PROPERTY, YES, BUT WHOSE?

Ronald Dore

The issue

How far should the brain-children of researchers, paid a salary to do research, and provided with facilities to do research by their employer, be "owned", or legally be deemed to be owned, by those researchers themselves? It is a question which has vexed research communities, company managers and civil law judges for a very long time. National practice, and notions of what counts as a "fair" division of property rights, vary considerably from country to country. Differences in national structures and cultures which account for this variation are:

1. Whether, for the socially desirable purpose of promoting innovation, there is deemed to be a greater need of the prospect for profit in order (a) to induce companies to spend money on research or (b) to induce diligence or inspiration in individuals.
2. The relative weight given to property rights, as opposed to other individual rights in the legal system.
3. The extent to which contract law permits employment contracts which may be deemed to infringe individual freedom. (The prohibition on "self-enslavement" which is a pretty universal feature of employment contract law, may or may not be extended to outlaw closed shop agreements which require employees to join a union, for instance.)
4. The conventional level of labour mobility among researchers – how easily they can change employer.
5. The social evaluation of "company loyalty".

But are these national differences disappearing? As with all the institutions of capitalism, from corporate governance to auditing standards to labour protection laws, the big question of the day is how far American cultural hegemony is gradually but surely bring about an international convergence. The paper which follows describes and reflects on a case can be considered particularly relevant to the convergence question, given that Japan, with respect to several of the factors just mentioned -- labour mobility, notions of fairness, the evaluation of loyalty and the supremacy of property rights – can be counted as the country most divergent (more divergent than any European industrial country, for instance) from the American model.

A "shocking" verdict

The R&D world in Japan was left flabbergasted in January 2003, by a judgement of the Tokyo District Court. Nichia, a relatively small Shikoku firm, was ordered to pay 20 billion yen (£100m, only a little less than the firm's total profits over the six years 1995-2001) claimed by its former researcher, Nakamura Shuji, currently a professor at the University of California Santa Barbara. The judge added for good measure that had he asked for it he would have been entitled to 60.4 billion yen.

Nakamura, while working for Nichia, had invented a process for producing blue light-emitting diodes. The sum was calculated to be the"appropriate price" (which the Japanese Patent Law requires that employees should be paid) for his intellectual

property. Those property rights he had automatically, as was the universal custom, transferred to his employer who claimed and received the ownership of the patent, and should therefore, according to the law, have paid the appropriate price.

The case had been going on for some years and had been fought with considerable bitterness. Nakamura was a graduate of Tokushima University in Shikoku, who joined Nichia, a local firm with about 200 employees primarily making fluorescent lighting, in 1979. Blue LED was widely seen as a desirable product, but no-one knew how to make it. In 1988, Nakamura decided it was a challenge to be tackled and the firm sent him for a year to the University of Florida to learn a particularly relevant technology and bought him the expensive machine that the technology required. In the autumn of 1990 he produced his breakthrough. The claim to fame was enhanced by the fact that the gallium nitrate route which he succeeded in making work through a long process of trial and error, had until then been considered the least promising. The firm applied immediately for a patent and after some challenges and rewriting of the specifications it was granted in 1997. The firm had a set of regulations under which employees received rewards for inventions. Nakamura received his due: 20k yen (£50) on application for the patent and the same sum when it was granted. Meanwhile further work in which Nakamura took part, and further protective patents, led to the development of a mass production process in which the company invested heavily, succeeding thereby in gaining a dominant share of a rapidly expanding world market. Nakamura's fame and his American connections apparently spread as his sense of alienation from his firm increased, and in 1999 he moved to California. It appears that at one point Nichia brought, or thought of bringing, a suit against him for betrayal of trade secrets, but he countered by suing for the "appropriate price" of his brain-child.

The 60.4bn yen calculation was based on the two factors which the law specifies as the basis for arriving at the "appropriate price", first, the extra profits that the firm receives as a result of exploiting the invention (in this case plus interest from the time it was made, plus an estimate of future profits until the end of the patent monopoly, discounted to present value) and secondly an estimate of the contribution to the discovery by the inventor, which in this case the judge set at 50 percent, remarking with a somewhat rhetorical flourish that this was very different from an invention in one of the well-heeled research labs of a large firm: "in the impoverished research environment of a tiny company, to have been able by his personal ability and creative imagination to arrive at a world-class invention that the whole world was waiting for, and to do it ahead of competitor firms both at home and abroad, makes this an absolutely unusual instance of employee invention."[1]

The judgement did not, on the whole, get a good press. Numerous R&D managers expressed their alarm at the precedent set. How can one possibly do rational R&D planning if you always have lurking in the background the possibility of being stung for millions ten years down the line thanks to some disgruntled employee? The Chairman of the Association of Corporate Executives (Doyukai) said it could have a ruinous effect

[1] Chiteki zaisanken hanketsu sokuhou, (Report on intellectual property right case) http/courtdomino2.courts.go.jp/chizai.nsf

on Japan's international competitiveness.[2] The Chairman of Honda also thought it a bizarre judgement, but added that material incentives for researchers was not a bad thing, but he couldn't understand what sort of firm would offer a derisory £100.[3] Members of corporate research departments who thought themselves underappreciated were delighted by the judgement, and in a symposium a Tokyo University professor pointed out that in manufacturing the lifetime earnings of science and engineering graduates were well below those of arts and social science graduates and it would be a good thing if this helped to redress the balance.[4] But it was also another ex-researcher, formerly of the Japanese telecommunications giant NTT, who launched the most apparently well-informed attack on the judgement. Nakamura's achievements, he claimed, were not so extraordinary given that most of the elements which he integrated in his process had been validated in previous work, and in any case the patent is shaky and might not hold up if challenged in the courts as it well might be. Far from being in "an impoverished research environment", his initial budget of 500m yen plus an exceedingly expensive machine was way beyond the average that researchers in large corporate labs could command. The judge had endorsed as a point in Nakamura's favour his claim that at one stage the company president tried to get him to use his machine to switch to a quite different line of product development, but the fact that he simply refused and kept on with his original work just shows how much privileged freedom he was allowed. And so does the fact that, although the firm asked him not to publish his achievement in a scientific journal, he nevertheless went ahead and did it and suffered no ill-consequences. His formal prize may have been only £100, but he was given extra bonuses and quicker promotion which the firm calculates as giving him an extra 62m. yen (£310,000) in the 9 years up to his departure. The profit made by the firm depended not only on Nakamura's invention and subsequent research, but on the bold managerial decision to invest heavily in mass production, and the final production process did not use an essential part of Nakamura's invention anyway.[5]

Pointed comparisons were also drawn between Nakamura's relation to his former company and that of another researcher prominently in the news a few months earlier. Tanaka Koichi, a chemist employed by a medium-sized firm, Shimazu Seisaku, was awarded the Nobel Prize for chemistry for his work on protein analysis. Tanaka and his invention clearly had considerable cash value to Shimazu. Sales jumped 6% in the half-year after his prize, and equally important was the fact that, in the competition to recruit the brightest of the bright among new university graduates, Shimazu has greatly raised its power to attract. But as far as one can tell there has been no attempt to calculate the market value of his contributions – either from his inventions or from the fame which his Nobel prize has brought to the firm. The satisfactions he has gained from his achievement have not been primarily monetary. Apart from visits to his lab by the Crown Prince and the gift of golden sake cups from the Prime Minister, the firm is

[2] *Nihon Keizai Shimbun* 3 Feb 2004
[3] *ibid*, 4 Feb 2004
[4] *Shokuin hatsumei kitei kaiseian ni nokoru gimon. (Proposals for revising the law relating to employee inventions: remaining doubts)*http.chizai.nikkeibp.co.jp/chizai/gov/20040223.html
[5] Yamaguchi Eiichi, "Nihyakuokuenhanketsu: Nakamura Shuuji wa eiyuu ka" ("The 20bn. Judgement. Was Nakamura Shuji such a hero?") *Bungei Shunju* April 2004, 182=169

rewarding him with a modest cash sum, but primarily by providing him with a grand new laboratory and the newly invented title of Fellow of the Firm.

Factory suggestion schemes

One of the things that struck me when I was looking at factories in Japan and Britain thirty-five years ago was the different way that employee suggestions were treated. In both countries there were formal schemes. They were explained by managers in Britain as being designed not just to improve productivity but also to increase employees' sense of "involvement", though, as one manager said; squabbles over the value of a suggestion often did more to damage industrial relations than to improve them.
The system was simple. If you had a suggestion you wrote it out on a prescribed form. Your name was then removed and the suggestion was given an anonymous number and sent to the engineers for evaluation. If it was adopted, the engineers also calculated the bottom-line value of the suggestion – how much it would increase or improve production or cut costs over one full year. The author of the suggestion was then paid half of that annual sum for his contribution. There was also the possibility of appeal open to anyone who thought that his suggestion had been undervalued. It was a system which brought out clearly the limited contractual nature of the employment relation. The original contract is for the performance of certain duties. Anything over and above that should be paid for at its market price. There is no reason for one party to the contract, the employee, to make a gift to the other.

In Hitachi by contrast – and this was well before the days of the Quality Circle movement, when the Deming prize was still being given for engineer-led quality control systems – making suggestions appeared in the work rules as one of the occasions for giving rewards. In contrast to English Electric, I wrote at the time, "the corporation is a micro-polity. As the traditional Confucian classics used to say, the secret of good government is the judicious use of rewards and punishments…..[and] the mark of *good* government was its more frequent recourse to rewards than to punishments. [So] in the Hitachi rules the section on "Rewards" comes before the one on "Punishments". Suggestions for improvements in working methods come here as just one occasion for reward. Others are saving life in danger, preventing disasters, outstanding results in company training schemes, bringing honour to the company by social and national achievements, general excellence in the performance of duties, and 'being a model to one's colleagues for devotion to one's work'." [6]The rewards were graded, from letters of commendation, to gifts in kind or in cash to extra holidays. Later, of course, as the Quality Circle movement got going in the 1980s, the grading of suggestions, the *happyokai* show-and-tell meetings at which teams described and boasted about their improvement achievements, and the system of graded awards became more elaborate, but at no point was there an attempt to make the bottom-line link, to make rewards directly proportionate to the calculated value-added of any particular improvement.

[6] R. Dore, *British factory, Japanese factory*, London, Allen and Unwin, p.240. The difference in punishments is equally suggestive. The elaborate gradation of punishments in the community-like Japanese firm assumes a relation between employee and the firm such as had not existed in Britain since the erosion of paternalism in the 19th century.

Typological dichotomies

How should one characterise the above difference? Various terms have been used to point up a contrast between what used to be considered the typical Japanese firm and the typical Anglo-Saxon[7] firm:

Japanese	Anglo-Saxon
Organisation-oriented	Market-oriented
Communitarian	Individualistic
The firm as entity	The firm as instrument
Quasi-community firm	Company-law-conforming firm
The firm as an aggregation of people	The firm as a nexus of contracts
Jinponshugiteki (human-capital-ist)	Shihonshugiteki (money-capital-ist)
Enduring relational transactions	Limited contractual transactions
Employee-sovereignty	Shareholder-sovereignty
Appealing to membership motivation	Appealing to market motivation

All of these highlight certain aspects of a complex and integrated set of differences, but the one which perhaps relates most closely to the present discussion is the last. By "appealing to membership motivation" I mean teamwork in the most complete sense, the use of incentives which assume that employees have a quite intimate sense of "belonging" to a firm, having for the most part an expectation that they will spend the rest of their lives in it, that they conceive of the firm as a really-existing entity for which they have positive affect, and that consequently recognition for some achievement on behalf of that entity enhances their standing among fellow-employees who are for them an important reference group. In addition to recognition and the prospect of promotion to greater power and organisational standing within the group, money incentives can still be important, but, given career employment, they do not need to be immediate and can take the form of the prospect of accelerated promotion.

Market motivation, by contrast implies a much more limited sense of commitment within a relation based on a contract in which both parties have tried to maximise self-interest, the terms of which are set by (and legitimated as "fair" by) values current in the market. The contract is expected to hold only as long as the market – the market for labour, the market for skills and ideas – does not offer the employee something better, and the exchange of favours not specified in the contract should be subject to the same market principles.

The design of Japanese-type suggestion schemes obviously attributes efficacy to membership motivation, while the British schemes assume the need to appeal to market motivation.

[7] "Typical American firm" is what counts in any discussion of influences on Japan today, but "Anglo-Saxon" has come to be widely used in the "varieties of capitalism" literature, partly because it is the French term used by Michel Albert who played the major role in getting that literature started (*Capitalisme contre capitalisme*, Paris. Editions Seuil 1992) and partly because it does point up the similarities among US, UK, Canada, Australia and New Zealand.

Law and Practice

The handling of patentable discoveries by corporate researchers in Japan has hitherto not been very different from the handling of shop-floor suggestions.

The wide gap between the provisions of Japanese company law which require firms to be run for the benefit of their owners and what has by and large hitherto been the social reality that they are run for the benefit of their employees, has long been recognised. There has been a similar gap over the treatment of intellectual property. The principle that the intellectual property in an invention belongs to the inventor, whether or not his invention is made in the course of employment has been a clear prescription of Japanese patent law since the revision of 1921 reversed a 1909 law which gave rights automatically to the employer[8]. The 1959 law current in 2004, is more explicit than that of 1921. It says that firms may have their employees cede them the rights to their inventions and thus become the owners of the patents produced by their employees, but that the employees are entitled to receive in return an "appropriate price". *Taika* is the word used and the assumption of a market-contractual relation could not be more clear.[9] As noted in the Nakamura case the law further specifies the two parameters to be taken into account for deciding what would be appropriate: the profits that the invention is expected to bring to the firm and the extent to which the firm, the inventor and his colleagues respectively contributed to the invention.

In practice, however, as the Nakamura case also made clear, inventors (apart from being named as such in the patent registration) have been offered not a "price" but *recognition* and a *reward*. The Nichia company rules specify for inventions, first of all the award of a scroll of recognition which presumably researchers could have framed and hang on their lab wall. Secondly and separately there were the token cash rewards recorded earlier when the firm applied for, and when it was granted, a patent– a standard 10,000 yen (£50) irrespective of the prospective profits from exploiting the patent rights. These were referred to as *houshou*, a word which in the Nichia regulations was written with two characters meaning praise and reward, though in other firms a homonym is used with two characters meaning "recompense" and "encouragement". Either or both may have been variations on the 1921 law's *hoshou* meaning "supplementary compensation"

The latter is the more "modern" alternative. By the end of the 1980s, pure "recognition and token reward" systems were increasingly seen as being a bit outdated. Most of the big R&D spenders revamped their reward systems at the beginning of the 1990s. They usually have the same standard payments as at Nichia when patents are applied for and

[8] It is interesting in the light of the constant appeal by Japan's reformers to "global standards" to note that Baron Yamamoto Tatsuo introducing the 1921 law to the House of Peers, assured them that the committee working on the bill, after spending two years studying foreign systems and the way they were evolving, was satisfied that it "conformed to the dominant trends in the world".*Kizokuin gijiroku*,8 March 1921

[9] The 1921 law used the word *hoshou*, literally "supplementary compensation", supplementary, presumably, to normal salary

again when they are granted – though on a rather less niggardly scale than at Nichia. Beyond that the criteria are often complex and use parameters which allow for a fair degree of discretionary evaluation. An estimate of sales of the product in which the invention is to be incorporated, plus an estimate of the contribution the invention makes to the product or products in question are usually the starting point, but the conversion factors which turn these sums into a ranking of the importance or worthiness of the invention are what determines the generosity of the scheme. Where the firm licenses out the invention so that the income from it is clear, the reward may consist in a fixed, and usually small, percentage share. There can also be special payments for, for example, setting an industry standard, producing a patent which plays a major part in securing a production alliance or a joint venture. It is hard to get an idea of the scale of these payments but a report that Hitachi was currently setting up a high-level committee in the President's office to review the system, offered the estimate that the firm currently pays out some 700m. yen (£3.5m) annually, which amounts to a little less than 0.2% of its 380bn.yen research budget.[10]

Arrangements such as these seemed to evoke little comment, and to be accepted, more or less, as "the way things are", until 2002-3. There had been the odd case of disputes being brought to court – a Patent Office Committee counted eight in the last century – most had been settled with minor adjustments of claims for the equivalent of a few thousand pounds. But from the turn of the century the pace became faster and the attitude of judges more favourable to literal interpretations of the law. In particular the Supreme Court gave judgement in a landmark case against Olympus in May 2003. It ruled that company schemes which specified maximum rewards for inventions, and any acceptance of such rules, implicitly or explicitly by employees, had no binding contractual force in the face of the mandatory provision of the patent law that the inventor was due an appropriate price, calculated as the law specified. In another case against Ajinomoto the inventor of a new kind of sweetener who had been given, and accepted, a 10 million yen reward, argued successfully that the reward for bringing extra profits to the company (which he estimated to amount to 28 billion yen) was something quite different from the "appropriate price" to be paid for his transfer, i.e. sale, to the company of his intellectual property.

Alarm bells were rung sufficiently loudly for an ad hoc committee to be formed between the Patent Office and the Ministry of Economy Trade and Industry to draft revision of the law There was some discussion in the committee of alternative foreign models[11]. The British, French, Russian and Italian systems give employers by law intellectual property rights in employee inventions. The German system, like the Japanese, respects the inventor's prior right and assumes that there is indeed an appropriate price, objectively ascertainable by universally, or at least nationally valid principles, and has special administrative procedures and a department of the Patent Office for enforcing it. The American system asserts the rights of inventors, but leaves it entirely to contractual arrangements between the parties as to the terms on which they cede these rights to employers.

[10] Nikkei net, 28 Feb. 2004

[11] Patent system sub-committee, Intellectual property policy committee, Industrial Structure Council, *Improvement of employee-invention system*,Dec. 2003, p.8

The new Japanese system will be a curious modification of the American. The notion of payment of an appropriate price is retained, but individual firms' rules for determining that price are to be respected (and no longer over-rideable as in the Supreme Court judgement) provided they are procedurally, rather than substantively reasonable. The text reads:

> If the appropriate price is determined by formulae set out in contracts or company regulations, the process of determination must not be unreasonable, the criteria for reasonableness having regard to the extent to which there was consultation between employer and employee in drawing up the formula, the transparency of disclosure of the formula and the opportunities given to the employee to express opinions regarding the application of the formula.
>
> If there is no such formula, or if on the foregoing grounds the price offered be deemed unreasonable, the price shall be determined in the light of the profits derived from the invention by the employer, the cost to and the contribution of the employer in bringing about the invention, the employer's treatment of the employee, etc.

For reasonably managed firms this should at least eliminate the possibility of outlandish judgements such as that in the Nakamura case. It is probable that there will be some modest increase in the sums awarded given all the publicity focussed on the issue. Students of corporate philosophy will be particularly interested to see if the new negotiated company rules speak of "price" or, as hitherto, of "recompense and encouragement". Perhaps firms will have to abandon the – in origin paternalistic – notion of giving "rewards" for inventions, but there is no reason why they have to abandon the notion that inventions are a collective effort, nor the notion that there is justice in rewarding effort, as well as the natural talent or strokes of luck that enable some people's efforts to be more fruitful than others'. (But see later for the extent to which *that* notion is currently under attack.)

The main difference from the American system will indeed be that the contracting is to be collective, not individual. In America a researcher with a good track record may be able to drive a good bargain, but not any run-of-the-mill researcher. Employees are required to sign contracts which not only consign the rights in any invention they make when still employed, but also require them to promise not to take their ideas elsewhere. As a software engineer complained in a chat room[12].

> I believe that something should really be done about the "sign your life away or we don't give you a job" phenomenon.
>
> This means that any law aimed at increasing the scope and power of copyrights and patents ends up supporting the corporation against the individual.
>
> Engineers as employees lose their intellectual property by virtue of being employees and more so by signing blanket nondisclosure/noncompetition/IP theft contracts, and are prohibited from using their IP in future projects with

[12] www.slashdot.org

different companies. This reduces the value of the engineer when applying for the next job (or asking for a raise).

Another difference from Japan, of course, is that Japanese R&D personnel rarely are looking for the next job, and are involved in company-wide wage systems rather than having individually bargained wages. A recent study of R&D careers in Japan[13] makes clear how much high-flyer researchers are concerned with disciplinary professional reference groups (have profession-membership motivation as much as, or more than company-membership motivation) and switch mid-career to university posts. But for a Hitachi man to get a job with Toshiba is still next to unthinkable.

The Urge to Discover

So the revision of the patent law should reduce the amount of litigation. How will it affect the incentives to invent -- the "national competitiveness" with which so many commentators were concerned?

Patent laws derive from a tradition formed in the days when nearly all inventions were owned by the individual inventor. Their basic assumption is the not unreasonable one that scientific discoveries and technological applications of science are 10 percent the result of the Promethean urge, the joy of discovery etc, and 90 percent the taking of infinite pains, and that the 90 percent can best be invoked by the prospect of profit. Hence the establishment of property rights as a source of such profit.

In Britain, in 1920, 77% of patent applications came from individuals; in 1981, 73% from companies[14]. Doubtless in Japan today, even if one excludes the small inventor-owner-manager whose inventions are owned by his firm, the proportion of patent applications coming from corporations is probably much higher than that 73%.

For companies it is still the prospect of gain – profits and market-share – that determines the size of R&D investment budgets. But for the individual researcher employed by those corporations, the mixture of motivations for the activity which leads to successful discovery are as complex as the motivations for work in general, with the added feature, not common in most forms of work, that a brilliant idea or a lucky piece of serendipity might make one a hero in the firm, or outside the firm in the community of researchers in the same field, or even, by the winning of prizes, a celebrity in the world outside.

It is questionable whether the prospect of a Nakamura-like jackpot, or even a doubling or tripling of current reward levels would make much difference. The findings of the study mentioned earlier showing up the importance of professional-peer reference groups and the prospects of academic careers are significant. Nakamura himself

[13] Fujimoto Masayo 'Kenkyusha, gijutusha no Kyaria Pasu to Shiko"("Scientists and Engineers:Their career paths and orientations") in *MOT Keiei no Jissen(Practice of MOT Management)*, Chuo Keizaisha, forthcoming, 2004

[14] Ronald Dore, *Taking Japan Seriously*, London, Athlone, 1987, p.128

revealed, at one stage in giving evidence, just how much more important his standing in the world of fellow-researchers in other companies was than matters of ownership and material profit[15].

> At the time my first concern was to get a paper out. Getting the patent applied for was simply a matter of wanting to get that paper out as soon as ever possible but having to make sure that the company did not suffer from somebody stealing the idea when I published. So I had no interest in seeing what it said in the Gazette about the ownership of the patent. I may have seen the notification, but all I was concerned about was the detail of the specification

But what is clear is that the publicity surrounding recent court cases over inventors' rights, by raising questions about what had hitherto been accepted conventional practice, has seriously affected attitudes and hence motivations among researchers. Nakamura again, in a newspaper interview[16] soon after he had brought his court case.

> Everybody was cheering me on. I can't name names, but leading researchers in some front-rank corporations told me "Keep at it. We can't come out into the open, but we're backing you." A lot of researchers are dissatisfied, but can't say so. It's a pet thesis of mine that Japan is a communist society. When I went off to America some fellow researchers from other companies who were friends of mine had a party for me and they said there: "even after you've gone to America, speak out as much as you can on our behalf; let people know how dissatisfied we are". That's why I'm determined to win this suit – on behalf of Japan's researchers – and I am sure I can.

The advance of market individualism

The extent of such subterranean rumblings against the "communist" oppression of the Japanese employment system is hard to gauge, but the flurry of court cases over the last few years does suggest that it is real, and it is worth asking: why now?

The anonymous author of a press briefing[17] which summarised some of the main court cases of 2003 sums up as follows.

> Given the way patent law makes clear that intellectual property belongs in principle to the inventors, it's pretty outrageous to think that companies can just take their rights away from them for a reward which companies themselves unilaterally specify. But this has not caused much of a problem in Japan hitherto, because it was traditionally the case that employees had a strong attachment to

[15] Tokyo Eiwa Horitsu Jimusho, Aoiro LED Tokkoyken mochibun itentoroku tetsuzukitoo seikyuu jiken, 2002, www.tokyoeiwa.com
[16] www.neonline.co.jp
[17] Foreign Press Centre, 2 May 2003, ://www.fpcj.jp/j/index.html

> their firm and the firm rewarded them not so much with the specified cash award as by long-term employment and promotion. And by and large employees were satisfied with that.
>
> These recent patent decisions mark a break with that tradition. The direct causes are, first an increase in employees' sense of their own personal rights, and second, the other side of that medal, a decrease in their sense of identification with their firm. As one analyst commented, this is not unrelated to the weakening of the lifetime employment system.

There is, in other words, a change in the dominant consensus concerning the meaning of "justice" in such matters, but I would argue that this is related not just to changes in lifetime employment but to the whole gamut of changes in the direction of market individualism which have taken place in Japanese corporations over the last decade.

What I mean by market individualism is basically the view that, in a market economy based on (fair) competition, the only valid criterion of social usefulness is what the market will bear. What people are willing to pay for is what they value, what has for them utility. Individual choice is an essential element of freedom, and that applies equally to one-man, one-vote democracy and to the one-consumer, one-pocket market. In the case of democracy it does not matter how much citizens differ in understanding, and in the case of the economy it does not matter how much they actually have in their pocket, or what intellectual or personality resources they have to get money in their pocket. The sovereign market, impersonally, objectively – and fairly – should decide everything.

The chief manifestations of the growing force of the market individualist *weltanschauung* in Japan over the last ten years, other than the insistence on market criteria in the evaluation of employee inventions as in the Nakamura and other cases, are three.

The first is, indeed, all the talk about the desirability of ending lifetime employment. The underlying assumptions of much of the arguments in favour of flexible mobile markets are (a) from an individual's point of view, that skills are individual possessions and individuals are well advised to make their careers by selling their gradually cumulating bundle of skills at the best price and under the most satisfying conditions that, from time to time, the market offers, and (b) from a firm's point of view, that the advantage of being able at any moment to fill organisational slots with the best human resource the market offers, outweighs any value derived from loyalty, commitment, identification with the firm, firm-specific skills or organisational learning.

The second manifestation is the widespread introduction of some kind of performance pay. Quite apart from all the (largely untested) empirical theories about incentive efficiency, at the normative level, the basis for the market individualist view that performance pay is **fair --** conforms with principles of justice -- is as follows.

First are arguments about the **unfair**ness of traditional *nenko* (seniority and merit) systems. These are quite generally and quite wrongly described in Japan as "senority=merit" systems, with only tiny differentials among seniority peers. Such systems are condemned as "false egalitarianism" (*akubyodo)* verging on what Profressor Nakamura would call the "communistic" principle of "from each according to his ability: to each according to his needs", the more direct expression of which came in the family allowances which some firms still paid. And as for any functional justification, seniority was a bad proxy for accumulated wisdom.

Nearly all *nenko* systems, however, were in fact "seniority plus merit" systems no different from European bureaucratic pay structures for teachers, police, civil servants etc., yielding interpersonal differentials of 50 percent or more by the age of 40. The trouble with these, runs the argument, is that the assessment of merit tended to put heavy weight on effort often at the expense of performance. But democratic, market-individualist societies are consumer sovereignty societies and the consumer is not interested in effort. The consumer is interested only in performance: does the widget widge at 100% efficiency or not? Hence it is only fair, since we are all consumers, and pleasing consumers is what the corporation's life depends on, that it is performance that should be rewarded.

The reasoning behind the current passionate advocacy of performance pay is, however, more commonly on empirical grounds, appealing to the unassailable goal of national competitiveness. Nitta recently quoted, and effectively demolished the dogmatic empirical assertions of, the judgement of an Osaka judge in a case involving disputes over wage systems,[18]

> In recent times it has become quite clear that we are moving into a period in which international competitiveness is required of Japanese firms, that nenko-type wage systems that have no direct relation to labour productivity are losing their raison d'etre, and that the need for wage systems based on ability and performance which recognise the importance of labour productivity grows steadily greater.

The logic may be faulty, but the sentiment would hardly be challenged in today's Japan by any except scholars like Professor Nitta. Even Canon, the highly successful maker of optical and electronic equipment whose President is well known for endorsing the lifetime employment system has recently got rid of the last vestiges of its family allowance system and increased the part played by performance criterion. As one of its public relations officials explains, "competition cannot be avoided in international capitalist society. In a competitive society the principle of "equality of outcomes" cannot hold. The basis must be the principle of fairness in competition under just rules"[19]

---

[18] Nitta Michio, "Nihongata nenkoshisutemu nojitsuzo wo saguru: nenkoshugi kara seikashugi e?"("Looking into the real face of the nenko wage system. From nenko to pay by results?"),*Rodo Chosa*, Oct 2003

[19] private communication

This form of the market individualist shift is based on a widespread change in social norms. It is not simply something imposed by managers. Many unions have collaborated willingly in revamping their firm's wage system. Indeed, one left-wing publisher which introduced a more merit-based pay system thirty years ago got only grudging acceptance from the union which then sought to sabotage its operation by constant amendments. After a few years it became once again a straightforward egalitarian seniority system. Now it is the union that is demanding a system of pay differentials, claiming the injustice of giving the same wage to an editor with a flair for best sellers and a plodding producer of safe pedestrian titles.

The third manifestation of market individualism is the increasing centrality of the stock market in the Japanese economy and the increasing extent to which managers accept their share price as the most important, objective valuation of their performance. The consequence of adopting that market criterion is that their efforts are more and more concentrated on keeping up (or telling plausible stories to make analysts believe that they will keep up) their ROE and hence their stock market price – at the expense of traditional objectives like growth, market share, and maximising the common pot of funds available to promote the welfare of the employee community of which they are a part. A further consequence, of this and of changes in corporate governance, is that top managers more and more see themselves as detached from the employee community of which they once felt themselves to be a part. They see themselves more and more as agents of shareholder principals, whose salary is to be determined not as a share in the employee-community pot, but by a compensation committee which judges their worth in the light of the "going price" for executive talent in an external labour market – a committee which, in the case of the 30-odd big firms which have chosen the new legal structure -- is composed of external directors, supposedly representing the shareholder owners[20].

The presence of the market-individualist syndrome in all these changes should be obvious. What has caused them? Three factors.
1. Cultural influence from the Anglo-Saxon economies, at a rough estimate, 85% from America, 10% from the other Anglo-Saxon economies (numerous delegations went to New Zealand to learn from that paragon of successful Thatcherism) and 5% indirectly via continental Europe. This takes many forms: (a) the penetration of Japanese universities by Anglo-Saxon economic theory(neo-classical methodological individualism, theories of market competition as sole guarantor of efficiency, consumer sovereignty etc.) and jurisprudence (the absolute priority of property rights over other rights; the sanctity and centrality of contract). (b) the training of many Japanese in American business schools, transferring not just skills but business ideologies, (c) pervasive assumptions by the media that – in a decade in which Japan stagnated and America flourished – everything American is better.

[20] The new company law which came into force in April 2003 allows firms the choice of adopting an American-style system, known as the "company establishing committees etc."A major feature is that they should have compensation, appointment and audit committees each with a majority of external directors. The total number of listed companies which had adopted that form in March 2004, was 64, but a large proportion were subsidiaries of Hitachi and Toshiba which converted en masse.

2. Constraints from the globalisation of financial markets – requirements for listing on foreign stock exchanges, and for bond issues which subject Japanese firms to the judgement criteria of American rating agencies, plus a pervasive but as yet unsubstantiated belief that global financial markets will starve Japan of capital unless its corporations are as profitable for shareholders as American firms.
3. Growing individualism in Japan as a result partly of the above cultural influence but partly also because of structural change – primarily changes in the family (disappearance of the final vestiges of the collectivist extended family) and the school (much greater individual choice), but also the effects of affluence, greatly widening individuals' scope for choice, not only of consumption but also of earning activity.

How much is it the growth of individualism?

The extent to which the last internal-evolution factor is important is a crucial question. That it plays some part cannot be doubted. A young Japanese lawyer, author of an interesting book on cross-shareholdings, wrote this about Japanese so-called human-capital-ism some 15 years ago.

> Is it really so good for humans? In the truly modern labour contract a worker sells his work; he doesn't sell his soul…. The employee-sovereign Japanese firms require Japanese to spend their whole lives, from birth to retirement, in enforced competition, first to enter the firm, then for advancement in it, and for that they have to sacrifice freedom and individuality, human feeling and creativity, cultural pursuits, playing a useful role in the family or community…spiritual poverty in return for material riches.[21]

There certainly are a number of young Japanese who want a "truly modern labour contract", and doubtless their number is increasing. But, as in any country, there is a wide range of personality differences in Japan and those who want to live in the context of modern "dry", and options-kept-open contract relationships are more likely to be found in the free professions, law and other business services. But, be it noted, lawyers and judges have a considerable influence on the media and the social norms in general. The splash created by the Nakamura case judge is a case in point, and so is the Osaka judge cited earlier for his beliefs about competition and pay. Moreover, the influence of such people is likely in future to increase, given the vast expansion of legal training with the new graduate law schools. (The intake into the Legal Training School is expected within a few years to be six times greater than in 1990.) It is not only a matter of numbers. These law schools are said to be siphoning off some of the top talent from the top universities' law and government departments which used to aim for the Finance Ministry and MITI.

Let us call the sort of reasoned individualism of the lawyer quoted above, "principled individualism" -- the sort of individualism which in the case of an R&D researcher

[21] Nakajima Shuzo, Kabushiki no mochiai to kigyoho, Tokyo, Shoji Homu Kenkyukai, 1990, 265

would cause him to insist that what he got from the company for his invention was a "price" and not a "reward". There are fewer signs of such principled individualism among those who still opt for entry into a large company whether from engineering or law and arts faculties. The assumptions of the "job for life" are still quite strong. Indeed, for all the talk about the end of lifetime employment, the actual figures for job-hopping – except among the growing number of temporary and contract workers whose hopping is usually not a matter of choice – show little growth for regular workers. Take, for example, as one measure of market mobility, the proportion of 30-34-year old male employees who, according to the wage census, have less than one year's service with their current employer. In manufacturing it was 4% in 1985, rose to 5% in 1990, and was back to 3% in 2002. For university graduates taken separately each figure was one percentage point lower. And only in financial services have mid-career newly arrived graduates -- where they amounted to 1% of the age group – been welcomed warmly enough to be paid more than the average of their contemporaries.[22]

Certainly Nakamura hardly counts as a "principled individualist" in the sense defined above. When he finally achieved the goal he had been working to, the assumption that all inventions belonged to the company was so much taken for granted that the legal formalities in Nichia were largely neglected, as became clear in the subsequent trial. When someone in the R&D centre produced something patentable he was supposed to write out the detailed specifications, and send it to the patent department along with "a request to file a patent application"(*shutsugan iraisho*). It was the latter which constituted the formal consignment of the intellectual property right to the company, but apparently it was often overlooked, and in the case of the Nakamura patent the only record was of one in pencil which he hadn't bothered to put his seal on. It was only ten years later when he claimed (but failed to establish) that he had not transferred and had not intended to transfer his property to the company that this came into question.

Towards a more litigious system.

The revisions of the law mentioned earlier may damp down court litigation, but, whether the individualism involved is principled or opportunistic, are unlikely to stem an increase in the disgruntlements of researchers and friction within firms. And this for three reasons.

The general growth of market individualism works in two ways: first and obviously to encourage the personal assertion of property rights, but secondly because it changes the nature of, and researchers' perceptions of the nature of, the firm which provides the social context of their work. Hitachi researchers who have happily allowed the firm to profit from their brains on the assumption that it all helped to benefit the collectivity of fellow-employees among whom they worked, may come to take a different view when they read that the President of Hitachi has told analysts' meetings something to the effect that increasing shareholder value is his dominant concern. It is a natural reaction

[22] Chingin Kihon Chosa, various years. The coverage is of all firms with 10 or more employees 1985 and 1990, 5 or more 2002.

to think: “If all my work is primarily for the benefit of these anonymous shareholders, then I am going to be very sure I get my just share.”

The third factor, not unrelated to, but not the same as market individualism, is the gradual erosion in Japan of the “productivist” ethic which sees *monozukuri* “making things” as morally superior to *kanezukuri* “making money”. This shift was much discussed at the time of the bubble when some of the brainiest new graduates of engineering departments started going for large salaries into the finance industry. At that time, the shift was not only much discussed, it was much deplored. There were deliberate attempts to resist it. Ten years later, the shift in ideology continues. More and more newspaper pages are devoted to telling their readers how to invest their savings most profitably; less and less to the celebration of scientific and technological excellence. And deliberate attempts to reverse the shift in values are not apparent.

Final reflections

Half a century after I first started pontificating about the nature of Japanese society, the question I posed above, “How far is it the growth of individualism” remains for me the big conundrum. When I first went to Japan in 1950, social scientists were preoccupied with “modernisation” as a process and as a goal, movement towards a society of free autonomous, principled, fearless – but cooperative – individuals. The underlying assumption was the marathon view of history – all societies are headed in the same direction; the processes of industrialisation and urbanisation had similar effects everywhere; it is just that some societies are always ahead of the others. The last chapter of the first book I wrote[23] drew heavily on Riesman and Talcott Parson’s “pattern variables” revamp of Toennies to argue that a 1950 Tokyo resident differed from – and in many senses was much more individualistic than -- his Tokugawa peasant great-grandfather in much the same way that a modern resident of Chicago differed from his Polish peasant ancestors. But that the more rapid arrival of big state and big organisation in the trajectory of Japanese development raised questions about whether the trend towards greater individualism would continue towards the level it had reached in the more “advanced” societies which had grown more slowly and where big bureaucracy had developed at a later stage.

When I started studying these big industrial organisations themselves in the late 1960s and early 1970s I decided that the trend towards greater individualism would indeed not continue, because, thanks, among other things, to individualism’s undeveloped nature and to other late developer advantages, Japan had been able to create organisational forms which were in fact much better adapted to exploiting modern technologies, dealing with all the learning problems and distributional conflicts and so on, than the sort of organisations that the more advanced and more atomistically individualistic societies could produce. And that there was a better chance of those latter societies converging on Japan than vice versa. Which would not be a bad thing because the less

[23] *City Life in Japan,A study of a Tokyo Ward*, London, Routledge and Kegan Paul, 1958, repr. Curzon Press, 2000

combative transactional forms of the Japanese system had a lot to be said for them on intrinsic value grounds.[24]

It was not too difficult in the 1960s and 1970s to find evidence in Britain-- and to a lesser extent in America -- of such, what came to be called "reverse convergence", (as opposed to right and proper convergence on the advanced Anglo-Saxon countries.) But the relentless marketism of the Reagan-Thatcher years changed all that. My most recent book[25] still maintained that the Japanese system has virtues (even if not as great as those trumpeted by the most jingoistic Japanese in the late 1980s) but asked why so many Japanese are so bent on destroying it in the name of market individualism. Admiration for a resurgent America, the multiple influences of a hegemonic American culture such as were listed earlier, real constraints stemming from international financial markets, pressures from American financial interests – all these doubtless played their part, but another important factor is the change in class structure, the effect of three generations of relative equality of educational opportunity in producing an increasingly hereditary and politically influential upper middle class with quite substantial financial assets whose accumulation and protection becomes their main concern. Such a milieu seems a likely breeding ground for the sort of individualism manifest in recent disputes over patent rights.

So back, full circle, to the assumptions of the 1950s. Perhaps there is something in old-fashioned theories of social evolution. Perhaps there are good grounds for believing that ever greater individualism (if one defines it loosely enough[26]) is -- if not quite the "sign of God's irresistible will" as Tocqueville described the supposedly inevitable trend to ever greater equality-- at least an irreversible consequence of societies' acquisition of greater technological power and greater affluence.

[24] *British Factory,Japanese Factory: the Origins of National Diversity in Industrial Relations,*London, Allen and Unwin, 1973, repr. University of California Press, 1990

[25] *Stock Market Capitalism,Welfare Capitalism: Japan and Germany versus the Anglo-Saxons,*Oxford, OUP, 2001

[26] I did, once, tease out seven different meanings for the word "individualism",R. Dore, *Will the 21st Century be the century of individualism,* Tokyo, Simul Press, 1990