

LAW AS A MARKETING GIMMICK—THE CASE OF THE GERMAN CORPORATE GOVERNANCE CODE*

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I. INTRODUCTION.....	115
II. CORPORATE GOVERNANCE	116
A. <i>Definition</i>	116
B. <i>Corporate Governance in Germany</i>	117
C. <i>Developments in other Countries and on the Supra-national Level</i>	119
III. THE GERMAN CORPORATE GOVERNANCE CODE.....	121
A. <i>History and Contents</i>	121
B. <i>Compatibility of the Code-Model with the German System</i>	123
1. <i>Management Culture</i>	123
2. <i>Constitutional Law</i>	125
3. <i>German Stock Corporation Law System</i>	126
4. <i>Legal Nature of the German Code</i>	127
C. <i>Legislative Rationale</i>	128
1. <i>Information of Investors</i>	128
2. <i>Improvement of German Corporate Governance</i>	129
IV. CONCLUSIONS	132
A. <i>(Code-) Form Follows (Marketing-) Function</i>	132
B. <i>Law for Marketing Purposes?</i>	133

I. INTRODUCTION

During the 1970s and the 1980s many developing countries realized that enterprises from the industrialized world were reluctant to transfer funds and technology to support investment projects in countries without solid legal systems. Now, with a global economic downturn, the competition between potential host countries of investment projects has become tougher, and even industrialized nations must take pro-active steps to attract foreign investment. The enactment of investor-friendly laws and regulations plays an important role in this context. Problems arise,

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however, if the marketing function dominates the legislative rationale, as demonstrated by the recent “enactment” of the German Corporate Governance Code.

This Article first briefly explains the German corporate governance system in the context of global developments. This Article will then discuss the German Corporate Governance Code and related problems. Finally, this Article argues that the Code’s legislative goal is to promote Germany’s capital markets, while its normative impact is limited. The question is whether this new function of law as a marketing tool is justifiable.

II. CORPORATE GOVERNANCE

A. Definition

Good corporate governance is meant to solve the principal-agent problem,¹ which arises whenever one party (the principal) employs another party (the agent) to perform a service. How can the principal ensure that the agent acts in the principal’s own interests, and how can the agency costs be kept low?² In the case of corporations, how can the owners (the shareholders) as principals make sure that their agents (the managers) only act in the owner’s best interest, i.e. for the value of the shares?³ In a broader sense, corporate governance stands for the management and the supervision of enterprises,⁴ thus covering a wide range of topics related to company law and capital markets in the context of success-oriented management and responsible supervision of

1. See MICHAEL C. JENSEN, FOUNDATIONS OF ORGANIZATIONAL STRATEGY 46-49 (1998); John Cassidy, *The Greed Circle*, THE NEW YORKER, Sept. 23, 2002, at 66. See also HANS-BARND SCHÄFER & CLAUS OTT, LEHRBUCH DER ÖKONOMISCHEN ANALYSE DES ZIVILRECHTS [TEXTBOOK OF ECONOMIC ANALYSIS OF CIVIL LAW] 529 (2d ed. 1995); C. Teichmann, *ECLR Corporate Governance in Europa* [ECLR Corporate Governance in Europe], in ZEITSCHRIFT FÜR UNTERNEHMENS-UND GESELLSCHAFTSRECHT 645, 662 (2001).

2. Cassidy, *supra* note 1, at 66-67; But see Jensen, *supra* note 1, at 4 (“there are nevertheless no ‘perfect agents’ in the real world. In other words, no one so thoroughly embodies the preferences of another that he or she can be that person’s perfect agent.”).

3. Cassidy, *supra* note 1, at 66-67.

4. *Bericht der Regierungskommission Corporate Governance—Unternehmensführung, Unternehmenskontrolle, Modernisierung des Aktienrechts* [Report of the Government Commission ‘Corporate Governance-Management of Enterprises-Modernization of the Stock Corporation Law’], DRUCKSACHE-BUNDES RAT 14/7515 Aug. 14, 2001, available at <http://www.boersenzeitung.de/online/redaktion/buecher/b020302.html> (last visited Sept. 5, 2003) [hereinafter Report of the First Commission]; German Corporate Governance Code (the “German Code”), http://www.corporate-governance-code.de/eng/download/DCG_K_E.pdf (last visited Apr. 28, 2003) [hereinafter the German Code]; NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 273 (2002); DIE AKTIENGESELLSCHAFT 236 (2002).

enterprises.⁵ However, despite its rather fashionable use in modern times, a detailed definition of the globally-accepted term “corporate governance” does not exist.⁶

Numerous books and articles have been written about advantages and disadvantages of different corporate governance models. The scope of this Article does not permit a discussion of these various viewpoints. However, it must be pointed out that there is not just one globally suitable corporate governance model. On the contrary, every jurisdiction must develop its own structure based on each country’s cultural, social, economic and, last but not least, legal environment.⁷

B. Corporate Governance in Germany

In Germany, rules regarding the management and supervision of stock corporations have traditionally been set out in statutory law, in particular in the German Stock Corporation Act, the Commercial Code, and the Co-Determination Act. These rules, which are mostly compulsory, are supplemented by the stipulations of the articles of association of German stock corporations, general trade practices, and German court decisions.⁸

The German stock corporation system is different from the structures applied in common law jurisdictions. German law takes a dualistic approach, providing that a Management Board is solely responsible for the management of a stock corporation. A Supervisory Board appoints the

5. Core elements include investor relations and relations with stakeholders (employees, clients, suppliers, interest groups like labor unions). Corporate Governance in Deutschland [Corporate Governance in Germany] See Bundesverband der Deutschen Industrie e.V./PwC Deutsche Revision AG ed, (“BDI”), 12, available at <http://www.pwcglobal.com/extweb/pwcpublishings.nsf/DocID/74BFE7DF5E2F656880256C2C00C0554> (last visited Oct. 17, 2003) [hereinafter BDI].

6. G. Roth & M. Büchele, *Corporate Governance: Gesetz und Selbstverpflichtung* [Corporate Governance: Law and Self-commitment], DER GESELLSCHAFTER 63 (2002); GYC Mok, *Corporate Governance—A Practitioner’s View*, 11 HONG KONG LAW. 33 (2002); Moses Chang, *Corporate Governance—Avoid Lurking Hazards*, 10 HONG KONG LAW. 76, 76-77 (2002); U.H. Schneider, *Kapitalmarktorientierte Corporate Governance-Grundsätze* [Capital Markets-oriented Corporate Governance Standards], DER BETRIEB 2413 (2002); UWE HÜFFER, AKTIENGESETZ § 76 Rn. 15a (5th ed. 2002); Martin Peltzer, *Corporate Governance Codices als zusätzliche Pflichtenbestimmung für den Aufsichtsrat* [Corporate Governance Codes as additional Determination of the Obligation of the Supervisory Board], NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 10, 12 (2002).

7. With regard to this problem of the so-called “path dependency of corporate governance” from the German viewpoint, see Teichmann, *supra* note 1, at 675. See also P. Hommelhoff, *Die OECD-Principles on Corporate Governance—ihre Chancen und Risiken aus dem Blickwinkel der deutschen corporate governance-Bewegung* [The OECD-Principles on Corporate Governance—Their Chances and Risks from the Viewpoint of the Germany Corporate Governance-Movement], ZEITSCHRIFT FÜR UNTERNEHMENS-UND GESELLSCHAFTSRECHT 238, 263 (2001); Schneider, *supra* note 6, at 2415.

8. Report of the First Commission, *supra* note 4, at side n.4; Hommelhoff, *supra* note 7, at 241.

members of the Management Board, supervises its activities, and carries out advisory functions.⁹ In contrast, common law countries use a monistic system in which only the Board of Directors is in charge of the management of a company. In addition, in Germany, shareholders' rights and interests are protected by mostly mandatory statutory law.¹⁰ Common law, in particular American state law, is different and relies to a large extent on the assumption that the market will enforce compliance with corporate governance standards and prevent stipulations in companies' articles of association that are potentially harmful for investors.¹¹

In Germany, the discussion regarding the legal framework of success-oriented management of enterprises and its supervision started some 150 years ago and has been put into practice by related stock corporation law reforms.¹² For this reason, the global discussion about corporate governance was observed with some skepticism in Germany, and was regarded as "old wine in new bottles."¹³ However, in light of the globalization of the world's economies and the worldwide economic crisis, the picture has changed. Towards the end of the 1990s, several private corporate governance initiatives were launched.¹⁴ These initiatives lead to the creation of two general corporate governance codes based on foreign models.¹⁵ In addition, a number of German enterprises developed

9. German Code, *supra* note 4, at Foreword; from a German comparative perspective, see P.C. Leyens, *Deutscher Aufsichtsrat und U.S.-Board: ein- oder zweistufiges Verwaltungssystem?* [*German Supervisory Board and U.S.-Board: One or Two-tier Administrative System?*], *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 57 (2003).

10. Report of the First Commission, *supra* note 4, at n.4.

11. *Id.*

12. *Id.* ("permanent stock corporation reform"). In particular, the Law for Small Stock Corporations and for the Deregulation of the Stock Corporation Law of 2.8. 1994 (BGBl. I. at 1961), and the Law for the Control and Transparency in the Enterprise Area of 27.4.1998 (BGBl. I at 786) brought major improvements to German corporate governance by improving the work of supervisory boards, increasing the transparency of boards, and enhancing of the control possibilities of the shareholder's meetings and the role of auditors. Teichmann, *supra* note 1, at 673; Schneider, *supra* note 6, at 2143; see also *Maßnahmenkatalog der Bundesregierung zur Stärkung der Unternehmensintegrität und des Anlegerschutzes* [*Catalogue of Measures of the Federal Government for the Enhancement of Corporate Integrity and the Protection of Shareholders*], *NEUE JURISTISCHE WOCHENSCHRIFT XXVIII-XXXIII* (2003).

13. Ulrich Seibert, *Im Blickpunkt: Der Deutsche Corporate Governance Kodex ist da* [*Focus: The German Corporate Governance Code Has Arrived*], *DER BETRIEBSBERATER* 581 (2002); ROTH, *supra* note 6, at 64.

14. The initiatives were the "Grundsatzkommission Corporate Governance" and the "Berliner Initiativkreis Corporate Governance." *cf.* Schneider, *supra* note 6, at 2413.

15. For the draft of the "Grundsatzkommission Corporate Governance," see *DIE AKTIENGESELLSCHAFT* 1091 (2000). For the draft of the "Berliner Initiativkreis Corporate Governance [Code of Corporate Governance]," see *DER BETRIEB* 1573 (2000), available at http://www.gccg.de/codex_eng.htm (last visited Sept. 6, 2003).

their own codes of corporate governance practice.¹⁶ The idea behind all corporate governance codes is to establish standards for good enterprise management and supervision, to which enterprises purport to adhere by adopting so-called declarations of compliance.¹⁷ Because corporate governance codes do not have the quality of state law, they are regarded as the “instruments of self-regulation” of the business world.

C. Developments in other Countries and on the Supra-national Level

In North America, corporate governance issues have been a topic of discussion for the past 40 years.¹⁸ In particular, giant pension funds have adopted their own corporate governance standards in order to assess potential investment opportunities. It appears as if the origin of the code-model in the corporate governance context lies here.¹⁹ In Europe, Great Britain was the first country to pick up the corporate governance discussion. These developments led to the creation of the so-called Combined Code.²⁰ Compliance with the Combined Code has been a listing requirement at the London Stock Exchange since 2000.²¹ The corporate governance discussion soon spread from Great Britain to the European mainland and is mirrored on the different national levels through the adoption of similar corporate governance codes.²²

In line with the worldwide trend to create codes of corporate governance,²³ on the supra-national level the European Union,²⁴ the

16. See, e.g., the corporate governance codes of Deutsche Bank, at http://group.deutsche-bank.de/ir/pdfs/en_corgov_112002.pdf (last visited Oct. 5, 2003); *Douglas Holding*, DIE AKTIENGESELLSCHAFT, http://www.douglas-holding.de/de/pressemedien/publikationen_1/archiv_cg.html (last visited Sept. 6, 2003). See also Wolfgang Bernhardt, *Der Deutsche Corporate Governance Kodex: Zuwahl (comply) or Abwahl (explain)? [The German Corporate Governance Code: Opt-in (comply) or Opt-out (Explain)]*, DER BETRIEB 1841, 1846 (2002).

17. ROTH, *supra* note 6, at 68.

18. BDI, *supra* note 5, at 15. Berle and Means formulated the basics of corporate governance in 1932. A.E. BERLE & G.C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (William S. Hein ed., 1982).

19. ROTH, *supra* note 6, at 65. It must be pointed out, however, that the code-model is not exclusive to corporate governance. In particular, on the international law level, governments tried to establish codes of best practice in order to control the cross-border activities of multinational enterprises, see Ahmed Khalaf Masa'deh, *International Rules for Investment and Investors: Light at the End of the Tunnel?*, 11 EUR. BUS. L. REV. 157, 164-65 (2000).

20. See *Combined Code*, http://www.fsa.gov.uk/pubs/ukla/lr_comcode.pdf (last visited Sept. 6, 2003) (“*Combined Code*”).

21. BDI, *supra* note 5, at 39.

22. See *Principles for Corporate Governance in the Commonwealth*, <http://www.combinet.net/Governance/FinalVer/listof.htm> (last visited Sept. 10, 2003); European Corporate Governance Institute, Index of Codes, http://www.ecgi.org/codes/all_codes.htm (last visited Sept. 10, 2003).

23. By October 2000, about seventy codes with standards of corporate governance which had

Organization for Economic Cooperation and Development (OECD),²⁵ and the World Bank (in connection with other institutions) have formulated their own corporate governance standards.²⁶ The “global code-fever” has in the meantime even reached the Peoples Republic of China, where the All China Securities Regulatory Commission (CSRC) and the State Economic and Trade Commission issued the Standards of Corporate Governance of Listed Companies on January 7, 2002.²⁷ Ironically, while the import of Anglo-American self-regulation in the form of corporate governance codes has obviously become very popular, the United States government seems to have taken a step in the opposite direction by responding to the Enron disaster and other corporate scandals with the rather strict rules of the Sarbanes-Oxley Act²⁸ of July 30, 2002.

been formulated on national or *supra*-national levels, had been counted worldwide. See BDI, *supra* note 5, at Annex 3. See also http://www.ecgi.org/codes/all_codes.htm, *supra* note 20.

24. As part of the program “Simpler Legislation for the Internal Market” (SLIM), a corporate governance working group was established by the European Union. The working group recently published its proposals, which David Bogler criticized for being “lukewarm proposals.” David Bogler, *Germany’s Balance Sheet Police*, FIN. TIMES, NOV. 8, 2002, at 8.

25. Organisation for Economic Co-operation and Development, <http://www.oecd.org/pdf/M00008000/M00008299.pdf> (last visited on Sept. 10, 2003). The OECD Principles of Corporate Governance are thought to provide minimum standards for the legal, institutional and regulatory constitutions of enterprises in developing countries. *Id.* Most of the industrialized nations have long complied with the OECD Principles. *Id.*

26. BDI, *supra* note 5, at 38. See also Susanne Soederberg, *The Promotion of ‘Anglo-American’ Corporate Governance in the South: Who Benefits From the New International Standard*, THIRD WORLD Q., 7, 11-16 (2003).

27. Bulletin of the All China Securities Regulatory Commission [Zhongguo zhengquan jiandu guanli weiyuanhui gongbao], No. 1, 6 (2002). See also Cai Shumo & Deng Yingxia, *Corporate Governance in China—Obstacles and New Developments*, 29.10 INT’L BUS. LAW. 455 (2001); I in MacNeil, *Adaption and Convergence: The Case of Chinese Listed Companies*, 2 J. CORP. L. STUD., 289 (2002); Cindy Schipani & Juahai-Liu, *Corporate Governance in China: Then and Now*, 1 COLUM. BUS. REV. 1 (2002); Zhongfei Zhou & Jingwei Li, *In Search of Approaches to Improving Corporate Governance in China’s State-owned Commercial Banks*, 36 INT’L LAW. 215 (2002); Hongchuan Liu & Zili Ren, *Halfway to Effective Shareholder Protection*, CHINA L. & PRAC. 29 (2003).

28. See, e.g., Günter Christian Schwarz & Björn Holland, *Enron, WorldCom ... und die Corporate-Governance-Diskussion [Enron, WorldCom ... and the Corporate Governance Discussion]*, ZEITSCHRIFT FÜR INTERNATIONALES PRIVATRECHT 1661 (2002); Hans-Georg Kamann & Martina Simpkins, *Sarbanes Oxley Act—Anlass zu Verstärkter Internationaler Kooperation im Bereich der Corporate Governance? [Sarbanes Oxley Act—Reason For More International Cooperation in the Area of Corporate Governance?]*, 49.2 RECHT DER INTERNATIONALEN WIRTSCHAFT 183 (2003); Hans Peter Leube, *Corporate Governance the American Way?: Konsequenzen aus Geänderten Corporate-Governance-Bestimmungen der New York Stock Exchange für Deutsche Emittenten*, 49.2 RECHT DER INTERNATIONALEN WIRTSCHAFT 98 (2003); Scott Benner et al., *The Long Arm of America’s Sarbanes-Oxley Act of 2002*, THE HONG KONG LAW. 55-59 (2002); Behn Steil, *American Investor Protection is Protectionist*, FT.COM, Jan. 15, 2003, at <http://news.ft.com/servlet/contentserver?pagename=FT.com/storyFT/fullstory&c=storyFT&cid=1042490813895&p=1612571727126> (last visited Sept. 10, 2003); John Palenberg et al., *U.S. Governance Reforms Clash With German Practice*, 11 INT’L FIN. L. REV. 24 (2002).

III. THE GERMAN CORPORATE GOVERNANCE CODE

A. *History and Contents*

On May 29, 2000 the German Chancellor established the Government Commission on “Corporate Governance–Corporate Management–Corporate Supervision–Modernization of the Stock Corporation Law” (the “First Commission”).²⁹ In July 2001, this First Commission, under the leadership of the Frankfurt-based law professor Theodor Baums, presented a final report (the “Report of the First Commission”) to the Federal Minister of Justice. The report was based on questionnaires that were sent to more than 80 experts and institutions. Apart from a large number of recommendations for legislative changes, the First Commission also suggested that another commission be established³⁰ in order to formulate a code of corporate governance for listed companies. This second commission (the “Second Commission”) was established in September 2001, and on February 26, 2002 it published the German Corporate Governance Code (the “German Code”).³¹

The German Code applies to German listed companies. It recommends, however, that non-listed companies observe the German Code as well.³² The German Code is published in the Electronic Federal Gazette³³ and will be reviewed and adjusted yearly as necessary by the Second Commission on the basis of national and international developments.³⁴ The first adjustment already took place on November 7, 2002.

The regulations of the German Code³⁵ are divided into three categories:

- (1) passages that only repeat German law that is already in force,³⁶
- (2) recommendations for the organs of companies which are marked in the text by the use of the word “shall,” and

29. Report of the First Commission, *supra* note 4, at A; Schneider, *supra* note 6, at 2413.

30. Compare Bernhardt, *supra* note 16, at 1842.

31. Seibert, *supra* note 13, at 581.

32. German Code, *supra* note 4, at Foreword. See also Report of the First Commission, *supra* note 4, at 13.

33. See <http://www.ebundesanzeiger.de/download/kodex2.pdf> (last visited Sept. 10, 2003).

34. German Code, *supra* note 4, at Foreword.

35. The German Code is comprised of the following seven chapters: (1) Foreword; (2) Shareholders and General Meeting; (3) Cooperation between Management Board and Supervisory Board; (4) Management Board; (5) Supervisory Board; (6) Transparency; (7) Reporting and Audit of the Annual Financial Statements. *Id.*

36. *Id.*

(3) “soft suggestions”³⁷ for which the German Code uses the words “should” and “can.”³⁸

The significance of each of the three categories is different. Passages of the German Code that repeat existing law have only declaratory, or better stated, informatory, functions. Further, soft “suggestions” may be followed or not followed without any consequence.³⁹ In contrast, the “recommendations” of the German Code have been made quasi-obligatory by the enactment of a new Section 161 of the Stock Corporation Act.⁴⁰ Section 161 of the Stock Corporation Act⁴¹ was introduced by the Transparency and Disclosure Law which entered into force on July 26, 2002. This law obliges the Management Board and Supervisory Board⁴² of listed companies to declare annually that the company complies with the recommendations of the German Code or the extent of non-compliance.⁴³ In addition, Section 161 obliges that the declaration be communicated to the company’s shareholders.⁴⁴ This so-called “comply-or-explain mechanism” is regarded as the core of the German Code.

As explained above, compliance with the Combined Code is a listing

37. Seibert, *supra* note 13, at 583.

38. German Code, *supra* note 4, at Foreword.

39. *Id.*

40. O. Erhardt & E. Nowak, *Die Durchsetzung von Corporate Governance-Regeln [The Enforcement of Corporate Governance Rules]*, DIE AKTIENGESELLSCHAFT 336 (2002).

41. Section 161 of the Stock Corporation Act states:

Management board and supervisory board of a listed company declare annually that the standards of best practice of the Code Commission regarding management and supervision of enterprises as published in the Electronic Federal Gazette are being followed and which standards have not been applied. The declaration is to be made available permanently for shareholders.

42. Martin Peltzer, *Handlungsbedarf in Sachen Corporate Governance [Action Required in the Matter of Corporate Governance]* NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 593, 594 (2002). Compare, however, Sections 2.3.2, 2.3.3, and 6.3 of the German Code which address “die Gesellschaft” (the company) and not the management board or the supervisory board. German Code, *supra* note 4, §§ 2.3.2-3, 6.3.

43. There is, however, no obligation to provide an explanation in the declaration of compliance for any non-compliance with the German Code. C.H. Seibt, *Deutscher Corporate Governance Kodex und Entsprechens—Erklärung (§ 161 AktG-E) [German Corporate Governance Code and Declaration of Compliance (§ 161 Stock Corporation Act—Draft)]*, DIE AKTIENGESELLSCHAFT 249, 252 (2002); Peltzer, *supra* note 42, at 594. Deviations from the German Code must be explained, however, in the Companies Annual Report according to Section 3.10 of the German Code. German Code, *supra* 4, § 3.10.

44. Section 161 of the Stock Corporation Act. Many companies have, for example, publicized their declaration of compliance on the company website. Pursuant to the newly adjusted § 325 paragraph 1 of the German Commercial Code, the declaration of compliance must also be submitted to the Commercial Registry, see also the publication requirements in connection with the balance sheet pursuant to § 285 Nr. 16 § 314 I Nr. 8 of the German Commercial Code.

requirement in Great Britain.⁴⁵ However, in Germany, there are no such direct consequences for listed companies that choose not to follow the recommendations of the German Code.⁴⁶ It is, however, expected that the German Code will gain indirect legal significance through its ability to interpret other statutory rules. The stipulations of the German Code may be used to determine whether directors or members of the Supervisory Board of listed companies have violated any of their duties.⁴⁷

Many legal writers had hoped that the German Code will help to unify the regulations of the various previously existing private codes.⁴⁸ However, neither Section 161 of the Stock Corporation Act nor the German Code itself prevent German companies from recognizing and declaring their compliance with other private or foreign corporate governance codes.⁴⁹

The vast majority of German legal writers and practitioners have welcomed the publication of the German Code and its implementation through Section 161 of the Stock Corporation Act.⁵⁰ However, the German Code also provokes very important questions that shall be discussed in the following sections.

B. Compatibility of the Code-Model with the German System

1. Management Culture

In the past, Germany has twice attempted to use code-models for regulatory purposes in the area of stock corporations.⁵¹ Both attempts have

45. *Combined Code*, *supra* note 20, at Preamble.

46. Report of the First Commission, *supra* note 4, at 9; Seibt, *supra* note 43, at 250; Peter Ulmer, *Aktienrecht im Wandel [The Changing Stock Corporation Law]*, 202 ARCHIV FÜR DIE CIVILISTISCHS PRAXIS 143,170 (2002).

47. Ulmer, *supra* note 46, at 170; Seibt, *supra* note 43, at 250.

48. Seibert, *supra* note 13, at 581; Teichmann, *supra* note 1, at 676; Hommelhoff, *supra* note 7, at 242.

49. Sometimes that may even be necessary for an intended listing at the London Stock Exchange. See *Combined Code*, *supra* 20, at pmb1.

50. Seibert, *supra* note 13, at 583. Compare Bernhardt, *supra* note 16, at 1841; Leyens, *supra* note 9, at 102-05.

51. Section 10.95 of the Takeover Code of October 1, 1995 has been replaced by the Securities Acquisition and Takeover Act, which entered into force on January 1, 2002. See THOMAS STOHLMEIER, GERMAN PUBLIC TAKEOVER LAW (2002). The Securities Trading Act of 1994 replaced the Recommendations Regarding Insider Problems, to which the German Ministry of Economics consented on July 1, 1976 and which had last been revised in May 1988. Both the Takeover Code and the Recommendations Regarding Insider Problems were sets of rules which had to be positively adopted by listed companies (so-called "opt in-model"). On the contrary, Section 161 of the Stock Corporation Act now applies the "opt out-model." See Peter Ulmer, *Der Deutsche Corporate Governance Kodex—Ein Neues Regulierungsinstrument für Börsennotierte Aktiengesellschaften [The*

failed.⁵² However, this kind of practical experience should not have been the only reason to be careful with the introduction of a code-model in Germany.

As explained above, the idea to use a code-model in order to achieve the desired self-regulation of the business world has its origins in the Anglo-American jurisdictions.⁵³ Adopting legal structures from abroad is, however, dangerous because of potential compatibility risks.⁵⁴ It is commonly acknowledged in the field of management-related theory and practice that the way managers approach their work greatly depends upon their cultural background. Nationality, or the home culture of a manager, has three times more influence on shaping managerial assumptions than any of the respective managers' other characteristics, such as age, sex, or position within the structure of the company.⁵⁵ Empirical studies also show that management approaches can be very different if the respective managers do not have identical cultural backgrounds.⁵⁶ The same proposition is true of course with regard to what extent managers really do want to regulate themselves or to what extent they have the ability to do so.⁵⁷ Therefore, even if the code-model had been used successfully in other jurisdictions, it is not necessarily guaranteed that this will be the case as well in Germany. In addition, corporate tragedies in the Anglo-American world in recent years, such as the Enron debacle, indicate that too much faith in managerial ability and willingness of self-regulation can be potentially fatal. Also, the failure of stock option programs as a solution

German Corporate Governance Code—A New Regulatory Instrument for Listed Stock Corporations?] 166 ZEITSCHRIFT FÜR DAS GESAMTE HANDELS- UND WIRTSCHAFTSRECHT 150, 159 (2002).

52. Erhardt, *supra* note 40, at 343 (“not necessarily to be regarded as encouraging examples”).

53. ROTH, *supra* note 6, at 64 (“methodologically new way”); Martin Wolf, *Corporate Governance: Impact of Anglo-Saxon Self-Regulation*, ZEITSCHRIFT FÜR RECHTSPOLITIK 59 (2002); Erhardt, *supra* note 40, at 342 (“strongly oriented towards the more flexible features of the federal stock corporation law of the US-American states”). For general aspects, *see, e.g.*, Soederberg, *supra* note 26, at 20.

54. Schneider, *supra* note 6, at 2415; Teichmann, *supra* note 1, at 651; Lutz-Christian Wolff & Bing Ling, *The Risk of Mixed Laws: The Example of Indirect Agency Under Chinese Contract Law*, 15 COL. J. ASIAN L. 173, 174-75 (2002).

55. André Laurent, *The Cross-Cultural Puzzle of Global Human Resource Management*, in GLOBALIZING MANAGEMENT – CREATING AND LEADING THE COMPETITIVE ORGANIZATION 174, 176 (Valdimir Pucik et al. eds., 1992).

56. MARK MENDENHALL ET AL., GLOBAL MANAGEMENT 286 (1995); RICHARD MEAD, INTERNATIONAL MANAGEMENT: CROSS-CULTURAL DIMENSIONS 167-231 (1995); P.R. HARRIS & RT MORAN, MANAGING CULTURAL DIFFERENCES (4th ed. 1996); H.N. SEELYE & A SEELYE-JAMES, CULTURE CLASH 78 (1996); E. MARK, BREAKING THROUGH CULTURE SHOCK 77 (1999).

57. The “path dependency” of corporate governance structures had already been mentioned above in the text prior to note 6. *See also* Benny S. Tabalujan, *Why Indonesian Corporate Governance Failed—Conjectures Concerning Legal Culture*, 15 COLUM. J. ASIAN L. 142, 162-71 (2002).

for the principal-agent problem⁵⁸ shows that corporate governance should not always be left to those whose failure has made it necessary in the first place to take action.⁵⁹

The German decision to use the code-model is based on the assumption that related managers, or the members of the Management Board and the members of the Supervisory Board will comply with the recommendations of the German Code, and that true declarations of compliance will be issued.⁶⁰ This assumption is in turn based on the assumption that capital markets will sanction any non-compliance with the recommendations of the German Code.⁶¹ Because the German Code depends on the correctness of these assumptions, an accurate forecast of its potential for success would require empirical studies regarding the manner that German managers react to the challenges of self-regulation. Examples of the relevant questions that such studies would have to answer are whether managers of German listed companies actually follow the recommendations of a code of best corporate governance practice at all,⁶² whether they publish true declarations of compliance, and whether they will change the declaration in the event that the factual situation changes.⁶³ Publicly-available materials do not support the conclusion that the German Code is based any such kind of specific empirical investigations.

2. *Constitutional Law*

The code-model's compatibility with German business culture is not the only critical issue. Problems also arise with respect to the viewpoint of German constitutional law. Section 161 of the German Stock Corporation Act refers to future standards of the German Code as established and amended by the Second Commission.⁶⁴ It has been claimed that this "dynamic reference" is incompatible with the principle of democracy set

58. *Combined Code*, *supra* note 20, § B.2.1.

59. Hommelhoff, *supra* note 7, at 242 ("voluntary action—even under pressure of market forces—is not as common in this country that lawmakers could refrain from taking action"); *cf.* Bernhardt, *supra* note 16, at 1845.

60. Peltzer, *supra* note 42, at 594; Seibt, *supra* note 43, at 250.

61. ROTH, *supra* note 6, at 66; Erhardt, *supra* note 40, at 342. *But see* Peltzer, *supra* note 42, at 594.

62. A group of companies listed at the Frankfurt Stock Exchange (NEMAX 50-Index) issued a joint corporate governance declaration in Oct. 2002 that goes beyond the recommendations of the German Code. *Declaration on Corporate Governance*, at <http://www.ixos.com/ftb/int/home-en/investors/governance.htm> (last visited Sept. 5, 2003).

63. Erhardt, *supra* note 40, at 342; Peltzer, *supra* note 42, at 595.

64. German Code, *supra* note 4, Foreword.

forth in Article 20 of the German Basic Law.⁶⁵ The basis of these constitutional concerns is that the German Code was originally drafted and, if necessary, will be adjusted annually by the Second Commission. The Second Commission, however, is not elected by way of a democratic process, rather it is appointed by the Minister of Justice.⁶⁶ The First Commission was obviously aware of the constitutional problems, and as a result, obtained an expert's legal opinion on this issue. Based on the report of the First Commission, it appears that the expert concluded that the code-model does not violate the German Basic Law.⁶⁷ The relevant passage of the Report of the First Commission reads as follows: "the obligation to declare and explain only establishes a communication between the listed company and the capital market, which finds its sufficient basis in the respective stipulation of the Stock Corporation Act."⁶⁸

It is doubtful, however, that the above-mentioned constitutional problems can be eliminated by simply declaring that the legal obligation established by Section 161 of the Stock Corporation Act is a communication tool. It remains to be seen whether German constitutional organs will also adopt this viewpoint.

3. *German Stock Corporation Law System*

As mentioned above, German stock corporation law, unlike corporate law systems in the Common Law-world, is to a large extent governed by

65. Article 20 of the German Basic Law reads as follows:

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive and judicial organs.
- (3) Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice.
- (4) All Germans shall have the right to resist any person seeking to abolish that constitutional order, should no other remedy be possible.

Grundgesetz [GG][Constitution] art. 20.

66. Wolf, *supra* note 53, at 59–60; Ulmer, *supra* note 51, at 162; Seibt, *supra* note 43, at 249; Schneider, *supra* note 6, at 2417; Martin Lutter, *Vergleichende Corporate Governance—Die deutsche Sicht* [Comparative Corporate Governance—The German Viewpoint], ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT 224, 228 (2001); Seibert, *supra* note 13, at 581. See generally Paul Kirchhoff, *Gesetzgebung und Private Regelsetzung als Geltungsgrund für Rechnungslegungspflichten?* [Legislating and Private Rulemaking as Reason for the Effectiveness of Accounting Obligations?], ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT 681, 685–86 (2000) (discussing general aspects of constitutional law).

67. Report of the First Commission, *supra* note 4, at 17.

68. *Id.*

mandatory statutory law.⁶⁹ Therefore, the introduction of a model of corporate self-regulation should mean that the traditionally strict statutory structures are abandoned and more regulatory power is granted to the market. With respect to whether this approach makes sense at all or whether it is even possible in Germany, the fifth edition of Hüffer's standard commentary on the German Stock Corporation Act, which was published shortly prior to the German Code, provides the following self-explanatory comment:

From a legal point of view, especially from a stock corporation law point of view there is no need for a code with corporate governance rules. . . . The Continental-European legal tradition, in particular the density of rules within the German area does not leave any room for a useful code.⁷⁰

4. *Legal Nature of the German Code*

Another interesting issue is how the German Code fits into the German system of legal sources. According to the Report of the Second Commission, the German Code cannot be regarded as law because it is not enforceable *per se*.⁷¹ Some legal writers have suggested that the German Code is located on a "regulatory mid-level" between formal laws and the stipulations of the respective companies' articles of association.⁷² This idea, however, does not appear to be correct because both laws and the stipulations contained in the articles of association are normally legally binding, while the German Code obtains, at most, only indirect legal significance through the declaration of compliance by the respective management bodies.⁷³ Consequently, it must, therefore, be concluded that the German Code does not fit into the traditional German system of legal sources.⁷⁴

69. BDI, *supra* note 5, § 2.2.

70. Hüffer, *supra* note 6, at 76; *see* Lutter, *supra* note 66, at 227.

71. Report of the First Commission, *supra* note 4, at 17; Ulmer, *supra* note 46, at 167.

72. Hommelhoff, *supra* note 7, at 244; Lutter, *supra* note 66, at 237.

73. Ulmer, *supra* note 46, at 169; Peltzer, *supra* note 42, at 10.

74. Ulmer, *supra* note 46, at 168.

C. Legislative Rationale

1. Information of Investors

It has been established above that major problems exist with regard to the compatibility of the German Code with the German system. This provokes the question of why the code-model has nevertheless been adopted. In other words, what was the legislative rationale behind the introduction of the German Code? The German Code itself expressly states only one goal:

The Code aims at making the German Corporate Governance system transparent and understandable. Its purpose is to promote the trust of international and national investors, customers, employees and the general public in the management and supervision of listed German stock corporations.⁷⁵

The Report of the First Commission is even more outspoken when it explains that the introduction of the German Code is necessary because “in particular Anglo-American, but also increasingly domestic institutional investors and shareholder groups do have knowledge of such kind of regulatory framework and principles and request their observation.”⁷⁶

In order to understand the focus on institutional investors,⁷⁷ in particular financial institutions, pension funds, and insurance companies, one must remember that the nature of shareholders has changed very much in Germany and elsewhere over the last two decades. The volume of investments of institutional investors, particularly from the United Kingdom and North America, has seen explosive growth rates.⁷⁸ For example, British Vodafone AirTouch made a hostile takeover-bid for German Mannesmann in November 1999. When the merger was finally concluded in February 2000, the \$183 billion deal was the largest

75. German Code, *supra* note 4, at Foreword. Compare Seibt, *supra* note 43, at 250 with Bernhardt, *supra* note 16, at 1846. See generally ROTH, *supra* note 6, at 66.

76. Report of the First Commission, *supra* note 4, at side n.6. For the dominance of Anglo-American investors, see ROTH, *supra* note 6, at 64; Teichmann, *supra* note 1, at 652; Soederberg, *supra* note 26, at 21. Soederberg writes: “Increasingly shareholder activism in general and the pressure from institutional investors in particular play an important role in ‘forcing those demanding capital to comply with international standards regarding disclosure and governance.’” *Id.* Cf. Marcos Lutter, *Neue Maßnahmen zum Anlegerschutz* [*New Measures for the Protection of Shareholders*], NEUE ZEITSCHRIFT FÜR JURISTISCHE WOCHENSCHRIFT III, 1209-72 (2003).

77. ROTH, *supra* note 6, at 66 (“pension funds corporatism”); Teichmann, *supra* note 1, at 652.

78. *Id.* at 652.

corporate merger ever.⁷⁹ At the time of the takeover-bid, about forty percent of Mannesmann's shares were held by Anglo-American institutional investors. The total percentage of institutional investors was as high as seventy-eight percent.⁸⁰ In order to create interest for Germany's capital markets, it is of course useful to explain the German corporate governance system,⁸¹ which greatly differs from the Anglo-American model⁸² to this tremendously important group of institutional investors. Furthermore, it is logical to support related marketing activities by making use of the code-model, a tool with which Anglo-American investors are familiar.

2. *Improvement of German Corporate Governance*

Not only the title of the German Code suggests that it has the same ultimate goal as corporate governance codes in other countries: to improve the corporate governance system and to contribute to the more efficient management and supervision of German listed companies.⁸³ While the stipulations of the German Code itself fail to address the issue explicitly, many legal writers have made this point as well.⁸⁴ Attempting to improve corporate governance structures, however, only makes sense if related action in the form of a code is necessary at all.⁸⁵ The following three quotations show that prior to the enactment of the German Code, this was not at all the common viewpoint. First, in the year 2000, the German Industrial Council⁸⁶ and PricewaterhouseCoopers, in a joint study, took the following position: "To date the requirements for a functioning corporate

79. Vodafone-Mannesmann Merger, at <http://telecomvisions.com/current/man.php> (last visited Sept. 5, 2003).

80. Schneider, *supra* note 6, at 2414; Soederberg, *supra* note 26, at 21.

81. Soederberg, *supra* note 26, at 20-21. Soederberg writes: "The implicit use of the Anglo-American definition of corporate governance in the creation of an 'international standard' is closely tied to powerful institutional investors . . ." *Id.*

According to an often-quoted McKinsey study of 1999-2000, German investors are willing to pay a twenty percent higher share price for good corporate governance. Ulmer, *supra* note 51, at 169 n.69.

82. See *supra* Part II. B and accompanying notes.

83. Ulmer, *supra* note 46, at 167 (noting "indirect pressure").

84. Report of the First Commission, *supra* note 4, side number 7; Ulmer, *supra* note 46, at 167 (double function of informing and regulating); *Combined Code*, *supra* note 20, at 177; Seibert, *supra* note 13, at 581; Erhardt, *supra* note 40, at 336.

85. Schneider, *supra* note 6, at 2413. The scope of this Article does not permit discussion of the different standpoints regarding the extent that legislative action can positively impact corporate governance systems or whether legislative action can rely on the mechanisms of the market.

86. BDI, *supra* note 5, at 11.

governance are being fulfilled in Germany.”⁸⁷

Even the Report of the First Commission, which suggested the creation of the German Code,⁸⁸ concluded that Germany already had a well-functioning corporate governance system:⁸⁹

When comparing these regulatory frameworks (*i.e. foreign corporate government standards—added by the author*) and in particular the recommendations of the OECD, with those standards for the management and the supervision of enterprises applied to German stock corporations it must be concluded that the German stock corporation law currently in force corresponds to a large extent with the recommendations contained in those regulatory codes and regulatory frameworks.⁹⁰

Further, the German Code can only be regarded as a tool to improve corporate governance structures if it does not recommend improvements that were already in place. Empirical studies could demonstrate to what extent German listed companies had already adopted measures recommended by the German Code prior to its implementation. However, some rather amazing statements have been made. Among others, the German attorney Dr. Peltzer, a legal expert for the First Commission, wrote the following: “Complying with most of the recommendations of the Code should not cause any problems for a properly managed company *since in any event things are done this way*. Only in exceptional cases the necessity for changes will arise. . . .”⁹¹

Even more outspoken was Professor Seibert, the individual within the Federal Ministry of Justice responsible⁹² for the enactment of Section 161 of the German Stock Corporation Act and thus the implementation of the German Code. Seibert wrote:

The organs could even declare that they do not follow the Code at all. Apart from the fact that this would not leave a good impression, this seems to be unrealistic, since the recommendations are mostly in line with practical reasonableness and acknowledged business rules of good management. A company that fails to apply all this

87. *Id.* at 41.

88. *See supra* Part III.A and accompanying notes.

89. *See also* Hüffer, *supra* note 6, at 76; Lutter, *supra* note 63, at 225.

90. Report of the First Commission, *supra* note 4, at side n.6. *Compare* Hüffer, *supra* note 6, at 76.

91. Peltzer, *supra* note 52, at 593.

92. Ulmer, *supra* note 51, at 159.

would according to my opinion become insolvent within a short period of time.⁹³

If these statements were correct, why then was it necessary to formulate the German Code and to bother German stock corporations with the burden of a declaration of compliance? Further, what could have justified taking the risk connected with the import of the code-model into the German system, a model which had already failed twice?⁹⁴

Indeed, a closer look at the German Code reveals that the practical impact of the recommendations is of minor significance either because they simply confirm already existing corporate practice⁹⁵ or because the wording is vague and does not require sincere commitment.⁹⁶ Contrary to the above-quoted statements, however, the German Code also recommends “real” improvements⁹⁷ that go beyond what is required by statutory law or common practice. For example, regarding the purchase and sale of shares in the company by Management and Supervisory Board Members, the disclosure duties were tightened.⁹⁸ Management Boards’ Terms of Reference now must specify the allocation of areas of responsibility and cooperation within the Management Board.⁹⁹ “Re-pricing” of variable components of the Management Board Members’ salaries is excluded.¹⁰⁰ The composition of each Management Board Member’s salary and any additional income arising out of separate contractual arrangements shall be reported in the Consolidated Financial Statements Notes.¹⁰¹ The opportunity to circumvent limitations to extend the Management Board members’ terms of office by stepping down prior to the end of the term only to be reappointed immediately thereafter was

93. Seibert, *supra* note 12, at 583.

94. *See supra* Part III.B.1 and accompanying notes.

95. *Cf. Peltzer, supra* note 42, at 594-95. This is supposedly true for the following sections of the German Code, *supra* note 4: §§ 2.3.1, 3.4 ¶ 3, 4.2.1 sentence 1, 4.2.3. sentence 1, 5.1.2 sentence 6, 5.1.3; 5.2 ¶ 1 sentence 1, 5.3.1; 5.4.5. ¶ 1 sentence 2, 6.3, 6.4, 6.5, 6.7, 6.8 (as far as publication of relevant data on company’s internet sites are concerned), 7.1.1 sentence 2 (as far as related companies follow IAS).

96. *See, e.g.,* German Code, *supra* note 4, §§ 2.3.3; 3.8; 3.10; 4.2.3 sentence; 5.1.2 ¶ 1, sentence 1; 5.1.2, ¶ 2, sentence 2; 5.1.2 ¶ 2 sentence 3; 5.1.2 ¶ 3 sentence 1, 5.3.1; 5.4.1; 5.5.3 sentence 2-3; 5.5.6, 6.8, 7.1.3.

97. *But see* Peltzer, *supra* note 42, at 594-95 and *passim* (*de facto* superfluous recommendations).

98. German Code, *supra* note 4, § 6.6.

99. *Id.* § 4.2.1 sentence 2. Terms of Reference of the Management Board are required under the German Stock Corporation Act, § 111, ¶ 4 sentence 2.

100. German Code, *supra* note 4, § 4.2.3 sentence 5.

101. *Id.* §§ 4.2.4, 5.4.5.

abolished.¹⁰² Both Management and Supervisory Board Members must disclose conflicts of interest.¹⁰³ Management Board members may only take outside jobs with the approval of the Supervisory Board.¹⁰⁴ The number of concurrent Supervisory Board memberships is limited to five.¹⁰⁵ Promotions of the Management Board Members to the Supervisory Board are limited.¹⁰⁶ Supervisory Boards shall establish independent Audit Committees.¹⁰⁷ Finally, the German Code recommends improvements regarding the reporting and auditing of Annual Financial Statements.¹⁰⁸

All of these recommendations, however, do not require major changes to existing German corporate practice. The recommendations are far less than what could have been delegated to the corporate level and what is necessary to establish a serious system of self-regulation.¹⁰⁹

IV. CONCLUSIONS

A. *(Code-) Form Follows (Marketing-) Function*

As described above, Germany realized that foreign institutional investors expect a code of corporate governance to be in place. The code-model, however, does not fit into the German system because a comprehensive statutory framework of mostly mandatory corporate governance rules was already in place. Therefore, scholars expressed a widespread belief that no real need existed to adopt a code-model in order to improve corporate governance in Germany. The German Corporate Governance Code now combines these seemingly contradictory positions: it leaves the already existing corporate governance structures basically untouched, while recommending changes without major impact.

The Report of the Government Commission, entitled “Corporate Governance-Corporate Management-Corporate Supervision-Modernization of the Stock Corporation Law,” is the base upon which the German Code was drafted. The report claims that three reasons exist for the implementation of rules regarding the management and supervision of

102. *Id.* § 5.1.2 sentence 5. Currently, this possibility is available under Stock Corporation Act § 84 ¶ 1 sentence 3 (2000).

103. German Code, *supra* note 4, § 4.3.4, 5.5.2-3.

104. *Id.* § 4.3.5.

105. *Id.* § 5.4.3. *But see* § 100 2 Nr. 1 German Stock Corporation Act (allowing ten memberships).

106. German Code, *supra* note 4, § 5.4.2.

107. *Id.* § 5.3.2.

108. *Id.* §§ 7.1.1-5, 7.2.1, 7.2.3, 2.3.2-3.

109. Bernhardt, *supra* note 16, at 1842.

enterprises.¹¹⁰ The first reason is to save transaction costs by enacting non-compulsory laws, which allow parties to avoid further negotiations regarding specific issues. Secondly, mandatory rules may be implemented in order to react to failures of the market.¹¹¹ Thirdly, legal rules can aim at autonomous political goals.¹¹² It is difficult to see how the German Code together with Section 161 of the German Stock Corporation Act can serve any of these purposes. On the contrary, it is doubtful that the benefits derived from the limited regulatory impact of the German Code can outweigh the transaction costs connected with the statutory burden imposed on German listed companies by Section 161 Stock Corporation Act to declare their compliance or non-compliance with the German Code. Further, despite the fact that the German Code gives a different impression, in Germany standards of good corporate governance are still guaranteed through mandatory statutory rules and not through self-regulation of the German business world.

The introduction of the German Code, therefore, appears to be mainly a marketing tool to improve the attractiveness of Germany's capital markets to foreign institutional investors. And indeed, this tool seems to be a perfect method, as evidenced by the following commentary published on November 8, 2002 by the Financial Times:

In Europe's battle to restore investor confidence through improved corporate governance rules, the best hope may lie with the Germans. . . . As of August, it is one of the few European countries alongside the UK, to have in place a proper corporate governance code. . . . Europe's largest economy is at least in this respect fulfilling its proper leadership role.¹¹³

B. Law for Marketing Purposes?

Law¹¹⁴ can be regarded as a "normative order setting out what ought to be done."¹¹⁵ Thus law is a set of rules and principles "intended to prescribe

110. Report of the First Commission, *supra* note 4, at side n.1.

111. This could protect minority shareholders and creditors without sufficient bargaining power against disadvantages arising out of the limited liability-principle.

112. An example would be the implementation of mandatory co-determination rights for employees on Supervisory Boards of enterprises with more than 500 employees.

113. Bogler, *supra* note 24, at 8.

114. This is not the place to discuss the historical dimension of the meaning of law, its philosophical meaning and intersection with politics, religion, or ethics. See STEPHEN C. HICKS, MODERN LEGAL THEORY: PROBLEMS AND PERSPECTIVES 3 (1998).

115. John Bell, *Statutes, Text and Operative Enactments*, in SEMIOTICS AND LEGISLATION:

and direct human behavior”¹¹⁶ in order to eventually balance conflicting interests of different parties.¹¹⁷ Law can prescribe human behavior directly by setting positive rules, or indirectly affect human behavior by simply making statements,¹¹⁸ thus “signaling appropriate behavior and . . . inculcating the expectation of social opprobrium and, hence, shame in those who deviate from the announced norm.”¹¹⁹

Due to its official character, law carries the impression of authenticity¹²⁰ and therefore appears to be a perfect tool to promote legal systems. Law enacted only for marketing purposes will neither directly nor indirectly establish rules. In other words, it has no regulatory function. Consequently, the creation of law for marketing purposes means nothing more than a perversion of the genuine role of law and an abuse of power vested in legislative bodies. Lawmakers should carefully consider if they want their work to carry this label.

JURISPRUDENTIAL, INSTITUTIONAL, AND SOCIOLOGICAL PERSPECTIVES 71, 79 (1999).

116. ROGER E. MEINER ET AL., *THE LEGAL ENVIRONMENT OF BUSINESS* 7 (8th ed. 2003).

117. ROSCOE POUND, *THE HISTORY AND SYSTEM OF THE COMMON LAW* 162-64 (Colier, 1939). See SURYA P. SINHA, *JURISPRUDENCE: LEGAL PHILOSOPHY* (West 1993); Edwin W. Patterson, *Pound's Theory of Social Interests*, *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 558-73 (Paul Sayre ed., 1947).

118. This idea is being promoted by the so-called expressive theories of law. See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV., 2021 (1996); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV., 1503 (2000). But see Matthew D. Adler, *Expressive Theories of Law: A Sceptical Overview*, 148 U. PA. L. REV., 1363 (2002).

119. Sunstein, *supra* note 118, at 2032.

120. *Id.* at 2031 (“law will have moral weight”).