

# RECHTSPRECHUNG

## Recent Judgements of the Supreme Court

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### I. CONSTITUTIONAL LAW

On September 2<sup>nd</sup> of 1998, the Supreme Court ruled on the constitutionality of the Upper House election which took place in July 1995. The difference in the value of the votes has been an issue since the 1960s. Arguably, a large difference in the value of votes would be against the equal treatment provision (Article 14) of the Constitution. Initially, the Supreme Court maintained that the allocation of seats among the constituencies was a matter of legislative policy. In 1976, the Supreme Court rendered a ground-breaking judgement in which it ruled that in cases where the inequality of the value of the votes is such that it cannot be justified even by taking into account various factors which are normally considered by the Diet, and the required reform has not been implemented within a reasonable period, it is unconstitutional. The Court found the 5 against 1 difference to be unconstitutional. On the other hand, the Court did not avoid the election, resorting to a provision in the Law on Administrative Litigation which allows the court to declare a certain act of the government to be unlawful, but to maintain its effect on the ground of public welfare.

Since then, there has been a series of judgements on the constitutionality of various elections. In 1996, the Supreme Court found the difference of 6.59 against 1 in the Upper House election to be unconstitutional. In the meantime, the Diet was slow in taking measures to rectify the inequality. It was only in 1995 that the Law on Public Election was amended and the difference of the value was reduced from a maximum of 6.48 against 1 to 4.81 against 1. In this present case, the constitutionality of the Upper House election which took place soon after this amendment, in which the difference in the value was 4.97 against 1, was contested.

The Supreme Court maintained its view that the equality of the value of votes is guaranteed by the Constitution, but the legislature is entitled to exercise reasonable discretion which may affect the equality of votes. The Court seems to require less strict adherence to the equality in the value of votes in Upper House elections in comparison with Lower House elections, since the system of the Upper House election takes into consideration various historical, political, economic, and social factors other than the number of the population. The Court also took into account the legislative measure which was finally implemented in 1995 which reduced the difference in the value of votes. The Court concluded that the difference of 4.97 against 1 had not reached the

level of impermissible inequality, and the Diet has not exceeded its scope of discretion in the allocation of the seats. There were five dissenting opinions which found the election to be unconstitutional and an opinion which set the ratio of 4 against 1 as a threshold of unconstitutionality.

## II. INSIDER TRADING

The Supreme Court rendered a judgement on insider trading in the Nihon Shoji case on February 16<sup>th</sup> of 1999. This is the first case in which the Supreme Court rendered a judgement on this matter. The defendant is a doctor (dermatologist) who runs a private practice. The defendant was informed by a sales company marketing the products of Nihon Shoji company that certain side effects which, in some cases, led to the death of users had been found. The defendant acted on this information and effected a transaction in the Osaka Stock Exchange before this material fact concerning the company was made public. He was prosecuted for the violation of the Securities and Exchange Law which provides for a maximum penalty of three years' imprisonment.

The court of first instance found the defendant guilty by applying Article 166, paragraph 2, subparagraph 4. This is a catch-all clause which covers "facts other than those listed in the preceding three subparagraphs which are material facts concerning the management, business, or assets of a listed company and which significantly affect the investment judgement of the investor".

The court of second instance quashed the judgement and reversed the case to the district court. The reason for this was that the court of first instance had denied the applicability of subparagraph 2 (disasters or damage resulting from business) on the ground of insufficiency of proof, but applied subparagraph 4. The court of second instance was of the view that the first instance court should have further examined the applicability of subparagraph 2, and if it was not applicable, then there was no room for the application of subparagraph 4. In fact, the ministerial ordinance provides for a minimum amount of damage which is to be regarded as significant as referred to in subparagraph 2, and there was a possibility that the damage did not exceed the threshold and therefore, the fact did not qualify as information subject to regulation.

The Supreme Court ruled that although the given information may qualify as disasters or damage resulting from business, the emergence of side effects meant that the given product, which was the first product which the company had developed by themselves with a significant amount of investment, had serious problems and its future sales would be affected, and therefore, might have significant effect on the business and the financial state of the company. Thus, the given fact exceeds the scope of facts covered by subparagraph 2. Instead of subparagraph 2, the applicability of subparagraph 4 should be considered.

The Supreme Court reversed the case to the second instance court in order to determine whether subparagraph 4 was applicable.