CHAPTER 3

ACTS-IN-THE-LAW

I. TESTING THE CLASSIFICATION OF DECLARATIVE SPEECH ACTS

1. The EEC-Treaty

At the end of the preceding chapter we formulated the hypothesis that actual legal systems comprise acts-in-the-law of all seven classes into which our general classification of declarative speech acts divides. The plausibility of this hypothesis could be illustrated by giving particular examples from various legal systems. However, an ad hoc collection of examples would be of little help in supporting this study’s central thesis, namely, that it is more accurate to picture present-day legal systems as coherent systems of specializations of declarative speech acts and of valid presentations resulting from successful performances of them than as systems of norms of conduct supplemented by auxiliary constructions. This thesis is corroborated by showing how declarative speech acts of all seven classes are jointly put to use in building up a particular legal system.

In order to provide an international readership with an opportunity to assess the persuasive force of our examples, we shall take them to a single supranational legal system that is progressively gaining in importance, namely, the legal system of the European Economic Community. The system’s constitutional norms are laid down in the Treaty establishing the European Economic Community (EEC-Treaty) of 1957, including later amendments and supplements. We shall confine ourselves to this Treaty. For our purposes it is of significance that the Treaty is not a simple agreement between states but is, indeed, part of the constitution of a supranational legal system. It enables us to make a distinction between an ‘institutional world’ and a ‘surrounding world of utterance’ with regard to the Community. On the one hand, the Community is an ‘institutional world’, namely, a legal system pressing on ‘reality’ to conform to its content; on the other, it is part of reality, namely, a political phenomenon grounded in a legal system.

In view of the analysis we are about to undertake, it is important to

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1 Cf. Court of Justice of the EEC, Case 6/64 (Costa - ENEL), Jur. 1964, 1204.
realize that acts-in-the-law present themselves in two different ways in legal texts. On the one hand, they are specified in constitutive rules. For instance, the provision of article 189 enables the Council and the Commission, in principle, to make recommendations. Thus, the Treaty serves to constitute recommending as an act-in-the-law performable by the said institutions of the Community. On the other, acts-in-the-law are presented by performances of them. For example, article 129 contains the following provision:

'A European Investment Bank is hereby established; it shall have legal personality.'

This provision does not specify the act-in-the-law of establishing European public corporations, but marks a particular performance of it. Since the rule constituting the act-in-the-law in question is nowhere to be found in the Treaty, the only explicit acknowledgement of it is its exemplification by this particular performance. As the Treaty belongs to the constitutional level of the legal system of the Community, linguistic manifestations of both types are equally strong evidence that the acts-in-the-law concerned are part of that system.

When a certain act-in-the-law is specified in a constitutive rule, such as the rule underlying the act-in-the-law of making recommendations, it is part of the Community's legal system, because the rule was established by the constitutional authorities of that system, namely, the (heads of the) member-states as High Contracting Parties. The presumed legal validity of constitutional constitutive rules under the basic norm or rule of recognition of the Community's legal system is equivalent to the validity of the acts-in-the-law specified by them.

On the other hand, when the Treaty gives evidence of a certain act-in-the-law in a provision expressing some performance of it by the constitutional authorities, the result of that particular performance is also presumably valid under the basic norm or rule of recognition of the legal system of the Community. However, the validity of the result presupposes the validity of a constitutive rule validating the act-in-the-law performed by the constitutional authorities in establishing the former. Unlike constitutive rules that are explicitly laid down in legal provisions, such presupposed constitutive rules are not deliberate designs prescribing that human utterances in conformity with them produce valid results. Rather, they resemble linguistic constitutive rules in that they, too, are reconstructions inferred from their own performances. In this perplexing way, performances of acts-in-the-law by the constitutional authorities of a legal system are sometimes the only available testimonies to the legal validity of these acts-in-the-law themselves. In the