Comments on Professor Marmor’s Theory of Strategic Speech in Legislation

Yasuo HASEBE
University of Tokyo

Professor Marmor’s theory of strategic speech in law-making is directly relevant to the Japanese judicial doctrine on the constitutionality of regulations of economic activities. In the realm of economic freedoms, the Supreme Court of Japan has adopted a doctrine that differentiates between legislation that is ‘passivist’ and legislation that is ‘activist’ in purpose.¹ For passivist legislation, which purports merely to maintain the public order or protect public health and safety, the Court requires a strict correlation between the legislative purpose and the measures adopted.² On the other hand, if the Diet has an activist goal of intervening in order to protect particular industries or social groups, the Court requires only a theoretical rationale for the adopted legislative measures.³ Consequently, whereas passivist legislation is closely scrutinised and, in some cases, found unconstitutional, activist legislation is almost invariably upheld as constitutional.

Constitutional scholars in Japan are widely sceptical of the wisdom of this judicial doctrine, which seems to make it more difficult for the Diet to pursue passivist legislation, benefiting the general interests of society, than to pursue activist legislation, benefiting narrow particular interests. However, many of the same academics naively assume that members of the Diet are usually forthright in expressing their purposes and motivations in the course of the legislative process. As Professor Marmor suggests, law-makers may often dissimulate their genuine purposes.

According to the so-called pluralistic view of democracy,⁴ competing parties in the legislative process are likely to pursue their own narrow interests rather than the general interests of society. From this perspective, the role of the Court should be restricted to assuring the fairness and transparency of the legislative process.

By this logic, when a passivist legislative bill purports to promote general public interests, its express purpose usually is a façade concealing some purpose that serves special interests. The Court must, therefore, ensure that the Diet has indeed promoted the public interest by requiring measures in such legislation to realise its publicly asserted purpose. If there is no close correlation between the alleged purpose and the adopted measures restricting economic freedoms, then it is

² Sumiyoshi Limited v. Governor of Hiroshima Prefecture, 29 Minshu 572, Supreme Court Decision, 30 April 1975 (regulation prohibiting a new pharmacy near existing stores of the same trade struck down as insufficiently related to its purpose of protecting public health).
³ Marushin Sangyo Corp. v. Japan, 26 Keishu 586, Supreme Court Decision, 22 November 1972 (regulation prohibiting newly setting up a marketplace for small retailers upheld as rationally related to its purpose of protecting small retailers from excessive competition).
⁴ See, for example, John Hart Ely, *Democracy and Distrust* (Harvard University Press, 1980).
the responsibility of the Court to send it back to the Diet. Through this process of constitutional review, the real purpose of legislation is brought to light, and fairer, more transparent political competition will ensue. On the other hand, activist bills endorse particular interests openly and must be approved by a majority of the Diet. Hence, the Court sees no need to intervene. So, under its apparently curious judicial doctrine, we find the Court to have performed its proper function.