cantons to regulate hunting in their territory. The cantons have to decide on the conditions for hunting permits, on the hunting areas and on the applicable system of hunting (article 3 Federal Hunting Law). As we have already seen above there are three kinds of hunting systems in Switzerland. In one Canton (Geneva) hunting is completely prohibited for private persons. Governmental gamekeepers are responsible for the management and care of wildlife. In the other Cantons hunters require a hunting license which is issued by the Canton itself.[32] Some Cantons divided their territory into parts and leases permissions to hunt to local associations of hunters. The cantonal administration decides how many animals can be shot in a fixed period. Most of the Cantons (2/3) allow hunting on their entire territory with a hunting licence. The state administration fixes the animal quotas per hunter. The title of the Hunting Law states that not every species can be hunted. There are protected species. Hence, to give endangered species a refuge some areas are declared as game reserves, where hunting is totally forbidden.
Hunting represents therefore a total restriction for the forest owner and this is both due to private and public regulations without any compensation by the state.

Regulations in the water legislation

In forests four different forms of water can be distinguished: groundwater, springs, rivers and ponds. The Civil Code states who owns water. The right to use the water is dominated by public law. In Switzerland water legislation is not codified. Depending on the function the different legal acts are dispersed on different domains such as environmental protection, public works (hydraulic engineering), production of energy, navigation, nature and landscape conservation etc. The protection and improvement of drinking water plays an important role for forest owners because the relevant legislation affects directly the infrastructure and the management of forests. The most restrictive regulations in that sense are stated in the Law on Water Protection. As groundwater resources are located in the majority of the cases under forest areas the relevant regulations in the water protection law are legally binding for forest owners. Depending on the type of a protected water resource zone or area forest owners are

30 Article 3 of the Federal hunting law.
31 Article 79 BV.
32 Article 3 + 4 JSG.

not allowed to build access infrastructure, to maintain timber yards, to employ environmentally hazardous substances for wood and timber conservation etc. (article 19 ff. Law on Water Protection). In the highly protected zone of the water catchment the permitted activities are only those which would suit the drinking water supply.
All these restrictions do not entitle forest owners to claim for compensation from the state. For the forest owner water is only of economical interest, if it is either a spring or a very little groundwater area.

Italy

Introduction to the Italian legal system

The Italian Civil Code (1942) guarantees (art. 832) the owner of a thing "the right to deal with the thing as he pleases and to exclude other from any interference, within the limits prescribed by the law and by the legal system". The same right is guaranteed by the German Civil Code (§ 903), by the French Civil Code (article 537), by the Swiss Civil Code (article 641) and by the Austrian Civil Code (§ 354) .
The definition contained in art. 832 of the Italian Civil Code expresses the eternal tension between the *right* of the owner and the *limits* prescribed by the legal system. This specific tension[33] is expression of a general correlation between freedom and obligation which represents a constant and necessary characteristic of every legal rule. However the definition does not tell us the intensity of the limits and obligations: it works like a formal scheme which can be filled up with different contents, therefore valid both in a legal system, in which the fullness of the owner's powers constitutes the general rule, as well as in a legal system characterized by frequent limits and obligations. This openness explains why the present definition could persist till nowadays.
The Civil Code (1804), inspired by Bonaparte, drafted by Tronchet, Portalis, Bigot de Préameneu and Maleville focused on the fullness of the owner's right, whereas the limits prescribed to safeguard general interest were perceived as exceptional[34].
In the legal and political debate of that time it was common opinion that the fullness of the owner's right could have a positive influence both on civil society (because the owners would have been interested in supporting the State and the laws which represented the guaranty of their property right) and on economy (because the interest of the owner, free from obligations

[33] Trimarchi, P. (1996), Istituzioni di diritto privato, undicesima edizione, Milano, Giuffré: 525.
[34] Trimarchi, P. (1996), Istituzioni di diritto privato, undicesima edizione, Milano, Giuffré 526.

on the thing, would have brought to the productive exploitation of it).
Since then time has passed and the property right has undergone a lot of changes, an example is represented by the different definitions of property that followed one another: property has been considered for many years a factual relationship between a thing and its owner (Natural law) and then with the coming of legal positivism the theory of Natural law has been replaced by the definition of property as a normative relationship between one person and all the others[35].
As history demonstrates, the concept of property or ownership has no single or universally accepted definition and the limits settled to this right vary a lot from period to period.
Nowadays we can distinguish two kinds of limits to the property right, and in particular to landed property on which we are going to focus our attention, because the owner of a forest is also the owner of the land in which the forest is located: these limits can be public and/or private, that is to say, limits established by public law and those established by private law.

Constitutional level

In the Italian Constitution (1948) property is foreseen under the Title III "Economic Relations", in particular in article 42 (Property)[36], article 43 (Expropriation)[37] and article 44 (Land)[38]. With the introduction of the Constitution in the Italian legal system, property looses definitively its systemic role and changes also its function in the legal system. Differently from the Civil Code which exalts the production system, the Italian Constitution establishes as a limit and objective of

[35] Interesting theories on the concept of property have been elaborated in the philosophy of law for example by H. Kelsen (legal positivism), A. Ross (legal realism).
[36] Article 42 states: (1) Property is public or private. Economic goods may belong to the State, to public bodies, or to private persons.
(2) Private ownership is recognized and guaranteed by laws determining the manner of acquisition and enjoyment and its limits, in order to ensure its social function and to make it accessible to all.
(3) Private property, in cases determined by law and with compensation, may be expropriated for reasons of common interest.
(4) The law establishes the rules of legitimate and testamentary succession and its limits and the state's right to the heritage.
[37] Article 43 [Expropriation]
In order to guarantee public utility, the law may reserve establishment or transfer, by expropriation with compensation, to the state, public bodies, or workers or consumer communities, specific enterprises or categories of enterprises of primary common interest for essential public services or energy sources, or act as monopolies in the public interest.
[38] Article 44 [Land]
(1) For the purpose of ensuring rational utilization of land and establishing equitable social relations, the law imposes obligations on and limitations to private ownership of land, defines its limits depending on the regions and the various agricultural areas, encourages and imposes land cultivation, transformation of large estates, and the reorganization of productive units; it assists small and medium sized farms.
(2) The law favors mountainous areas.

the action, also of the owner's actions the fulfilment of the person as a human being[39]. This explains why property is inserted under the Title concerning "Economic Relations" and not under the Title concerning "the fundamental rights"[40], in fact property is not guaranteed as a characteristic of the person, but as a legal situation regulated by the legal system.
Article 42 guarantees property, but it also provides legal limits to its acquisition and enjoyment because of the social function that property plays in the society, and it also provides limitations based on common interest. The concept of "social function" applies to those goods which due to their nature or they intended use, can concern interests of subjects different from owners (for example landscape planning, environmental protection, forest protection, the nature and landscape protection etc.). In this context public goods will always be referred to this kind of goods.
With regard to the obligations and limits prescribed by the law to assure the social function of property, the Italian Constitution foresees the possibility of expropriation (article 43) in order to guarantee public utility.
Article 44 of the Constitution deals with landed property.
According to this article obligations and restrictions are imposed by the law to landed property in order to achieve a rational exploitation of the soil and to establish equitable social relations. In line with this statements article 44 (Land) provides quantitative limits for landed property [41] with regard to regions and agricultural zones. The article states also that "the law promotes and imposes the reclamation of the lands, the transformation of latifundism and the reconstitution of productive unities; the law helps small and middle property".
There is no direct constitutional provision regarding forest.
The expressions used by the Constitution with regard to the limits settled to the property rights are very general and generic: social function, general/public interest, general/public utility etc. These expressions are not only generic, but also deliberately elastic, flexible and open, in order to allow their adaptation to the needs of each historical epoch.
As far as the public law is concerned, limitations and restrictions, as well as legal incentives (i.e. financial) to landowners and forest owners will take place within the new constitutional framework of article 117 (as modified by the reform 2001, Constitutional Act n. 3/2001) that provides Central Government with exclusive jurisdiction on the protection of the environment (exclusive jurisdiction on the following subjects: protection of the environment, of the ecosystem

[39] Ruscello, F. (2003), Proprietà e diritti di godimento. Famiglia. Successioni. Istituzioni di diritto privato, Volume quarto, Milano, Giuffrè: 2.
[40] In the Constitutions inspired by the Enlightenment and by Liberalism property had always a inviolable and sacred character.
[41] There are historical reasons for this special provision, that is to say the problem of latifundism in central and south Italy.

and of cultural heritage). In this context it is clear that the State will play a central role in defining limits as well as incentives to the property right, by virtue of its exclusive competence. A fundamental role is also played by EU-Directives.

Regulations in the Civil Code

The Italian Civil Code provides a special section concerning landed property (art. 840-868). These articles fill in the formal scheme of article 832 by determining the legal framework in which use and enjoyment of land can take place. The section concerning landed property provides limits and obligations which do not only refer to the private legal sphere, that is to say relationships among private persons, but it mentions also the limits and obligations deriving from public law, in particular special law. Of course it is a general remind to the more specific public legislation, nevertheless this shows how legal restrictions of property derive both from public and from private law which do cross themselves and influence in different ways the property rights.
There is no direct statement concerning forest owners, therefore the rules regarding landed property are valid also for forest owners.
Article 42 of the Italian Constitution states that property is public or private. The Civil Code specifies the regime of public property (article 822) as it follows: public domain[42] (*demanio pubblico*) and public property (*patrimonio pubblico*). To the public domain belong for example beaches, harbours, rivers, lakes and so on, these goods are inalienable and they can never be acquired by private persons. Public property (article 828) is divided into two categories: 1) public property that can be disposed of and the one that can not be disposed of. The goods belonging to the second group (*patrimonio indisponibile*) are bound to a particular destination (aim), i.e. public service or other social/public functions. They can change their destination only with particular procedures. The goods belonging to the first group (*patrimonio disponibile*) are available and alienable in accordance with the rules of private law.
Forests are part of the unavailable public property, therefore in line with article 828 they are subjected to a special legal regime defined by special laws.
On the contrary private property is regulated in detail and with reference to all its categories by the Civil Code (articles 810-1172). Head II section I of the Civil Code deals with landed property and establishes some basic rules with a general validity, therefore they apply also to forest owners.

[42] It is important to notice that article 827 of the Italian Civil Code states that: the vacant immovable property, which does not belong to anyone, belongs to the State.

According to article 840 landed property comprises the subsoil, including all that can be found in it, and the owner can make any kind of excavation or work which does not damage the neighbour's property (*accession*, *superficies solo cedit*). This provision does not apply to what is regulated by the laws concerning mines, quarries and peat bogs and to the restrictions deriving from special laws concerning water, landscape, cultural heritage and so on. The article in question states also that the owner cannot oppose the activities of third parties which take place to such a depth in the soil or to such a height in the space, if he has no interest in excluding them. Already in this article we find limitations prescribed in order to regulate private and public interests. The following article 841 states the right of the owner to enclose the land any time, this is valid also for forests. Although it seems that this right guarantees an absolute title, it is not so. The following articles of the Civil Code provide many exceptions which are on the one hand correlated to public interest and social function of property (for example article 842 hunting and fishing[43], article 866[44] obligation due to hydrogeological factors) and on the other hand to private interests (article 843 access to land).

As far as forest and its products (timber and non timber forest products) is concerned, the Italian Civil Code foresees some general rules that must be integrated with special public legislation. In Italy 60% of forest belongs to private persons[45] so it is important to know how these persons can manage their property and what influence this management can have on users. There are two important rules in the Civil Code which apply to landed property and therefore also to forests: article 841 (just discussed) and the general rule expressed in article 923 which states that *res nullius* (things that do not belong to anybody) undergo the rule of first appropriation (occupation). If we apply these rules literally we can assert in general that if a forest is not enclosed, everyone has the right to walk in it and pick up for example mushrooms or hunt. This apparently freedom is not so absolute as it seems because these two rules should be integrated not only with the article concerning the acquisition of civil and natural fruits (article 821, natural fruits belong to the owner of the thing that produces them, it they are not assigned to others. In this last case the acquisition of the fruits takes place with separation) and the one on the access to land (article 843), but also with the articles concerning on the one hand usufruct (article 978), building lease (article 952), emphyteusis (article 957), hunting and fishing (article

[43] Whereas fishing in a private land is possible only with the owner's consent, hunting can be prohibited by the owner only if he encloses the land in accordance with the provisions contained in the hunting act or if the land is being cultivated, and hunting could damage it.

[44] This article has the clear aim to safeguard land and forest as well as grazing land and therefore it provides an obligation due to hydrogeological factors, and remind the specific regulation of this obligation to the special legislations concerning water.

[45] ANPA (2000), Indicatori di gestione forestale sostenibile in Italia, Rapporto finale della Ricerca Affidata al Dipartimento Territorio e Sistemi Agro-Forestali dell'Università di Padova. In Serie Stato dell'Ambiente 11/2000.

842) and on the other hand with special legislation deriving from public law which we are going to analyse in the next paragraph, in particular, Act No. 157: provisions for the protection of wildlife and restrictions on hunting (1992), the Acts concerning water resources and water pollution (Act No. 36/1992 *legge Galli; Testo Unico* n. 152/1999), the Legislative Decree 18th May 2001, n. 227 about the modernisation of the forest sector (*Orientamento e modernizzazione del settore forestale*) and the Act on cultural goods and landscape (*Codice dei beni culturali e del paesaggio*, n. 42/2004).

Regulations in selected public laws

As pointed out before the Civil Code regulates landed property and directly and indirectly the management of timber and non timber forest products with general and specific rules.

In Italy the newest legal rules concerning different aspects of environmental protection play an important role in reshaping the property rights of forest owners, not only through further limits and obligations but sometimes also through incentives. The common factor in this legislation (which derives in the majority of the cases from the implementation of EU-Directives) is the focus on a sustainable management of the different resources, such as water, wildlife, forest, landscape and so on.

Forest and agricultural legislation

The fresh Legislative Decree for the modernisation of forest sector (n. 227/2001) together with the Decree on agriculture (n. 228/2001) represents a new approach to the management of territory, agriculture and forestry. The Legislative Decree on agriculture introduces new conventional instruments that could be defined as "territorial contracts"[46] which are expression of a new understanding of the ecological role played by agriculture.
There are three kinds of contracts: collaboration contracts, promotion contracts and conventions. The key word of these contracts is "incentive". They are stipulated between the manager (normally the owner) of the land and the public administration: the manager compels himself in return for a financial support for example to high quality production, to protect natural resources during the productive activities, to safeguard the landscape, the hydrogeological asset and so on.

[46] It is still unclear to which legal category these contracts belong: public or private? See Benozzo, M., Bruno, F. (2003), Legislazione ambientale per uno sviluppo sostenibile del territorio, Milano, Giuffré:196.

A sector in which these contracts have gained a consistent "environmental value" is the forest sector. Forest does not only represent a source of timber, but it has a great importance for its ecological function. The new Legislative Decree for the modernisation of forest sector does not mention explicitly these instruments, but according to the doctrine[47] the strict connection between agricultural activity and forestry makes these contracts applicable also to the forest management. These territorial contracts help to emphasise the connection between forestry and the protection and improvement of environment. What is new in this Decree is the fact that all the limits and obligations, once imposed on forestry from outside, are now part of the entrepreneurial activity. Public interests which were guaranteed in the past only through legal restrictions, are now pursued through the contractual instruments. Article 1 of the Decree focuses on forestry as a fundamental element for the socio-economical development and for the protection and safeguard of environment.

According to article 5 of the Decree Regions have the task to provide rules to help preventing deterioration of forests. To promote a rational management of forest resources Regions, local bodies and agrarian associations promote the constitution and participation to farmers' cooperative or other forms of associations.

The Legislative Decree contains rules which affect the property right of forest owners. It states for example that transformation (deforestation) of forest is forbidden, if it is not authorized by the Regions. In this last case transformation must be compensated through reforestation at the expense of the receiver of the authorization (Article 4).

Article 6 provides a regulation for forestry: the article stresses the importance of this activity not only for national economy, but also for the protection of environment. If regional legislation does not prescribe something different, high forests cannot be converted into coppice woodland management system. Clear-cutting is also forbidden if forestry does not aim at natural renewal.

To promote the development and the professionalism of commercial farms, Regions elaborate lists concerning farms which are responsible for works and services in the forest area. These farms can obtain (article 7) the possibility to manage areas belonging to the State and destined to forestry (property or possession).

Mushrooms

Mushrooms are non timber forest products which undergo the principle of accession, because they are fix connected to the soil. According to this rule forest owners should be the only owners of this product. However, this rule needs to be integrated through other rules, in fact in the Italian Civil Code there is no direct rule concerning mushrooms picking.

[47] Benozzo, M., Bruno, F. (2003), Legislazione ambientale per uno sviluppo sostenibile del territorio, Milano, Giuffré.

The State Act concerning mushrooms picking and marketing (Legge 352/1993, *Norme quadro in materia di raccolta e commercializzazione dei funghi epigei freschi e conservati*) establishes that it is up to the Regions to elaborate legal rule to regulate mushrooms picking and marketing. However, the Act in question states at article 6 that mushrooms picking is forbidden in: 1. Integral natural reserve; 2. in the areas of national and regional natural parks, natural reserves; 3. forestry areas; 4. gardens and grounds belonging to private houses, in this case the prohibition is not valid for the owners.
The mushrooms picking is more specifically regulated at regional and provincial level. The general rule is: mushrooms picking is free in forests and on uncultivated fields for resident population. In some cases forest owners, landowners and leaseholders can reserve themselves the right to pick by delimitating the ground through clear tables[48].
The Regional Act concerning Forest in Toscana (*Legge forestale della Toscana*, L.R. nr. 39/2000) provides for example at article 63 paragraph 5 the following regulation: in case of private lands mushrooms picking is allowed only with the landowner's or leaseholder's consent; in case of lands belonging to the agricultural-forest property of the Region mushrooms picking is subject to public authorization.
Special rules are foreseen for truffles. Truffles produced in truffle-ground belong to the leaseholder, if the truffle-ground is delimitated through tables (article 3 Act 752/1985 concerning truffle picking and marketing. *Normativa quadro in materia di raccolta, coltivazione e commercio di tartufi freschi o conservati destinati al consumo*).
The general rule of the Civil Code regarding "access to land" (article 843) is always valid if not expressly derogated, therefore forest owners in Italy have the possibility to prohibit the access to the forest to collect mushrooms.

Landscape protection

Landscape and cultural goods are protected through the Legislative Decree n. 42/2004 (Codice dei beni culturali e del paesaggio). The present Decree divides landscape goods into three categories: real property and areas of great public interest; areas protected *ex lege*; real property and areas protected through landscape plans. For our discussion it is interesting to deal with the second category, areas protected *ex lege* (by law), because forests are part of this group (article 142).
The *ex lege* protection means that forests are protected even if they are not inserted in the

[48] See for example PARCO REGIONALE NATURALE DEL SASSO SIMONE E SIMONCELLO (PS) Disposizioni per la raccolta dei funghi, 8th April 2002.

regional landscape plan and the owners of forests are always obliged to ask for an authorization (article 146 landscape authorization) for any kind of project or modification which could harm the landscape values protected by the law. This type of authorization is necessary even if the projects must be realized by the public administration (article 147), although in this case there are some differences in the procedure.
Those parts of the territory protected *ex lege* are subjected to specific rules of use and environmental improvement through landscape plans which should determine the transformations compatible with landscape values (article 135 paragraph 2).

Protected areas

The State Act for the protected areas n. 394/1991 (*Legge quadro sulle aree protette*) provides a special regulation for those areas which are considered protected (national parks, regional natural parks, state natural reserves, regional natural reserves and marine protected areas). The institution of these protected areas has a great influence on the property rights of private persons and local institutions. They undergo the restrictions deriving from the rules concerning the protection of the natural environment of the park. These rules absorbe all the restrictions present in the environmental existing laws as for example the one concerning cultural goods and landscape, water legislation etc., as mentioned before[49]. In the territory of a park or of a natural reserve all the activities take place as "programmed activities", for this reason the management of natural resources (forest and its products) undergoes a restriction, in particular with regard to agroforestry activities. The statute of national parks provides grazing and cutting restrictions. The statute of the park foresees that all the activities that can compromise the protected environmental values are forbidden, in particular, among others, hunting, picking of vegetable species, mining activities, dumping ground, modification of water regime (article 11, State Act 394/1991).
To try to overcome the resistance of the local institutions and private persons, directly hit by the institution of a protected area, the law provides a system of incentive measures (article 7, State Act 394/1991). It is given local institutions and private persons the priority for EC-financing, state or regional financing foreseen for the realization of interventions such as cultural activities in the parks, agroturism, systems to use energy sources with little impact on environment etc.

Regulation on wildlife protection and hunting

Also this legal regulation has a great influence on forest management and use.
The Civil Code deals with hunting and fishing in article 842. The private rules restrict their regulation concerning the access to the land/forest with different solutions: possibility to give access to the land for hunting if the land is not enclosed or cultured; need of the owner's permission to fish. These rules have been integrated by the legislation concerning wildlife and hunting (Act 157/1992 provisions for the protection of wildlife and restrictions on hunting) which establishes in article 1: wildlife is unavailable property of the State. Hunting is permitted if it doe s not contrast with the preservation of wildlife and does not harm agricultural production. What belongs to this protected wildlife is listed in article 2: mammals, birds and all the species threatened with extinction. The law does not apply to moles, rats, mice and fieldmice. Regions must provide rules to manage and protect wildlife. Provinces elaborate hunting plans, environmental improvement plans and plans to introduce wildlife.
The present regulation establishes at article 15 a restriction of land property and therefore for forest. If a land is part of the regional hunting plan the owners or leaseholders must receive a contribution, the amount of which is determined by the public authority with regard to the agronomic conditions, extension and measures for the protection and improvement of environment.
If the owners or the leaseholders want to forbid hunting on their land or forest, they have the possibility to make a request which will be granted, if there is no interference with the hunting plan.
In the lands/forests which are not part of the management control it is forbidden to hunt (this is also for the owner or leaseholder valid).
If the land/forest is enclosed in observance of the prescriptions of article 15 paragraph 8 hunting is forbidden. This is a clear specification of article 842 Civil Code.
Regions approve and publish the hunting plan (*piano faunistico-venatorio*). According to this plan every hunter has the right of access to a defined area of the Region in which he is resident. Hunting is subjected to a state authorization, licence to carry weapons, assurance policy and a regional card (article 12).

Regulation on water resources and water pollution

Land and forest management can be influenced by water legislation. Nowadays water has become an essential and limited good and its utilization can not be delivered to private persons,

[49] Ciocia, M.A. (1999), Aree protette e diritto di proprietà, vincoli urbanistici ed uso del territorio, Padova, CEDAM.

as it is considered a public good par excellence (in accordance with the concept of social function and public interest expressed by the Constitution). The Italian legislator has therefore decided to declare public all the water, that is to say superficial and groundwater, with the Act n. 36/1994 (*Legge Galli*, provisions on water resources)[50]. Rivers, torrents and lakes are part of the public domain in accordance with article 822 of the Civil Code.
This Act (*Legge Galli*) has repealed some provisions of the Civil Code concerning water, but not all the provisions.
The open question is: should be considered public also the water catch basin or only water? This situation causes problems of interpretation, because it is not clear what it is the relationship between *Legge Galli* and all the provisions contained in the Civil Code concerning private water which have not been repealed by this Act. In particular those provisions (articles 915, 916 and 917) according to which the owner of a land crossed or hugged by a watercourse must contribute to the maintenance charges and cost of repairs of the banks and of removal of bulky objects. An explanation[51] for this situation could be the following: a) if the water catch basins, which were once considered private, do not satisfy a public interest, remain property of the privates. What changes is the fact that if on the one hand privates must ask for an authorization to use the water which once belonged to them, on the other hand they are always responsible for the maintenance costs of banks and sides, for the removal of bulky objects and obstacles in pursuance of the articles of the Civil Code which have not been repealed (915-917); b) on the contrary, if the water catch basin satisfies a public interest, water and catch basin are considered a public good and the public authority is responsible for their maintenance (R.D. n. 523/1904). This theoretical reconstruction explains why the legislator has maintained article 942 paragraph 2 of the Civil Code (soil abandoned by running water)[52]. In this article the legislator specifies that the public water regime, generally applicable to soil and riverbeds abandoned by water, is valid also for rivers, torrents and for public declared water. This specification would not have been necessary if it could not be referred to those cases in which not only water but also its container is public.
According to the *Legge Galli*, the general rule for private water use prescribes that private users can use water only if they posses an authorization (*autorizzazione di derivazione*).
With regard to water pollution the Legislative Decree n. 152/1999 (Testo Unico sulle Acque), issued in pursuance of a EU-Directive (n.91/271), mentions in article one among the aims of the

[50] Benozzo, M., Bruno, F. (2003), Legislazione ambientale per uno sviluppo sostenibile del territorio, Milano, Giuffré
[51] Benozzo, M., Bruno, F. (2003), Legislazione ambientale per uno sviluppo sostenibile del territorio, Milano, Giuffré: 90.
[52] Benozzo, M., Bruno, F. (2003), Legislazione ambientale per uno sviluppo sostenibile del territorio, Milano, Giuffré.

Act the "sustainable" and "lasting" use of water resources. The protection of water is perceived through qualitative and quantitative aspects. What seems to be important for our discussion is that it is foreseen a special preventive authorization for all discharges, with exception of domestic waste water in water drain which are always allowed in pursuance of the legal provisions.

Comparison between Switzerland and Italy

As far as the concept of property is concerned the legislation of the two countries considered above presents some differences and similarities.
Very similar is the complexity and density of the legal rules which do cross themselves and influence forest property. Both countries present a dense net of rules in private and public law which concur to reshape property rights.
As for the differences, if we consider the constitutional level we find out that the two countries define property in different ways.
The Italian Constitution divides property in private and public and connect this last concept to that of "social function" and of "public utility". From a legal point of view public goods are therefore those goods to which the concept of 'social function' is being applied. In Switzerland property is defined only in private law. Public domain does not exist and a good becomes public by virtue of its nature or by being declared public by the State.
Also the collocation of the property guarantee at the constitutional level is different. In Switzerland it is listed among the fundamental rights, whereas in Italy it is listed under the Title concerning the "Economic Relations".
In both countries private law seems to define property in a very wide way (article 832 of the Italian Civil Code, article 641 of the Swiss Civil Code). The right of disposal undergoes the limitations of the legal system. In both countries "limits of the legal system" refer not only to restrictions imposed by private rules but also to the ones emerging from public law.
With regard to private law it is worth noticing that the two countries use the same principle with regard to soil property: the main rule is *superficies solo cedit* (*Akzessionsprinzip, principio di accessione*, principle of accession).
In accordance with the principle of accession plants belong both in Italy and Switzerland to the landowner, and therefore to the forest owners. In Italy if the land belongs to leasholders the plants belong to them.
According to the principle of accession also mushrooms (which are fixed to the soil) should belong exclusively to the landowner. In Switzerland this is stated in article 667 of the Civil

Code. But article 699, which states the free access, to the forest for everybody restricts this provision. The result of this is that: mushrooms picking is free and the landowner cannot prohibit it.
In Italy the principle of accession expressed in article 840 of the Civil Code has to be integrated with the State Act concerning mushrooms picking and marketing (Act n. 352/1993). It states the possibility to collect mushrooms in forests and unlcultivated fields only for resident population. In some Regions mushrooms picking is allowed only with the landowner's consent.
The basic difference between the two countries is to be found in the two following articles of the Italian and Swiss Civil Code:
Article 841(Italian Civil Code) the landowner can enclose the land anytime. This rule can be specified through exceptions or more detailed regulations, the first case is the one of the article 842 (Hunting and Fishing).
In the Swiss Civil Code the basic article concerning forest is article 699 just mentioned. The two articles state just the opposite rule. The Italian Civil Code wants basically to protect the owner's right to deal with the thing as he pleases and to exclude other from any interference, within the limits prescribed by the law and by the legal system (article 832), whereas in the Swiss Civil Code it seems to prevail the right of the collectivity over that of the private landowner.
With regard to wildlife it can be noticed that the legal regulation is different between the two countries.
In Italy the owner of a forest cannot dispose of the wildlife which lives in its forest because the article regarding *res nullius (article 923 Civil Code)* cannot be applied. Indeed the Italian legislator has approved in 1992 the Act concerning provisions for the protection of wildlife and restrictions on hunting which explicit states that wildlife belongs to the State, in particular it is part of its unavailable property.
In Switzerland wildlife is considered a *res nullius* (*herrenlose Sachen*, article 664) and the Canton has the seigniorage over it. It is up to the Cantons to regulate the occupation of lands without owners (article 664 paragraph 3 Swiss Civil Code).
As far as hunting and fishing is concerned the two countries present some similarities which concern necessity of an authorization to hunt: in Switzerland the licence is issued by the Canton; in Italy hunting is subjected to a central state authorization, licence to carry weapons, assurance policy and a regional card.
The basic difference rests on the one hand on the private law: article 699 of the Swiss Civil Code which gives everybody the right of access to private property in order to hunt or to fish, and indeed in Switzerland the landowner cannot exclude others from hunting on his land. Article 842 of the Italian Civil Code which prescribes the possibility of access to a private land for hunting, if the land is not enclosed or cultured and the need of the owner's permission to fish.

With regard to public law, in Italy the Act 157/1992 provisions for the protection of wildlife and restrictions on hunting clearly establishes those species which cannot be hunted (as mentioned before) and the rules concerning those lands which are part of a regional hunting plan and whose owners or leaseholders receive a contribution, the amount of which is determined by the public authority with regard to the agronomic conditions, extension and measures for the protection and improvement of environment.
If the owners or the leaseholders want to forbid hunting on their land, they have the possibility to make a request which will be granted, if there is no interference with the hunting plan. The Act foresees the possibility to enclose the land (article 15 paragraph 8) at certain conditions, if the land is enclosed in observance of the prescriptions of article 15 paragraph 8 hunting is forbidden. This is a clear specification of article 842 Civil Code.
Some common elements between the two countries can be found in the forest legislation. Although only Switzerland has a proper constitutional provision on Forest and a Forest Act (*Waldgesetz, WaG*), whereas in Italy the legal discipline is represented by the Legislative Decree for the modernisation of forest sector (n. 227/2001) , the restrictions concerning forest management are very similar. It is generally forbidden in both countries the conversion of high forests into coppice woodland management system, clear-cutting and deforestation. Both countries provide in their regulation a compensatory reforestation. What has changed in Italy is the conception of the forest.
In the past the protection of this good was concentrated on prohibitions imposed by the external public authority. With the new territorial contracts forest protection is not a part of the entrepreneurial activity, it is the activity itself which, thanks to financial incentives, aims to safeguard the forest as well as timber and non timber products.
What is different is that the *WaG* specifies the right of free access to forests (article 14) and it obliges Cantons to ensure this right to all. The right of disposal guaranteed in general to the forest owners by the legal system is affected by this rule which is not present in Italy.

Water legislation presents also some basic differences: In Italy rivers, torrents and lakes are part of the public domain (article 822 Civil Code). Superficial and ground water has been declared public and the new legal discipline is public, in fact the private rules which have not been repealed by this Act are still valid and concern the catch basin.
In Switzerland springs and groundwater are subject to accession (*superficies solo cedit*). The property of water can be private or public, in fact article 664 of the Swiss Civil Code states at the second paragraph that public water cannot be subjected to private property if there is no proof of the contrary. In Switzerland it still exists the category of private water which seems to be disappeared in Italy.

Landscape protection and protected areas are regulated differently in the two countries. In Italy it exists a State Act concerning landscape protection (*Codice dei beni culturali e del paesaggio,* n. 42/2004, mentioned above) whose aim is to preserve cultural heritage and landscape (article 2 of the *Codice* defines those goods which form the landscape such as real estate and those areas which express historical, cultural, natural, morphologic and aesthetic values of the territory). Article 1 paragraph 5 states an obligation for private owners to guarantee the conservation of these goods. The most important restriction prescribed by the law in this context is the necessity of an authorization to make any kind of modification in those areas protected *ex lege*.

The State Act for the protected areas n. 394/1991 provides a special regulation for those areas which undergo the regime of ‚programmed activities'. In these areas the restrictions of the owner's rights are even more detailed as for the goods protected *ex lege* mentioned before. In this areas added to the restrictions provided by the State Act n. 394/1991, are in force all those restrictions established by other laws, such as archaeological, hydrogeological and landscape restrictions.

In Switzerland forest protection is achieved through the Forest Act in combination with the Act concerning spatial planning (*RPG,Raumplanungsgesetz*). Landscape is protected in spatial planning (*RPG, Raumplanungsgesetz*) and in the Law on the Preservation of Nature and the Landscape (*NHG, Natur- und Heimatschutzgesetz*).

In article 17 of the Act concerning spatial planning forest is not protected *ex lege* as for example rivers, lakes, banks, landscape which are particularly beautiful and/or historically or naturally very important. Forests are conceived as natural areas;forest is not a building area, in fact buildings in forest need a special authorization.

Forests can be part of protected areas but they are not protected *ex lege*. Fens and fens landscapes are protected by article 23a and following, if they are located in forest this can lead to a limited use of it or even to a ban of their use.

Biotopes are also protected in this Act (article 18 ff.) Objects (fens, biotopes) which are considered of national importance are registered in a federal inventory (article 5 Law on the Preservation of Nature and the Landscape). The registration means (article 6) that the object should be preserved undiminished.

Land in the protected areas is owned by the municipalities. Nature reserve is protected contractually.

Summarizing tables:

Italy

Regulation concerning	**soil/plants**	**wildlife**	**water**	**mushrooms**	**landscape/protected areas**
Public Law		Unavailable property of the State Act n.157/1992 Forests which are part of the hunting plan undergo the rules provided for these areas	Superficial and groundwater is public (Act n. 36/1994, *Legge Galli*) Forest owners need an authorization to use it	Act n. 352/1993 provides general rules. Regions elaborate more precise rules. Example Toscana: On public Land it is necessary an authorization On private land it is necessary the consent of the landowner	Landscape:: Forest protected *ex lege* (Legislative Decree n. 42/2004). Any kind of modification is subject to authorization (Private landowner as well as public administration must ask for it) Protected areas: State Act for the protected areas n. 394/1991. Grazing and cutting restrictions as well as restrictions deriving from water and landscape legislations. Incentive measures.
Private Law	Principle of accession (*superficies solo cedit*) Art. 840 Civil Code	Article 842 C.C Hunt is prohibited if the land is enclosed according to the legal prescriptions on hunting or if the land is cultivated. Fishing: owner's consent always necessary	Articles 915, 916 and 917 C.C. Problem of interpretation concerning the ownership of water catch basins. Rivers, torrents and lakes are part of the public domain (article 822)	Article 841 C.C. Access to land (the landowner can enclose the land anytime)	

Switzerland

Regulation concerning	**soil/plants**	**wildlife**	**water**	**mushrooms**	**landscape/protected areas**

Public Law		Cantonal rules. Cantons have seigniorage	Act on water protection: restrictions to avoid their deterioration		Landscape: several acts are concerned with landscape for example NHG, RPG Protected areas: land is owned by the municipalities. Nature reserve is protected contractually.
Private Law	Principle of accession (*superficies solo cedit*) Art. 667 Civil Code	*Res nullius* Article 664 Civil Code	It depends on the body of the water. Springs belong to the land (accession) article 704 Swiss Civil Code	Article 699 Swiss Civil Code: everybody can enter forests and collect mushrooms, berries etc	Article 664 C.C. alpine areas

Conclusions and outlook

Forests have always been considered a mean to generate income and welfare. Nowadays the exploitation of natural resources is influenced not only by private law but also by public legislation.

The "Institutional Resource Regimes" shows the complexity of the system of rules which is applied to forests. The right of the owner guaranteed at the constitutional level seems to be very wide, but the specification "within the limits of the legal system" restricts the room of manoeuvre of the owners.

The private legislation concerning landed property was once predominant (both the Italian and Swiss Civil Code regulate the relations among owners in a very detailed way).

The Civil Code defines the content of landed property and fixes the rights of the neighbours, of the public and of the state to the disadvantage of the forest owners. These third parties'rights affect sensibly the exploitation of timber and non timber products.

This private rules were already influenced by public aspects, for example with regard to those rules in the field of superficial and groundwater, hunting and fishing and so on.

Public law is nowadays gaining more and more importance. The Italian Case is in this sense paradigmatic. The influence of the Constitution (goods with social function) and of the EU Environmental Policy have transformed the regulation of different legal areas.

Rules concerning spatial planning, land use, and use of natural resources concur to circumscribe the property rights of the forest owners (for example with regard to acquisition, bargain, use and sale of forest and forest products). In this legal context, in which so many rules (public and private) cross themselves it seems that there is no room left for self-regulated approaches.

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