Opinion Paper Requesting Appointment of Foreign Nationals as Conciliation Commissioners and Judicial Commissioners

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Japan Federation of Bar Associations

Summary

The Japan Federation of Bar Associations (JFBA) requests that the Supreme Court appoint any person, regardless of whether or not they have Japanese nationality, as a civil or family affairs conciliation commissioner, if they meet the criteria of being "between 40 and 70 years old with advanced integrity and insight, and qualified to be attorneys, possessed of expert knowledge which is useful for the settlement of civil or family affairs disputes, or possessing considerable knowledge and experience in social life."
The JFBA also requests the Supreme Court to notify district courts that they may appoint any suitably qualified person as a judicial commissioner regardless of their nationality.

Reasons

1. Background
In 2003, the Hyogo Bar Association recommended a member attorney of Korean nationality as a candidate for a position as a family affairs conciliation commissioner, based on a request made by the Kobe family court for a recommendation. However, the Kobe family court subsequently informed the Hyogo Bar Association that as a conciliation commissioner is a public officer who engages in acts involving the exercise of public power they therefore are required to have Japanese nationality and thus the recommended person could not be filed with the Supreme Court. Accordingly, the Hyogo Bar Association was compelled to rescind its recommendation.
In opposition to this decision of the Kobe family court, the Kinki Federation of Bar Associations unanimously adopted a "Resolution Requesting Appointment of Foreign Nationals as Conciliation Commissioners," at its conference held on November 25, 2005.
In March 2006, the Sendai Bar Association recommended a member attorney of Korean nationality as a candidate to become a family affairs conciliation commissioner, but the

recommendation was rejected for the same reason. In the same month the Tokyo Bar Association recommended a member attorney of Korean nationality as a candidate for a judicial commissioner position, with the appointment also subsequently being rejected. The Tokyo Bar Association and the Sendai Bar Association submitted their opinions and requests to the respective courts on March 31, 2006.
In autumn 2007, the Tokyo Bar Association recommended a member attorney of Korean nationality as a conciliation commissioner, with the Sendai, Osaka and Hyogo Bar Associations also recommending member attorneys of Korean nationality as family affairs conciliation commissioners, but the respective district and family courts responded from December 2007 to March 2008 that the recommendation would not be filed with the Supreme Court. In protest at such responses, the Sendai Bar Association sent a resolution, adopted at its General Meeting, and the other bar associations sent President's statements or opinion papers to the Supreme Court.

2. Opinion of the Supreme Court

The Rules on Civil Conciliation Commissioners and Family Affairs Conciliation Commissioners (hereinafter referred to as the "Conciliation Commissioner Rules") stipulate on the appointment of conciliation commissioners as follows:

- Article 1 (Appointment) "A civil conciliation commissioner or family affairs conciliation commissioner shall be appointed by the Supreme Court from among persons 40 years of age or older and 70 years of age or under, who are of advanced integrity and insight, and are qualified to be attorneys, are possessed of the expert knowledge necessary to settle civil or family affairs disputes, or have considerable knowledge and experience in social life; provided, however, that the persons shall not be required to be 40 years of age or older and 70 years of age or under, in cases of particular necessity."
- Article 2 stipulates the grounds for disqualification, with nationality not being included among the grounds. In other words, neither relevant laws nor rules of the Supreme Court require any specific nationality to be appointed as a civil or family affairs conciliation commissioner. As for judicial commissioners, there are also no provisions concerning a nationality requirement, with the only requirement being "persons of good sense or other suitable persons," as provided by Article 1 of the Rules on Judicial Commissioners.

The general practice of appointing attorneys as conciliation commissioners is that each bar association recommends candidates for conciliation commissioners from among its member attorneys at the request of a family or district court with the district or family

court then filing the recommendations with the Supreme Court. The Supreme Court subsequently appoints the recommended candidates as commissioners. As for judicial commissioners, each bar association recommends candidates at the request of each district court and the district court subsequently appoints the recommended candidates as judicial commissioners. The JFBA made an inquiry to the Supreme Court as to the reasons why Japanese nationality was required in order for a candidate to be appointed as a conciliation commissioner or judicial commissioner and received a reply from the Recruitment Division of the Personnel Affairs Bureau, the General Secretariat of the Supreme Court, on October 14, 2008. It stated that it would avoid providing an answer on behalf of the Supreme Court but instead explain its administrative practice. This implies that there are no laws or rules on which the practice is based. The reply continued, "it is presumed that a public officer who engages in acts involving the exercise of public power or in decisions on policies of importance, or who participates in these activities will be appointed from among persons of Japanese nationality, and Japanese nationality is required for a person to be appointed as a conciliation commissioner or judicial commissioner, because these commissioners fall under the category of the said public officer."

3. Equal Right of Foreign Nationals to be Conciliation/Judicial Commissioners

(1) Guarantee of Fundamental Human Rights of Foreign Nationals

The provisions guaranteeing the fundamental human rights in Chapter 3 of the Constitution of Japan should be interpreted so as to be equally applied to foreign nationals who reside in our country, except for those provisions which are interpreted to be applicable to Japanese national only, in light of the nature of such rights (Supreme Court 1975 (*Gyo-Tsu*) No.120, 1978.10.4, the Grand Bench). In addition, the equality under law guaranteed by Article 14 of the Constitution should also be applicable to foreign nationals (Supreme Court 1962 (A) No.927, 1964.11.18, the Grand Bench), and the freedom to choose one's occupation guaranteed by Item 1 of Article 22 of the Constitution should also be applicable to foreign nationals. We must say that requiring Japanese nationality as a qualification to become a conciliation commissioner or judicial commissioner violates the right to the pursuit of happiness, the right of no irrational discrimination, and the freedom to choose one's occupation, which are guaranteed to foreign nationals by Articles 13, 14 and 22 of the Constitution respectively. It is also against the rule of law to refuse an appointment without restrictive provisions.

(2) Points of contention regarding the idea of "Local Public Officers Exercising Public Power, etc." presented by the Supreme Court's judgment in the "Nationality Clause for

Qualification of Managerial Personnel of the Tokyo Metropolitan Government" case.
The said answer of the Supreme Court is presumably based on the court's judgment on January 26, 2005, referred to as the "Nationality Clause for Qualification of Managerial Personnel of the Tokyo Metropolitan Government" case, which stated, "As for a person who engages in acts involving the exercise of public power, such as setting forth the rights and obligations of residents or determining the extent thereof, engages in decisions on important policies of a local government, or participates in these activities as a part of their duties (hereinafter referred to as "local public officers exercising public power"), … their performance of such duties has a significant involvement with the life of residents either directly or indirectly, through establishing or having practical impact on the rights, obligations and legal status of the residents. Therefore, considering that the Japanese people with whom resides sovereign power of Japan have the ultimate responsibility for the administration of the national government and ordinary local public entities, on the ground of the principle of popular sovereignty (Article 1 and Item 1 of Article 15 of the Constitution), it is presumed, in principle, that only persons of Japanese nationality may become local public officers exercising public power."
However, the dissenting opinions of Justice Shigeo Takii and Justice Tokuji Izumi were attached to the said judgment and the JFBA President further pointed out certain problems with the judgment in his comment of January 28, 2005, to wit, that the mention of "local public officers exercising public authority" in this judgment did not clarify the scope of "public authority" and the Supreme Court's upholding of the decision of the Tokyo Metropolitan Government to block the path for foreign nationals to assume its managerial posts without exception was a disregard for equality under law and the freedom of foreign residents to choose their occupations, especially those classified as special permanent residents in Japan.
The dissenting opinion of the said Justice Takii reads, "There should be a certain level of restrictions for foreign nationals to become public officers on the basis of the principle of popular sovereignty, and it should be allowed to require Japanese nationality for a person to assume a certain position, if it is so stipulated by law and it is reasonable." It continues, "As a corollary to popular sovereignty, we should only curtail positions of ruling power and require Japanese nationality from the viewpoint of maintaining national autonomy and independence, and as to local administrative organs, such positions should be limited to the responsible officials of the local public entities, such as the head of a local government". In addition, the opinion states, "it is unreasonable to exclude foreign nationals from all managerial positions regardless of the nature of their duties."

In other words, restricting the freedom of foreign nationals to choose their occupation should be permitted on the grounds of the principle of popular sovereignty, if allowing them to assume a certain position within the government conflicts with that principle. However, the scope of such a restriction should be limited to those occupations or positions of which assumption by foreign nationals would essentially contradict the principle of popular sovereignty due to the nature of their duties. Besides these occupations or positions, it should be permissible to restrict the occupational choice of foreign nationals based on their nationality only if such restrictions are based on a due consideration of the current situation that special permanent residents in Japan bear, there is a truly compelling reason, and it is so stipulated by law. However, the said judgment of the Supreme Court allowed the refusal of foreign nationals to assume a wide range of public positions by categorizing them as "local public officers exercising public power, etc." regardless of the concrete nature of their duties. Such a judgment brings about an injustice to foreign nationals.

(3) Appointment of foreign nationals as conciliation/judicial commissioners is not inconsistent with the principle of popular sovereignty.

As mentioned below, considering the purposes of the conciliation and judicial commissioner systems, and the roles, authority, and duties of conciliation/judicial commissioners in a comprehensive manner, the JFBA is not of the opinion that assumption of the positions of conciliation/judicial commissioners by foreign nationals conflicts with the principles of popular sovereignty.

i. Conciliation Commissioners

(i) The Purpose of the Conciliation System and the Roles of Conciliation Commissioners

The purpose of the conciliation system is to resolve civil or family affairs conflicts among citizens through dialogue and agreement between the parties, before they reach the stage of trial proceedings, and it is regarded as one of the typical means of Alternative Dispute Resolution (ADR) in Japan. Its main feature is that judges are involved in the process and it is performed in courts. The essential role of conciliation commissioners appointed among citizens is to assist the parties in settling the dispute through mutual concession, with their expert knowledge or considerable knowledge and experience in social life.

It should be apparent that a person of advanced integrity and insight, who is familiar with the Japanese social system, culture, and general opinions of its citizens, is capable of performing these duties, regardless of their nationality. The Conciliation Commissioner Rules stipulate the requirements necessary to

be appointed as conciliation commissioners as being "persons 40 years of age or older and 70 years of age or under, who are of advanced integrity and insight, and are qualified to be attorneys, are possessed of the expert knowledge necessary to settle civil or family affairs disputes, or have considerable knowledge and experience in social life," and this provision fails to include any implication that the consideration of nationality is required. Attorneys are especially regarded as having the expertise necessary for the settlement of disputes as experts in the resolution of legal conflicts, regardless of their specialties and it should be self-evident that nationality ought not to be regarded as an issue in this area. In other words, there are no concrete or objective circumstances which indicate that foreign nationals' assuming positions as conciliation commissioners goes against the purpose of the conciliation system or becomes an obstacle to its operation. A foreign national who is qualified to be an attorney is a person who has passed the Japanese bar examination, completed the legal apprentice training course, and registered as an attorney, just as those of Japanese nationality have done. In order to limit the activities of a person based on the qualifications acquired through this process, a reasonable ground to justify imposing disadvantage on that person is necessary. In addition, it is apparent that a foreign national who does not hold the qualification of attorney but is in possession of the expertise necessary for settling disputes, or one who has spent many years in Japan as a member of its society and acquired the kind of social experiences useful for settling disputes, and who is of advanced integrity and insight, has the ability to fulfill the duties of a conciliation commissioner. Furthermore, considering the fact that many people who have retired from public or private entities choose to serve as conciliation commissioners as their post-retirement jobs and are actively engaged in their duties, through which they are able to contribute to society, foreign nationals who are in similar circumstances should equally be allowed to serve as conciliation commissioners.

(ii) Duties and authority of conciliation commissioners

A record of conciliation shall have the same effect as a final and binding judgment, but this does not equate to conciliation commissioners exercising public power in conflict with the principle of popular sovereignty. An arbitral award made in Japan by an arbitrator who does not hold Japanese nationality shall have the same effect as a final and binding judgment without the intervention of a Japanese court if it does not require enforcement, such as a

confirmation of absence of obligation (Article 45 (1) of the Arbitration Act) . Entries in a schedule of bankruptcy creditors made by a court clerk with regard to the matters that are determined by approval of a bankruptcy trustee without any objection from any holder of a filed bankruptcy claim shall have the same effect as a final and binding judgment (Article 124 of the Bankruptcy Act), and a large number of attorneys of foreign nationality have been appointed as bankruptcy trustees. The contents of a record of conciliation are based on agreements made among the parties. However, an arbitral award is made at the discretion of an arbitrator whether or not the parties agree; i.e. the parties only agree to settle through the arbitration procedure. Therefore, arbitral awards carry a greater and more direct influence on the rights and obligations of the parties than records of conciliation. Regarding determinations made by a bankruptcy trustee in the process of investigating bankruptcy claims, an opportunity to file an objection is given to any holder of a filed bankruptcy claim. Under the conciliation procedure, a record of conciliation is not made without the consent of the parties in general. Therefore, there is little difference between the substantive effectiveness of schedules of bankruptcy creditors and records of conciliation. In other words, even though the effect of a record of conciliation as a final and binding judgment could be grounds to regard the duties of conciliation commissioners as having an aspect of exercising public power, it should not be grounds for excluding foreign nationals from being conciliation commissioners, from the viewpoint of having an appropriate balance with the effect of arbitral awards or schedules of bankruptcy creditors.

The fact that summonses, orders, and other measures taken by conciliation commissions carry non-penal fines for non-compliance could mean that these summonses, orders, and other measures include an aspect of “acts involving the exercise of public power.” However, they are merely an incidental disposition utilized in order to render dispute resolutions by conciliation more effective. Therefore, an insistence that the appointment of foreign nationals as conciliation commissioners is against the principle of popular sovereignty on the grounds of the existence of such a non-penal fine system is preposterous.

Concerning the authority of conciliation commissioners to investigate facts and examine evidence, an arbitrator also has the authority to conduct non-compulsory investigations of facts and examinations of evidence. In practice, conciliation commissioners rarely conduct these investigations and examinations on a compulsory basis in light of the purpose of conciliation.

Therefore, this authority should also not be seen as rational grounds for contending that the appointment of foreign nationals as conciliation commissioners is against the principle of popular sovereignty.

(iii) Summary

As explained above, there is no adequate reason for the argument that the appointment of foreign nationals as conciliation commissioners is in conflict with the principle of popular sovereignty. Accordingly, the so-called "matter-of-course rule" claimed by the State that Japanese nationality is required to serve as public officers should not apply to the appointment of foreign nationals as conciliation commissioners, and if any restrictions are justified, they must be based on rational reasoning and stipulated by law. In this case, it is apparent that there exists no such rational reason in light of the purpose of the conciliation system and roles of conciliation commissioners as we have already mentioned as well as from the viewpoint of creating a multiethnic and multicultural society, as described later. Even without pointing out these matters, we are able to argue that the grounds for disqualification provided by Article 2 of the Conciliation Commissioner Rules do not include any restrictions on nationality. Consequently, a person should be appointed as a conciliation commissioner if they meet the requirements provided by Article 1, "A civil conciliation commissioner or family affairs conciliation commissioner shall be appointed by the Supreme Court from among those persons 40 years of age or older and 70 years of age or under, who are of advanced integrity and insight, and are qualified to be attorneys, are possessed of the expert knowledge necessary to settle civil or family affairs disputes, or have considerable knowledge and experience in social life; provided, however, that the persons shall not be required to be 40 years of age or older and 70 years of age or under, in cases of particular necessity," and does not fall under any of the grounds for disqualification stipulated by Article 2. The practice of the Supreme Court not to appoint foreign nationals as conciliation commissioners is against the rule of law as there is no law at present to support such a practice. If a person meets the requirements of appointment, there should be no obstacle to their accomplishing their duties and the Supreme Court should immediately change its practice to appoint any person meeting the requirements listed in Article 1 as a conciliation commissioner regardless of their nationality.

ii. Judicial Commissioners

Regarding judicial commissioners, there is no requirement of nationality by law and

the only requirement provided for in the relevant statutes is “persons of sound judgment or other suitable persons” (Article 1 of the Rules on Judicial Commissioners). Their duties are limited to purely auxiliary functions to assist judges and, as opposed to conciliation commissioners, they have no authority to exercise public power, such as engaging in the decision-making process, making entries in records of conciliation, summoning, ordering, taking other measures, investigating facts, and examining evidence. Therefore, it is pointless to even argue that their duties constitute “acts involving the exercise of public authority.” Consequently, it is apparent that there exist no grounds for an insistence that the appointment of foreign nationals as judicial commissioners is against the principle of popular sovereignty.

4. From the Perspective of Creating a Multiethnic and Multicultural Society

Many foreign nationals live in Japan as members of its society, including special permanent residents, such as Koreans from former Japanese colonies and their descendants who have been living continuously in Japan even after losing their Japanese nationality upon the enforcement of the San Francisco Peace Treaty, as well as other domiciled foreign nationals.

Many of these foreign nationals are likely to utilize the conciliation system and among their cases there are a substantial proportion in which it would be beneficial to involve a conciliation commissioner who has knowledge of any cultural background peculiar to the special permanent residents or domiciled foreign nationals in question. Similarly, many foreign nationals become parties to cases in which judicial commissioners are involved. As a corollary of the freedom to choose one’s occupation and the principle of equality, foreign nationals and the Japanese should participate in cases equally as conciliation/judicial commissioners, and the advantages of involving foreign nationals as described above should not be emphasized. However, allowing foreign nationals to equally participate in more social systems is a fundamental requirement for the creation of a multiethnic and multicultural society. From that perspective, it is constructive and meaningful that foreign nationals who have settled in Japan be permitted to serve as conciliation/judicial commissioners and that they interact with other conciliation/judicial commissioners and court clerks, and work together in order to further improve the systems involved.

5. Conclusion

As mentioned above, there is no rational reason for excluding foreign nationals from being appointed as conciliation or judicial commissioners and such a practice brings

about an injustice to foreign nationals residing in Japan, violating their right to non-discrimination and the freedom to choose their occupation. Contrary to this practice, the JFBA believes that foreign nationals should have the right to be equally appointed as conciliation or judicial commissioners from the perspective of creating a multiethnic and multicultural society. In addition, the JFBA adopted its "Declaration Requesting the Creation of a Multiethnic and Multicultural Society and the Establishment of a Baisc Human Rights Act for Foreign Nationals and Ethnic Minorities," at the 47th JFBA Convention on the Protection of Human Rights held in Miyazaki Prefecture on October 8, 2004. In the declaration, the JFBA urged the guaranteed participation of foreign nationals in the legislative process such as granting settled foreign nationals voting rights in local elections, in the administrative process such as appointing them as public servants, and in the judicial process. The JFBA further urges the appointment of foreign nationals as conciliation commissioners and judicial commissioners.