

The death of communism

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It's official – communism is dead in China. Judging from the burgeoning consumer economy across scores of large cities in China, it has been dead for a while.

The New New China is represented by the upwardly mobile, urban-dwelling couple who own their own flat, drive a foreign-branded automobile and upgrade their mobile phones every six months. They would probably be surprised to learn that, before the passage of the new Property Rights Law by the National People's Congress last month (which takes effect on October 1), there was no legal basis for protection of their personal assets.

At least that is how the new Property Rights Law is being presented. It is the product of a 14-year ideological struggle, and for the first time provides a comprehensive framework for the protection of private property rights in China. As a practical matter, private ownership of property has been around for years, and various laws and regulations had been enacted to regulate and protect those interests. The Chinese constitution was amended in 2004 to recognize private property rights.

So in some respects the new Property Rights Law simply fills in the legislative gap between the amended constitution on the one hand and the existing regulations and practical reality on the other. But it does more than that. It is both the official echo of an earlier ideological shift and an advance of the legal framework for property rights in China.

The scope of the new law is remarkable. In addition to immovable property (land and buildings) and movable property (such as motor vehicles, equipment and inventory), it covers vessels, aircraft, natural resources, radio spectra and cultural relics. It provides for tort liability for damage to property, protection of rights to access to natural light and even priority rights of condominium owners to parking spaces within a residential compound.

The new provisions on creditor rights will create fundamental changes in existing security arrangements. For example, the Property Rights Law suggests that floating charges over inventory may now be possible. However, private rights of action will still not be permitted, so the mortgagee has no choice but to go to the local People's Court to seek enforcement.

The new law has the look and feel of a reasonably sophisticated piece of legislation from a reasonably sophisticated jurisdiction. It takes its place with the new Company Law

as one of the cornerstones of the new and improved legal infrastructure in China. The impact of the Property Rights Law will be far-reaching and it will take some time to dissect fully. However, no one should expect an immediate change in how things are done in China. Full and proper implementation will take time.

For example, the new Property Rights Law reinforces the principle of fair compensation for government expropriation of property rights through the exercise of eminent domain, but specifics as to due process and what constitutes fair consideration are still lacking. Long-term China watchers still have vivid memories of how in the mid-nineties McDonald's was forced to abandon its long-term lease for a prime location on Wangfujing, the top shopping street in the capital, to make way for a large Li Ka Shing office complex development. McDonald's took its case to the international media and caused a global uproar over China's lack of respect for property rights, but still was forced out. Similar strong arm tactics are still in evidence today in preparation for the Olympics and in connection with hundreds if not thousands of other public works projects across China.

In some cases, property rights have almost literally proceeded out of the barrel of a gun. Telecom network civil works were long the sole province of engineering companies under the People's Liberation Army (PLA). When conducting due diligence several years ago on access rights for a 32,000 kilometre PLA-owned national fibre-optic backbone network, we discovered that, in lieu of easements (for which at the time there was no corresponding legal concept in China), there was merely a raft of notices from the PLA civil works entity to the local government

departments and state-owned companies occupying the land in question stating when and where the trenches for the optical cables were to be dug. The PLA entity was not asking for permission. It was a classic example of might makes right – or in this case, rights (as in property rights). The new Property Rights Law now provides for easements by contract, but it is to be expected that some de facto easements will still exist in the absence of written agreement.

But things are already changing. McDonald's leveraged its withdrawal from the Wangfujing location into rights to open scores of new restaurants around Beijing, including four within a few hundred meters of the original site. It might not be compensation in the classic sense, but it works.

And limits on government authority are popping up here and there. A section of a new expressway in Beijing that was completed several years ago remains closed to traffic reportedly due to a legal dispute over rights to the land on which a main off-ramp is built. This would never have happened even five years ago. This budding sense of individual rights portends well for the longer term implementation of the new Property Rights Law, perhaps with implications the original drafters did not anticipate.

This appears to confirm the popular anecdote about the foreign businessman who asked a senior Chinese official what "socialism with Chinese characteristics" meant. The ever-pragmatic official responded without hesitation: "it means capitalism". In the New New China, communism is dead, and the new Property Rights Law simply confirms this well-established fact. Long live capitalism!

