Focus on the Corporatization Process in China

FOREWORD

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For many readers, the title of this Special Focus may seem doubly puzzling: what is corporatization and why is there no mention of privatization? In the Chinese context corporatization, literally, "stockification" (*gufenhua*), refers specifically to the transformation of state-owned enterprises (SOEs) into joint-stock companies, in which the state, or its agents, continue to hold the controlling interest. Thus, if we take privatization to mean the "transfer of ownership or control of assets from the public to the private sector,"[1] then although actual and constructive privatization is occurring in sectors of the Chinese economy, and may eventually occur in large-scale SOEs, what has been happening to these enterprises over the last several years is not truly privatization.

Moreover, the notion of privatization remains ideologically sensitive. Indeed, in a recent interview, a senior Chinese economic official denied that privatization is "the orientation for China's enterprise restructuring" and insisted that "the joint-stock system is just a property organization form [that] does not mean private ownership" because the original state capital is not transferred.[2] Smaller SOEs, acknowledged the official, may transfer original state-owned capital, but the state uses the proceeds to reinvest in the state-owned sector in order to insure that the state and collectively owned public sector retains its dominant position and leading role. Thus, the

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1. Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries* 95 COLUM. L. REV. 223, 226 (1995).

2. Statement by the vice-minister in charge of the State Commission for Reform of the Economic Structure, June 23, 1995, *available in* LEXIS, NEWS Library, Xinhua File.

policy-makers continue to treat this transformation of the state sector as a process of corporatization, not privatization.

In our fascination with China's corporatization experiment, we tend to forget that it is the fifth in a line dating back to the beginning of this century. In 1904, during the last decade of the Qing dynasty, then in 1914, 1929, and 1946 under the Republican government, company laws were enacted. Yet as a recent study of these laws by Bill Kirby cogently argues, none of these Western-style corporate law frameworks proved to be the "essential vehicle for private Chinese economic development" that their creators had envisioned.[3] Of interest not only to historians, but also to the current experimenters, is why not? The positive explanation, suggests Kirby, is that the Chinese model of family-based companies worked so well at forming capital and competing commercially, there was little incentive to adopt impersonal corporate forms. Moreover, the few times family firms adopted these forms, they, much like the state in both the Republic and the People's Republic, sedulously protected their position by never separating investment and management.[4] Kirby also offers a negative explanation for the diminished impact of western corporate legal frameworks that focuses on the question of trust: firms had to trust the government to be a friend not foe, to enforce its own laws, and to maintain a society that was stable beyond the family. For its part the government had to trust that firms would obey the law and pay taxes. On neither side, concludes Kirby, was there such trust.[5]

To a large extent, the sharply disparate assessments of the current corporate experiment found in the two articles that follow also revolve around issues of trust, particularly between the markets and the state. In the first of the two pieces, Fang Liufang, though among the academic specialists consulted by the drafters of the Company Law, writes from the traditional Chinese intellectual's perspective of detached, critical outsider. His Article derives from an extensive study, first prepared for the Asian Development Bank, of the implementation of China's experiment in corporatization. From effect he infers intent. And like many foreign scholars of contemporary Chinese law,[6] Fang finds a state determined to use the law in

3. William C. Kirby, *China Unincorporated: Company Law and Business Enterprise in Twentieth Century China*, 54 J. ASIAN STUD. 44 (1995).

4. *Id.* at 51.

5. *Id.* at 58.

6. See, for example, articles on China's legal reforms in 141 CHINA Q. 1-210 (1995).

instrumentalist fashion. Still driven by the mentality of "the plan," the state has halted experimentation, imposed standardization regardless of costs, and not so coincidentally served its own interests.

Gao Xiqing's response is that of the outsider as insider. As an outsider, Gao helped promote the idea of securities markets and co-founded the first securities law firm in China. Now on the inside as chief counsel and director of public offerings at the China Securities Regulatory Commission, an organization of which Fang is sharply critical, Gao defends the instrumental actions of the state, denying that it has been a "quixotic, irrational" designer and arguing that planning and control are both inevitable and necessary in the transition to a market economy. To Gao standardization and regulation are not as nefarious as Fang suggests. They aim to create a stable, predictable corporate system, not an "unworkable ... paternalistic and self-perpetuating" one. Yet, as Gao implicitly acknowledges, things have not always turned out as intended.

Pointed but productive, this intellectual exchange between one of the Chinese corporatization experiment's most thorough scholars and one of its leading participants provides a unique window onto this fundamental reform.

The editors of the *Duke Journal of Comparative and International Law* offer these articles with the hope that they will help further the understanding of China's corporatization framework. To this end, every effort has been made to provide the reader with both interesting articles and useful research. To facilitate further research, we have provided translations of key Chinese terms and, when possible, citations to sources that may be found at most major research libraries. Particular attention has been paid to the citations in Fang Liufang's Article, where we have included as much information as possible to aid those who use the Article as a research tool, even if the inclusion of such information is contrary to the letter of the *Bluebook*.[7]

7. The long editorial process for this Special Focus has demonstrated that the *Bluebook* is not as comprehensive as it would have its readers believe. It is perhaps time that we, the student editors of U.S. law journals and law reviews, reconsider how we should cite to foreign legal materials.