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KOBE UNIVERSITY

# Legal protection of landscape in Japan - A response to Prof. Peukert's presentation[1]

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## 1. Introduction

The lecture examined whether it is possible to argue the gist of the judgment of the Supreme Court in the "Kunitachi Condominium Lawsuit" from the perspective of German law. Professor Peukert made a negative assessment of the judgment. My comments provide basic information relating to arguments surrounding landscape protection in Japan, so that we can move on to a productive debate based on the current situation in Japan and Germany, and indicate how Professor Peukert's viewpoint can be positioned amidst arguments in Japan. I shall analyze the theoretical basis of these arguments, the background to how this situation came about, and the areas that are attracting attention, comparing Professor Peukert's perspective as I go. Professor Peukert added a detailed examination to the grounds for arguments which may underlie protection of the landscape by private law, and rejected the validity of any of these grounds. He also indicated that protection of the landscape should be left to public law. This argument is supported by a distinction-oriented concept in which private law protects individual legal interests and public law protects collective legal interests, and by a notion that the nature of the landscape is such that it is a true collective legal interest.

## 2. Basis of Landscape Protection by Private Law

(1) Argument for Protection of Landscape by Private Law

In Japan, there are many positive assessments of landscape protection by private law. These assessments can loosely be categorized into the following three arguments. First, there is an argument based on the right to landscape[3] as a personal right

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1 This article originated from my commentary at the lecture delivered by Professor Peukert. I would like to thank Professor Peukert for coming to Japan and giving a lecture on The Protection of Individual and Collective Legal Interests. I would also like to express my gratitude for being given this valuable opportunity to comment on the lecture.
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2 Former Lecturer of the Graduate School of Law, Kobe University and Lecturer of the Faculty of Economics, Yamaguchi University.

3 There are those who acknowledge the right to landscape based on Article 13 and Article 25 of the Constitution of Japan,

under private law. Professor Takehisa Awaji states that "when good scenery has an objective and expansive aspect and thus creates an valuable environment, namely, a natural, historical, or cultural landscape, there is a right to enjoy such a good landscape". It is said that such a landscape can be taken as a broad collection of individual interests to good outlook. In addition, infringement of the right to landscape in such cases is said to constitute an infringement of individual legal interests. Furthermore, since the subject and target of landscape protection may be limited within a fixed range, and the interest of enjoying a limited and specific landscape in such a form may satisfy conditions as a specific right[4].

The second argument acknowledges an interest in the landscape derived from property rights. This argument was used in the judgment given at the first trial in the Kunitachi Condominium Lawsuit (the so-called Miyaoka Decision of December 18, 2002, Tokyo District Court Ruling). In this judgment, the court found that "Upon consideration, however, property right holders do have the obligation to preserve the good landscape themselves, which is derived from their property rights, and at the same time, they have the right to mutually demand such preservation (hereinafter an "Interest in the Landscape"), and such Interest in the Landscape deserves legal protection; and an act which violates such interest should be understood to result in tortious liability in certain cases". The theoretical basis for this decision lies, as is well known, in the "Relationship of Reciprocal Interchangeability"[5].

As for the third argument, Professor Katsumi Yoshida has said that local rules relating to land use are formed by residents as a unit, and that such rules are acknowledged as a source of law. Dismantling part of a completed condominium or prohibiting building work shall be acknowledged as a sanction if such building work violates local rules which include protection of the landscape[6].

(2) Background that Supports Protection of Landscape by Private Law

While efforts to protect the landscape under private law have become more numerous, this is not a case of such perspectives showing disrespect for the peculiarities of the landscape as a collective interest. There is a widely shared

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and also argue that it has effect between individuals (Toshihiro Yamauchi, *Keikan Hogoseisaku ni yoru "Eigyo no Jiyu" Kisei no Tekihosei* [Legality of Restrictions of "Freedom of Trade" Due to Landscape Protection Policies]—Ryukoku Law Review, Vol. 46 No. 1 (2013), p. 242 onwards). For those who consider this is not necessary, see Emiko Saito, *Kankyoken—Keikan no Rieki* [Environmental Rights—Landscape Interests]; edited by Hideyuki Osawa et al., "Kempo.com" (Seibundo, 2010), p. 67. For those who hold the opposite view, see Kazuhiko Matsumoto, *Kenpo ni okeru Kankyo Kitei no Arikata—Kenpo Kenkyusha no Tachiba kara* [Ideal Environmental Regulations In the Constitution—Viewpoint of a Constitutional Scholar], Jurist No. 1325, p.83 onwards).

4 Takehisa Awaji, *Keikanken no Seisei to Kunitachi/Daigaku Dori Sosho Hanketsu* [Formation of Rights to Landscape and the Kunitachi/University Dispute Judgment], Jurist No. 1240 (2003), p.72 onwards.

5 For a discussion of this concept, see Narufumi Kadomatsu, *"Gokanteki Rigai Kankei" Gainen no Juyo to Henyo* [Acceptance and Transformation of the "Relationship of Reciprocal Interchangeability" Concept]; Mizuno Takeo Sensei Koki Kinen Ronbunshu *Gyosei to Kokumin no Kenri* [Government and Citizens' Rights], (Houritsu Bunka Sha, 2011), p. 150 onwards.

6 Katsumi Yoshida, *Hanhi* [Case Comments] (Tokyo District Court, December 18, 2002), Hanrei Times No. 1120 (2003), p.71 onwards.

belief that landscapes have a public nature, and that protecting the landscape should primarily be left to legislation and administrative processes (a judgment of the Supreme Court has also emphasized this point).

However, despite this, some argue that protection of the landscape cannot be left solely to legislation and administrative processes since they have the following situation in mind. The "principle of minimum intervention" is said to apply in the actual practice of Japanese city legislation. This principle is a concept in which "only the minimum regulations necessary in order to avoid imminent interference with respect to the public interest shall be permitted with regard to property rights"[7]. For this reason, only extremely laissez faire land right regulations exist in Japan, and broad freedom of construction (Baufreiheit) applies in areas not covered by the regulations.

In a comparison made quite often, the situation in Japan differs greatly from that in Germany. In Germany, despite some minority opinion to the contrary, the dominant idea is that freedom of construction can be significantly restricted[8]. Proponents of this idea argue that under Article 14 of the Basic Law for the Federal Republic of Germany, which guarantees property, freedom of construction can only be enjoyed within the legal and regulatory framework. Further, under German city planning regulations, it is said that the principle of "no plan, no development" has been established under the custom of "laying down a B plan, a detailed city plan that must be developed when expanding urban areas under the federal architectural construction code, in combination with municipal ordinances on architectural formation, which local governments may implement under state architecture regulations"[9]. On the other hand, the reality in Japan, which is quite different from that in Germany, requires that the Civil Law "is expected to play a role to complement structural issues arising from regulations of land-use and substantially strengthen such regulations"[10]. As for the landscape, the Landscape Act was surely enacted in 2004. However, the adequacy of the legislation is still arguable in terms of its regulatory effects. Even assuming it is not adequate, it is said that the Landscape Act "does not expressly guarantee civil rights to seek protection of the landscape or a remedy for an Interest in the Landscape under civil procedure", and the question of whether or not an Interest in the Landscape can be protected under private law or civil procedure still requires theoretical consideration[11].

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7 Tokiyasu Fujita, *Hitsuyo Saishogen Kisei Gensoku to Sono Motarashita Mono* [Principle of Minimum Intervention and the Results Thereof]; edited by the Investigative Research Committee Concerning Fundamental Detailed Analysis Relating to Land Systems, "Public Nature in Land Use Regulations Legislation" (The Land Institute of Japan, 2002) p. 7.

8 Vgl. Joachim Wieland, Art. 14 GG, in: Horst Dreier (Hrsg.), Grundgesetz Kommentar, 3. Aufl., 2013, Rn. 50.

9 Mitsuru Noro, *Toshi Keikan Gyosei to Kenchiku no Jiyu* [Landscape Administration in City and Freedom of Construction], Osaka University Law Review Vol. 62, No. 3-4 (2012), p.121 onwards.

10 Yasuhiro Akiyama, *Minpogaku ni Okeru Shiho / Koho no <Kyodo>—Seikatsu Kankyo no Hozen / Keisei no Bamen wo Sozai ni Shite--* [Cooperation between Private and Public Law: from the Viewpoint of Civil Law—Based on Environmental Preservation and Formation Aspects], The Sociology of Law No. 66 (2007), p. 42.

11 Ryoichi Yoshimura, *"Kankyo-ho no Gendai-teki Kadai ——Koshi Kyodo no Shiten Kara* [Contemporary Issues in Environmental Law from the Perspective of the Cooperation between Public and Private]" (Yuhikaku, 2011), p.127.

In line with these practical needs, people in Japan have in recent years been more concerned with "collective legal interests", one of the key terms constituting the title of today's lecture by Professor Peukert. Collective legal interests are considered to fall halfway between public and private interests, and a deeper analysis of ways to protect such interests has been called for[12]. Although no common understanding has yet been reached on this issue, a major developing trend is to approve of private law protection of interests with a public element and to build a rationale for it.

Furthermore, under this trend, the opinion that the existing level of land use regulation is not sufficient in terms of its regulatory effects can sometimes be used as a partial rationale for regulation by private law. The theoretical basis of this argument involves the idea that "public and private orders are reciprocally supplemental". Its proponents say that "since a private individual is able to express his or her interest and benefit subtly and in a nuanced manner, and to respond to the situation flexibly, a private law regime applicable to private individuals is suitable for nuanced and responsive regulation", while "since administrative agencies have authority and responsibility for realizing the public good, an administrative law regime is suitable for comprehensive and persistent regulation"[13]. It is true that the landscape should primarily be protected by comprehensive and persistent regulation under an administrative law regime. They also argue, however, that because the landscape's "significance and value is often 'discovered' only when a specific architectural project arises"[14], "it is unrealistic for legislative or administrative systems to cover any and all problems, and sooner or later we will inevitably need to identify and respond to new problems. We need to complement 'comprehensive and persistent regulation' with 'nuanced and responsive regulation' which enables a case-by-case approach"[15].

(3) Focus on Landscape Formation Processes

When protecting the landscape based on private law, the focus is on the landscape formation process, so that the scope of the interest will be limited and that the interest can effectively contended against the building owner. In other words, it is important to examine the basis on which the plaintiffs have "acquired" the

12 An example which takes an extensive view of recent argument is *'Tokusyu' Koho to Shiho ni okeru Shudan-teki / Shugo-teki Rieki-ron no Kanosei* ['Feature Articles' Possibility of Theory of Group/Collective Benefits under Public Law and Private Law], Minshoho Zasshi Vol. 148, No. 6 (2013), p.1 onwards.

13 Ryuji Yamamoto, "*Gyosei-jo no Shukan-ho to Ho Kankei* [Subjective Law and Legal Relationship under Administrative Law]" (Yuhikaku, 2000), p. 322 onwards. Argument in Japan was stimulated by Eberhard Schmidt-Aßmann, Öffentliches Recht und Privatrecht, in: ders./Wolfgang Hoffmann-Riem (Hrsg.), Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen, 1996, S. 7 ff.

14 Narufumi Kadomatsu, '*Kosi Kyodo' no Iso to Gyosei-ho Riron eno Shisa* [Phases of 'Public and Private Cooperation' and Suggestion for Theory of Administrative Law], Koho Kenkyu No.65 (2003), p. 207. This point is argued in Germany as a question of "prediction risk" involved in plan judgment (Yasuhiro Akiyama, *Sorin Kankei ni okeru Chosei no Ronri to Toshi Keikaku tono Kankei (3)* [Relationship Between Theory of Adjustment and City Planning Relating to Neighborhood Relations (3)], Waseda Law Review Vol. 75 No. 2 (2000), p. 251 onwards.)

15 Kadomatsu, supra note 14, p. 209. See also Takahiro Mikami, "*Chiiki Kukan wo Meguru Jumin no Rieki to Ho* [Citizens' Interest and Law in Relation to Community Space]" (Yuhikaku, 2006), p. 9.

landscape[16]. Professor Yoshida advocates a division of cases into two categories: cases of "enjoying the existing landscape" in which "the right to a landscape is seen as a right to enjoy an already existing landscape" is an issue, and cases involving "joint formation of the landscape" in which "the right to landscape is seen as a right to enjoy a landscape created by oneself" is an issue[17]. In the Kunitachi Condominium Lawsuit, the judgment given at the first trial stated that the case fell into the latter category. That is to say, the landscape of Kunitachi had "been created by landowners within a specific area as a result of adequate mutual understanding between landowners and long-term continuous cooperation involving unity and self-sacrifice, and such landowners are enjoying the landscape themselves".

In this way, the focus on joint formation works to strengthen private law protection of the landscape. However, in Professor Peukert's study, the very fact that this is joint formation works in the opposite way. Professor Peukert's view is based on the thesis that "Various interests of a proprietary nature are allocated to those who created such interests through individual work and contributions". Therefore, a landscape formed by collective acts rather than individual work and contributions cannot be attributed to individuals, but to **everyone,** and it is thus impossible to invoke private law protection.

The idea that it is not possible for certain people to assert in lawsuits the protection of a landscape that belongs to everyone most certainly holds true when recalling the following issue. This is the issue of the "ways of institutionally guaranteeing that regional rules constantly coincide with the public interest"[18] to which Professor Yoshida refers. Such an assertion must coincide with the interests of all in order for certain people to assert that a landscape that belongs to everyone should be protected. One viewpoint relevant to this issue is that discussion should be promoted in a form that narrows down regional rules. In other words, there is a viewpoint in which only regional rules that are likely to receive social approval and that are easily recognizbale can be acknowledged as customs, and only legal interests based on such customs can constitute landscape interests protected by private law[19]. This is an issue in which further refinement of discussion is necessary, and such initiatives could be said to be ongoing.

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16 Narufumi Kadomatsu, *Hanhi* [Case Comments] (Judgment of Supreme Court, March 30, 2006); edited by Tsutomu Isobe, et al. "*Chiho Jichi Hanrei Hyakusen* [Top Hundred Local Government Judicial Precedents] < 4th Edition>", (Yuhikaku, 2013) p. 74.

17 Yoshida, supra note 6, p. 69.

18 Hiroshi Matsuo, *Hanhi* [Case Comments] (Judgment of Tokyo High Court, October 27, 2004), Hanrei Times No. 1180 (2005), p. 124.

19 Tadashi Otsuka, *Kunitachi Keikan Sosho Saikosai Hanketsu no Igi to Kadai* [Significance and Issues in the Kunitachi Landscape Lawsuit, Supreme Court Judgment], Jurist No. 1323(2006), p. 76; see also Kiyoshi Hasegawa, "*Toshi Community to Ho* [City Community and the Law]", (University of Tokyo Press, 2005), p. 316.

## 3. Denial of Landscape Protection by Private Law

### (1) Demand for Democratic Legitimacy

To this point, I have outlined a positive perspective on landscape protection by private law in Japan. A contrasting perspective firmly maintains a negative stance toward protection of the landscape by private law, and essentially follows the direction taken by Professor Peukert.

According to Yasutaka Abe, Emeritus Professor of Kobe University, who is renowned as a negative proponent of protection of the landscape by private law, acknowledging this causes a situation in which "the property rights of persons thought to have violated the landscape are suddenly restricted and legal stability and predictability are seriously damaged". In addition, landscape protection linked to property right restrictions should in principle accord with the law as a democratic agreement. That is to say, in principle, protection of the landscape should be created by administrative regulations under democratic political processes[20].

While this viewpoint leads to the same conclusion as that reached by Professor Peukert, there are differences between the arguments involved. In arguing that protection of the landscape should be left to the *Gemeinde* (municipality), Professor Peukert cites two main reasons. The first is that procedures the *Gemeinde* employs for forming an L plan and a B plan are appropriate for balancing all related interests, and the second is that BL plans formed by the *Gemeinde* have greater democratic legitimacy than civil trials.

Here, so-called public law regulations are not[21] necessarily sought[22] from an infringement reservation of law (Gesetzvorbehalt als Eingriffsgesetzvorbehalt) viewpoint in order to vindicate property right restrictions resulting from landscape protection, in other words, from "a viewpoint of 'liberalism and individualism', which are guaranteed by the constitution"(one can so characterize the Japanese perspective) . Rather, the emphasis is thought to be placed on ensuring that the necessary democratic legitimacy exists when creating public spaces. As noted above, in Japan, when we think about protecting the landscape, there is a tendency to focus on protecting conflicting property rights[23]. Thus, in legal theory, the administrative and legislative regulations that should be sought are largely inadequate. The hope

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20 Yasutaka Abe, *Keikan wa Shihoteki (shihouteki) ni Keisei Sareruka (I)* [Is the Landscape Formed by Private Law (Judicially)?], Jichi Kenkyu Vol. 81 No. 2 (2005), p. 10; see also Katsuhiko Itagaki, *Hanhi* [Case Comments] (Judgment of Supreme Court, March 30, 2006), Minshoho Zasshi Vol. 127 No. 12 (2007), p. 190 onwards; Madoka Torisawa, *Keikan Funso ni okeru Kokyosei—Ho to Keizaigaku no Shatei* [Public Nature in Landscape Disputes—Firing Range of Law and Economics]; edited by Tatsuo Inoue, "Gendai Ho-tetsugaku Kogi [A Modern Treatise on Legal Philosophy]", (Shinzansha, 2009), p. 189 onwards.

21 Professor Peukert severely criticizes equating property with freedom. That property rights are formed by the law is not a reason for such property rights to be restricted. See Alexander Peukert, (translated by Taro Suizu), *Shoyuken to Jiyu* [Property and Freedom], Keio Law Review No. 19 (2011), p.425 onwards. Vgl. Alexander Peukert, Güterzuordnung als Rechtsprinzip, 2008, S. 660 ff.

22 Itagaki, supra note 20, p. 127.

23 Saito, supra note 3, p. 67.

that this situation will be overcome is a forlorn one as long as it is included in the logic that public law regulations be sought from an infringement reservation of law viewpoint. This is so even if, citing Paragraph 2 of Article 29 of the Constitution of Japan, which provides that "Property rights shall be defined by law, in conformity with public welfare", it is also asserted that policy constraints are easily allowable in the case of property rights, and that there will not be that great a change. That is to say, "public welfare", within the infringement reservation of law concept framework, only functions to tolerate the exercise of authority by the state, but has no function that obligates the state to exercise its authority"[24]. In contrast to this are perspectives such as that of Professor Kadomatsu, who recommends that the property rights guarantee structure itself be reexamined. According to this perspective, the idea that the property rights institution is designed from the "perspective of designing a rational institution in order to promote welfare" for society as a whole is conceivable, and it is "legislators who have greater democratic legitimacy than the judiciary" who are responsible for this[25]. Professor Peukert's perspective, which emphasizes the need for coordination of democratic interests when creating public spaces, has greater affinity with the guarantee structure for such property rights[26].

(2) Possible Resolution of Issue Concerning Democratic Legitimacy

As discussed above, the democratic legitimacy perspective is not ignored in Japan. However, despite this, a recent trend in discourse favors the conclusion that the landscape should be protected under both a private law regime and a public law regime. To reach this conclusion, how do we resolve the issue concerning democratic legitimacy? It appears that argument in Japan is not precisely on the same wavelength as the view of Professor Peukert.

One opinion is that democratic legitimacy does not come into play in this regard because landscape protection is conferred by the courts in response to the filing of petitions by private individuals. It is not extended on behalf of administrative agencies that must otherwise confer it, but solely pursuant to the courts' own responsibility to provide legal remedies under a specific civil law regime[27]. This opinion, however, fundamentally differs from the view of Professor Peukert on the question of whether damage or threatened damage to the landscape is sufficient to constitute a cause of civil action and provides grounds for a judgment within the civil law framework.

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24 Matsumoto, supra note 3, p. 85.

25 Narufumi Kadomatsu, *Keizaiteki Jiyu* [Economic Freedom]; edited by Takayuki Ando, Constitution II, (Houritsu Bunka Sha, 2001), p. 234 onwards; The author's LL.D. thesis "Der verfassungsrechtliche Eigentumsschutz", 2013.

26 For minimizing freedom of expression regulations due to landscape protection that concerns constitution scholars (for example, outdoor advertising ordinances), it would be more useful to clarify discrepancies in the guarantee structure than to separate freedom of expression and property right guarantees by the extent of such guarantees.

27 Katsumi Yoshida, *Hogohoeki to shiteno Rieki to Minpogaku* [Interests and Civil Law as a Legally Protected Interests], Minshoho Zasshi Vol. 148, No. 6 (2013), p.604 onwards.

Furthermore, the issue of democratic legitimacy arising from discourse on the protection of collective legal interests by the courts is argued in another context, which involves discussion of whether or not environmental representative action should be introduced[28]. Professor Peukert maintains a negative stance on landscape protection via representative action. A widely held view in Germany is said to be that environmental representative action should be accepted only as a "limited exception"[29]. By contrast, such a negative opinion is hardly ever heard in Japan. Instead, a popular view is that because of normative demand to proactively correct problems arising in the course of democracy, environmental representative action should be introduced[30]. This view seems to be permanently at cross purposes with the view of Professor Peukert. In Japan, where people have been attempting to resolve the democratic legitimacy issue, we must continue to sincerely address this fundamental question, as raised in a straightforward manner by Professor Peukert, and develop a wide range of theoretical solutions.

My last observation on recent developments in Japan is that people are more concerned about how best to discuss a case before or after filing a lawsuit. More specifically, they are interested in how local governments, community residents and the nation as a whole should participate in the landscape judgment process[31]. This issue was discussed only peripherally in the lecture because it distracts from the real issues discussed therein. I hope to have an opportunity to hear how people are discussing this issue on efforts to "enhance the democratic decision-making process" in Germany.

## 4. Conclusion

Even in Japan, a broad consensus has been formed that protecting the landscape should be dealt with primarily through public law regulations. In addition, whether

28 This issue is raised by Yushin Kuwahara, *Kankyo Dantai Sosho no Ho-teki Seito-sei* [Legal Legitimacy of Environmental Representative Action], Kankyo-ho Seisakugakkaishi No.15 (2012), p.158 onwards.

29 The latest situation is reported by Noriko Okubo, *Konmeisuru Doitsu no Kankyo Dantai Sosho—Kankyo/Ho-teki Kyusai Ho 2013nen Kaisei wo Megutte—* [Chaotic Situation of Environmental Representative Action in Germany — Concerning 2013 Amendments to Environment/Legal Remedies Act—], Hokkaido Journal of New Global Law and Policy No. 20 (2013), p. 227 onwards.

30 Takeshi Shimamura, *Kankyo Dantai Sosho no Seitosei ni Tsuite* [Legitimacy of Environmental Representative Action], edited by Hikaru Takagi, et al., "*Gyoseihogaku no Mirai ni Mukete* [New Perspectives in Administrative Law and Regulatory Policy]", (Yuhikaku, 2012), p. 529 onwards (which refers to opinions different from that of Professor Peukert in Germany.)

31 The need for such a debate was pointed out many years ago. See Kenji Ishikawa, *Kukan to Zaisan—Taisho Hokoku—* [Space and Property—Comparison Report], Public Law Review No. 59 (1997), p. 309 onwards.
Recent arguments are Narufumi Kadomatsu, *"Kyodo Keisei Gata" Machizukuri no Seido Sekkei to Rule / Standard Ron* ["Institutional Design for Collaborative Formation Style" Town Planning: Rules/Standards Theory], Japan Association of Real Estate Sciences Journal Vol. 27 No. 3 (2013), p. 55 onwards. Narufumi Kadomatsu, *Chiiki Kukan Keisei ni Okeru Gyosei Katei to Shiho Katei no Kyodo—Shiho Katei no Feedback Kino wo Megutte—*[Cooperation of Administrative Process and Judicial Process in Forming Community Space—Concerning Feedback Function of Judicial Process—], edited by Yayoi Isono, et al., "*Gendai Gyosei Sosho no Totatsuten to Tenbo* [Terminus Ad Quem and Prospects of Modern Administrative Litigation]" (Nippon Hyoron Sha, 2014), p. 3 onwards.

it is possible to protect the landscape through private law actions in the courts, or whether the landscape should be protected through private law, is a matter currently being contested. In Japan, private law landscape protection is sought to tackle the situation in which public law regulations are inadequate. However, there are theoretical premises that is more important than such pragmatic grounds when private law landscape protection are affirmed by academics. In other words, fundamentally, there is an understanding about Civil Law that differs from that of Professor Peukert in terms of acknowledging[32] both the public nature of interests and their private attributes. The question is this: what kind of dialogue is possible between the two sides amidst such a fundamental confrontation?

32 Yoshida, supra note 6, p. 70.