JUDICIALIZATION OF POLITICS AND THE JAPANESE SUPREME COURT

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I. INTRODUCTION: GERMAN LEGACY

In his Article, Professor Matsui provides us with a general explanation of judicial conservatism in Japan.[1] He points out that the Supreme Court of Japan is self-restrained because it is staffed with Justices who share a collective mentality of self-restraint. He also argues, among other things, that this kind of "judicial passivism" has its root in "traditional German constitutional philosophy"—that is, the positivist interpretation of the written constitution that was dominant in prewar Japan.

I agree with Professor Matsui's observation that the doctrines and standards of review the Court has adopted in the name of Americanization are disguises of the fin de siècle German conceptual jurisprudence.[2] This statutory positivism, which was preconditioned by legal-political philosophy specific to German nation building, discourages public lawyers from questioning the legitimacy of government.[3] Instead, it requires them to apply systematized juristic propositions prescribed in statutes to concrete cases and controversies regarding infringement of rights. The *Dogmatik* can be applied in a very liberal or conservative fashion, but is itself everlasting.[4]

I hesitate, however, to overestimate the dogmatic character of Japanese conservatism. The German heritage theory cannot account for why Japanese Justices did not follow a different constitutional philosophy like that adopted in today's Germany, which favors more judicial control of

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1. Shigenori Matsui, *Why is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375 (2011).

2. *Id*.

3. *See, e.g*., MICHAEL STOLLEIS, A HISTORY OF PUBLIC LAW IN GERMANY 1914–1945, at 14–19 (Thomas Dunlap trans., 2004); Stefan Korioth, *The Shattering of Methods in Late Wilhelmine Germany*, *in* WEIMAR: A JURISPRUDENCE OF CRISIS 41, 41–44 (Arthur J. Jacobson & Bernhard Schlink eds., 2002).

4. *See* RALF POSCHER, GRUNDRECHTE ALS ABWEHRRECHTE [BASIC RIGHTS AS DEFENSIVE RIGHTS] 24, 31 (2003); Olivier Jouanjan, *Freedom of Expression in the Federal Republic of Germany*, 84 IND. L.J. 867, 869 (2009).

politics through constitutional adjudication.[5] It is apparent that what controls the Japanese high court's "conscience" is something else lurking in its dogmatic judgments.[6]

In contrast to Professor Matsui, I argue that the Japanese conservatism is ostensible. We should look at the "rationale for rationale"—that is, an *invisible constitution* that invests government activities with a comprehensive presumption of constitutionality. According to the organic theory of state, the limit of government powers lies in the government's *abuse* of power, rather than its *lack* of authority. By contrast, individual rights function as a trump that exempts citizens from excessive government interference, and that is why their definition should be left to the judiciary.[7] Indeed, the Japanese Supreme Court is reluctant to "judicialize" politics when rights and entitlements of the citizen are not at stake.

II. JUDICIALIZATION OF POLITICS AS DEPOLITICIZATION

A. Judicialization of Politics

In general, judicialization of politics means judicial review of policy making over the composition of government.[8] Some scholars even go further to define it as "the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies."[9] Though it is a phenomenon accompanied by the adoption of constitutional courts, judicialization of politics does not necessarily result from the U.S. model of judicial review. For example, France and Germany, which tutored Japan in modern nation building, intensify judicial control of government activities by expanding their own constitutional review.[10] Thus, judicialization of politics does not necessarily mean the globalization of the U.S. judicial review. Rather, it

5. JOJI SHISHIDO, KENPO SAIBANKEN NO DOTAI [THE DYNAMICS OF CONSTITUTIONAL ADJUDICATION] (2005).

6. *See also* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 76, para. 3 (providing that Justices "shall be independent in the exercise of their conscience").

7. ELISABETH ZOLLER, INTRODUCTION TO PUBLIC LAW: A COMPARATIVE STUDY 25 (2008).

8. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 265 (2003).

9. Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 721 (2006).

10. *See* John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1671 (2004).

denotes national responses to the emerging judicial constitutionalism that intends to impose a rule of lawyers on the political process.

There are criticisms, of course, toward judicialization of politics. Recent research shows that courts are coming to judicialize "mega-politics," "matters of outright and utmost political significance that define and divide whole polities."[11] However, they achieve these goals not by giving their "sober second thought" that rouses the drunken political community,[12] but rather by relying on technological doctrines that are alien to other political actors. For lay critics, this indicates a hypocritical attempt of depoliticizing democracy by the oligarchic elite.

B. Depoliticization

Professor Rancière, a French political philosopher and critic of judicial review, identifies judicialization with bureaucratic depoliticization. He argues that judicial review prevents the popular struggle for democracy—the *subjectification* of those who are excluded—from being politically activated.[13] The modern state's subordination to judicial review is, he says, actually subordination of the *political* to the *administrative*, which means "the exercise of a capacity to strip politics of its initiative through which the state precedes and legitimizes itself."[14] He argues that the "constitutionality checkup" (i.e., judicial review) does not really mean the submission of the legislative and the executive to the "government of the Bench": "This is really state mimesis of the political practice of litigation. Such a mimesis transforms the traditional argument that gives place to the show of democracy, the internal gap in equality, into a problem that is a matter for *expert knowledge*."[15]

The essence of Professor Rancière's argument is that what the "*judicialization* of politics" really means is the *depoliticization* of constitutional democracy by the bureaucratic state. Interestingly, though his criticism is crafted in unjuristic, post-modernistic terms, it merely reflects the orthodox understanding of French constitutionalism. That is,

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11. Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 93 (2008).

12. Adrian Vermeule, *Second Opinions* 28–29 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, No. 10-38, 2010), *available at* http://ssrn.com/abstract=1646414.

13. JACQUES RANCIÈRE, DIS-AGREEMENT: POLITICS AND PHILOSOPHY 109 (Julie Rose trans., 1999) (1995); *see also* Srinivas Aravamudan, *Sovereignty: Between Embodiment and Detranscendentalization*, 41 TEX. INT'L L.J. 427, 435 (2006) (arguing that Rancière redefines democracy as "a political discourse of self-determination" formed out of sovereignty).

14. RANCIÈRE, *supra* note 13, at 109.

15. *Id.* (emphasis added).

French democracy is so centripetal that it enables a bureaucratic government to "monopolize and depoliticize the public sphere" in the name of statutory law, which is deemed to represent the general will of the sovereign people.[16]

By "centripetal," I mean a tripartite combination: the legal homogeneity of society, monopoly of legitimacy by the democratic state, and centralized structure of government.[17] The French model lays down a sovereignty of statutory law. Moreover, until recent constitutional reform, civil rights in France were defined as "public liberties," ensuring a citizen that he or she has a part in *res publica*, i.e., the political process. Because it was the statute that defined the rights and made them enforceable, the idea of a statutory violation of rights per se was a *contradictio in adjecto*. Therefore, anticipating the suffering of citizens, it was the government's duty to seek review of its own actions by the *Conseil d'État* or *Conseil Constitutionnel*, which are both essentially nonjudicial.[18]

This centripetal democracy also copes with an authoritarian regime.[19] The supremacy of lawmaking authority makes the separation of powers functional rather than structural, necessitating a civil service that performs separate functions without harming the unity of state.[20] The aristocratic elite, possessing "politically neutral" expertise, interpret and enforce laws, thereby contributing to the depoliticization. Thus, those who are excluded from this oligarchy have to fight for recognition of their rights in the political arena. In that sense, Rancière merely restates a pivotal thesis in the French constitutional history: it was partisan politicians, not judges, who aligned themselves with the popular movement for democracy and bestowed rights on political minority.[21] That is why he treats judicial review as another sophisticated form of bureaucratic depoliticization.

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16. *See* GEORGES LEFEBVRE, THE COMING OF THE FRENCH REVOLUTION 171 (R.R. Palmer trans., 2005); JACQUES RANCIÈRE, HATRED OF DEMOCRACY 51–55, 71 (Steve Corcoran trans., 2006); CARL SCHMITT, THEORY OF THE PARTISAN 82–83 (G. L. Ulmen trans., 2007) (1975).

17. Rogers M. Smith, *Beyond Sovereignty and Uniformity: The Challenges for Equal Citizenship in the Twenty-first Century*, 122 HARV. L. REV. 907 (2009) (reviewing LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2008); HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006); PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008)).

18. *See* ZOLLER, *supra* note 7, at 199; *see also* James E. Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431 (1972).

19. *See* YOICHI HIGUCHI, HIKAKU KENPO [COMPARATIVE CONSTITUTIONALISM] 77 (3d ed. 1992); ZOLLER, *supra* note 7, at 75.

20. *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 263–88 (2d ed. 1998); Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s*, 113 YALE L.J. 1341 (2004).

21. *See* LEFEBVRE, *supra* note 16, at 201.

III. JAPANESE PRACTICE: ANTITHESIS TO JUDICIALIZATION OF POLITICS

A. Japanese Antithesis?

Theoretically, the criticism against judicialization is applicable to Japanese judicial review. First of all, we know Japan is a centripetal democracy.[22] Moreover, some scholars point out that the Japanese judiciary is one of the bureaucratic branches and that it uses the legal reasoning that it is ostensibly neutral to secure its autonomy from partisan politicians.[23] Thus, it is not unfair to predict that the oligarchic elite will go further to depoliticize the politics. However, Professor Matsui does not expect that judicial activism will give rise to judicialization of politics. It is simply unrealistic, he argues, to ask the Court to vindicate Article 9 or reshape the welfare state.[24] Instead, he proposes a "limited activism," enabling the Court to "protect the democratic process based upon the popular sovereignty principle, while paying respect to the outcome of the political process."[25]

I think Professor Matsui's limited activism speaks to the reality rather than the ideal. In fact, the Japanese Supreme Court employs both conservatism and activism in order to avoid judicial depoliticization. Here I will introduce two cases not discussed in Professor Matsui's article but which are significant to my argument, and I will explore structural reasons for the Court's antijudicialization policy.

B. Case Law

1. Limited Conservatism

In the *SDF Officer Enshrinement Case*,[26] the Court used limited conservatism to bypass judicialization of politics.[27] The widow of a Self-Defense Forces official who died on his duty sued the government and a

22. *See, e.g.*, Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT'L L. & POL. 419 (2001).

23. *See* BRADLEY RICHARDSON, JAPANESE DEMOCRACY 95 (1997); David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009).

24. Matsui, *supra* note 1, at 1422.

25. *Id.*

26. Saikō Saibansho [Sup. Ct.] June 1, 1998, Showa 57 (O) no. 902, 42 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 277.

27. *Id.*

shrine for damages, claiming that the government sponsorship of shintoistic apotheosis of her husband violated the constitutional provision commanding separation of state and religion,[28] thereby invading her right of religious personality. The Court denied her final appeal on the grounds that there was no government act in the case at all and that her religious personality is not the kind of right or interest protected by law. By invoking the doctrine of "institutional guarantee,"[29] the Court asserted that a government action that does not directly invade the rights of an interested party is excluded from judicial review, even when that action is unconstitutional:

> The provision . . . is an attempt to indirectly guarantee the freedom of religion by setting forth the *parameters* of actions which the State and its organs may not conduct . . . . Therefore, the religious activity of the State or its organs which violates this provision *should not necessarily be deemed unlawful in relation to individual persons* unless the activity directly infringes upon their religious freedom as guaranteed by the Constitution, e.g., by imposing restriction on their exercise of religious freedom . . . .[30]

Note that *Officer Enshrinement* is a judgment on its merits. This is not a case in which a constitutional court hid its real concerns "behind the cloak of standing."[31] The majority of Justices said that they will not strike down an unconstitutional government act unless it infringes on the constitutional or other legal rights of a related party, and the widow failed to establish such rights.

2. Limited Activism

In the *Yahata Steel Case*,[32] the Court invoked limited activism to evade judicialization of politics. A stockholder brought a derivative suit against

28. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 20, para. 3 (prohibiting "the State and its organs" from conducting "any . . . religious activities").

29. This doctrine was developed in France and Germany and exploited by Schmitt for explaining why the Weimar Constitution made the Christian churches a public body. The Japanese judiciary borrowed it in order to confer a presumptive constitutionality on government activities deemed religious. *See* CÉCILE LABORDE, CRITICAL REPUBLICANISM 57–59 (2008); CARL SCHMITT, CONSTITUTIONAL THEORY 208–12 (Jeffrey Seitzer ed., trans., 2008) (1928); Jan Deutsgh, *Some Problems of Church and State in the Weimar Constitution*, 72 YALE L.J. 457, 464 (1963).

30. Saikō Saibansho [Sup. Ct.] June 1, 1998, Showa 57 (O) no. 902, 42 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 277, 279 (emphasis added).

31. Mark V. Tushnet, Commentary, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1726 (1980).

32. SAIKŌ SAIBANSHO [Sup. Ct.] June 24, 1970, 24 SAIKŌ SAIBANSHO MINJI HANREISHŪ

two directors of Yahata Steel who contributed money to the Liberal Democratic Party, the then-ruling party in Japan, contending that the donation deviated from the business purpose prescribed in the company statute and thus was a violation of the directors' duty of care or loyalty. Knowing that the lawsuit aimed for the total ban on corporate expenditures to political parties, the Court responded with a ruling against the stockholder that legalized corporate political donations.[33] The Court declared that a corporation, like a natural person, has a constitutional right to perform political acts, and making corporate contributions to political parties forms part of that right. Though the Constitution says nothing about political parties, it "surely presupposes the existence of political parties, which are important organs of parliamentary democracy."[34] Accordingly, "it is matter of course for a business corporation to cooperate on the sound development of political parties and making political contributions is a way of cooperation."[35]

The *Yahata* Court constitutionalized political donations and political parties by contriving a theory of "corporate democracy," which was adopted by the U.S. Supreme Court in *Citizens United* forty years later.[36] This is epoch making, in view of the ingrained elite hostility toward party politics and grassroot distrust of party finance in Japan.[37] However, *Yahata* is not an attempt to judicially structure party politics. Rather, it merely gives a belated recognition to the long-existing status quo. The majority's suggestive refutation that the parliamentary government has full authority to impose strict regulations on political contributions for anticorruption concerns simply leaves the political battle on "money politics" to take its own course.[38]

It should be noted that the Court considered both cases to be controversies between private parties, and thus there were no government actions available for review. Nonetheless, the Court went the extra mile to take up constitutional issues. This reveals that the Court is not traditionally conservative, and its judicial philosophy is very situational.[39]

[MINSHŪ] 625.

33. *Id*.

34. *Id*.

35. *Id*. at 629.

36. Citizens United v. FEC, 130 S. Ct. 876 (2010).

37. *See* ROBERT A. SCALAPINO, DEMOCRACY AND THE PARTY MOVEMENT IN PREWAR JAPAN 143–45 (1953).

38. SAIKŌ SAIBANSHO [Sup. Ct.] June 24, 1970, 24 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 625, 631.

39. Yoichi Higuchi, *Lösung politischer Streitfragen durch die Verfassungsgerichtsbarkeit* [*Solving Political Controversies through Constitutional Adjudication*], *in* 2 FORTSCHRITTE DER

C. Structural Reasons

1. Principle of Distribution

The reason for antijudicialization first lies in the past constitutional borrowing. The Prussian-German constitutionalism is an imitation of, and reaction against, its French counterpart. Its basic concern is the creation, not the division, of a sovereign power. It maintains that the state is the only source of public authority, but rejects the French idea that the state and society stem from one republic. Instead, it embraces a division of state and society grounded on the Hegelian dichotomy, which distinguishes a System of Morality from a System of Desire.[40] The concept is that the state is a corporation rather than association and that people under its reach are its members. Under this organismic constitution, democracy and monarchy are checked and balanced by each other, and the democratic struggle for public liberties is adroitly replaced by government enforcement of private rights that are negative or positive concessions from the self-contracting state.[41]

This constitution calls for a rule of depoliticized private and administrative law (*Rechtsstaat*) based on the separation of the public and private spheres. The state strips individuals and groups of *powers*, reassigning to them *rights* in return.[42] Property rights are interpreted not as delegations of sovereign power to individuals by the state, but as guarantees of freedom to citizens through juristic institutions in compensation for their depoliticization.[43] By contrast, the self-binding state is free to meddle in the periphery of private autonomy so long as it does not disproportionately infringe on the rights of citizens. In other words, rights distributed to a citizen are in principle unlimited, while

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VERFASSUNGSGERICHTSBARKEIT IN DER WELT [PROGRESS OF CONSTITUTIONAL ADJUDICATION IN THE WORLD] 35, 37–40 (Christian Starck ed., 2004) (arguing that the Japanese high court is active in supporting government policies and that the Court has dealt with political questions without triggering constitutional review).

40. *See, e.g.*, ERNST CASSIRER, THE MYTH OF THE STATE 264–65 (1946); Jürgen Habermas, *Labor and Interaction*, *in* HEGEL'S DIALECT OF DESIRE AND RECOGNITION: TEXTS AND COMMENTARY 123, 145–46 (John O'Neill ed., 1996); Bernhard Schlink, *The Inherent Rationality of the State in Hegel's* Philosophy of Right, 10 CARDOZO L. REV. 1427 (1988–89).

41. Duncan Kelly, *Revisiting the Rights of Man: Georg Jellinek on Rights and the State*, 22 LAW & HIST. REV. 493, 512–19 (2004).

42. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 62–63 (George Schwab trans., 2006); *see also* Yasuo Hasebe, Book Review, 30 J. JAPANESE STUD. 189, 192–93 (2004) (reviewing LAWRENCE W. BEER & JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN'S TWO CONSTITUTIONS, 1889–2002 (2002)).

43. JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 1.1.5 (2d ed. 2005).

powers distributed to the state are principally limited. This is what Carl Schmitt called the "principle of distribution."[44] In case the government violates that principle, the only redress for a politically powerless citizen is the judicial enforcement of his or her rights.[45]

As postwar German legal scholars argue, *Rechtsstaat* is a functional equivalent of democracy introduced by undemocratic polities.[46] It supposes that the evil of state power is mitigated by checks and balances among organs of the state and neutralized by rights of the citizen. The state as a juristic person is to be normatively self-binding, although how it actually limits itself is a "metajuridical," and hence *political*, question that courts cannot handle.[47] Accordingly, judicial review under the organismic regime preserves rather than nullifies the independence of politics.

2. Presumption of Constitutionality

The second reason is that the postwar constitution is not incompatible with the principle of distribution. As leading constitutional scholars point out, the most profound transformation that the 1946 Constitution has brought is the polarization between the sovereignty transferred from the Emperor to the People, and the constitutionalized human rights against the popular sovereignty.[48] Equipped with democratic legitimacy, the executive acts with the presumption of constitutionality as it did under the prewar regime.[49] Collaborating with its colleague, the judiciary maintains a wall of separation between bureaucratic and partisan politics on the pretext of its undemocratic characteristics, notwithstanding its new constitutional status. As usual, Japanese courts are willing to judicialize rights, but unwilling to reshape politics through judicial enforcement of those rights.

It seems paradoxical, but the adoption of American-style judicial review consolidates the traditional canon. As Professor Jackson points out, what makes the U.S. model influential is the idea of a written set of rights enforced by courts enjoying *adjudicatory* independence from "the

44. SCHMITT, *supra* note 29, at 170–71.

45. *See id*. at 174–75.

46. Ralf Poscher, *Terrorism and the Constitution*, DISSENT, Winter 2009, at 13, 17.

47. Kelly, *supra* note 41, at 523–24.

48. *See* Katsutoshi Takami, *From Devine Legitimacy to the Myth of Consensus: The Emperor System and Popular Sovereignty*, *in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 9 (Yoichi Higuchi ed., 2001); *see also* Yoichi Higuchi, *The Constitution and the Emperor System: Is Revisionism Alive?*, 53 LAW & CONTEMP. PROBS. 51 (1990).

49. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 41 (making the Diet "the highest organ of state power").

prevailing powers of their time."[50] This idea accords with the Japanese tradition that discourages judges from challenging the legitimacy of government actions out of an adjudicatory context. The nation-building constitutionalism is a project of *steering* the state by restricting and warranting its power. The organismic constitution dominating the Japanese governing elite demands that this steering function be performed by various government organs and that no one reign supreme.[51] As one of the government actors, the Japanese Supreme Court is aware that it is not the last resort in terms of constitutional politics.

3. Relativist View of Constitutional Democracy

The third reason is that the postwar constitution does not clearly incorporate the idea of militant democracy in judicial review. A militant democracy empowers the judiciary to review "mega-political" questions such as the constitutionality of political parties. However, unlike the German Basic Law, the 1946 Constitution does not authorize the judiciary to protect the constitutional order by denying enemies of the Constitution their rights.[52] Both legal academics and the Court take the silence as constitutional refusal of militant democracy. The mainstream scholars oppose militant democracy for fear that the conservative governments, the real enemy of the Constitution, may use the idea as a plausible excuse to persecute citizens who stand against them.[53]

The Court shares this relativist view on different grounds. A militant democracy also presupposes pluralistic, deliberative politics fueled by cultural, religious, or ideological division. However, Japan's postwar democracy replaces such political pluralism with claims for economic self-decision and individual equality. The lack of ethnic diversity in constitutional democracy deprives the Court of an incentive to judicialize politics.[54] It induces the Court to respect the independence of politics, by which the Court can enforce countermajoritarian rights such as freedom of

50. Vicki C. Jackson, *Progressive Constitutionalism and Transnational Legal Discourse*, *in* THE CONSTITUTION IN 2020, at 285, 293 (Jack M. Balkin & Reva B. Siegel eds., 2009).

51. IKUO KABASHIMA & GILL STEEL, CHANGING POLITICS IN JAPAN 20–21 (2010) (stating that no single agency is able to dominate decision making in the Japanese government).

52. *See* GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 18, 21 (Ger.).

53. Shojiro Sakaguchi, *Japan*, *in* THE "MILITANT DEMOCRACY" PRINCIPLE IN MODERN DEMOCRACIES 219, 226, 232–40 (Markus Thiel eds., 2009).

54. The epochal decision made by the Sapporo District Court in 1997 granting an Ainu the constitutional right to pursue his or her ethnic identity did not go beyond nonpolitical individual rights. *See* Levin, *supra* note 22, at 426.

occupation and suffrage equality without offending the conservative majority.[55]

IV. CONCLUSION

Professor Matsui argues that the judicial conservatism in Japan stems from the prewar reception of German statutory positivism. However, the German legacy establishes itself as an invisible constitution, rather than judicial philosophy. Above all, it brings about a separation of the politicized and depoliticized spheres. Since the task of the judiciary is to protect nonpolitical citizens against political power by enforcing their rights, there is no room for judicialization of politics.

This classic constitutional canon survived even after Japan adopted a new democratic constitution. Under a centripetal democracy, the political and administrative branches possess plentiful authority that is presumed constitutional, and the judicial branch will overturn that presumption only when the government action immoderately violates the rights of the citizen. It is beyond Japanese judges' imaginations and abilities to convert all political questions into justiciable cases. In sum, the Japanese Supreme Court can be active or conservative, depending on how it assesses the risk of judicialization.

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55. *See* Yasuo Hasebe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms*, 5 INT'L J. CONST. L. 296 (2007).