

Special Report on Important Matters Not Included in the List of Issues
(CCPR/C/JPN/QPR/7) by the Human Rights Committee

- Adoption of Appropriate Measures for the Right of Foreign Nationals to Take Office as Public Servants

February 18, 2021

Japan Federation of Bar Associations

I. Content of Recommendations to be Requested of the Government of Japan

1. Relax the nationality requirement for the right to take office as public servants and open the door further to long-term foreign residents.
2. Guarantee the right to take office as a public servant in principle to special permanent residents¹ who do not have Japanese nationality if they intend to work as public servants.
3. The courts should reform its practice of refusing to appoint foreign nationals as civil and family conciliation commissioners as well as judicial commissioners and counselors on the grounds that such positions involve the exercise of public authority, and should make appointments on the basis of equality, irrespective of holding Japanese nationality.

II. Current Situation for Foreign Nationals to Take Office as Public Servants

1. With only a handful of exceptions, Japanese laws do not include provisions to prohibit appointment of foreign nationals as public servants. Public servants are categorized as national public officers and local public officers. The requirement of holding Japanese nationality to become a public servant is neither provided in the Constitution, the National Public Service Act nor the Local Public Service Act.

Despite the fact above, the Rules of the National Personnel Authority (8-18 Article 9), which is an administrative standard holding a subordinate position to the National Public Service Act, state in connection with national public officers that “those who do not hold Japanese nationality may not take employment examinations.” With regard to local public servants, the former Ministry of Home Affairs which is an administrative

¹ Special Permanent Residents as provided for under the Special Act on the Immigration Control of, Inter Alia, Those Who Have Lost Japanese Nationality Pursuant to the Treaty of Peace with Japan.

agency states that pursuant to the commonly understood principle of public servants, those who do not hold Japanese nationality may not be appointed as a public servant engaged in the exercise of public authority or participation in the decision-making process of a local government².

2. The Government of Japan has restricted the appointment of foreign nationals as public servants based on its understanding that holding Japanese nationality is required for public servants who participate in the exercise of public authority or in public decision-making. However, we must say that it is against the rule of law and unlawful to restrict such an important right of taking office as a public servant based on such a vague and overbroad concept of the exercise of public authority or participation in public decision-making while there are no such provisions of laws. It is contrary to Article 14 (Equality under the Law) and Article 22 (Freedom to choose her/his occupation) of the Constitution and Article 26 (Equality before the Law) of the International Covenant on Civil and Political Rights (“ICCPR”) to deny employment uniformly without considering specific content of job duties. In particular, consideration must be given to the historical context that special permanent residents include those who had held Japanese nationality before the War but lost that status when the San Francisco Peace Treaty took effect.

III. Discrimination of Public Secondary/High School Teachers and Discrimination against Foreign National Public Servants in Appointment to Managerial Positions

1. In 1982, a special law concerning academics was established³. Accordingly, foreign nationals are now eligible to be university teachers.

However, at the same time as the establishment of the said Act, the Government of Japan issued an administrative notice⁴ to the effect that existing treatment shall remain unchanged for high schools and hereunder. According to this administrative notice, foreign nationals may not be appointed as a principal or vice-principal of a high school

² Jichi-Ko No. 28 (dated May 28, 1973)

³ Act on Special Measures concerning National/Public Universities’ Employment of Foreign Teachers and Other Matters; currently, the Act on Special Measures concerning Public Universities’ Employment of Foreign Teachers and Other Matters

⁴ Bun-Kyo-Chi No. 80 dated March 22, 1991 addressed to the Board of Education of each Prefecture/ Designated City: Notice of the Director-General of the Local Education Support Bureau of the Ministry of Education, Science and Culture - “Regarding Appointment of Persons Who Do Not Hold Japanese Nationality, such as Zainichi Koreans as a Teaching Staff Member of a Public School (Notice)”

or hereunder. In the opinion of the Government of Japan, the office of a principal or vice-principal involves the exercise of public authority.

This opinion has been maintained until the present day. Therefore, it remains that while foreign nationals can assume the post of the president of a (national, public or private) university or the principal of a private secondary or high school, they are employed as “full-time lecturers,” and not even eligible to become “teachers,” and cannot assume any managerial position or the post of principal at a national/public secondary or high school. In this way, it is a matter of fact that foreign national teaching staffs may be employed only as “full-time lecturers” who are not eligible to assume any managerial position and suffer disadvantages in promotion as well,

In March 2012, the JFBA made a recommendation to the Ministry of Education, Culture, Sports, Science and Technology and the Kobe Municipal Board of Education to adopt a policy of foreign teaching staffs as “teachers” and allow promotion to managerial positions⁵.

2. Refusal of Application for Taking an Examination for Managerial Positions

On January 26, 2005, the Supreme Court dismissed a complaint by a local public servant who was a Korean resident⁶. The said local public servant was a public health nurse employed by the Tokyo metropolitan government, but the Tokyo metropolitan government refused to accept her request to take a managerial position examination on the grounds that she did not hold Japanese nationality.

This local public officer was born in 1950 and held Japanese nationality when she was born but was deprived of Japanese nationality unilaterally by the notice issued when the San Francisco Peace Treaty took effect on April 28, 1952. The father of the local public servant had held Korean nationality while her mother was Japanese⁷. The Supreme Court decided that it was lawful that the Tokyo metropolitan government refused to accept her request to take the examination without consideration for such circumstances.

⁵ JFBA: “Petition for Human Rights Remedy Concerning Revocation of Appointment of a Foreign Teacher to Managerial Position (Recommendation)” (dated March 6, 2012)
https://www.nichibenren.or.jp/library/ja/opinion/hr_case/data/2012/complaint_120306.pdf

⁶ (Gyo-Tsu) No. 93 of 1998

⁷ According to the additional remark of the above decision, “the Appellee was born in Japan to a Japanese mother and was brought up receiving the Japanese education, but her father held Chosen-seki (Korean nationality), and consequently the Appellee lost Japanese nationality regardless of her own will when the Peace Treaty with Japan went into effect.”

The JFBA pointed out with regard to the above Supreme Court decision that “its endorsement of the Tokyo metropolitan government’s total prohibition of foreign nationals from promotion to managerial positions disregards equality under the law, and freedom to choose her/his occupation for foreign residents in Japan, in particular special permanent residents⁸.”

IV. Discrimination by the Supreme Court regarding Foreign National Conciliation Commissioners, Judicial Commissioners and Counselors

1. In March 2003, the Hyogo-ken Bar Association recommended a member holding Korean nationality as a candidate as a family reconciliation commissioner to the Kobe Family Court, but the court rejected the appointment. In March 2006, the Tokyo Bar Association recommended a member holding Korean nationality as a candidate as a judicial commissioner, but the appointment was rejected, and in December 2011, the Okayama Bar Association recommended a member holding Korean nationality as a candidate as a counselor, but the appointment was also rejected. As just described, the door has remained closed since 2003 for foreign nationals to participate in justice as conciliation commissioners, judicial commissioners, or counselors. In response to these rejections, each of the Bar Associations delivered resolutions of its general assembly, etc., to request appointment of conciliation commissioners, judicial commissioners and counselors holding foreign nationality, and sent such written resolutions, etc., to the Supreme Court.
2. In September 2008, the JFBA made a referral to the Supreme Court for clarification regarding the reasons for the requirement of holding Japanese nationality for selection of a conciliation commissioner or a judicial commissioner⁹. The Personnel Affairs Bureau of the General Secretariat of the Supreme Court then responded on October 14, 2008, “the Supreme Court refrains from making its own response to inquiries by the JFBA, but the procedures within its office are below.” Although no provisions based on laws and regulations exist, the response continued, “it is assumed that a person holding Japanese nationality will be employed as a public servant who exercises public authority

⁸ JFBA: “President’s Statement on the Judgment of the Grand Bench in the Case against the Nationality Clause for Qualifying for a Tokyo Metropolitan Government Managerial Position” (dated January 28, 2005)

https://www.nichibenren.or.jp/activity/document/statement/year/2005/2005_01.html

⁹ The JFBA made a referral titled “Situation of Judicial Participation by People without Holding Japanese Nationality (Referral)” dated September 25, 2008 to the Supreme Court.

or makes decisions related to important policies, or whose work is to participate in the aforementioned duties. Because a conciliation commissioner and a judicial commissioner fall under this category of a public servant, the holding of Japanese nationality is required for such appointment.”

3. The rules of the Supreme Court relating to a conciliation commissioner provide that a person who is eligible to become a conciliation commissioner is “qualified to be an attorney, has expert knowledge and experience useful for resolution of civil or family-related disputes or has extensive knowledge and experience gained through daily life in society, and has a high degree of integrity and insight within an age range of forty to less than seventy years¹⁰,” and no nationality requirement is included. The same applies for a judicial commissioner or a counselor as well. Nevertheless, refusal of employment on the grounds of nationality and other matters is based on reasons which the law does not set forth, and we must say that this is against the rule of law. In particular, as relates to an attorney, a person who specializes in resolving legal disputes is naturally assumed to have expert knowledge and experience necessary to take on cases involving dispute resolution, and therefore there is no room for discussion about matters of nationality.
4. The purpose of the conciliation system is to resolve civil and family disputes among citizens based on discussion and agreement between parties concerned before such disputes enter into lawsuits. Moreover, the fundamental role of conciliation and judicial commissioners is to utilize expertise or extensive knowledge and experience gained through daily life in society in order to assist in resolution of disputes through mutual concession. A conciliation commissioner is solely responsible for mediation of discussions between parties concerned and assists in reaching an agreement. If the parties do not reach an agreement, then the mediation is considered to have failed, and the conciliation commissioner cannot make unilateral determinations. The same is true of a judicial commissioner and a counselor. Therefore, conciliation commissioners, judicial commissioners and counselors only function as mediators, and it cannot be said that they serve as public servants engaged in the exercise of public authority. In October 2010, research by the Osaka Bar Association found a precedent that an attorney holding the nationality of the Republic of China belonging to the said Bar Association was appointed as a civil conciliation commissioner from January 1974 to March 1988. Yet, the Supreme Court continues to refuse employment of foreign national attorneys

¹⁰ The Supreme Court Website: “Rules for Civil and Family Conciliation Commissioners”
http://www.courts.go.jp/vcms_lf/chouteiinkisoku2.pdf

recommended by each bar association even today.

5. There are many foreign nationals living in Japan as members of society, including special permanent residents such as Koreans and their descendants as well , who have had no other choice but to reside in Japan while losing their Japanese nationality pursuant to the notice issued when the San Francisco Peace Treaty took effect, as well as settled foreign nationals. Such foreign nationals often have opportunities to make use of the mediation system in Japan. A conciliation commissioner who has knowledge of cultural backgrounds unique to such permanent residents and settled foreign nationals may be of service in a number of cases among the conciliation cases. Similarly, foreign nationals often become parties to trial or court cases in which judicial commissioners or counselors are involved. From the perspective of freedom to choose her/his occupation and the principle of equal treatment, it is only natural that a conciliation commissioner or a judicial commissioner holding foreign nationality would participate in cases equally to those holding Japanese nationality. The JFBA published the “Opinion Paper Requesting Appointment of Foreign Nationals as Conciliation Commissioners and Judicial Commissioners” (dated March 18, 2009)¹¹ as well as submitting a request to the Supreme Court to employ conciliation commissioners and judicial commissioners without discrimination based on nationality¹². Also, as for councilors, the JFBA published the “Statement Requesting Appointment of Foreign National Bar Members as Counselors” (dated February 15, 2012)¹³.

As described, refusal of a foreign national to become a conciliation commissioner, judicial commissioner or councilor lacks logical reasoning and violates Article 26 (Equality before the Law) of the ICCPR.

V. Concluding Observations of the Committee on the Elimination of Racial Discrimination

¹¹ JFBA: “Opinion Paper Requesting Appointment of Foreign Nationals as Conciliation Commissioners and Judicial Commissioners” (dated March 18, 2009)

https://www.nichibenren.or.jp/library/en/document/data/090318_2.pdf (English)

https://www.nichibenren.or.jp/library/ja/opinion/report/data/090318_6.pdf (Japanese)

¹² JFBA submitted to the Supreme Court a request titled “Concerning the Matter of Appointment of Foreign National Conciliation Commissioners (Request)” as of March 30, 2011.

¹³ JFBA: “Statement Requesting Appointment of Foreign National Bar Members as Counselors” (dated February 15, 2012)

https://www.nichibenren.or.jp/en/document/statements/120215_2.html (English)

https://www.nichibenren.or.jp/document/statement/year/2012/120215_7.html (Japanese)

1. The Committee on the Elimination of Racial Discrimination states in its Concluding Observations in the Third to Sixth Reports as of April 6, 2010, “The Committee recommends that the State party review its position so as to allow competent non-nationals recommended as candidates for mediation to work in family courts.” (Paragraph 15)¹⁴.

Further, in its Concluding Observations in the Seventh to Ninth Reports as of September 26, 2014, the Committee states, “Recalling its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee recommends that the State party review its position so as to allow competent non-citizens to act as mediators in family dispute settlement courts. The Committee also recommends that the State party remove the legal and administrative restrictions in order to promote more participation by non-citizens in public life including access to public jobs that do not require the exercise of the State authority, paying due attention to non-citizens who have been living in the State party for a long time.” (Paragraph 13)¹⁵.

Furthermore, also in its Concluding Observations in the Tenth and Eleventh Reports as of August 30, 2018, the Committee states, “Bearing in mind its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee recommends that the State party ensure that Koreans who have lived in Japan for many generations are allowed the right to vote in local elections, and serve as national public servants who can also engage in the exercise of public authority and decision-making.” (Paragraph 22) and “Allow non-citizens, especially long-term foreign residents and their descendants, to also have access to public positions that engage in the exercise of public authority or public decision-making” (Paragraph 34 (e))¹⁶.

2. As recommended by the Committee on the Elimination of Racial Discrimination as abovementioned, the current situation in which foreign national teaching staff cannot become a “teacher”, public servants holding foreign nationality cannot assume a managerial position, and foreign nationals cannot be appointed as a conciliation committee member, judicial commissioner or counselor is against the equality principle under ICCPR General Comment No. 15 and Article 26 of ICCPR, which needs to be rectified promptly.

¹⁴ CERD/C/JPN/CO/3-6

¹⁵ CERD/C/JPN/CO/7-9

¹⁶ CERD/C/JPN/CO/10-11

VI. Conclusion

Thus, the JFBA desires that the Human Rights Committee will include such recommendations as listed at the beginning of this Report in its Concluding Observations to be adopted in the review of the Seventh Report of the Government of Japan.