

**Secondhand Japan:
Used Goods Regulation 1645 – Present
(Part 2)**

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I. INTRODUCTION

Despite the tumultuous and sweeping nature of the changes that gripped Japan during the transition period,² the Meiji recasting of used goods dealers from merchant guild to regulated trade association appears to have had a relatively modest impact on their relationship to officialdom. As we have seen, dealers and police enjoyed a mutual back-scratching arrangement under the old regime, trading informant services for association discipline and barriers to entry. Following the instability of the earlier period, mutual convenience and the sympathy of legislators carried this forward into the new national economy, but as we shall see, the relative benefits of market supervision as a method of suppressing theft decline in the course of the 20th century. The new environment finally produces telling legislative change in this traditional tool of policing in 1995, one month before the 350th anniversary of its inception.³

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- 1 During the preparation of this article, the author benefited from the good offices of Fumio Jimbo, Tomoko Masuda, and Kaoru Sugihara. Any flaws in this article are the responsibility of its author alone.
 - 2 See F. BENNETT, *Secondhand Japan: Used Goods Regulation 1645 – Present (Part 1)*, in: *ZJapanR / J.Japan.L.* 21 (2006) 37. Two additional references relevant to the pre-Meiji environment may be of interest to readers of Part 1 of this article. Concerning the abolition of the *kabu-nakama* and its effects, see T. OKAZAKI, *The role of the merchant coalition in pre-modern Japanese economic development: an historical institutional analysis*, in: *Explorations in Economic History* 42(2) (2005) 184-201. For an examination of recycling activity in the agricultural system of feudal Japan, see ALAN MACFARLANE, *The Savage Wars of Peace* (Oxford 1997) esp. 154-180.
 - 3 *Kobutsu eigyô hô no ichibu o kaisei suru hôritsu*, Law no. 66, 19 April 1995. See *infra*, text accompanying notes 63-72.

II. BUSINESS AS USUAL: 1895 – 1949

With the enactment of the Used Goods Dealer Oversight Act of 1895,⁴ the transitional Ordinance of 1884⁵ ceased to have effect. The new Law consolidated, and in some ways expanded, powers granted to the police under the Ordinance. The laundry list of regulated goods was replaced with a general definition,⁶ and traders were required to specify the scope of their trade in their licensing application to the prefectural police.⁷ Traders continued to be obligated to report suspicious transactions to the police.⁸ The register of sellers and purchasers, originally introduced during the *Tenpō* reform of the Tokugawa era,⁹ and used only as a probationary measure in the Ordinance, was imposed on *all* dealers, with specific provisions concerning the maintenance, inspection, auditing, and preservation of registers, and the handling of lost and stolen goods reports (*shinabure*).¹⁰ Police were given authority to suspend or cancel licenses for violation of any terms of the Law or of orders issued under it,¹¹ and any suspension was given nationwide effect.¹² Markets and auctions, and trade in swords and other dangerous items was placed entirely under the discretionary regulatory control of the police,¹³ and the police were given explicit authority to extend the Law to “other traders”, as deemed necessary to fulfill its purposes.¹⁴

The generality and the discretionary character of the provisions in the 1895 Law may be taken as a strategic response to potential limitations imposed by the courts.¹⁵ All in

4 *Kobutsu-shō torishimari-hō*, Law no. 23, 2 March 1895 (hereinafter cited as “1895 Act”).

5 *Kobutsu-shō torishimari jōrei*, *Daijōkan* proclamation no. 50, 28 Dec. 1883 (hereinafter cited as “1884 Ordinance”).

6 1895 Act, *supra* note 4, art. 1 (“Used goods dealers are those whose business consists primarily of trade in or sale of goods that have been once used for a purpose, or which have been subjected to alteration”). Note that the text of the enacted provision differs slightly from the text originally submitted to the Diet, with the explicit parenthetical inclusion of works of art in this definition. For the original text, see *Shūgi’in chihō gyōsei i’in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 17th meeting, 7 May 1949 (1st statement of Moritoshi Nakashima).

7 1895 Act, *supra* note 4, art. 2 (“Those intending to engage in the business of used goods dealers shall apply to the administrative authorities, specifying the types of goods to be traded”).

8 *Id.* art. 6.

9 1884 Ordinance, *supra* note 5, arts. 16, 17 & 18. See BENNETT, *supra* note 2, 44-46.

10 1895 Act, *supra* note 4, art. 7 & 9-13 (see Part 1 of this article for a discussion of these provisions and their origin).

11 *Id.* art. 14. Equally significant is the complete discretion to reinstate traders following a suspension. *Id.* art. 16.

12 *Id.* art. 15.

13 *Id.* art. 5.

14 *Id.* art. 18.

15 Supreme Court, 15 October 1884, *Taihan Minroku* 29, 541 (summarized in BENNETT, *supra* note 2, 51 n. 74). See also note 37 and accompanying text.

all, the new Law appears to have represented a clean sweep legislative victory for police control over the trade. Evidence of how this regime was operated is unfortunately rather sparse, but indirect hints in the record suggest that the relationship between government and these particular subservient partners in law enforcement actually changed rather little. The legislative record of debates over the post-War successor to the 1895 Law cites a common police practice of delegating license application decisions to the head of the local dealers' association, thus confirming and reinforcing his position of authority within the association, and providing an effective barrier to new entrants into the trade.¹⁶ Such an arrangement was certainly consistent with the terms of the 1895 law, which delegated licensing authority to the police without specifying the standard by which applications were to be judged.

As further, albeit indirect evidence of the persistence of old practices, the pre-War commemorative history of the Sakai district association (Osaka) notes that in 1922, the association office "directed its membership to reduce prices in response to government policy". Evidently, traces of the stubborn Tokugawa tendency to assume that guilds had omnipotent control over the markets in which they were permitted to participate appears to have survived well into the 20th century.

Quite rationally, after attaining near-complete *de jure* authority over used goods traders, the police (for whom this power was a tool, not an end in itself) continued to allow traders to exercise a significant degree of collective autonomy. On the other hand, since Japan under the Tokugawa was organized as a police state (albeit an agrarian and isolationist one), it is meagre sanguinity to say that traders enjoyed similar rights and privileges under the new government as they had under the old. That is, however, the best that can be said for their position between 1895 and 1949.

III. ADAPTING TO THE NEW CONSTITUTION: 1949 – 1962

When the Fifteen Years' War was followed by surrender and the Occupation, Japanese government underwent substantial change, both in its constitutional foundations and in its political dynamics. Used goods regulation was an unobtrusive element of the overall legal system, and as in previous eras of change, the surrounding turmoil had but a small impact upon it. A revised law passed during the Occupation largely affirmed existing practice. But this would prove, as it were, to be the swansong of the canary; subsequent rapid economic development would dictate that later reforms be driven by a more complex mixture of interests.

16 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 18th meeting, 7 May 1949 (5th statement of Zentarô Taniguchi). Transcripts of Diet committee deliberations are available online at <<http://kokkai.ndl.go.jp/>>.

The new Used Goods Business Act was enacted in 1949. The law arose as a government bill drafted by the National Police Agency, and was discussed in the Committee on Provincial Administration of both chambers in the 5th Diet session held under the new Constitution. At this time, this committee was struggling with a major series of bills on provincial government in which Occupation authorities took a close interest. But the proper context of the National Police Agency's proposed bill on used goods dealers is an event from two years before, in the first year of the Occupation.

One of the instruments used to maintain social cohesion in the last phase of Japan's experience with militarism was the *tonarigumi* (neighbours' association), a small administrative unit composed of households in close proximity to one another, made collectively responsible for one another's actions. As a specific legal construct, the *tonarigumi* were a coercive wartime institution, initially deployed in Japan's colonies, and established on the main islands in 1940. The general practice, however, has a longer history. As described in the first Part of this article, collective punishment of the *gonin-gumi* (an earlier form of neighbour association) was used to exhort the Osaka used goods dealers to a straighter form of uprightness as early as the 17th century,¹⁷ but this was not novel to Japan even then; it had originally been copied from China a thousand years before.¹⁸ Japan's modest 20th century innovation was to tie rationed food distribution and social services to *tonarigumi* membership, creating a powerful lever for discipline and social control under conditions of industrialized total war.

The *tonarigumi* were a focus of attention in the offices of the Supreme Commander for the Allied Powers (SCAP) from the beginning of the Occupation.¹⁹ As civic bodies integrated into the fabric of local administration (most importantly, in the short term, for the distribution of food) the *tonarigumi* were initially left in place. There was suspicion of their role in political organization and control, however, and this was ultimately converted into a demand for reform. On January 22, 1947, under heavy pressure, the Ministry of Home Affairs abolished the *tonarigumi* and their federated bodies as public institutions, in preparation for the SCAP-directed reorganization of local government.²⁰ As this organizational infrastructure was of potential utility to interests as diverse as politicians and organized crime syndicates, shades of its persistence survived the termination of formal government support.

Although the two might seem at first to be quite unconnected, from a policing perspective, the *tonarigumi* and the regulatory regime for used goods dealers (as well as

17 BENNETT, *supra* note 2, 39.

18 Local Government, in: GOVERNMENT SECTION, SUPREME COMMANDER FOR THE ALLIED POWERS, Political Reorientation of Japan: September 1946 to September 1948, 1 (Washington D.C. 1948) 285, 260-290 (hereinafter cited as "Local Government Report").

19 Supreme Command for Allied Powers Instruction Note (SCAPIN) No. 236, 4 November 1945, reprinted in: *Sengo jichi-shi* [A History of Post-war Local Government] 1 (Tokyo 1960) 27-28; C. ALDOUS, *The Police in Occupation, Japan* (New York 1997) 36-40.

20 *Id.* 73-85.

pawnbrokers) were useful to investigations in similar ways and for similar reasons. In both, some degree of police contact and community intrusion was routinized; in both, police had control over resources essential to the target community; and both provided a dispersed population of informants. There were, and are, potential benefits in community policing based on such foundations.²¹ Unfortunately, this is accompanied by the potential for a leveraged expansion of police power.²² Given that the existing Japanese police forces were accustomed to operating in an informant-rich environment, and that they were now charged with maintaining social order under desperate conditions, *mala fides* need not figure in an explanation of why government sought to preserve either of these institutions. On the other hand, both were demonstrably useful as instruments of coercion, and it was equally natural for Occupation reformers and political minorities to view them with suspicion.²³

The National Police Agency presented a Used Goods Business Oversight bill to the Diet during the third Yoshida administration.²⁴ The proposed text constituted in many respects a reenactment of existing legislation, with changes to adapt the regime to the new Constitution. Its most important features, most of which will be familiar from the first Part of this Article, were the following:

Licensing

Those dealing in used goods are required to obtain a license from the prefectural Public Safety Commission, valid for three years.²⁵ A separate application is required for each place of business.²⁶ License qualifications are specified in statute,²⁷ under which an applicant could be disqualified on account of employees, co-resident family members, or (in the case of a corporation) corporate officers with a prior criminal record or for violations of the statute within the past three years.

21 L.C. PARKER, *The Japanese police system today: an American perspective* (Tokyo 1984) 37-39.

22 E. SIBBITT, *Regulating Gambling in the Shadow of the Law: Form and Substance in the Regulation of Japan's Pachinko Industry*, in: *Harvard International Law Journal* 38 (1997) 568.

23 Local Government Report, *supra* note 18, 284-288.

24 The Used Goods Business Act was directed to the Provincial Administration Committee, as a bill granting administrative authority to police operating at the prefectural level.

25 Arts. 2, 10(1) & 10(2) *Kobutsu eigyô-hô*, Law no. 108/1949 (as enacted). The prefectural Public Safety Commissions are the bodies responsible for police activities, in the reformed structure of police administration. See "Government Aspects of Law Enforcement", in: GOVERNMENT SECTION, SUPREME COMMANDER FOR THE ALLIED POWERS, *Political Reorientation of Japan: September 1946 to September 1948*, 1 (Washington D.C. 1948) 303, 291-313.

26 *Kobutsu eigyô-hô*, *supra* note 25, art. 2.

27 *Id.* art. 4.

Revocation

Revocation of any license in any prefecture has the effect of revoking all licenses in all prefectures.²⁸

Record keeping

All dealers are required to confirm the identity of persons from whom they purchase, or to whom they sell, and to maintain a record giving their name, address, and distinguishing features of the items sold and purchased.²⁹

Duty of reporting

All dealers are required to respond to *shinabure* (reports of lost or stolen goods) issued by the police.³⁰

Inspection

All dealers are required to submit to spot inspections of their premises and records by the police during business hours.³¹

Freezing of inventory

Police are given the power to freeze the inventory of individual dealers for a 30-day period immediately upon notice.³²

Return of lost or stolen goods

Dealers are required to restore stolen items to the original owner without compensation.³³

The bill was greeted with vocal opposition from members of the Japanese Communist Party (JCP), beginning with a question about efforts to revive the *tonarigumi* system,³⁴ which set the stage by highlighting past abuse of power by the police. One of the core concerns of the JCP, as a political minority, was that this statute could be used as a

28 *Id.* arts. 24(2).

29 *Id.* art. 17.

30 *Id.* art. 20.

31 *Id.* art. 23.

32 *Id.* art. 22.

33 *Id.* art. 21.

34 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 18th meeting, 7 May 1949 (6th statement of Toshio Tachibana). The Minister addressed (Kozaemon Kimura) acknowledged that *tonarigumi* had been banned “by a Potsdam order”, and undertook to follow up.

Id. (2nd statement of Kozaemon Kimura). The order referred to is Cabinet Order no. 15/1947, original English version reprinted in: GOVERNMENT SECTION, SUPREME COMMANDER FOR THE ALLIED POWERS, Political Reorientation of Japan: September 1946 to September 1948, 2 (Washington D.C. 1948) 701-702.

convenient means of tracking reading habits, through the records maintained by used book dealers.³⁵ A broader range of objections was raised, however, which may be divided into three categories. First was the claim that the new law would expand the scope of police authority; second, that its licensing and monitoring provisions were unconstitutionally broad; and third, that the police, in light of past performance, could not be trusted with the powers that would be granted to them under the new law.

Two specific features of the new law do clearly appear to expand the scope of police authority. The first related to filing requirements. Under existing law (i.e. that enacted before the Occupation), the administrative requirements for dealers depended on the category into which their business fell. For ordinary dealers, a license (*menkyo*) was required; to open a market required approval (*ninka*); street vendors and itinerant dealers were required to obtain a permit (*kansatsu*); and prospective auctioneers were governed only by a notice requirement (*todokede*).³⁶ The new law proposed to apply a uniform licensing requirement on all businesses intending to deal in used goods. When challenged on this point, the National Police Agency representative, in a telling show of *chutzpa*, replied that this would not actually broaden police authority, because they were currently just treating everything in this field as a license requirement anyway.³⁷

Second, the three-yearly relicensing requirement was novel. Pre-Occupation law had no provision for renewal; licenses were valid indefinitely, although the holder was required to notify police of changes of address and the like. Theft levels surged when the war effort ended, and licence renewal was meant to provide police with a means of pushing dealers who fenced stolen goods out of the trade. It was defended in committee on that basis.

Of constitutional objections there were three. The first of these was a potential conflict with the right to freely choose one's path of employment.³⁸ The second was that the peremptory powers of inspection violated the warrant requirement.³⁹ The third was that the ascription of illegal acts by a co-resident family member to the holder of a used goods license under Article 22 of the bill constituted a form of collective punishment

35 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 18th meeting, 7 May 1949 (7th statement of Zentarô Taniguchi).

36 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 17th meeting, 6 May 1949 (1st statement of Fumio Takefuji).

37 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 18th meeting, 7 May 1949 (1st statement of Masumi Mizobuchi).

38 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 18th meeting, 7 May 1949 (7th statement of Zentarô Taniguchi).

39 *Id.*

abolished under the new Constitution.⁴⁰ None of these points gained traction in committee, but court challenges would be mounted on each following the enactment of the law.⁴¹ Given the immediate concern of the political minority over censorship, monitoring and selective punishment, free speech might have been another potential ground for objection, but this was not raised in committee, nor in any subsequent court proceeding of which the author is aware.

Objections founded on the questionable police record on trustworthiness and self-restraint were naturally not calculated to be immediately persuasive; but the discussions prompted by this line of argument reveal contemporary assumptions about the role that used goods regulation would play in governance. Because some of these assumptions would be reevaluated in subsequent years, it is worth reviewing a sampling of the points made here.

A rare glimpse into existing practice was given in a statement by JCP member Zentarô Taniguchi, who noted that it was common at the time for police to give the head of the local dealers' association veto power over license applications. As indicated above, this was simply a carryover from the Tokugawa practice of licensing guilds in exchange for the performance of governmental services.⁴² From a modern liberal perspective, such an arrangement artificially enhances the power and position of the association "boss",⁴³ produces an unhealthy community of interest between police and the

40 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 18th meeting, 7 May 1949 (7th statement of Toshio Tachibana).

41 Supreme Court, 3 June 1952, Saiban-shû keiji 65, 59 (Liability for acts of a co-resident family member under Article 22 of the Used Goods Dealer Law is calculated to accomplish the purposes of the Law, and does not violate Article 14 of the Constitution); Supreme Court (Grand Bench), 18 March 1953, Keishû 7, 577 (The requirement in Article 2 of the Law that those intending to deal in used goods obtain a license does not violate Article 22 of the Constitution); Supreme Court, 4 May 1962, Keishû 16, 510 (The requirement that dealers record the personal details of those from whom they buy, and make this information available to the police does not violate Article 38 of the Constitution); Tokyo High Court, 23 February 1962, Kôkei hantoku 29, 57 (The requirement that dealers licensed under the previous regulatory regime file for the non-discretionary issue of a permit within three months of the enactment of the Law at pain of losing their trading privileges does not violate the new Constitution). Thus, thanks largely to geopolitical tensions at the outset of the Cold War, Japan is perhaps the only nation on the planet that can boast a comprehensive string of Supreme Court precedents evaluating the constitutionality of regulation applied to used goods dealers. Whether this raises or lowers Japan's stature as a nation based on the Rule of Law is a delicate question that I will entrust to the discriminating powers of the indulgent reader.

42 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 18th meeting, 7 May 1949 (5th statement of Zentarô Taniguchi).

43 The exact term used by member Zentarô Taniguchi. *Id.* Taniguchi further underlines the archaic character of the Act, when he pauses to ask for guidance on how to pronounce the characters for *shinabure* – a non-standard reading of the corresponding Chinese characters, originating in the Tokugawa era.

association, and raises an unwarranted barrier to entry into the trade. It is significant that the representative of the National Police Agency, responding, did not deny the practice, but simply indicated that the reform proposal would undercut it by establishing clearly the qualifications for obtaining a license in the text of the law. This would later prove to be very true indeed.

Taniguchi also criticised the Law as running counter to the principle of free enterprise and being bad for business.⁴⁴ Although his words had little effect in committee,⁴⁵ he was not alone. The Ministry of Manufacturing and Commerce had established barter markets for household essentials during the war, and these had been exempted from the recording and disclosure requirements of the old Law. The Ministry lobbied hard, and successfully, during the preparation of the Used Goods Dealer Oversight bill to keep them that way.⁴⁶ The government response to the challenge in committee was that expected of a party in possession of a majority: a representative of the National Police Agency declared that dealers “would be amazed at how liberal the regime was when it was introduced”.⁴⁷

It would be useful to explore the government assertion that a revised Used Goods Business Law would help the police to combat theft without abuse of their authority. *Table 1* (see p. 137) shows the ratio of theft arrests to items stolen between 1934 and 1964, based on official figures. The sudden change in 1946 indicates that the police were either suddenly infused with magical powers of investigation ... or abruptly altered the way in which statistics were collected, producing a meaninglessly correct result. This record unfortunately provides no insight into the impact or operation of used goods dealer supervision, in what would prove to be its period of greatest change in three centuries' time.

Numbers aside, the JCP was certainly correct about dealers perceiving regulation to be an irritation. By setting up objective criteria for obtaining a license, the new law would disturb the reciprocal balance of the police-dealer relationship. When the police became unable to deliver on their end, the trade would go shopping first for statutory restraints on entry or, failing that, a release from regulatory burdens. This is in essence what we find in the subsequent history of the Used Goods Business Act of 1949.

44 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 18th meeting, 7 May 1949 (5th statement of Zentarô Taniguchi).

45 There is gentle irony in the fact that only the Japanese Communist Party raised this objection against the bill.

46 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 15th meeting, 13 May 1949 (3rd statement of Zentarô Taniguchi).

47 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 5th Diet session, 20th meeting, 12 May 1949 (8th statement of Zentarô Taniguchi).

Table 1

Offences relating to ill-gotten goods			
<i>Year</i>	<i>Offences</i>	<i>Arrests</i>	<i>(Arrests/Offences)*100</i>
1934	18256	20371	11,585
1935	16425	18427	12,189
1936	16194	18074	11,609
1937	15695	18241	16,222
1938	23027	24913	8,190
1939	17648	22056	24,977
1940	17580	19583	11,394
1941	16700	23262	39,293
1942	12507	15263	22,036
1943	18341	22317	21,678
1944	18395	21822	18,630
1945	11312	11867	4,906
1946	26453	28664	8,358
1950	38234	38372	0,361
1955	18225	18220	-0,027
1956	16360	16361	0,006
1957	14067	14068	0,007
1958	10489	10491	0,019
1959	11533	11532	-0,009
1960	12282	12282	0,000
1961	12768	12768	0,000
1962	11019	11019	0,000
1963	9773	9772	-0,010
1964	9848	9848	0,000
<i>1941-1946</i>	<i>266767</i>	<i>303232</i>	<i>13,669</i>
<i>1955-1964</i>	<i>126364</i>	<i>126361</i>	<i>-0,002</i>

Source: *Nihon tôkei nenkan* [Japan Statistical Yearbook] 1965
(Tokyo 1965) 572-573 Table 350.

IV. THE WIDENING GYRE: 1962 – 1995

The police begin loosening their hold on the used goods trade in 1962, with a revision to the Used Goods Dealer Act that eliminated the renewal requirement for most dealer licenses.⁴⁸ As a result, the number of licensed dealers steadily increased thereafter, growing from 163,915 in 1962 to more than half a million in the year 2000.⁴⁹ There is no way of knowing how many licenses now on record apply to dealers who are no longer in business; once again, statistics tell us somewhat less than we can learn from a critical reading of the legislative record.

Diet committee discussions over the 1962 revision contain one particularly interesting appeal, this time from committee member Eiichi Tanaka, a Liberal Democratic Party member who entered politics after a full career in the national police service.⁵⁰ In a series of exchanges with attending representatives of the National Police Agency, Tanaka solicits data on licenses issued and licences revoked, and underlines the important role of both pawnbrokers and used goods dealers in the investigation of theft offenses. He goes on to express his deep and abiding concern for the welfare of both the pawnbroker and the used goods dealer trades. He cites their important role in the formation of local Crime Prevention Associations.⁵¹ And then, in a move fit to inspire the young George Stigler,⁵² he proposes that some means should be found to restrain their numbers.⁵³ Pursuing this point, he suggests establishing a minimum distance between stores⁵⁴ as one possible method of protecting members of these important and cooperative trades. When this is rebuffed, he suggests delegating decisions over new members to the local dealers association (as had been the practice until 1949),⁵⁵ and finally, the statutory recognition of Crime Prevention Associations as an auxiliary to the police.⁵⁶

48 Arts. 2, 10(1) & 10(2) *Kobutsu eigyô-hô*, Law no. 108/1949 as amended by Law no. 76/1962.

49 *Kobutsu tôkei* [Used goods statistics], facsimile transmission from the National Police Agency, 19 July 2001 (on file with the author).

50 *20 seiki nihon jinmei jiten* [20th Century Japanese Dictionary of Biography], 2 (Tokyo 2004) 1552-1553; *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 40th Diet session, 25th meeting, 27 March 1962 (1st through 13th statements of Eiichi Tanaka).

51 Concerning these associations, see Parker, *supra* note 21, 172-180.

52 Referring of course to G. STIGLER, *The Theory of Economic Regulation*, in: *Bell Journal of Economics* 2 (1971) 3-21.

53 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 40th Diet session, 25th meeting, 27 March 1962 (1st through 5th statements of Eiichi Tanaka).

54 *Id.* (6th statement of Eiichi Tanaka) (this statement specifically addresses pawnbrokers, who are evidently the central concern of the speaker).

55 *Id.* (7th statement of Eiichi Tanaka) (this statement specifically addresses pawnbrokers).

56 *Id.* (15th statement of Eiichi Tanaka) (this appeal is made specifically on behalf of used goods dealers, who had filed petitions on this issue with both the National Public Safety Commission and the Diet in advance of the committee session).

We cannot know the full background of this exchange. But it is clear from the text of the revision that the police, in removing the license renewal requirement, had chosen to loosen their grip on the trade. This legislative record tells us that the trade, for its part, would have welcomed something of greater value. Tanaka speaks for a reactionary position that apparently favoured the establishment of a strong national network of local crime control associations, with pawnbrokers and used goods dealers serving as active organizers in exchange for protection against competition. This style of networking was familiar from both past and existing practice,⁵⁷ and cannot have been unattractive to the police. That it did not find favour with the government of the day is shown by the mere fact that it is visible in the legislative record; and the responding representative of the National Police Agency indicates that the government has chosen “to pass over this proposal on this occasion”, because “there is the Constitution to consider” among other things.⁵⁸ The police would continue to develop the Crime Prevention Associations, but presumably with more tepid support from pawnbrokers and the used goods trade than they might otherwise have enjoyed.⁵⁹

Meanwhile, Japan was at the base of a prolonged economic expansion that would add further strain to the police-dealer relationship.⁶⁰ That relationship had developed and matured when Japan was an agrarian nation, in the absence of the cheap energy that fostered industrialization in the 20th century, and that has powered globalization in the 21st. In the Tokugawa era, the opportunities for expanding production were limited, and the reuse of goods and materials was an important means of increasing social welfare.⁶¹ There was thus a strong demand for used, recycled, and recyclable goods, and the cost of regulating the used goods market operated, in a sense, as a tax on this source of wealth. The emergence of a plentiful supply of mass produced goods, accompanied by steady improvements in quality, drastically altered this equation. The demand for most forms of used goods all but disappeared, and by 1989, the Ministry of Health and Welfare was reporting an upcoming crisis in available landfill space;⁶² the mass consumption society had proved so successful that there was no longer sufficient room to throw the stuff away. Eventually, legislators would be pressed to set the interests of “recycle business” against a costly and increasingly ineffectual regime for the discouragement of theft.

57 See SIBBITT, *supra* note 22.

58 *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 40th Diet session, 25th meeting, 27 March 1962 (11th statement of Kôzô Kimura).

59 PARKER, *supra* note 21.

60 See, e.g., Cambridge History of Japan, 6 (Cambridge 1988) 516-527.

61 See MACFARLANE, *supra* note 2.

62 “*Gomi gekizô ni maitta, ‘dasu gawa’ ni kyôryoku yôsei, Kôsei-shô, keidanren-tô nado 36 dantai ni*” [Pained by Sudden Rise in Garbage: Ministry of Health and Welfare requests cooperation from the Japan Business Federation and 36 other ‘producers’], *Nihon Keizai Shimbun*, 19 December 1989, 34.

V. TURNING THE TABLES: 1995 – PRESENT

Partly in response to the traumatic collapse of the economic bubble in 1991, Japan has undertaken an extensive legislative reform program.⁶³ This effort has produced an unprecedented volume of legislation – large enough to put considerable strain on the existing mechanisms for the drafting and review of new bills.⁶⁴ This pressure may help explain why, in committee hearings on a revision of the Used Goods Dealer Act held in 1995, statements by both government and opposition members seem curiously at odds with the actual effect of the bill under discussion.

In used goods markets, the valuable service offered by the merchant is to reduce the search cost for buyers with specific tastes or needs. In a physical store, the dealer must attempt to attract buyers to her premises by broadening her selection of goods. Today, with the advent of the Internet as a medium of commerce, online auction services have dramatically expanded the selection available to potential buyers. But the first online auction startups in Japan would not emerge until 1999; in 1995, the market for used goods was still driven entirely by the capabilities of traditional “brick and mortar” retailers.

Because the cost of acquiring inventory is fixed (by the clearance price of goods in the hands of individual sellers), the most forceful means for a used goods merchant to secure a competitive advantage is through economies of scale. The larger a store (or chain of stores), the larger the selection, and the larger the selection, the greater the attraction for potential buyers. Under the law as drafted in 1949, however, there was a crippling obstacle to the expansion of used goods businesses. As noted above, Article 24(2) of the Act provided that the revocation of a dealer license for breach of its terms in one prefecture triggered the automatic revocation of licenses for all businesses under the same ownership in all prefectures. As licenses can be revoked for the act of an agent,⁶⁵ the risk that a single lazy or dishonest employee could bring down an entire chain of stores would have made investing in such businesses a risky proposition.

The 1995 revision eliminated this restriction, and movements in the retail sector immediately before and after the passage of the 1995 revision at least suggest that its dominant purpose was to enable this market to grow.⁶⁶ In the relatively safe area of

63 See, e.g. “Diet passes bill to create panel on legal reforms”, Daily Yomiuri (Tokyo), 3 June 1999, 2, “Commercial Code revisions promise greater flexibility”, Nikkei Weekly (Japan), 27 August 2001.

64 “Pension bills littered with errors”, Japan Times, 17 July 2004. To gauge the pace of legislative activity, it is sufficient to compare the shelf space taken up by the official gazette for this period with previous years.

65 Art. 24 *Kobutsu-shô eigyô-hô*, Law. no. 108/1949 (as enacted).

66 This is suggested by other features of the law as well, such as the exemption of transactions under a certain threshold value from the recording requirement. The deregulatory features of the revision are summarized by a representative of the National Police Agency in: *Shûgi'in chihô gyôsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of

trade in used books, the Niigata-based Book-Off firm began to establish itself as a national chain after its founding in 1991. In 1996, one year after the passage of the revision, Book-Off launched a new venture, Hard-Off, dealing in the much more theftable commodity of used computer equipment.⁶⁷

Given this outcome, it is odd that, in discussions over the revision within the Committee on Provincial Administration, both government and opposition seem curiously attached to the issues originally aired in 1949 and long since rendered moot. Government stresses the importance of the Used Goods Business Act to the control of a rising tide of theft.⁶⁸ An opposition member expresses a reservation rooted in Article 22 of the Constitution (the right to freely choose one's occupation).⁶⁹ Be that as it may, the newly founded Hard-Off venture quickly expanded in size, swelling to 58 stores nationwide in 1998⁷⁰ then to 300 stores in 2003.⁷¹ Book-Off itself grew from 100 stores in 1994 to 500 in the year 2000, and went public in 2001.⁷²

The most recent change to the Used Goods Business Act has been a revision introduced in 2004, aimed at sales via the Internet. The first large online auction services opened in Japan in 1999, with parallel offerings by Yahoo! Auctions and E-Bay.⁷³ The latter eventually withdrew from the Japanese market,⁷⁴ but Yahoo! Auctions and a number of domestic ventures continue to operate at a brisk pace.⁷⁵ If the accommodation of chain stores can be said to have opened a hole in the Act, the emergence of online auctions have well and truly breached it. The traditional model of dealer supervision discourages theft by reducing the outlets through which stolen goods can be sold,

Representatives], 132nd Diet session, 12th meeting, 11 April 1995 (13th and 15th statement of Tsuneo Nakata).

67 Book-Off corporate website, at: <<http://www.bookoff.co.jp/company/enkaku.html>>.

68 *Shūgi'in chihō gyōsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 132nd Diet session, 12th meeting, 11 April 1995 (1st statement of Hiromu Nonaka).

69 *Shūgi'in chihō gyōsei i'in-kai giroku* [Protocol of the Committee on Local Administration, House of Representatives], 132nd Diet session, 12th meeting, 11 April 1995 (1st statement of Hiromu Nonaka).

70 "Used goods enjoying new acceptance: Low prices, nice shops help sector benefit from tough times", *Nikkei Weekly* (Japan), 4 May 1998 (corporate finance section) 6.

71 Book-Off corporate website, at: <<http://www.bookoff.co.jp/company/enkaku.html>>.

72 *Id.*; "Used goods enjoying new acceptance", *Nikkei Weekly* (Corporate Finance section) (4 May 1998) 6. Legislation positively promoting the recycling of used goods by effectively taxing their disposal has helped fuel the growth of the used goods trade. See, e.g., "New disposal law opens bag of opportunity", *Nikkei Weekly* (Japan), 2 April 2001 (reporting the effects of *Tokutei katei-yō kiki saishō hinka-hō* [Specified Home Appliance Recycling Law], Law no. 97/1998).

73 "eBay Japan aims to become No. 1 Net auction company", *Daily Yomiuri* (Tokyo), 27 April 2000, 20.

74 "Net auctioneer eBay down hammer", *Nikkei Weekly* (Japan), 4 March 2002.

75 "Spread of broadband access driving online auctions", *Nikkei Weekly* (Japan), 9 September 2002.

thus reducing their value in the hands of the thief.⁷⁶ Online auctions undermine such a scheme by providing a relatively efficient national (even international) market for goods of almost any kind. The market-expanding effects of technology can thus be said, as a practical matter, to have overrun this traditional method of theft suppression. Old mandates do not go quietly, however, and the Act was recently amended to provide some coverage of the online world.⁷⁷

A revision introduced in 2004 provides two extensions to the licensing scheme. First, dealers who intend to deal in goods via online transactions are required to notify their local prefectural Public Safety Commission of the URL through which they intend to do business.⁷⁸ Second, licensees that have registered to do online business are to be listed on the website of the prefectural Public Safety Commission that issued their license.⁷⁹ Given the international scale of the online auction markets and the changeable chaotic variety of Web content, it is doubtful whether this regulation will have a significant impact on the market for stolen goods.⁸⁰ Perhaps the most sensible interpretation of this revision is as a move to retain this string to the law enforcement bow in the present environment, to hold open the possibility of strengthening it at some point in the future.

VI. CONCLUSION

This Article has provided an overview of Japan's experience, across ten generations, with one method of crime control. We may conclude that the monitoring of used goods markets is no longer a central tool for suppressing theft in Japan, but the underlying story provides more important lessons.

The technological and political pressures for deregulation of the used goods market have expanded its size. As we saw in the previous Part of this article, suppression of theft through the monitoring of transactions becomes less effective when the market for used goods expands.⁸¹ The question is whether the greater losses from theft are counter-balanced by other benefits – in this case, gains to consumers in greater market choice, and gains to society in a lessened flow of consumer rubbish into the nation's sanitary landfill sites. Japan has made its choice. The response of Japanese legislators at

76 BENNETT, *supra* note 2, 52.

77 "Police look to clamp down on Net sales of stolen goods", *Nikkei Weekly* (Japan), 12 February 2002.

78 Art. 5(1) no. 6 *Kobutsu eigyô-hô*, Law no. 108/1949 (as amended by Law no. 147/2004).

79 *Id.* art. 8(2). By way of example, two such pages can be found at <<http://www.pref.aichi.jp/koan/kobutu.html>> and <<http://koaniinkai.police.pref.chiba.jp/kobutsu/kobutsulist.php>>.

80 Similar reservations were expressed by the Minister of Justice in 2003. *Naikaku i'in-kai giroku* [Protocol of the Standing Committee on the Cabinet], 156th Diet session, 11th meeting, 16 May 2003 (5th statement of Sadakazu Tanigaki).

81 See BENNETT, *supra* note 2.

each point in market development can be read in the text of the law, which has undergone only incremental change from one generation to the next. It may be that Japan's management of legal change has proven relatively successful, not because the nation has identified uniquely effective solutions to the common problems of preserving order, but because in times of upheaval, authorities have been reluctant to tamper with simple tools known to work for the tasks most essential to government.

ZUSAMMENFASSUNG

Wie in vielen anderen Ländern auch, sind Gebrauchtwarenhändler in Japan dazu verpflichtet, Aufzeichnungen über die An- und Verkäufe zu führen. Diese können von der Polizei eingesehen werden und sollen der Bekämpfung von Diebstählen dienen. Der erste Teil des Artikels (ZJapanR 21, 2006) war den Ursprüngen dieser Vorschrift in Japan ab der Mitte des 17. Jahrhunderts gewidmet. Er endete mit dem Übergang von dem vom Zunftwesen geprägten Wirtschaftssystem der Tokugawa-Zeit zu einer transparenteren Wirtschaftsordnung, die mit der Übernahme westlicher Rechtsmodelle im Bereich des Privat- und Handelsrechts aufkam.

Dieser Übergang wirkte sich auf den Gebrauchtwarenhandel in einer Verlagerung der primären Verantwortung für wirtschaftliche Disziplin und die Verhinderung von Diebstahl und Hehlerei von den Gebrauchtwarenhändlern hin zu staatlichen Einrichtungen aus. Tatsächlich änderte sich jedoch auf kurze Frist wenig im Verhältnis zwischen Polizei und Gebrauchtwarenhandel, da in der Praxis die Polizei, der ein weiter Ermessensspielraum zukam, den Vorstehern örtlicher Händlervereinigungen ein Einspruchsrecht bei der Vergabe neuer Lizenzen einräumte. Heutzutage finden sich Zugeständnisse der Polizei an die Händler in wesentlich geringerem Ausmaß. Die Kräfte, die diese Veränderung herbeigeführt haben, sind im Umfeld dreier Gesetze zu suchen, die zwischen 1949 und 1995 verabschiedet wurden.

Im Jahr 1949 wurde ein Gesetz über den Handel mit Gebrauchtwaren erlassen. Mit der Einführung einer Pflicht zur Erneuerung der Lizenz alle drei Jahre war dieses strenger als vorangehende Gesetze. Es wurden jedoch auch objektive Maßstäbe zur Erteilung von Lizenzen niedergelegt, die den bisherigen Ermessensspielraum der Polizei einschränkten.

Im Jahr 1962 legte die Nationale Polizeibehörde eine formale Revision des Gesetzes von 1949 vor, die die dreijährliche Erneuerungspflicht abschaffte. Ein Mitglied des Ausschusses mit engen Beziehungen zur Polizei schlug vor, daß Pfandleiher und Gebrauchtwarenhändler aktiv vor Wettbewerb geschützt werden, im Gegenzug jedoch einer erhöhten Pflicht zur Kooperation mit der Polizei unterliegen sollten. Dieser Vor-

schlag wurde von der Regierung unter anderem auch aus verfassungsrechtlichen Gründen abgelehnt.

Im Jahr 1995 erfuhr das Gesetz eine weitere Novellierung. Bis dahin hatte ein Verstoß gegen das Gesetz durch eine Filiale eines Unternehmens mit mehreren Filialen zu einem Entzug der Lizenzen aller Filialen landesweit geführt. Diese Vorschrift wurde abgeschafft, was zu einer raschen Expansion von Filialunternehmen im Gebrauchtwarenhandel führte.

Im Jahr 2001 wurde mit dem Verkauf von Gebrauchtwaren auch über das Internet ein neuer Markt mit zahlreichen Herausforderungen eröffnet. Diese, wie auch die vorangehenden Entwicklungen in Richtung einer Erweiterung des Marktes mit Gebrauchtwaren haben zwar, wie vorherzusehen war, die Möglichkeiten, aus Diebstahl und Hehlerei Gewinn zu schlagen, vergrößert. Dies wurde jedoch durch die sich ergebenden Vorteile für Verbraucher sowie für die Umwelt ausgeglichen.

(Übersetzung durch d. Red.)