

## **Secondhand Japan: Used Goods Regulation 1645 – Present (Part 1)**

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### I. INTRODUCTION

Contrary to the nation's image today, Japan once boasted one of the world's most efficient systems for the resale and reprocessing of a wide variety of used products. Combining, from time to time, features of commercial regulation, intrusive police oversight, and reliance on "private ordering", the nation's management of used goods markets has continued through upheavals large and small since it began three hundred and fifty-six years ago.

This Article traces the history of this field of regulation, starting from 1645, when the Tokugawa Shogunate began extending monopoly trading rights to used goods dealers, foreshadowing the network of Osaka guilds that would come to underpin the Tokugawa commercial system. Part 1 of this Article will carry the story to 1895, when used goods regulation finally became a public licensing regime, the form that it has today. Part 2, forthcoming in the next issue of this journal, will cover events from 1895 to the present; the advent of high production capacities and a larger political voice for the corporations responsible for it has tended to alter the aim of regulation – even in traditional Japan.

### II. 1645 TO 1841

Hyôei and Emon of the *Ishi-machi* ward in Osaka may have been brothers; there is no way to be certain.<sup>1</sup> What we do know is that they were dealers in secondhand goods, and that they were caught in the act of fencing stolen goods<sup>2</sup> received from one Kyûrô, a tofu maker of *Hon-machi* ward. They became unwilling figures in legal history when

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1 The names given here are full names. Prior to the Meiji era, the Japanese population was classified into status categories. The defendants in this case would have been merchant commoners (*chônin*). Commoners were not permitted to use surnames, but were identified by their personal name and, if necessary, their place of residence or trade, much as was once customary in Europe. See R. ISHII, *A History of Political Institutions in Japan* (Tokyo 1980) 110-111.

2 The record of the case does not mention what the goods actually were.

the original thief was arrested, confessed under torture, and gave their names to the police. In a judgment handed down on 17 May 1645, the court proclaimed a new regulatory regime for the used goods dealers of Osaka and, as if to underline the importance of this new arrangement, sentenced Hyōei and Emon to death.<sup>3</sup>

From the judgment we can infer that the used goods trade had attracted a significant following in Osaka in the early years of Tokugawa, and that by 1645, secondhand dealers had independently formed self-governing gangs, or associations.<sup>4</sup> The court's order was not implemented as a command (*ofure*),<sup>5</sup> but as a set of charter regulations

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3 A transcription of the judgment and attached regulations are reproduced in ÔSAKA-SHI SANJI-KAI (ed.), *Ôsaka shishi* 3 [History of the City of Osaka 3] (Tokyo 1911) 13-14.

4 See H. KUROBANE (ed.) *Ôsaka shōgyō shiryō shūsei* 1 [Compilation of Historical Materials on Trade in Osaka 1] (Osaka 1934) 162. The licensing and regulatory scheme applied to these guilds with the judgment of 1645 which had been preceded by a similar arrangement for pawnbrokers. S. KODA, *Koda Shigetomo chosaku-shū* 1 [Collected Works of Shigetomo Koda 1] (Tokyo 1934) 200. The earliest reference to a Tokugawa order addressed to pawnbrokers is from Kyoto in 1622. R. SHIBUYA ET AL., *Nihon no shichiya* [Japanese Pawnbrokers] (Tokyo 1982) 93. In 1629, a further Kyoto edict adds to the duty to assist police a requirement that pawnbrokers check the address and other personal details of the people with whom they do business. *Id.* In Osaka, the earliest surviving direct evidence of regulation appears to be the charter of 1642. See *id.*, 155; ÔSAKA-SHI SANJI-KAI, *supra* note 3. The earliest extant evidence of anti-theft regulation in Edo is a 1658 circular to pawnbrokers (*shinabure*) describing stolen goods to be watched for. SHIBUYA, *supra*, 13. The pawnbroking license and its role in discouraging theft may well have local precursors still further back in time, before the settlement of 1600 that established the Tokugawa order; but the dates above have been established on the basis of surviving records.

5 An odd assertion often made about the Tokugawa order is that access to its laws was a privilege reserved to an administrative elite. See, e.g., H. ODA, *Japanese Law* (2<sup>nd</sup> edition, Oxford 1999) 19-20 (“It is interesting to note that the second part of the *osadamegaki* was a secret code, accessible only to three commissioners and other senior officials of the Shogunate: it was considered unnecessary to let ordinary people know the contents of the code.”). In fact, no society can hope to achieve a high degree of integration without informing its members of the rules they are expected to follow, and Japan was never an exception. In areas under the direct control of the Shogun, edicts – mostly prohibitions – were promulgated as *ofure*, a term which means literally “to disseminate”. *Ofure* could originate from the center of the Shogunate or at the regional level. In either case, they were distributed downward through the Shogunate's administrative apparatus, and were meticulously communicated to target populations. If so ordered, these instruments were read out loud to neighborhood squads at the lowest level of administration, and affixed with the seals of the listeners. Knowledge of *ofure* was not assumed, and the entire dissemination process was repeated at intervals for many of them, as if to hammer the message home. (Similar practices were followed in the domains that remained beyond the direct control of the Shogunate.) In 1742, the eighth Shogun, Yoshimune, ordered the production of a compendium of *ofure* issued between 1615 and 1743. The effort, which essentially ran the dissemination process in reverse, soliciting copies from the offices through which they had first been routed, collected 3,550 individual edicts. Three other collection efforts were mounted before the end of Tokugawa rule. This material – all of which was most certainly conveyed to ordinary people, some of it *ad nauseum* – is an important part of the historical record of the Tokugawa period. Misunderstanding can arise from the fact that the latter half of the *o-sadamegaki*, a

(*tegata*)<sup>6</sup> to which the members of these associations were a party. The regulations included the following provisions:<sup>7</sup>

- Trade associations were recognized as self-governing guilds, with bosses (*toshiyori*) responsible for the discipline of their rank and file, and serving as liaison between the guild and the government.
- Government authorities undertook to punish traders not licensed by the trade guilds.
- Traders were to make purchases only during daylight hours.
- Purchases at samurai households were to be witnessed by another member of the same household.
- Purchases at commoner households were to be witnessed by neighbors.
- Purchases at the buyer's residence were to be made with opportunity for consultation with members of the buyer's neighborhood squad,<sup>8</sup> or with his immediate neighbors.
- Traders were banned from putting up travelers in their dwellings.
- Purchases at the roadside were forbidden.
- Members of the neighborhood squad<sup>9</sup> to which a trader belonged were to be held liable for any violation of these rules, in equal degree with the trader himself.

much smaller compendium of rules and precedents for judgment prepared under Yoshimune, was restricted to elite administrators. While the *ofure* look and feel less like what is taught in modern law schools than the provisions of the *o-sadamegaki*, anyone wanting to understand what the Tokugawa regime had to offer in the way of a legal system cannot safely ignore either. In English, see Y. HIRAMATSU, *Tokugawa Law* – translated by D.F. Henderson –, in: *Law in Japan* 14 (1981) 1, 7-10 (note that this source does not treat the important practice of oral transmission and confirmation by seal). In Japanese, see N. HOZUMI, *Hôritsu shinka-ron* 2 [On the Development of Law 2] (Tokyo 1924) 196-197. Contemporary copies of three Tokugawa-era orders, bearing the black seals of the small group of commoners for whom each was prepared, are on file in the Nagoya University law library.

6 In modern Japanese, the word *tegata* denotes a promissory note or banker's draft. This usage (which had already attained frequency in early Tokugawa) is derived from the more general meaning of a signed memorandum of understanding, in which it was used here.

7 Transcriptions of the text of the original charters can be found at ÔSAKA-SHI SANJI-KAI, *supra* note 3, 13-15. See also ÔSAKA-SHI SANJI-KAI (ed.), *Ôsaka shishi* 1 [History of the City of Osaka 1] (Tokyo 1911) 352-353.

8 "Neighborhood squad" renders *gonin-gumi* (literally "five-person group"). The Tokugawa Shogunate can be thought of as a feudal police state, and the squads as mutual surveillance cells. Neighboring commoner, merchant and samurai households in Tokugawa villages and cities were grouped into squads of five by the authorities (with some regional variation), without reference to the social rank of the occupants. Vicarious liability for offenses committed by fellow members, as found in the secondhand dealer charter regulations, provided a powerful incentive for ratting on one's neighbors. The neighborhood squad system was first introduced by Toyotomi Hideyoshi to suppress the spread of Christianity. It appears to have been a more important tool of enforcement in the fierce years of early Tokugawa than in later times. See J.W. HALL (ed.), *Cambridge History of Japan*, Vol. 4 (Cambridge 1991) 172, 177; D.B. SIMMONS, *Notes on Land Tenure and Local Institutions in Old Japan* (edited by J.H. Wigmore; reprinted edition, Tokyo 1979) 95-100.

9 *Id.*

This regulation was introduced into a Japan that could not travel. The Tokugawa regime followed the longstanding feudal practice of restricting the mobility of commoners.<sup>10</sup> This, together with the nation's modest transport infrastructure (also a product of policy) prevented the secondhand trade from simply moving out of Osaka in response to this change in the business climate there.<sup>11</sup> Apart from transport restrictions, the licensing arrangement struck with the Osaka authorities had its advantages under the conditions of the time, as subsequent developments would show.

In 1645, the trade was divided into a number of fraternities,<sup>12</sup> with the bosses at the head of each fraternity serving as liaison between government (which is to say, the Tokugawa police) and members of the trade. The aim of the police was to reinforce policing efforts, but the regulations show signs of political accommodation with their target population.<sup>13</sup> The secondhand dealers' charters would have directly affected at least a thousand individual dealers, whose names and seals accompanied the original charters.<sup>14</sup> The sheer numbers involved, together with the contractual form of promulgation, suggest that a significant amount of groundwork was done to prepare for the introduction of these instruments. It appears that the regulations sought to co-opt existing organizational structures as agents through which to leverage policing efforts. This was a strategy at which the Tokugawa regime would prove to be particularly adept.<sup>15</sup>

Entry into the secondhand trade was not restricted by the charters. Because there were multiple fraternities, and because total membership numbers in each was not fixed,<sup>16</sup> dealers would have been unable to control competition among themselves.

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10 See, e.g., HALL, *supra* note 8, 173

11 In other environments, of course, regulations of this kind can be driven by a nimbyist intention to provoke precisely that response.

12 At the time of the original charters, records show an initial cohort of 13 bosses from the "13 fraternities association" and six from the "Nakagai and the Uwamachi used goods association" under the first charter (the latter appears to refer to a single organization), and two from the "Metal scrap and used tools association" under the second. ÔSAKA-SHI SANJIKAI, *supra* note 7, 352-353.

13 Some sources interpret the *kabu-nakama* (uncritically in my own view) as raw expressions of police authority (in the case of pawnbrokers and secondhand dealers) or of capital (in the case of the commercial associations established later). See, e.g., M. MIYAMOTO, *Kabu-nakama no kenkyû* [A Study on *Kabu-nakama*] (Toyko 1958).

14 This is a conservative estimate. See *infra*, text accompanying notes 19-21.

15 The Osaka authorities were unwittingly ahead of their time; with the benefit of multivariate regression analysis, Professors Milhaupt and West would visit this very same cutting edge three and a half centuries later in the pages of the *Chicago Law Review*. See C. MILHAUPT / M. WEST, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, in: *The University of Chicago Law Review* 67 (2000) 41.

16 KUROBANE, *supra* note 4, 163.

However, dishonest traders could now be expelled with official backing; and as a result, the bosses at the top of the fraternities within the guild would have derived enhanced authority from their association with the police. Official recognition thus created conditions favorable to the development of (relatively) cohesive business associations, of a sort.

There is evidence that the secondhand dealer guilds managed to improve their economic position through official recognition. In common with the other *kabu-nakama*, secondhand dealers enjoyed what amounted to a right to petition for injunctive relief against unlicensed traders.<sup>17</sup> Because this right was regularly exercised,<sup>18</sup> we may infer that the trade was lucrative enough to attract opportunistic entrants, and that the guilds found the petition process a useful tool for fending them off. Even allowing for the pretty-nearness of Tokugawa population data, it seems clear that the trade thrived as the Osaka economy expanded in the latter half of the 17<sup>th</sup> century and the first half of the 18<sup>th</sup>. A census of 1688 shows 2,791 total members;<sup>19</sup> a census approximately thirty years later shows a population of 6,643;<sup>20</sup> and another from 1764 shows 6,791.<sup>21</sup> After this, numbers appear to have grown slowly to perhaps a maximum of 10,000 traders.<sup>22</sup> To help put the overall scale of the industry into perspective, set these figures against samples from official population data: 287,891 residents in 1679,<sup>23</sup> 374,498 in 1719,<sup>24</sup> 377,729 in 1789.<sup>25</sup> Even allowing for considerable undercounting in the latter figures, the recycling of goods and scrap metal appears to have occupied between 1% and 2% of the urban population at any given time.

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17 See KODA, *supra* note 4, 198.

18 The standard history of Osaka notes protests against unlicensed traders filed in 1715, 1730, 1732 and 1735, and a protest against the contemporary equivalent of community flea markets in 1794. ÔSAKA-SHI SANJI-KAI, *supra* note 7, 764; ÔSAKA-SHI SANJI-KAI, *Ôsaka shishi* 2 [History of the City of Osaka 2] (Tokyo 1911) 121. Given the peripheral nature of the secondhand trade and the frequency of fires in Tokugawa cities, it is safe to assume that this is only a partial list of petitions filed.

19 ÔSAKA-SHI SANJI-KAI, *supra* note 7, 550.

20 ÔSAKA SHÔKÔ KAIGI-SHO, *Ôsaka shôgyô shi-shiryô* 13 [Historical Materials on Trade in Osaka 13] (Osaka 1964) 38-44.

21 ÔSAKA-SHI SANJI-KAI, *supra* note 7, 1131-1132 (for consistency, this figure excludes 3036 traders from suburban associations).

22 One survey shows 8,065 traders in 1852, ÔSAKA-SHI SANJI-KAI, *supra* note 7 1132, while a secondary source gives a figure of 12,170 for the following year, KUROBANE, *supra* note 4, 211. The latter source explicitly states that the figure includes the *arikata* suburban associations, while the scope of the former figure is unknown. Assuming that this accounts for the discrepancy, the latter figure should be used for comparison. If it is not obvious from the citations, I should add that my search for population data on this point was nowhere near exhaustive.

23 ÔSAKA-SHI SANJI-KAI, *supra* note 7, 370-371.

24 ÔSAKA-SHI SANJI-KAI, *supra* note 7, 597.

25 ÔSAKA-SHI SANJI-KAI, *supra* note 18, 107.

These secondhand dealer guilds were early precursors to what later became known as *kabu-nakama*,<sup>26</sup> the guilds<sup>27</sup> of Tokugawa, which by the 19<sup>th</sup> century would swell to over one hundred institutions strong in Osaka.<sup>28</sup> Some would allow fluctuating membership, like the secondhand dealers' guilds.<sup>29</sup> In other cases numbers would be restricted either by the police, or entry would be controlled by a more unified association.<sup>30</sup> Each of the *kabu-nakama* would offer some service that required better coordination than could be achieved under the general rules of personal obligation recognized in *bakufu* courts. Restriction on entry, in one form or another, was the general means by which many of the later guilds achieved the internal discipline necessary to fulfill their charter undertakings to the government.<sup>31</sup> This formula fostered the development of more uniform and efficient commercial practices and rules of conduct, but it also depended on the enforcement of trade monopolies. Given the mixed foundations of these institutions, it is not surprising that Tokugawa ministers (and later their historians) would struggle to read their impact on economic behavior. Beneficial in the short term,

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26 See, e.g., J. HIRSCHMEIER / T. YUI, *The Development of Japanese Business, 1600-1973*, (London 1975) 36-38; N. S. Smith, *Materials on Japanese Social and Economic History: Tokugawa Japan* (London 1937) 7-32; MIYAMOTO, *supra* note 13. The term *kabu-nakama* has a weak etymological connection with *kabu* meaning "corporate share". After the two guilds mentioned in the main text were formed, the interest represented by individual licenses to practice a restricted trade under charter regulations would come to be referred to as *kabu*. The licenses themselves each consisted of a wooden plaque (branded with the seal of the *kabu-nakama*) known as a *kabu-fuda*. In trades with restricted numbers, the plaques had value as property, and came to be traded and used as collateral. Much later, this term was seized upon by reformers as the best Japanese equivalent for the legal concept of "corporate share". Concerning *kabu-nakama* and *kabu-fuda* generally, see, e.g., KOKUSHI DAI-JITEN HENSHŪ I'IN-KAI (ed.), *Kokushi dai-jiten* 3 [Encyclopedic Dictionary of Japanese History 3] (Tokyo 1983) 522-525. For a description of events in the early days of the transition from guild-based commerce to corporate law, see ÔSAKA SHÔKÔ KAIGI-SHO, *Ôsaka shôgyô shiryô, Bekkan kaisetsu hen* [Historical Materials on Trade in Osaka, Special Interpretive Volume] (Osaka 1966) 179-180. For a more detailed discussion of events leading to the modern corporate form in Japan, see M. HAMADA, "*Kaisha*" to no deai: *bakumatsu kara meiji shoki* [Encounter with the Japanese Company: From the Times of the Shogunate into the Early Meiji Period], in: Hamada (ed.) *Nihon kaisha rippô no rekishi teki tenkai* [The Historical Development of the Japanese Company Legislation] (Tokyo 1999).

27 In this article, the terms *kabu-nakama* and "guild" are used interchangeably.

28 S. KODA, *Koda Shigetomo chosaku-shû* 2 [Koda Shigetomo Collected Works 2] (Tokyo 1972) 200 (noting over 100 guilds in a census of 1804, including one made up of 24 separate guilds counted as one); KUROBANE, *supra* note 4, 43-45 (giving an approximate list of 98 Osaka trade guilds active immediately before the abolition of 1842).

29 See KUROBANE, *supra* note 4, 163.

30 KODA, *supra* note 28, 199.

31 Procedurally, only fraternity elders had authority to submit petitions protesting against unauthorized competitors. KODA, *supra* note 28, 198. M. WEST, *Private Ordering at the World's First Futures Exchange*, in: *Michigan Law Review* 98 (2000) 2574 (offering detailed evidence on this point with respect to the guild of rice buyers at the forward trading market).

with the passage of time these structures would come to show their grasping side, as Osaka merchants sought to exploit their dominant position in the increasingly varied Japanese trading system.<sup>32</sup>

In a separate development, an elaborate system for circulating lost item reports to used goods dealers emerged in the early 18<sup>th</sup> century, in which internal control hierarchies of the trade were reinforced and exploited for regulatory purposes. Each fraternity within the guild was topped by a boss (*nanushi* in Edo, *toshiyori* in Osaka,). One boss was designated as the “duty boss” at any given time. When a lost item report was issued by the police, the duty boss would deliver copies to each of his fellows, each boss in turn would visit the city precincts (*machi*)<sup>33</sup> under his supervision, and deliver a copy to the fraternity’s precinct heeler (*kumi no tsuki-gyôji*). The fraternity heeler, together with the precinct chief (*machi no tsuki-gyôji*) would visit each local trader of the fraternity, and inspect his records in search of an item matching the description given in the report. If none were found, the heeler and the chief would both affix their seals to the report over the name of the trader. Completed reports were passed back up the chain, ultimately arriving at the office of the duty boss, and from his hand to the police. If the item turned up in the course of this cascading inspection process, the report would be passed straight to the top of the guild hierarchy, and thence to the police.<sup>34</sup>

Although the Osaka guilds made considerable progress in commercial organization, the Tokugawa model of delegated rule-making was bound by an important constraint. Because rules were enforced through mutual monitoring, the rules worked far better when traders worked in close proximity to one another. Exchanges and auction centers depend on bringing traders together in any case, and delegated regulation was a good fit for these.<sup>35</sup> But even secondhand dealers, if they offered credit terms to their customers, clustered together with others performing the same commercial role. In fact, clustering was practiced by most if not all licensed traders. This was well enough for Osaka, but it had implications for the legal order of greater Japan. It was not caprice that permitted

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32 Note that the variety bred of long stability also served to undermine their position as monopolists. See M. JANSEN (ed.), *Cambridge History of Japan*, Vol. 5 (Cambridge 1989) 151.

33 Osaka was divided into three administrative districts (*kumi*), which were further subdivided into precincts (*machi*). A census of 1665 contains records for 549 precincts, with 247 in district *kita*, 241 in district *minami*, and 61 in district *tenman*. ÔSAKA-SHI SANJI-KAI, *supra* note 7, 370-371.

34 This description is based on the detailed account of practice in Edo (now Tokyo) given in KODA, *supra* note 4, 153-154. The *shinabure* system was the subject of an order issued in Edo in 1698. SHIBUYA, *supra* note 4, 20. After a period of administrative experimentation, it settled into the form described in the main text by an order of 1723. KODA, *supra* note 4, 154. I have been unable to locate a reference for the exact date on which the system was introduced in Osaka, although there is no doubt that the system existed there as well. See Y. HIRAMATSU, *Kinsei keiji soshô-hô no kenkyû* [Study on the Law of Criminal Procedure in the Edo Period] (Tokyo 1960) 665-668; KUROBANE, *supra* note 4, 163, 168.

35 Consider the methods of self-regulation used in the rice futures market, a detailed discussion of which can be found in WEST, *supra* note 31, 2574.

Osaka alone, among the cities of central Japan, to surge ahead in the development of commercial institutions. The very foundation of those institutions demanded that there be a single locus for commercial activity.<sup>36</sup> Tokugawa commercial practice could not be adapted to a national economy without the introduction of far more intrusive modes of limiting membership and monitoring behavior. In the event, the first step that the government took in that direction was a firm step backward. In the year 1842, after 198 years of steady institutional development, and more than a decade before the arrival of Admiral Perry, every one of the *kabu-nakama* was abruptly abolished by government fiat.

### III. 1841 TO 1868

In 1842 and 1843, Japan was subjected to the “*Tempô* Reforms”, the last of four major Confucian back-to-basics disciplinary campaigns of the Tokugawa period. One of this reform’s most important innovations was the abolition of the *kabu-nakama*, in 1842. They were not physically disbanded, but the critical buttresses of official recognition and government backing of restraints on entry were withdrawn.<sup>37</sup> In retrospect, this was an extremely peculiar move. It was made on grounds of competition policy; Japan was emerging from a period of famine, and the Osaka *kabu-nakama* were suspected of contributing to consumer price inflation by hoarding rice and other essential commodities.<sup>38</sup> From a wider perspective, however, eliminating the institutions that backed up what passed for commercial law was an act of legislative madness. Osaka suffered a commercial implosion that lasted throughout the ten years that the abolition persisted.<sup>39</sup>

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36 This is by no means a novel point. See, e.g., C. GEERTZ, *The Bazaar Economy: Information and Search in Peasant Marketing*, in: *American Economic Review* 68 (1978) 28; R.A. POSNER, *A Theory of Primitive Society, With Special Reference to Law*, in: Stigler (ed.), *Chicago Studies in Political Economy* (Chicago 1988) 149.

37 ÔSAKA SHÔKÔ KAIGI-SHO, *supra* note 26, 178-181.

38 *Id.*

39 The order remained in force until 1851. See ÔSAKA-SHI SANJI-KAI, *Ôsaka shishi* 5 [History of the City of Osaka 5] (Tokyo 1911) 508. Two prominent English sources are in need of correction over the timing of the restoration order. First, the *Cambridge History of Japan* discusses the reforms at length, including the abolition of the *kabu-nakama*, but gives the impression that the abolition lasted for less than a full year, by inadvertently confounding the political momentum enjoyed by lawmakers with the laws they leave behind when they fall from grace. See JANSEN, *supra* note 32, 159. Second, a standard survey of Japanese legal history places the abolition in 1857 (the fourth year of the *Ansei* era), six years later than the actual date. C. STEENSTRUP, *A History of Law in Japan until 1868* (Leiden et al. 1991) 149.

Credit dried up, standards of commercial conduct deteriorated, and trade flagged. The price of rice continued to rise, as the general collapse of trust choked distribution channels.<sup>40</sup> Despite its significance, the abolition of the guilds has raised scant notice in overseas accounts of Japanese legal history.<sup>41</sup> In one sense, this is not surprising; in the face of the opening to external trade that began in 1858,<sup>42</sup> the Osaka guilds were doomed; and lawyers do abhor a loser. Even historians typically have little to say about the *kabu-nakama* that is not disparaging.<sup>43</sup>

However, dinosaurs though the Osaka guilds may have been, the timing of their extinction had important implications for the process of law reform in the Meiji era. Policy makers were able to draw upon domestic experience of sophisticated commercial institutions,<sup>44</sup> and commercial actors themselves had a thirst for a more stable business environment. At the same time, a return to delegated rule-making through a revived system of *kabu-nakama* was not possible, because the glue of trust binding government and guild had evaporated.<sup>45</sup> Finally, the *kabu-nakama* as institutions, having been faced down by the now-defunct Tokugawa administration, started from a zero-base position vis-à-vis the Meiji reformers. It is worth noting that these very conditions – rapid legal change in the presence of commercial sophistication and in the absence of powerful distributional coalitions – are particularly favorable to rapid economic development.<sup>46</sup>

The significance of all this for secondhand dealers was that the suspension order of 1842 triggered a sea change in their relationship to what would in due course become the state. The aim of the abolition was to shake up guilds that had been abusing their privileges. Until that point, there had been little at the level of law to distinguish one

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40 See ÔSAKA-SHI SANJI-KAI, *supra* note 39, 508; ÔSAKA SHÔKÔ KAIGI-SHO, *supra* note 26, 178-181.

41 The sole reference in English of which I am aware in the legal literature is contained in STEENSTRUP, *supra* note 39, 149 (but see corrigendum *supra* note 39). A recent study of the forward market run by the *kabu-nakama* of rice traders follows its development into the early years of Meiji, but neglects mention of the abolition. WEST, *supra* note 31, 2574, 2614. This and two other forward trading markets are known to have been seriously affected by the abolition. ÔSAKA SHÔKÔ KAIGI-SHO, *supra* note 26, 178-181.

42 JANSEN, *supra* note 32, 271-284.

43 See, e.g., E.S. CRAWCOUR, Changes in Japanese Commerce in the Tokugawa Period, *Journal of Asian Studies* 22 (1963) 387, 397, reprinted in: Hall / Jansen (eds.), *Studies in the Institutional History of Early Modern Japan* (Princeton 1968) 189, 199.

44 See WEST, *supra* note 31 (futures markets existed); M. RAMSEYER, Thrift and Diligence: House Codes of Tokugawa, in: *Monumenta Nipponica* 34 (1979) 209-230 (analogs to corporations existed); MIYAMOTO, *supra* note 13, 325 (rules of commerce existed); ÔSAKA SHÔKÔ KAIGI-SHO, *supra* note 26, 178-181 (the *kabu-nakama* were the kingpin at the center of all of the above).

45 In the event, government did not try. The Shogunate restoration order of 1851 refused support for restraints on entry. See ÔSAKA SHÔKÔ KAIGI-SHO, *supra* note 20.

46 See M. OLSON, *The Rise and Decline of Nations* (New Haven et al. 1982).

officially sanctioned guild from another. All were backed up by enforceable exclusive rights to trade; all paid fees for those rights; and all were largely left to their own devices with respect to their internal governance.<sup>47</sup> But ministers hesitated over the treatment to be meted out to secondhand dealer and pawnbroker guilds, because the firmly established system for suppressing theft depended on their existence.<sup>48</sup> When the abolition of the pawnbroker and secondhand dealer guilds in Osaka finally was confirmed by an order issued on 28 May 1842, it brought with it a new set of procedures – this time imposed, not agreed. The order declared the following rules:<sup>49</sup>

- Dealers were subjected to an affirmative duty to confirm the identity and address of sellers, and to report suspicious items to the police.
- Dealers were required to keep a register of all goods purchased in a register with pre-numbered pages to protect against forgery, and to keep them ready for inspection at any time.
- Procedures for the search of registers for lost or stolen articles were formalized.

The significant difference in this regime is that it had individual dealers responding directly to the police. How well it worked as a crime control measure in Osaka, particularly as it was not accompanied by a licensing scheme, is doubtful; but these rules remained in effect throughout the period of abolition. When the rights of the *kabu-nakama* were partially restored in 1851,<sup>50</sup> the transaction recording requirement was scrapped, and lost article reports again came to be circulated directly to the professions through their internal structures.<sup>51</sup>

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47 The *O-sadamegaki hyakka-jô*, a reference compendium of laws first prepared and circulated under the Shogun Tokugawa Yoshimune in 1742, formalized this position: When a number of persons are co-signatories of a deed (*i.e.* a contract) for the execution of some undertaking, and a suit regarding the division of profits amongst the joint signatories is brought by any of them against the others, such a suit is not to be entertained, being a matter of company adjustment (*nakama no koto*). (Customary) *O-sadamegaki hyakkajô*, art. 33, prov. 3, translated in: J.C. HALL, *Japanese Feudal Law* (Washington 1911) 185-86.

48 See ÔSAKA-SHI SANJI-KAI, *supra* note 18, 532-38. The initial orders canceling guild privileges were published on 13, 23 and 26 December 1841, and on 14 March 1842. But an order two days after the last of these, on 16 April 1842, placed the cancellation on hold for 24 guilds, including pawnbrokers and secondhand dealers. Final orders for these two particular trades, calling for the cancellation of their privileges but with provision for regulation of their activities, were issued in Osaka on 28 May. On 3 June 1842, the dissolution of the *kabu-nakama* was driven home by an order abolishing the position of elder for all guilds.

49 ÔSAKA-SHI SANJI-KAI, *supra* note 18, 704-705.

50 See *supra* note 26.

51 ÔSAKA-SHI SANJI-KAI, *supra* note 18, 876-877.

## IV. 1868 TO 1895

Inter-regional tension and disagreement among Japan's elites over the proper stance toward the foreign threat led to an increasingly violent struggle for authority between Tokugawa and royalist factions between 1863 and 1868. This period culminated in victory by the royalists. Assumption of authority by the new regime<sup>52</sup> was followed by the accession of a new emperor, and the presentation to the Emperor of a "Charter Oath" of five principles, in April of 1868. The Meiji era, signifying the period of his reign, would last until 1912, and would see a flood of reforms that transformed the institutions of national government, local government, and civil society.

Commercial matters in the early period of the Restoration were coordinated by a new "Center for Commercial Law" established by the government. The Center's first action with respect to the guilds of Osaka was to confirm the status quo, in March of 1867.<sup>53</sup> This was followed by an order, the *Shôhō dai'i*, which proclaimed that under the new government, there would be no restraints on entry, and no taxes payable by the guilds. The Center arranged for the submission of guild membership registers on June 9, and in July the decision was made to issue new membership certificates (*fuda*). For the eight months from July 1868 through February 1869, the newly established Osaka court<sup>54</sup> issued permits to the members of 448 organizations that put themselves forward as *kabu-nakama*.<sup>55</sup> Finally, on April 14, 1882, the government issued an order formally abolishing these commercial associations.<sup>56</sup> After this point, the guilds survived only as voluntary trade associations.<sup>57</sup>

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52 The reform process of the Restoration government began in advance of the Restoration itself. *Hôrei Zensho* (the Japanese statutory series analogous to Statutes at Large in the U.S., or to Halsbury's Laws in the U.K.) dates from the 10<sup>th</sup> month of the third year of the Keiô era (1867). The Osaka Court was established by Order no. 59 on January 27, 1868. It is customary among historians to date the period of reform from the Charter Oath. See, e.g., ISHII, *supra* note 1, 98.

53 As the government had borrowed money from banking institutions organized as *kabu-nakama*, abolition was not an option.

54 The order under which "city courts" were established following the restoration of rule under the Emperor was one of the earliest acts for which the new government put itself on record. Order no. 59, January 27, 1868.

55 A list of the 448 guilds issued with Meiji licenses is reproduced in KUROBANE, *supra* note 4, 45-55.

56 This account of events is drawn from ÔSAKA SHÔKÔ KAIGI-SHO, *supra* note 26, 179-180.

57 ÔSAKA SHISHI HENSAN-SHO (ed.), *Ôsaka shishi shiryô* 51 [Historical Materials on the History of the City of Osaka 51] (Osaka 1998) 120-122, 137-139. But see SAKAI KOBUTSU-SHÔ KUMIAI, *Sakai kobutsu-shô kumiai 50 nenshi* [Fifty-year History of the Sakai Used Goods Trade Association] (Sakai 1936) 6-8 (reproducing a similar regulation from the neighboring city of Sakai, which charges dealers with an affirmative duty to report stolen goods (and offending colleagues), and providing for suspension of the right to do business for knowingly purchasing stolen goods; Sakai merged with Osaka in 1881).

Other changes came thick and fast in the early years of Meiji administration. In addition to establishing a national network of courts, the new regime moved swiftly to replace feudal land entitlements with alienable rights of ownership,<sup>58</sup> to eliminate restraints on personal mobility,<sup>59</sup> and to abolish the feudal-era caste system.<sup>60</sup> The former *kabu-nakama* began to lose ground with the expansion of inter-regional trade that resulted from these and other liberalizing reforms. The consequences of market expansion for the secondhand trade – hardly a field in which fortunes were waiting to be made at the time – were probably not particularly severe. But the same cannot be said of policing. The lifting of travel restrictions instantly gave rise to an interregional market for stolen goods. Even if the Osaka police attempted to enforce the Tokugawa regulatory practices of compulsory record keeping and the circulation of lost item reports, stolen goods could now easily be sold into other markets.

Clear evidence of the effect of market expansion on crime was available to the government of the time. The data relevant to the used goods trade, which unfortunately cover only the years 1877 through 1887, are shown in *Table 1* (on the opposite page). These numbers give a rare glimpse, if an imperfect one, of the relationship between thievery and the regulation of the market for used goods. At the beginning of the series, Japan had no national regime for the regulation of trade in used goods. The critical figures are those for the number of items of clothing stolen. Formal clothing was one of the most common personal assets of significant value at the time of the Meiji Restoration, and this accounts for its presence as a separate category in early crime statistics.<sup>61</sup> Clothing is of interest in the present connection because a thief must sell it (or pawn it) in order to benefit from the theft.

The first four years in the series show an average year on year increase of 9.5% in the volume of clothing theft. This trend may be read as an adjustment in progress. Naturally, theft of all kinds will have risen following the lifting of the travel restrictions imposed by the former regime; theft is a business like any other, and opportunities to profit from it naturally increase when more people are allowed to move about and mix with one another. The trend flattens in 1882 and 1883; but in 1884, the number of stolen articles of clothing plunges by 40%. This may be taken to be a simple statistical variation. But given the relatively steady rise in the total number of burglaries over the same period, it is probable that something happened in 1884.

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58 ISHII, *supra* note 1, 109-110.

59 *Id.*

60 *Id.*

61 This was also apparently true of the pawnbroking trade in early 19<sup>th</sup> century New York. J.P. CASKEY, *Fringe Banking: Check-Cashing Outlets, Pawnshops, and the Poor* (New York 1994) 17, citing R. FOULKE, *The Sinews of American Commerce* (New York 1941) 118, citing in turn MATTHEW CAREY, *Public Charities in Philadelphia*, in: Carey, *Miscellaneous Essays*, printed for Carey and Hart (Philadelphia 1830) 160.

Table 1

Items of Stolen Clothing, 1877 to 1886					
Year	Burglaries	Cash (Stolen)	Clothing (Stolen)	Clothing (Ret'd)	(CIR/CIS) *100
1877	171,723	447,680	485,614	n/a	---
1878	194,150	509,804	534,142	n/a	---
1879	128,365	634,897	572,528	7,222	1.2%
1880	234,004	744,678	630,815	14,418	2.2%
1881	219,602	804,909	701,875	13,759	1.9%
1882	203,581	831,650	599,568	5,165	0.8%
1883	207,664	716,787	612,963	5,737	0.9%
1884	207,244	626,223	358,723	2,017	0.5%
1885	363,768	624,034	455,477	2,747	0.6%
1886	374,011	590,900	602,965	2,358	0.3%
1887	297,176	552,827	537,213	2,329	---

Source: NAIKAKU TÔKEI-KYOKU, *Nihon teikoku tôkei nenkan 8* [Statistical Yearbook of the Japanese Empire 8] (1889) 590, Table 259. (n/a = Data not available)

That something was almost certainly the Used Goods Business Oversight Ordinance of 1884, Japan's first national law governing the secondhand trade.<sup>62</sup> The movement in thefts of clothing, set against the more stable trends in the total number of burglaries and total amounts of cash stolen, strongly suggest that this law had a discriminate impact on the behavior of thieves. The terms of the law itself suggest how this could have happened.

62 *Kobutsu-shô torishimari jôrei*, *Daijôkan* proclamation no. 50, 28 Dec. 1883 (hereinafter cited as "1884 Ordinance"). The Ordinance took effect on 1 February 1884, and provincial governments were primed for its implementation. See ÔSAKA-SHI (ed.), *Meiji taishô ôsaka shi shi 6* [History of the City of Osaka in the Meiji and Taishô Periods 6] (Tokyo 1933) 696-697 (reproducing the Osaka *Kobutsu-shô torishimari saisoku*, local regulations promulgated under the Ordinance on January 14, 1884, to become effective on February 1, 1884).

The 1884 Ordinance imposed a uniform nationwide licensing requirement on traders dealing in a laundry list of used goods: tools, books, paintings and calligraphy, clothing, scrap metal, and coins.<sup>63</sup> Traders were required to keep records of their transactions for reference by the police.<sup>64</sup> For good measure, they were prohibited from trading with unknown persons,<sup>65</sup> those convicted of theft or fraud offenses,<sup>66</sup> or those controlling goods as household servants or as representatives of certain institutions.<sup>67</sup> Restraints were placed on where trading in used goods could take place.<sup>68</sup> The practice of *shinabure* was revived,<sup>69</sup> and police were given explicit authority to enter the premises of traders at will to inspect and seize goods or attach records for inspection.<sup>70</sup> Nothing new for Osaka here; these measures had all been used previously, in the *Tenpō* reform period or before. Uniform nationwide application was, of course, another matter.

The Ordinance introduced two additional measures of particular interest. The first was a restraint on inter-regional trade.<sup>71</sup>

ARTICLE 9

(1) When a used goods trader intends to send goods to another prefecture or to receive goods from another prefecture, the trader must provide a list of the goods concerned to the police station having jurisdiction over his business.

(2) Police officers may, as appropriate, open such shipments, inspect their contents, and seize them. However, the cost in such cases shall be born by the recipient.

This reflects a clear understanding that rising levels of theft were a direct result of market expansion. Lacking the institutional infrastructure and resources to police the market nationwide at this early point, the government gave police the power to cut markets down to size. As noted above, this strategy appears to have been remarkably effective, at least in the short term.

The second novelty in the Ordinance is a provision for probationary treatment, or “special oversight”. Traders convicted of violating the provisions of the Order were subjected to a special regimen:<sup>72</sup>

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63 *Id.* art. 2. This list was presumably intended to encompass all then-significant areas of the secondhand trade.

64 *Id.* art. 3.

65 *Id.* art. 4.

66 *Id.* art. 6.

67 *Id.* art. 5.

68 *Id.* art. 7.

69 *Id.* arts. 10 & 11.

70 *Id.* art. 13.

71 *Id.* art. 9.

72 *Id.* arts. 16, 17 & 18.

## ARTICLE 16

A trader subject to special oversight must abide by the following conditions:

1. He must record, with respect to every article acquired through purchase or trade, the name, address and age of the seller, a physical description of the article acquired, the purchase price and the date and time of the sale.
2. He must not purchase or trade for articles in connection with business between sunset and sunrise.
3. He must hold any articles acquired by purchase or trade from anyone not involved in trade, in the condition in which they were received, for a period of five days.
4. When he sells or trades away articles, he must record a description of the article sold, the price, the date and time of the sale and, if known, the name, address and age of the buyer or transferee.
5. Once each month, he must submit his records of articles bought, sold and traded to the police having jurisdiction, for inspection.
6. He must receive the permission of the police having jurisdiction before moving house, traveling, or taking in lodgers.

This is a specific deterrence and rehabilitation measure, again aiming to preserve the utility of existing (Tokugawa-era) policing methods in a new, less regimented environment. Nonetheless, the Order signaled a clear break with the self-regulatory approach of the Tokugawa regime. The power to grant and to revoke licenses, formerly shared at the local level with trade associations, was now taken over entirely by state authorities.<sup>73</sup> The procedural framework for anti-theft regulation was also taken over by the state. As a consequence of this shift to a uniform, market-wide monitoring framework, the Ordinance set up explicit standards of conduct, not only for traders, but also for the local police, both of which were enforceable through the national courts. This had two readily identifiable effects on police work. First, as *Table 1* (*supra* p. 49) suggests, it likely motivated thieves to avoid licensed dealers when selling on stolen goods, because of the more rigorous monitoring to which they were subjected. Second, review in national courts imposed a check on the extent of police authority; the first appellate case arising under the Ordinance operated to constrain the scope of police authority.<sup>74, 75</sup>

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<sup>73</sup> *Id.* art. 2.

<sup>74</sup> *Daishin'in*, in: *Hanketsu-roku* 29 (1884-1887) 541 (The case was an appeal by the prosecutor from a judgment in the *Matsuyama* Petty Criminal Court in *Ehime* Prefecture, dismissing the charge against Eijirō Mishima, a used clothing trader. Mishima had purchased a woman's kimono from one Kumayoshi Moriyama who, it emerged, was listed in police records as having been convicted under Article 399 of the Criminal Code. Mishima was charged under Article 6 of the Used Goods Trader Oversight Ordinance, making it a criminal offense to receive goods from anyone previously convicted of theft or fraud. The Supreme Court, upholding the trial court judgment, interpreted the provision to require actual knowledge of the individual's criminal record.

The Ordinance held sway for 12 years, yielding in 1895 to the Used Goods Trader Oversight Act and its associated regulations, to be treated in the second part of this Article.<sup>76</sup>

## V. CONCLUSION

It is commonly observed that at the beginning of the Meiji era, Japan had the benefit of a well-trained administrative elite, a high literacy rate in the general population, and a long tradition of stable government. The situation was rather different in 1645, when the Osaka police first undertook to regulate the secondhand trade. Early Tokugawa was a rougher time, and the early charters were addressed to organizations which were in some ways more lawless than any that exist in Japan today. In fact, scarcity of law was a boon to the policy of policing theft through dealer associations.

The same distrust that encourages traders to cluster together, and to make exceptional efforts to monitor one another, lends itself to exploitation by the police for policing purposes. Because the police and the courts of the time did not ordinarily recognize rules of collective or corporate action, chartered traders were able to offer a more efficient market for used goods than their ragtag competition. Because police supervision was heightened within this specific market, thieves could be expected to divert a proportion of their takings to other channels. Because efficient markets were scarce, this depressed the value of stolen goods, which in turn reduced the attraction of thievery as a vocation. And, other things being equal, in a society with fewer thieves, property rights have greater value; “everybody gets a share”.<sup>77</sup>

This delicately balanced system of monopoly trading rights and monitoring, like much else from the Tokugawa era, was severely undermined by the Meiji reforms. The shadow of its form, however, would continue into the age of the Internet.

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The prosecutor’s argument that entry of the individual’s name on the list of convicted persons maintained by the police should communicate constructive knowledge was rejected.)

<sup>75</sup> 1884 Ordinance, *supra* note 62, art. 6.

<sup>76</sup> *Kobutsu-shô torishimari-hô*, Law No. 13, March 1895; *Kobutsu-shô torishimari-hô saisoku*, Home Ministry Order No. 8, July 1895) (hereinafter cited as “1895 Act” and “1895 Regulations” respectively).

<sup>77</sup> J. HELLER, *Catch-22* (New York 1961).

## ZUSAMMENFASSUNG

*Die Regulierung des Handels mit gebrauchten Waren zur Verhinderung von Hehlerei und Diebstahl hat eine lange Tradition in Japan. In der heutigen Zeit des Handels über das Internet hat diese an Bedeutung verloren, sie spielte jedoch eine große Rolle bei der Aufrechterhaltung der Stabilität der Eigentumsordnung und zwar nicht nur in der Tokugawa-Zeit, sondern auch im 19. und am Beginn des 20. Jahrhunderts beim Übergang zu einem westlichen Rechtssystem. Der vorliegende Artikel untersucht historische Dokumente zur Regulierung des Handels mit Gebrauchsgütern als Beispiel dafür, wie eine Nation auf rapiden wirtschaftlichen und rechtlichen Wandel reagierte.*

*Die Lizenzierung und Regulierung des Handels mit Gebrauchsgütern wurde ausdrücklich mit der Verhinderung von Diebstählen in Zusammenhang gebracht, hat aber immer auch anderen Zwecken gedient. Die Zünfte bildeten das Herz des Wirtschaftssystems der Zeit vor der Meiji-Restauration, unter anderem mit den von ihnen aufgestellten Verhaltensregeln und Streitbeilegungsmechanismen. In der Tokugawa-Zeit bildete Osaka nicht nur den wirtschaftliche Mittelpunkt Japans, sondern war auch das Zentrum der Zunft-Tätigkeiten. Die Zünfte der Gebrauchsgüterhändler und der Pfandleiher waren die ersten Zünfte, die sich in Osaka bildeten, und dienten als Beispiel für Regelungen bei der Entstehung eines auf dem Zunftsystem aufbauenden Handelsrechts in den folgenden 200 Jahren.*

*Der vorliegende Artikel zeichnet die parallele Entstehung eines organisierten Gebrauchsgüterhandels und von Mechanismen zur Kontrolle von Diebstählen nach. Dabei wird auch auf die frühe und vollständige Abschaffung der Zünfte zehn Jahre vor der erzwungenen Öffnung Japans eingegangen, die erhebliche Auswirkungen in der folgenden Übergangsperiode hatte, was jedoch bislang von westlichen Autoren kaum gewürdigt wurde. Dokumente aus den ersten Jahren der Meiji-Regierung zeigen eine Wiedereinführung der auf dem Zunftsystem aufbauenden Regelungen teilweise im Bereich des Handelsrechts, aber auch (wie etwa beim Gebrauchsgüterhandel) als Verordnungen und im Bereich des Strafrechts. Die plötzlich vergrößerte Bewegungsfreiheit während der Meiji-Restauration führte zu einem rapiden Anstieg von Diebstählen. Frühe Statistiken und rechtliche Aufzeichnungen zeigen, daß die gut eingeführten Regulationsmechanismen der vorangehenden Ära herangezogen wurden, um dieser Entwicklung entgegenzutreten.*

*(Übersetzung durch die Red.)*