

# Articles

## Overview of the Judge Impeachment System in Japan : Focusing on the Constitutional Design for the Impeachment Committee and Court

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### 1. Introduction

The Constitution of Japan received an impeachment system from the United States around seventy years ago<sup>1)</sup>. However the impeachment systems of both countries are not entirely the same. For example, in the United States all officers of executive and judiciary branches are impeachable, while under the Japanese system impeachable officers are limited to judges.

Although empowered by the supreme law, little attention has been given to the Japanese judge impeachment system. From what I have seen, there has been no article written about the Japanese impeachment system in English.

In this paper, I would like to portray the Japanese impeachment system while showing the similarities and differences between Japanese and

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1) TAKAO SASAKI, *SAIBANKAN-DANGAISEIDO-RON* [ON JUDGE IMPEACHMENT SYSTEM] 7-8 (1988). Considering the reception of the impeachment system more closely, modern Japan's first encounter with impeachment was not in 1946. On September, 1876, Meiji Emperor ordered members of his Council to establish the first Japanese constitution, and the first draft of it that was made in November by reference to the constitutions of foreign countries of that time had a system like impeachment. Some proposals written by private groups constituted of influential politicians and scholars also contained the system of impeaching officials. However, Hirobumi Ito, who was one of the most important politicians in the Meiji era and later become the first prime minister of Japan, considered an impeachment system was not suited to the Japanese constitution, and opposed introducing it. Therefore the impeachment system was not introduced in the Constitution of the Empire of Japan, which was promulgated on February 11, 1889, but first appeared in the Constitution of Japan promulgated on November 3, 1946, that is the second constitutional law of Japan.

American impeachment systems. I believe that a comparison with the federal impeachment system in the United States will offer the key to a deeper understanding of the Japanese impeachment system. Among the many problems about impeachment, I will concentrate on the organizations in charge of impeaching and trying it in Japan.

## **2. The Meaning of the Comparative Studies of the Impeachment Systems between Japan and the United States**

In Japan, the most orthodox research method for law is comparative studies. To explore some legal systems in Japan, we, the legal scholars, usually compare between the legal systems or cases of Japan and those of foreign countries. In most cases, gaining information from abroad makes a contribution to the deeper understanding of our legal systems. However, sometimes we embark on an attempt to arbitrarily explain the Japanese legal systems by applying legal systems or precedents of foreign countries that have absolutely no bearing on the situation in Japan. Some Japanese scholars who have no interest in anything in their own country eagerly write, in the Japanese language, many papers about law-related topics in foreign countries that are never read by the people in those countries. Although I think that introducing any foreign law systems to Japan has enormous significance in itself, we should distinguish between comparative studies and foreign studies. I would like to emphasize that we should use the comparative approach when it is really needed.

In this paper, I use this approach to examine the Japanese impeachment system, because there is a genuine reason for comparing the impeachment system in Japan to the federal impeachment system in the United States.

Why is it beneficial to refer to the American system in order to research the Japanese impeachment system? The reason is that there is no doubt the Japanese impeachment system stems from the American system.

As it is well known today, the Constitution of Japan was originally written by Americans. Under the Allied Occupation that followed World War II, the staff of the Government Section of the General Headquarters (GHQ) of the Allied Forces drew up the draft of the Constitution of Japan.

At first, the original draft of the Japanese constitution was written on February 4 and 5, 1946, by some committees of the Government Section of GHQ. Regarding the impeachment clause, the Committee on the Emperor, Treaties and Enabling Provisions fulfilled its drafting. The provision of the first draft which stipulates impeachment was as follows:

*All officers of the State shall be removed from office upon impeachment for and conviction of treason, bribery, or any high crime or mis-*

*demeanor, in accordance with the provisions of Article \_\_\_<sup>2)</sup>.*

As everyone will quickly discover, this provision looks like the Article II, Section 4 of the Constitution of the United States, which provides that, “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors”. It seems probable that the staff of GHQ had their own country’s constitution in mind when writing this draft of the Japanese constitution. Also, it may be worth noticing that cabinet ministers or any other officers in the executive branch could be subject to impeachment according to this first draft.

However, this phantom impeachment clause was quickly dismissed. On February 6, 1946, the Committee on the Emperor and Miscellaneous Affairs that had written this provision set a meeting with the Steering Committee, and then the scope of impeachable officials become limited to judges. According to the meeting notes at that time, the Steering Committee recommended omitting the article on impeachment and to use an impeachment only in order to remove members of the judiciary. They said that impeachment, as a general technique for the dismissal of the public officials is cumbersome and time-consuming, and would necessitate the Diet sitting as an Impeachment Court every time a charge was made against a public official<sup>3)</sup>.

In the end, designing impeachment for the executive branch was abandoned, and a revised version was written. The Macarthur Draft, which GHQ had given to Japan as the last version on February 13, 1946, stipulated an impeachment as follows:

*Removals of judges shall be accomplished by public impeachment only and no disciplinary action shall be administered them by any executive organ or agency<sup>4)</sup>.*

After GHQ delivered the Macarthur Draft to Japan, a few legislative bureaucrats and ministers discussed it secretly, and in accordance with it they were forced to make up their own version of the Japanese constitutional law. Through negotiation between Japan and GHQ, on March 5, the impeachment clause was revised as follows:

2) *Id.* at 93.

3) According to the document titled “Meeting of the Steering Committee with Committee on The Emperor (original draft)” which was recorded on February 6, 1946, the prime minister can be removed from office by a vote of non-confidence, he or she can remove his or her individual ministers at will, civil servants can be removed, the Diet can be permitted to make its own rules for the removal of its members, and all other elected officials can be recalled. 1 KENZO TAKAYANAGI, ICHIRO OHTOMO AND HIDEO TANAK, *NIHONKOKU KEMPO SEITEI NO KATEI* [THE MAKING OF THE CONSTITUTION OF JAPAN], 138-9 (1972).

4) *Id.* at 96.

*Removals of judges shall be accomplished by public impeachment only and unless judicially declared mentally or physically incompetent. No disciplinary action shall be administered them by any executive organ or agency<sup>5)</sup>.*

Article 78 of the present constitution seems much the same as the article in this draft. While on the subject of the other provisions there were some changes though following deliberation of the establishing of the new constitutional law in the Imperial Diet, the impeachment clause was not changed.

As mentioned above, we can say with fair certainty that the Japanese impeachment system is rooted in that of the United States. As it turned out, it is meaningful to compare the impeachment systems between in Japan and in the United States.

### **3. Overview of the Japanese Impeachment System**

#### **3.1. Constitutional Provisions and Acts concerning Judge Impeachment**

In the Constitution of Japan, there are two provisions which apply specifically to impeachment. One is Article 64 which establishes the subjective tribunal of impeachment, the Judge Impeachment Court, and the other is Article 78, which sets the subject officers of impeachment, judges in court of law.

These provisions are as follows:

*Article 64*

*The Diet shall set up an impeachment court from among the members of both Houses for the purpose of trying those judges against whom removal proceedings have been instituted.*

*Matters relating to impeachment shall be provided by law.*

*Article 78*

*Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges shall be administered by any executive organ or agency.*

At the request of Articles 64, Section 2 of the Constitution, the Diet Law (Act No. 79 of 1947) stipulates about impeachment in Articles 125 to 129, and the Judge Impeachment Act (Act No. 137 of 1947) provides for more detail. Because the Judge Impeachment Act is a comprehensive law includ-

5) *Id.* at 104.

ing general provisions, impeachment proceedings, impeachment trial, and penal provisions, the articles appearing hereinafter in this chapter are those of this act unless otherwise stated.

### 3.2. Meaning and Overview of Judge Impeachment

Two articles of the Constitution of Japan quoted in the preceding section can tell us the outline of the Japanese impeachment system. Here I would like to consider the meaning of the Japanese impeachment system and to explain a basic point about it a little more before illustrating its procedure.

First of all, the meaning of the judge impeachment system in Japan has two different perspectives<sup>6)</sup>.

One view is that impeachment system is embodied in peoples' constitutional right to choose their public officials and to dismiss them. Article 15, Section 1 of the Constitution of Japan provides, "[t]he people have the inalienable right to choose their public officials and to dismiss them", and the noticeable system second to election is impeachment. That is to say, it pursues democracy in a constitutional scheme.

The other standpoint is that impeachment system is established for the separation of powers. In Japan the Diet has a legislative power and the court has a judicial power. To prevent the rise of an absolute dictator, the Japanese constitution divides the sovereign into a legislature, an executive, and a judiciary, and gives three powers to these different branches. Each branch can check and balance the operations and powers of the other two branches: for instance, the Diet can elect the prime minister who is able to form the Cabinet; the Cabinet can dissolve the House of Representatives which composes the Diet with the House of Councillors. The judge impeachment system which is a weapon of the legislative branch against the judicial branch is understood as one of the checks and balances.

Although I think that these two perspectives on the impeachment system are not mutually exclusive, what should be considered further is which perspective is more essential. I do not approve of the latter as an essential perspective, because under the Japanese impeachment system the Diet and the courts are not in fact in a relationship of separation of powers. As discussed later, the organization in charge of the impeachment trial is not the Diet itself but a tribunal independent from the Diet.

From what has been discussed above, the reason why the Diet has the

6) As for this point and other relative issues in the Japanese impeachment system, see Noboru Yanase, *Saibankan Dangai-seido wo meguru Kenpou-jou no Ronten* [Constitutional Issues on the Judge Impeachment System], 2011 SAIBANKAN DANGAI-SAIBASHO HOU [THE JUDGE IMPEACHMENT COURT REVIEW], 3, 4-9 (2011).

power of establishing the impeachment court should seem reasonable. The Diet has two aspects; one is as the law-making organ<sup>7)</sup>, and another is as the organ representing the people<sup>8)</sup>. I argue that the Diet works on impeachment not as the legislative organ but as the representative one. The power to impeach should be associated with the sovereignty of the people.

The second point of that we should discuss is the scope of impeachable officials. Under the federal impeachment system in the United States, the President, Vice President and all civil officers of the United States can be impeached and removed from their office (U.S. Const., Art., II, Sec. 4). In contrast, in Japan, the Articles 64 and 78 of the Constitution limited the impeachable officials only to judges. This is the most obvious difference between the impeachment systems in Japan and the United States. After all, in America there have been nineteen impeachment cases including the President, senators and cabinet members, but the officials that have been removed by the Senate are all judges. The end result of both American and Japanese impeachment systems is that the systems have proven to function effectively in the rare instances where impeachment proceedings are initiated, working to dismiss judges.

Thirdly, I take up the grounds for impeachment in Japan. The impeachable offences consist of grave violation of duties by a judge, serious neglect of duties, and severe degradation of the dignity of judges. The grounds for impeachment are recognizably important for this system, and they are described in Article 2 of the Judge Impeachment Act. What is important is that the grounds for impeachment are described not in the constitution directly based on people but in the ordinary law made by the Diet. In America, since the grounds for impeachment are described in the Constitution, the houses of Congress cannot change it arbitrarily<sup>9)</sup>. In Japan, however the Diet can always change it. That is to say, the Diet can have both the power to establish the impeachment court and the power to describe the grounds for impeachment. Under the Japanese impeachment system, since the Diet is too strong with regard to impeachment, it may be necessary to pay attention to the Diet's power concerning impeachment.

7) Article 41 of the Constitution of Japan stipulates, “[t]he Diet shall be the highest organ of state power, and shall be *the sole law-making organ of the State*” (Emphasis added).

8) Article 43, Section 1 of the Constitution of Japan stipulates, “[b]oth Houses shall consist of elected members, *representative of all the people*” (Emphasis added).

9) Nevertheless, some scholars take a suspicious view of Congress's abuse of discretion to judge the grounds for impeachment. See L. Darnell Weeden, *The Clinton Impeachment Indicates a Presidential Impeachable Offense is Only Limited by Constitutional Process and Congress' Political Compass Directive*, 27 WM. MITCHELL L. REV. 2499, 2518 (2001). Since Congress's discretion is given attention in spite of the existence of the constitutional grounds, we in Japan should pay more attention to it because of the absence of constitutional grounds.

### 3.3. Procedure of Judge Impeachment

Impeachment proceedings may begin with two triggers; external public proposal, and internal self-cleansing of courts.

Regarding the external trigger, whoever thinks a certain judge should be impeached can ask the Judge Impeachment Committee to impeach the judge (Art. 15, Sec. 1). Because the impeachment system embodied peoples' right to dismiss their public officials as stated before, the right to request the impeachment of a judge is given to the general public.

The internal trigger is initiated by the Supreme Court or the chief judges of the lower courts. The chief judges of the lower courts shall report the fact to the Supreme Court when they deem a certain judge under their own jurisdictions impeachable. The Supreme Court shall request the Committee to impeach any judges whom the Supreme Court deems to be impeached (Art. 15, Sec. 2).

The Judge Impeachment Committee consists of ten members of the House of Representatives and ten members of the House of Councillors (Art. 5, Sec. 1). When a public proposal or claim by the Supreme Court is filed, or when the Committee itself deems any judges to be impeached, the Committee shall investigate. After the investigation, the Committee decides whether or not to impeach the judge. The Committee can also suspend the impeachment of the judge under extenuating circumstances (Art. 13). The resolution regarding impeachment or suspension requires a more than two thirds majority in the vote of all the attending members of the Committee (Art. 10).

When the Committee approves the resolution to impeach, it files the articles of impeachment with the Judge Impeachment Court (Art. 14). The given article is also served to the impeached judge (Art. 21).

The Judge Impeachment Court consists of seven members of the House of Representatives and seven members of the House of Councillors (Art. 16, Sec. 1). It is located in the building of the National Diet of Japan<sup>10)</sup>, and has a permanent courtroom and its own secretariat division.

When the Court receives the articles of impeachment, an impeachment trial shall be conducted and the judgment declared publicly (Art. 26). Although the members of the Judge Impeachment Committee and the Judge Impeachment Court are elected from among politicians, they shall independently exercise their authority (Art. 8 and 19), which means that

10) To put it more concretely, the courtroom and other facilities of the Judge Impeachment Court are located on the ninth floor in the Second Annex of the House of Councillors. The Judge Impeachment Committee is located in the Diet Members' No. 2 Office Building of the House of Representatives.

they are required to perform their duties independently from their party or parliamentary group.

After hearing and deliberation, the Court shall make a judgment for removal of the impeached judge. The judgment for removal requires a more than two thirds majority in the vote of all the attending members of the Court (Art. 31, Sec. 2). When the Court declares a sentence of removal from office of the impeached judge, he or she will be removed from office immediately, and will lose his or her certification as an officer of the court<sup>11)</sup>.

#### **4. Who impeaches judges and who tries the impeachment?**

##### **4.1. Not by the House in Body but by a Small Group Created by the House**

Under the Japanese system, not the plenary session of the House of Representatives but a small-group committee created by the Diet shall impeach a judge. Likewise, not the plenary session of the House of Councillors but the small-group tribunal created by the Diet shall try the impeachment of the judge. Put simply, in Japan it is not the houses of the Diet in body that impeach or try the judge, but alternative organizations.

On the other hand, under the American impeachment system that is the origin of the Japanese system, the House of Representatives itself impeaches officials and the Senate itself also tries impeachment of the officials.

The reason why it is not the houses in body but the special organizations that play the role of impeachment under the Japanese system is that the houses are very busy. Both houses of which the Diet of Japan consists have a huge amount of duties, for example, deliberating bills, national budgets, government policies, and so on. If the houses themselves were to sit for an impeachment committee or an impeachment court, much valuable time that could be spent on other duties would be lost.

Obviously, the Congress of the United States is also busy as well as the Diet of Japan. However, the Constitution of the United States gives the House of Representatives a sole power of impeachment and the Senate a sole power to try all impeachments (U.S. Const., Art. I, Sec. 2, Cl. 5 and

11) Under the Japanese system to nurture the legal profession, people who have passed the bar examination can become a lawyer, public prosecutor, or judge based on his or her wishes. If a prosecutor or a judge retires from office, he or she can become a lawyer. However, a former judge who was removed and disqualified by the Judge Impeachment Court cannot become a lawyer, unless he or she obtains a reinstatement decision by the Impeachment Court and enters one of the local bar associations.



Art. I, Sec. 3, Cl. 6). In the United States, the organizations handling impeachment are not a small group created by Congress, but the houses themselves.

Why does not the Constitution of Japan establish the same system as the American system concerning the impeachment organizations? Why does the Japanese constitution empower the impeachment and trial to houses in body, and why does it establish the special impeachment committee and the special impeachment court separately from the houses? These are the first problems concerning the impeachment organizations

In my opinion, the Japanese system is more reasonable for impeaching judges than the American system. In any country in the world, the parliament has hugely important duties to carry out, and their members are too busy to be concerned about the position of one of the many judges of the lower courts. Similarly, the independence of the judiciary is highly important in all countries which have a constitutional democracy, and consequently attacks on judicial independence must be avoided with constitutional systems. If a judge was impeached and tried by busy members of the parliament who have no interest in the position of judges, and if the judge was easily removed by impeachment according to some political booby trap, the fairness of the judiciary would be ruined and the constitution would in effect collapse. On the other hand, it is reasonable that not all but a small number of members of parliament who are in charge of impeachment and have a genuine concern about it deliberate and try impeachments of judges seriously. Furthermore substantive deliberation by a small group about an impeachment (rather than a charade of a deliberation by all members of parliament) contributes to guaranteeing the status of tenured judges.

In fact, under the federal impeachment system in the United States, investigating impeachments of judges is nowadays treated not by all members of the House of Representatives but by the House Committee on the Judiciary. For instance, in recent cases concerning judges, the House Judiciary Committee or the special subcommittee conducted impeachment investigations and reported the results of them to the full House<sup>12)</sup>. The Committee was able to favorably report the resolution, indicating to the House that the Committee members recommend the House adopt the articles of impeachment<sup>13)</sup>. Although it is not the Committee but the full House

12) SUSAN NAVARRO SMELCER AND BETSY PALMER, CONG. RESEARCH SERV., R41110, THE ROLE OF THE HOUSE OF REPRESENTATIVES IN JUDICIAL IMPEACHMENT PROCEEDINGS: PROCEDURE, PRACTICE, AND DATE, 12-7 (2010).

13) *Id.* at 15. In the latest impeachment case of Judge Thomas Porteous in March, 2010, this recommendation was taken by the Committee.

that decides about impeachment, the role of the Committee is very important, because judgments by the Committee which has intently investigated the judge<sup>14)</sup> are usually respected by the other members of the House.

In addition, since 1986 the trial of impeachment of judges is conducted substantively not by the plenary session of the Senate but by a small group of it. According to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, which were adopted in 1935, the Senate can provide that a committee of twelve Senators can receive evidence and hear testimony relating to the articles of impeachment. Although this committee makes no recommendations, and the final determination as to guilt or innocence is left to the full Senate, this trial committee procedure was used in all four current judge impeachment cases after 1986<sup>15)</sup>. Some say this committee impeachment trial is unfair and unconstitutional, because the Framers intended not the committee but the full Senate to hear impeachment trial evidence according to the text of the Constitution. For instance, Daniel Luchsinger insists the trial committee procedure violates due process in the 5th Amendment of the Constitution of the United States<sup>16)</sup>. Rose Auslander also disagrees with the committee trial because it violates the due process embodied in the Article I, Section 3, Clause 6 of the Constitution<sup>17)</sup>. In the 1980s' three judge impeachment cases - Claiborne, Hastings, and Nixon - all appealed to the courts arguing that this sole-power-to-try clause requires the trial by the full Senate and using Rule XI trial committee violates this clause. However, the Supreme Court of the United States held that the constitutionality of Senate procedure, including the use of a trial committee, is a political question and, therefore, nonjusticiable on January 13, 1993<sup>18)</sup>. Subsequently, the impeachment trial committee procedure was used in the recent case against

14) According to the report by the Congressional Research Service, concerning the five judge impeachment cases after 1980 investigations by the House Judiciary Committee have lasted 304 days, or about 10 months on average. *Id.* at 16-7.

15) Rule XI Committee was provided in the cases of impeachments against Harry Claiborne, a former judge of the United States District Court for the District of Nevada, Alcee Hastings, a former judge of the United States District Court for the Southern District of Florida, Walter Nixon, a former chief judge of the United States District Court for the Southern District of Mississippi, and Thomas Porteous, a former judge of the United States District Court for the Eastern District of Louisiana.

16) Daniel Luchsinger, *Committee Impeachment Trials: The Best Solution?*, 80 GEO. L. J. 163, 180 (1991).

17) Rose Auslander, *Impeaching the Senate's Use of Trial Committees*, 67 N.Y.U. L. REV. 68, 90-9 (1992).

18) *Nixon v. United States*, 506 U.S. 224 (1993).

Judge Thomas Porteous on March 17, 2010<sup>19)</sup>.

Since impeaching the top of the executive branch of the country and trying this impeachment are very important duties under the federal government system in the United States, the chambers in body of the legislative branch are suitable to impeach and to try the President. In my opinion, impeachment by the House in body and trial by the Senate in body do not need to be changed for the executive branch. This does not apply to the Japanese impeachment system, the targets of which are limited to judges.

#### **4.2. Not by Either House Separately but by Both Houses Together**

Another point to note is relating the separation of powers. Under the American system, the lower house, the House of Representatives, has the power to impeach, and the upper house, the Senate, has the power to try the impeachment. Since the body bringing forth the impeachment charges and the body that conducts the impeachment trial are different, the impeached official is guaranteed the opportunity to be scrutinized by chambers of different political compositions. This is a sort of separation of powers, which prevents abuses by the government.

Although the Japanese Constitution adopts the separation of powers as one of its fundamental principles and maintains a bicameral legislative system, the two houses together establish both the organization to impeach the judge and the organization to try the impeachment. Specifically, the Judge Impeachment Committee consists of the same numbers of the members of both the upper house and the lower house, and the Judge Impeachment Court is similarly constructed. This is a unique system without any peer in the world<sup>20)</sup>.

What should be first explained regarding this unique structure is the intentions GHQ had about the Japanese parliamentary system. At first, GHQ had considered that a unicameral assembly suited Japan. The chapter of the legislature of the original draft of the Japanese constitution was writ-

19) S. Res. 458, 111th Cong. §2 (2010). The Senate provided for the appointment of a committee of twelve senators to receive and to report evidence with respect to articles of impeachment against Porteous pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

20) Here we should probably turn back to 1788 and recollect Alexander Hamilton's passage in the Federalist No. 66. It states "[t]he division of them between the two branches of the legislature, assigning to one the right of accusing, to the other the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution, from the prevalency of a factious spirit in either of those branches"(THE FEDERALIST NO. 66, at 370 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

ten by the Committee on the Executive by February 6, 1946, and among it the provision concerning impeachment courts, which become Article 64 of the present constitution was as follows:

*Public officials may be impeached for dereliction of duty, malfeasance in office, or violation of public trust. Impeachment charges shall be brought by the legislature and tried before the Supreme Court....*<sup>21)</sup>

Under the federal impeachment system in the United States, and also under the English impeachment system from which America borrowed the two-stage procedure, the lower house of the parliament should impeach and the upper house should try it<sup>22)</sup>. Compared with an Anglo-American common law system, the Japanese impeachment system of the original draft looked strange. However, it is not unusual in European civil law system. There are many countries in the world where impeachment is not done by the upper house and trial of it is not done by the lower house in spite of having a bicameral legislature. For instance, in France, both houses of the Parliament can impeach the President and the High Court can try it. In Germany, the Federal President and any federal judges in courts can be impeached by one or both houses of the Parliament<sup>23)</sup> and can be tried by the Federal Constitutional Court.

If this continental impeachment system were established in Japan, it would have been very interesting to see the acceptance of American law creating a European law system in Asia. However, the plan allowing the judicial branch to try impeachment was dismissed. After negotiating with GHQ about making the Japanese new constitution, Japan succeeded in get-

21) SASAKI, *supra* note (1), at 93–4. However, in the record of the meeting of the Steering Committee with the Executive Committee on the day after February 6, there is no mention about impeachment (TAKAYANAGI ET AL., *supra* note (3), at 170–3).

22) According to Hamilton, the American impeachment system derives from the United Kingdom. The Federalist explains that the English experience was “[t]he model from which the idea of this institution has been borrowed” (THE FEDERALIST No. 65, at 397 (Alexander Hamilton)). In the United Kingdom, impeachment was done by the House of Commons and trial and conviction were done by the House of Lords, and this is very similar to the American system. However, unlike American impeachment, English impeachment extended to any citizen (including legislative officials but excluding members of the royal family) rather than to “civil officers,” and the penalty of English impeachment was also extended beyond removal to include fines, forfeiture, incarceration and capital punishment. Considering this aspect of English impeachment as a criminal procedure, the American impeachment system is quite different to the English system. Although the Parliament repeatedly used impeachment during the 1600s, impeachment had fallen into desuetude with the times, and became never to be used after the last case in 1806 in the United Kingdom.

23) On the impeachment against the President, both houses impeach him or her, and when the target is a judge, the lower house (Bundestag) can impeach him or her.

ting the bicameral legislature<sup>24</sup>).

Since the draft which was given by GHQ to Japan on February 13 stated the Japanese parliament should be unicameral at first, and then it was suddenly decided to change to a bicameral system on February 22, from my viewpoint, a mistake has occurred in recomposing the draft. Article 58 of the MacArthur Draft provided that:

*The Diet shall constitute from among its members a court of impeachment to try members of the judiciary against whom removal proceedings have been instituted.*

However, when the Diet was changed to bicameral, the phrase “its members” turned out to be grammatically incorrect and a need arose to correct the grammatical errors together with many other phrases in any provisions which were endowed duties with the Diet.

GHQ requested to Japan to make up the Japanese version of the draft immediately, and the drafting members of Japan had no time to consider the impeachment system because they had to deliberate about many other things which they thought more important<sup>25</sup>). It is safe to say that they automatically translated “its members” to “the members of both houses” in order to adapt the change of a structure of the legislature. It is also possible that they were not familiar with impeachment, because Japan had not had it until then. Therefore, “as for the impeachment court, the system, constituted by members of both houses of which nobody including the drafters thought, was generated here<sup>26</sup>.”

By the way, is the fact that impeachment and trial of it are done by organizations created not by either house but by both houses detrimental to the

24) According to the notes at that time, GHQ did not support unicameral legislature for the Japanese constitution seriously. “*Memorandum for the Records concerning Conference on preliminary rough draft of new Constitution*”, Summary: Report on Meeting of the Government Section on 5 February, 1946, in TAKAYANAGI ET AL., *supra* note (3), at 120–22. It said as follows:

The conclusion was reached that a number of considerations made it preferable to propose a unicameral rather than a bicameral legislature. There is nothing in Japanese political development to particularly recommend the bicameral system, and General MacArthur has expressed a preference for the unicameral system for Japan. Simplicity recommends the unicameral legislature as well; if the bicameral system is established it involves the use of the two forms of representation, and the difficult problem of deciding to which House the ‘vote of no confidence’ will belong. Colonel Kades suggested that this issue might give us an effective bargaining lever. If we propose the unicameral legislature and the Japanese strongly oppose its adoption, we might well compromise on this issue in order to strengthen our position in insisting upon a more important issue.

25) Sasaki insists “.....when the tentative proposal was replaced the word for fitting the bicameral legislature was not changed and no consideration of the content was made.” (SASAKI, *supra* note (1) p. 115). See also *id.* at 109–21.

26) *Id.* at 116.

separation of powers?

In Japan, I think that impeachment trials have not been abused as a political weapon in the past and will rarely be abused in the future. The scope of impeachable officials is limited to judges in Japan, contrary to the American system, which allows the President or other important officials to be impeached.

I do not, however, assert that no abuse of impeachment will ever happen in the future in Japan. In my opinion, even if the scope of impeachable officials is limited to judges, it is not free from the possibility of political abuse, not because of the judges' political attitudes but of their judgments. In Japan, almost all judges will never act politically on behalf of a certain party or utter an undisguised 'politically-incorrect' word, because judges in Japan are expected to be strictly politically neutral. However the judges' judgments in specific cases sometimes causes political problems, for example, the cases related to national security policy; construction or operation of a nuclear power plant; the Prime Minister's planned visit to Yasukuni Shrine, and so on. Although these are very rare cases among the numerous cases filed to the courts, judges sometimes cannot help but treat an ideological conflict. The independence of the judiciary potentially faces a credible threat, and this is a kind of weak point of the Japanese impeachment system.

#### **4.3. From Only by the House of Representatives to With the House of Councillors**

After the formal draft of Constitution of Japan had been announced by the Japanese government in April, 1946, the law regarding the concrete system of impeachment required to be established.

Professor Sasaki, who is one of the few Japanese scholars researching the Japanese judge impeachment system, says that the existence of the phantom of the Judge Impeachment Bill must not be forgotten<sup>27)</sup>. At that time in the Civil Affairs Bureau of the Ministry of Justice two outlines of the impeachment act were drafted, which included one plan where the Impeachment Court would consist of only the members of the upper house, and another plan in which it would consist of members of both houses. The intent of the former plan was for the Impeachment Committee to consist of members of the lower house, which would be allowable if the impeachment clause in the proposed constitution had the flexibility to be interpreted to include "the members of both houses." The latter plan was based

27) *Id.* at 121.

on a literal interpretation of the impeachment clause. As for the organization in charge of impeachment, two plans were also proposed there<sup>28)</sup>, including the plan that the Cabinet should impeach a judge and the committee consist of the members of the House of Representatives<sup>29)</sup>. Maybe the persons who wrote these outlines were unfamiliar with impeachment and obsessed with the two-stage procedure, which meant the lower house of the parliament should impeach and the upper house should try, just according to the systems of other countries.

If the plan in which the Impeachment Court consisted of members of the House of Councilors with no members of another house had been brought into reality, the upper house would have had stronger impeachment powers from the beginning, and the impeachment system of Japan would have come to resemble that of the United States or other common law countries. However this plan became extinct and the other plan was continuously reviewed by the Provisional Legislative Research Council, which was a consultative body to the Prime Minister<sup>30)</sup>.

To enforce the Constitution of Japan, a lot of laws were required to be enacted, and the Judge Impeachment Act is one of these laws. This act, however, was not considered to be important, and took a backseat in the enactment of the Diet Law. The Diet Law interested many people, especially the members of the last Imperial Diet at that time who eagerly immersed themselves in the debate. Although the Diet Law stipulates about impeachment organizations briefly in five articles as stated before, while deliberating this Law impeachment was completely ignored by the Diet members. Since almost all members of the Diet thought only about themselves and cared little about the guarantee of status of tenured judges, they were interested in the parliamentary system. Amazingly, the House of Peers which was one of two chambers of which the Imperial Diet consisted approved the Diet Law after no deliberation on impeachment<sup>31)</sup> and much

28) At that time other plans were suggested in which impeaching power was given to the Prosecutor General, and that the Impeachment Court was directly filed to by the public, and could make an executive decision to start trying an impeachment case without establishing any special organization for impeachment. *See SAIBANKAN DANGAI-SAIBANSHO JIMUKYOKU AND SAIBANKAN SOTSUI-IINKAI JIMUKYOKU EDS., SAIBANKAN DANGAI-SEIDO NO GOJU-NEN [FIFTY YEARS HISTORY OF THE JUDGE IMPEACHMENT SYSTEM], 12 (1997).*

29) In reality, the plan in which impeachment was to be conducted by the Cabinet was soon repealed because of the factious danger against the judiciary by the executive.

30) *Id.* at 13.

31) *Id.* at 12. It is of great significance to note that nobody expressed displeasure over the personnel of the Judge Impeachment Committee. When the Diet Law was deliberated in the Imperial Diet, the House of the Councilors was not established yet and could not complain about it.

deliberation on relationship between both houses. Eventually, the Diet Law was enacted on April 30, 1947, and enforced at the same time as the Constitution. Enactment of the Judge Impeachment Act was too late for the Diet Law and the Constitution.

The new Constitution came into force on May 3, 1947, and the democratic Diet in which the House of Councillors replaced the House of Peers was going to deliberate the Judge Impeachment Bill. Here this bill came to encounter a difficulty. Since it provided that the Judge Impeachment Committee consisted of members of the House of Representatives, a lot of members of the House of Councillors criticized this structure. Some members of the House of Councillors who realized this fact insisted on revising the Diet Law in order that the members of the House of Councillors could attend the Committee<sup>32)</sup>. While under the Constitution of the Empire of Japan the House of Peers consisted of blue-blooded persons, noblemen, and members directly appointed by the Emperor without any election, the House of Councillors under the new Constitution became democratic, because the members of the new house are elected by popular vote. Its members claimed that they reflected the will of the voters as well as the members of another house, thus some members of it should be selected to serve as members of the Committee as well as the Court. In spite of a patient deliberation by the members of the House of Councillors, the first session of the Diet of Japan under the new Constitution did not revise any laws for impeachment. Finally, the Judge Impeachment Act was enacted and enforced in concord with the Diet Law on November 20, 1947.

Seven years had passed when, as a result of an effort of the members of the House of Councillors who had had a complaint, the Judge Impeachment Act was revised on January, 1955<sup>33)</sup>. From then on, the Judge Impeachment Committee has consisted of members of both houses as well as the Judge Impeachment Court.

## 5. Conclusion

Until now the Judge Impeachment Committee and the Judge Impeachment Court have soundly conducted their duties. Up to this time, the Judge Impeachment Committee impeached nine judges<sup>34)</sup>, and the Judge

32) *Id.* at 13–15.

33) *Id.* at 128–31.

34) Since two cases of the nine targeted the same person, the judges who were impeached by the Impeachment Committee are eight.



Impeachment Court tried them and declared seven impeached judges<sup>35)</sup> to be removed during around seventy years. Precedents of the judge impeachment in Japan seem free from notable troubles, nevertheless the Committee or Court missed some judges who should be impeached and removed.

At first, the impeachment organization consisting of the two-stage procedure like other countries of common law was pursued and failed in Japan. The first factor which prevented establishment of the two-stage procedure is the provision of the Constitution of Japan which was written in the confusion of the postwar and reconstruction period. The Constitution made the Court consisting not of the members of the upper house but of the members of both houses. Afterward the Committee consisted of the members of the lower house for several years according to the original Judge Impeachment Act and the Diet Law. However, the upper house pursued equal involvement in impeachment and conquered the Committee. Therefore, in Japan both Impeachment Committee and Court are composed of the members of both houses in the Diet.

Eventually, it went the way to the original system, departing from the initial and original intention of the American drafters of GHQ. We, the Japanese constitutional researchers must study this important system provided by the Constitution of Japan, both comparing the American system as its origins and focusing on the uniqueness of the Japanese system.

35) The Judge Impeachment Court also treated six requalified cases of which three cases the Court requalified the former judges as lawyers. In Japan, the Judge Impeachment Act empowers the Judge Impeachment Court to requalify a disqualified former judge who has been removed by it after its deliberation on demand from his or her petition five years after the sentence of the impeachment removal (Art. 38, Sec. 1 of the Judge Impeachment Act). In my opinion, it is not appropriate to give this reinstating power to the Impeachment Court, because this is not a problem regarding the judge impeachment system based on the constitutional democracy. For details, see Yanase, *supra* note (6), at 20-1.