

# **Legal Education Reform in Japan**

## **– To Foster Creative Thinking Ability of Students –**

Shigeru KAGAYAMA  
Professor of Law,  
Graduate School of Law, Nagoya University, Japan  
[kagayama@lilac.ocn.ne.jp](mailto:kagayama@lilac.ocn.ne.jp)

---

### **I. Realities and Problems in Legal Education Being Given in Japan**

---

About 70 years ago, Izutaro SUEHIRO (1888-1951), one of the most honorable law professors in Japan, described realities and problems on legal education of Japan in his 'Hoso Zakki (*Miscellaneous Notes about Legal Profession*)' (1936) .

It is strange and disgraceful that legal education in Japan has not been changed substantially at all for about seventy years, though he pointed out as follows:

All education, including legal education, has been thought to be able to be given only by one-way teaching of theories. In classes, professors always give theories and principles at first. As a method to explain them, a few case examples are given and explained. Professors have only laid down theories, their developments and applications, while students have been passive from start to finish.

According to the traditional education method, we can increase legal knowledge in quantity. We can not, however, cultivate minds and courage. Students can get a lot of theoretical knowledge, but they have no ability to solve concrete legal problems in spite of their knowledge which is useful when they can reconstruct its elements and apply to their problems in front of them.

---

### **II. The Aim of Education to Bring Up the Legal Profession in Law Schools**

---

In Japan, in order to get a legal profession, one has to pass the National Bar Examination that is very hard because the ratio of successful applicants is about 3 %. It is not too much to say that this examination has had a bad influence upon the above permanent realities of professors' one-way teaching of theories and students' passive learning in legal education given in Japan. However, it is impossible to bring up the creative legal profession with only one-way teaching and passive learning like this.

In this way, as a part of the Justice System Reform in Japan that was initiated at the start of the 21st century, it has become the purpose in training legal professionals to foster their critical and creative thinking ability through the following active learning given by the establishment of Law Schools that is expected to raise the ratio of successful applicants for the National Bar Examination up to more than 50 % (The Justice System Reform Council "Recommendations -- For a Justice System to Support Japan in the 21st Century -- " (June 12, 2001)).

#### **Educational Philosophy for Training Professionals at Law Schools:**

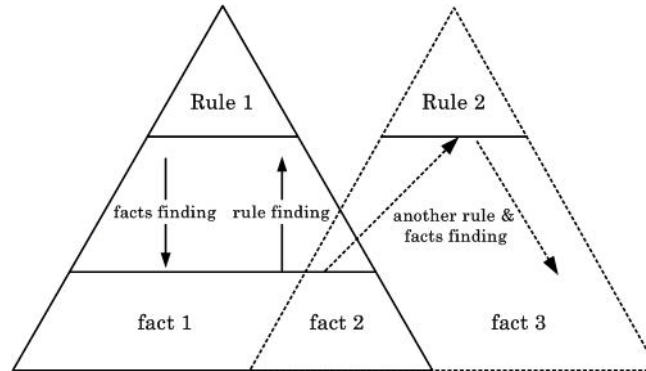
Enable law students to acquire specialized legal knowledge as well as foster their creative thinking ability to critically review and develop such knowledge and their capacity for legal analysis and legal discussion necessary for solving actual legal problems according to the facts.

Here, the point is to foster '**creative thinking ability**.' On the face of it, the above "Recommendations" seems to suggest that to critically review and develop specialized legal knowledge only after having law students 'acquire specialized legal knowledge' is 'creative thinking ability.' However, it is clear that training in the order of having law students 'acquire specialized legal knowledge' at first in order to foster 'creative thinking ability' comes to be insufficient in time at the stage of having law students 'acquire specialized legal knowledge,' which has been the existing training for legal professionals, and fostering 'creative thinking ability' that is most important comes to fail.

Therefore, in Law Schools, it is necessary to make thoroughgoing preparations for fostering 'creative thinking ability' from the first stage of having law students 'acquire specialized legal knowledge' and to realize new education methods. In fact, hints of new education methods of fostering creative thinking ability have already been shown clearly in the latter half of Educational Philosophy for Training Professionals at Law Schools in the above " Recommendations," that is, **fostering 'their capacity for legal analysis and legal discussion necessary for solving actual legal problems according to the facts.'** Here, it is important that the aim of 'solving actual legal problems according to the facts' is shown and that the necessity of ' their capacity for legal analysis and legal discussion' is positioned clearly as the method of the aim.

In order to foster creative thinking ability, in contrast with the existing training for legal professionals, it is important to foster the capacity to fix a concrete case at first, the capacity to search for rule that can solve the problem and 'the capacity to find out an appropriate rule.' And, it is necessary to foster 'the capacity to rearrange the elements,' that is, the capacity to return to the very principles deriving the known rules, in case of finding out no appropriate rule, to reanalyze various elements (legal propositions) constructing the known rules, to newly rearrange the elements of the rules through making free use of the traditional interpretation methods (extensive

interpretation, restrictive interpretation, argumentum e contrario, analogy, etc.) and to solve the problem, creating a new rule appropriate to the problem solving.



It is natural to think that we can enable law students to 'acquire specialized legal knowledge' only through the process of fostering 'creative thinking ability' based on 'the capacity to find out an appropriate rule' and 'the capacity to rearrange the elements' like this, contrariwise.

### III. The Education Method of Fostering Creative Thinking Ability

#### 1. What is Creativity?

It is true that “nothing is new under the sun”. Creativity is, therefore, only a new combination of existing elements (facts, concepts, principles etc.). Even a new born baby is result of new combination of genes of their parents.

New combination creates diversity. Almost of all of products of new combination, in facts, fail to adapt the environment. Only a few of products of new combination, however, have an ability to adapt not only present but also a new environment. We have to regard these type of new combinations ad important and offer the initiative to them.

#### 2. Social need for creativity of legal professionals

If the educational philosophy at law school is to bring up students to foster their creative thinking ability, our goal is clear. Enable law students to acquire capacity to reconstruct elements of rule of statutes or precedents (i.e. to create new rule) for solving new type of legal problems to which we could not apply current rules.

Speaking figuratively, legal system preventing disputes or solving them is like an immunity system against virus of diseases such as AIDS (Acquired immuno-deficiency syndrome)

or SARS (Severe Acute Respiratory Syndrome). Our body has to create new immunity changing combination of amino acid into new protein (antibodies to specific virus).

It is true that in stable society there is no need for creativity, but in rapid changing society there is strong need for creativity. If there is no creativity in our immunity we cannot overcome new type of diseases like SARS. Our society asks legal professionals for having capacity to overcome new type of disputes, that is, capacity to reconstruct elements of rule of statutes or precedents for solving new type of legal problems.

---

## **IV. The Education Method of Fostering Creative Thinking Ability**

---

### **1. Educational method at law school in Japan in general**

Accomplishing educational aim, law schools have to provide students with the educational environment as follows:

- To promote preparation for class: Law schools have to provide students with good examples and questions which attracts students' interests.
- To develop the students' ability of analyzing and discussing legal problems: Professors have to communicate with students who understand the problems and questions by preparation with the method of discussing during the class (Socratic method) and after the class (Electronic bulletin board).
- To promote the students' creativity: Professors have to encourage students with praise who discover new viewpoints.
- To promote the students' ability of discovery: Professors will encourage students to study of comparative law and law of history from the viewpoint of comparison. Making comparative table will be useful to discover a new point of view.

### **2. Usefulness of Comparison**

Comparison usually helps to discover a new point of view. For example, we know ourselves in comparing with others. We know the characteristics of our language in comparing with foreign languages.

If you make a comparison table (matrix table) from several points of view, the issues of problem will be clear and you can understand the problem deeply. Furthermore, a comparison table helps you finding lacks of elements of issues and encourages you to find new points of view, i.e. creativity.

### **3. Method of making comparison table**

### A. Comparative table about “Know thyself”

Now let us make a comparative table about “Know thyself” (Socrates) and “Those who do not know foreign language, do not understand their own language” (Goethe).

Issues	Comparative viewpoints
	Comparison of space
Know thyself	Know others.
Know own language	Know foreign languages.

If we make a comparative table we can understand two propositions from the same viewpoints. And then we easily add the new point of view comparing with “comparison of space” i.e. “comparison of time” as follows:

Issues	Comparative viewpoints	
	Comparison of space	Comparison of time
Know thyself	Know others.	Know your ancestors or your gene.
Know own language	Know foreign languages.	Know your classical language.

Previous table will be easily developed adding a new issue, for example, “Know own law”.

Issues	Comparative viewpoints	
	Comparison of space	Comparison of time
Know thyself	Know others.	Know your ancestors or your gene.
Know own language	Know foreign languages.	Know your classical language.
Know own law	Know foreign states’ laws.	Know you classical laws.

### B. Comparative table about “Mirror Image Rule”

In order to explain usefulness of making comparative table, I will take example of "Mirror Image Rule" both Civil Code of Japan and CISG.

Mirror Image Rule: The common-law principle of contract law, requiring an acceptance’s terms to correspond exactly with the offer’s terms in order for a contract to be concluded.

Rules	Civil Code of Japan		CISG	
	Articles	Contents	Articles	Contents
Mirror Image Rule	Art. 528 (Modified Acceptance)	If the acceptor has accepted an offer subject to a condition or with any other modification, he shall be deemed to have rejected the original offer and made a new offer himself.	Art. 19	(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

Then we will see the revised Mirror Image Rule in CISG. We understand there is no revised Mirror Image Rule in civil code of Japan.

Rules	Civil Code of Japan		CISG	
	Articles	Contents	Articles	Contents

Mirror Image Rule	Art. 528 (Modified Acceptance)	If the acceptor has accepted an offer subject to a condition or with any other modification, he shall be deemed to have rejected the original offer and made a new offer himself.		(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
Revised Mirror Image Rule (contradictory to the definition of acceptance)	-	-	Art. 19	(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
Definition of acceptance	-	-	Art. 18	(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

The previous table will help us to understand difference and common points between civil code of Japan and CISG. This table will also recognize you contradiction of Art. 19(2) to Art. 18(1) CISG.

If you make a comparative table of Art. 528 civil code of Japan and Art. 19 CISG, you will find not only the contradiction of Art. 19(2) to Art. 18(1) CISG but also the role of principle of good faith (Art. 7(1) CISG), compromising Art. 18(1) and Art. 19(2).

Rules	Civil Code of Japan		CISG	
	Articles	Contents	Articles	Contents
Mirror Image Rule	Art. 528 (Modified Acceptance)	(1) If the acceptor has accepted an offer subject to a condition or with any	Art. 19	(1) A reply to an offer which purports to be an acceptance but contains additions,

	ce)	other modification, he shall be deemed to have rejected the original offer and made a new offer himself.		limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
Silence Rule	-	-	Art. 18	(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
Good faith Rule	Art. 1	(2) The exercise of rights and performance of duties shall be done in faith and in accordance with the principles of trust.	Art. 7	(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
Revised Mirror Image Rule	My proposal for new Art. 528 (the second paragraph should be added)	(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, <b><i>the principle of good faith is applied to this case and the no-objection of offeror is deemed to be an acceptance to the counter-offer of offeree</i></b> , and then the terms of the contract are the terms of the offer with the modifications contained in the acceptance.	Art. 19	(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

And finally, we will find that this mechanism of good faith will be applied to interpretation of Art. 528 civil code Japan and we can share with common rule between CISG and civil code of Japan.

Now we could reach a good conclusion through comparative table. The conclusion is also describe a comparative table as follows:

Mirror Image Rule	Art. 528 Civil Code of Japan	Art. 10 CISG
Normal case	A modified acceptance is not an acceptance but a rejection of offer and constitutes a new offer (counter-offer).	
Exceptional case: Modified acceptance does not materially alter the terms of offer and	A modified acceptance is not an acceptance but a rejection of offer and constitutes a new	The terms of the contract are the terms of the offer with the modifications (i.e. the terms of

offeror does not object the modified acceptance	offer (counter-offer).	counter-offer) contained in the acceptance.
Application of principle of good faith to the Rule	If offeror does not object to modified acceptance which does not materially alter the terms of offer , <b><i>the principle of good faith is applied to this case and the no-objection of offeror is deemed to be an acceptance to the counter-offer of offeree</i></b> , and then the terms of the contract are the terms of the offer with the modifications contained in the acceptance.	

Through the legal education reform promoting a creative way of thinking for students, we can bring up the different type of legal professionals as before.