# To Use or Not to Use *Shall*: Current Debate on *Shall* in Legal Texts



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**ABSTRACT:**
In the context of plain language efforts, *shall* in legal texts has been vigorously targeted and criticized for being archaic and ambiguous. Consequently, language planning experts have sought its complete suppression or a "disciplined use" in public and private legal documents and across jurisdictions. At the same time, appropriate substitutes have had to be found to replace *shall*, most of them posing certain difficulties. This paper outlines the current debate surrounding the use of *shall* in legal texts and discusses the substitution strategies deployed in the countries where *shall* has been removed from certain legal texts altogether or where it has been used only sporadically. The second part of the paper presents synchronic and diachronic corpus-based research into the use of *shall* in UK legislation, EU legislation, and British contracts (in comparison to Australian contracts) to find out to what extent the plain language efforts targeting *shall* have been successful in private legal documents and whether the substitutes deployed in legislation are of any use in private documents. The results show substantial differences across genres and jurisdictions. Overall, it appears that the term "modal revolution" coined by Christopher Williams aptly describes the current situation.

**ABSTRAKT:**
V kontextu snah o srozumitelnou komunikaci se v anglicky mluvícím prostředí věnuje velká pozornost slovesu *shall*, které je obecně kritizováno pro svoji archaičnost a dvojznačnost. Z toho důvodu usilují odborné kruhy v poslední době o to, aby se toto sloveso ve veřejných i soukromých právních dokumentech nepoužívalo vůbec, nebo jen s mírou. K tomu je ovšem zapotřebí najít k *shall* vhodné alternativy, přičemž žádná z navrhovaných možností není zcela bezproblémová. Tento článek nastiňuje současnou odbornou debatu o *shall* v právním jazyce a rozebírá jednotlivé substituční strategie, ke kterým se přistoupilo v zemích, kde se *shall* v určitých žánrech již nepoužívá vůbec, nebo jen sporadicky. V druhé části článku uvádíme výsledky synchronního a diachronního korpusového výzkumu, který byl zaměřen na výskyt *shall* v britské legislativě, v právních předpisech EU a v britských smlouvách (v porovnání s australskými smlouvami). Cílem bylo zjistit, do jaké míry se dlouhodobé snahy o srozumitelnější komunikaci v anglicky mluvících zemích projevily v soukromých právních dokumentech a zda se substituční strategie používané v legislativě uplatňují rovněž ve smlouvách. Výsledky ukazují velkou různorodost mezi jednotlivými žánry i zeměmi. Obecně se zdá, že stávající situaci ohledně *shall* dobře vystihuje Williamsův termín „modální revoluce".

**KEY WORDS / KLÍČOVÁ SLOVA:**
*shall*, modal revolution, plain language, contracts, substitution strategies
*shall*, modální revoluce, srozumitelná komunikace, smlouvy, substituční strategie

## 1 INTRODUCTION

For many people the word *shall* is a typical feature of legal language. According to Kimble (1992, p. 61), "*shall* is the most important word in the world of legal drafting" and "*shall* is the most misused word in the legal vocabulary". Few lawyers can imagine drafting contracts or legislation without using *shall*. Yet over the last decades, *shall* has been vigorously targeted by plain language exponents for being archaic and ambiguous and thus unfit for modern legal texts. For example, according to Butt (2018, p. 565), "[*s*]*hall* has had its day", and Asprey (1992, p. 79) suggests abandoning *shall* altogether. This is part of the general trend that "the language of the law should not be different without a reason" (Mellinkoff, 1963, p. 285). If the word *shall* is rarely used in general English now (only in British English in the 1st person to denote futurity and in suggestions), its position in legal language should arguably be re-evaluated. Interestingly, Mellinkoff as the forefather of the plain language movement and a vigorous critic of traditional legal language did not seem to mind *shall* much. He even used it in his improved version of a lease provision (Mellinkoff, 1963, p. 388). Nevertheless, the current climate in legislative drafting does not seem to favour *shall*, which has led Williams (2012, p. 363) to call the current dynamic situation a "modal revolution" — "certain modal auxiliaries cease to be used altogether while others may suddenly take on a new lease of life" (*ibid.*, p. 356).

This paper aims to outline the current debate on *shall*, focusing in particular on the problematic characteristics of the word and possible substitution strategies. These theoretical considerations will be supported by synchronic and diachronic research into the use of *shall* in legislation (British and EU legislation) and contracts. While the use of *shall* in legislation has been already explored in some detail (Garzone, 2013a, 2013b; Williams, 2006, 2012), private documents, such as contracts, remain rather under-researched, most probably due to practical difficulties. While legislation is widely available, private documents are normally kept private. Yet it would be interesting to see whether the changes that have been occurring worldwide as a result of plain language efforts (namely the suppression of *shall* in the legislation of some jurisdictions) have had any measurable impact on the language of contracts as well.

### 1.1 CRITICISM OF *SHALL*

The criticism of *shall* is wide-ranging, mostly concentrating on its ambiguity in legal contexts. According to Xanthaki (2013, p. 115), "[*shall*] is one of the most ambiguous terms in legislative writing". Garner (2001, p. 939) sees the problem in the consistency of meaning: "… a word used repeatedly in a given context is presumed to bear the same meaning throughout". Butt (2014, p. 266) warns against an "uncritical use" of *shall* and provides numerous examples of court decisions where the judges had to interpret *shall*.

Garner provides an outline of the typical meanings of *shall* in legal texts (2001, p. 940):[1]

1 See also Butt (2018, p. 565).

1. to impose an obligation ("*The tenant shall keep the premises in good condition …*"),
2. to grant a right ("*The tenant shall be entitled to …*"),
3. to impose a condition precedent / subsequent ("*If the tenant shall give notice to the landlord …*"),
4. to state a fact or assumption ("*The fixtures … shall be deemed to be tenant's fixtures*"), and
5. to denote futurity ("*The right … shall terminate at the end of the lease*").

The last item (denoting futurity) has become controversial. For example, Garzone (2013b, p. 72) claims that pure futurity should be expressed through *shall* only in the first person, because in the second and third persons it has a deontic meaning, and it is true that the first person is rare in legal texts. In addition, the temporal framework of legal documents operates differently than in the real world, where time is divided into past, present, and future. Legal documents refer to a hypothetical world (Williams, 2012, p. 357) and consequently, the temporal framework displays certain peculiarities. For example, there are few references to the past in operative legal documents (except in judgments), and while all English modal verbs "look to the future for fulfilment" (Fries, 1927 as cited in Garzone, 2013a, p. 97), the element of futurity is generally combined with deontic modality. Modern legislative texts in some English-speaking countries are drafted in the present tense (which can be seen as convergence to civil law countries), but this present tense implicitly carries deontic modality. An extra difficulty is added by the difference between the encoding time and the decoding/reference time (Fillmore, 1971, p. 229), where, for example, the legislative drafters are writing their text with futurity in mind, and the text takes effect only after its promulgation and then it operates hypothetically in the present tense: "[Barbara] Child explains how the novice drafter finds it unnatural to write in the present tense while thinking about the future, but the drafter must learn to think in terms of the time when the statute is read." (Trosborg, 1997, p. 137).

The ambiguity of *shall* has been aptly demonstrated by Butt (2014, p. 264) in the Hong Kong case of *HKSAR v Ma Wai-kwan*. A provision in the Hong Kong's Basic Law was considered ambiguous because of an unclear meaning of the word *shall*. Article 160 stated: "Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong *shall be adopted* as the laws of the Region …". The question was whether it was necessary to formally adopt the laws or whether they would become the laws of the newly established region automatically. The court chose the latter interpretation.

According to Kimble (1992), the only correct use of *shall* is the imposition of a duty, and the other uses are incorrect. The incorrect uses can be exemplified by the following examples (*ibid.*, pp. 64–66):

1. "The law of Michigan *shall* govern this contract.";
2. "If the tenant *shall* not pay the rent on time, the landlord may charge a late fee.";
3. "There *shall* be created a Department of Plain English.";
4. "The employee *shall* receive $40,000 a year."

The test for the correct use of *shall* is the "has a duty" test (Kimble, 1992, p. 64; Adams, 2017, p. 58), implying that *shall* should be used only in situations where it can be substituted with the expression "has a duty".[2] As this approach has become popular in the US,[3] Garner (2001, p. 940) calls it the "American rule". Yet lawyers seem to be struggling with a consistent application of this rule (*ibid.*), and thus the "ABC" rule seeking the complete abandonment of *shall* has become popular in the US too (ABC — Australian, British, and Canadian drafters, suggesting the geographical spread of this approach (*ibid.*)).

Other authors have noted certain syntactic aspects, for example that *shall* is redundant in subordinate clauses, such as in the sentence "The Minister of Finance *shall* appoint all such officers, clerks and servants as *shall* be necessary for the purposes of this Act ..." (Williams, 2006, p. 241).

In addition, while *shall* has been weeded out from the legislative texts of several countries,[4] it may still thrive in other genres, for example in contracts. In this regard, Adams (2014) has taken a more nuanced position towards *shall* in his article *Banishing Shall from Business Contracts: Throwing the Baby out with the Bathwater*. While he acknowledges that some countries, such as Australia, "have gone further than others in purging *shall* from their contracts" (*ibid.*, p. 13), he nevertheless makes the case for a "disciplined use of *shall*", in line with the "has a duty" test, because total elimination of this modal verb causes several additional problems, for example with regard to appropriate substitutes. At the same time, Adams recommends a subtler approach to the potential readership; he calls for a disciplined use of *shall* in business contracts, but he would not use it in consumer documents. In his iconic *Manual of Style for Contract Drafting*, Adams (2017, p. 60) claims the following:

> It might be a good idea to eliminate *shall* from court rules, statutes, and consumer contracts, but it doesn't automatically follow that the same approach should be applied to business contracts — they serve a different function and address a different audience. Instead, banning *shall* from business contracts offers only modest benefits, and they're outweighed by the drawbacks.

Apparently, the "has a duty" test requires an animate subject. Yet Garzone (2013a, p. 98) has challenged this "exclusively prescriptive interpretation of *shall*" according to which other uses are considered incorrect. Garzone (*ibid.*) claims that this reasoning is "based on the false premise that *shall* in itself is purely deontic", arguing that

2 See also Drafting Techniques Group (2008, p. 16), who quote Driedger (1957): "The word *shall* in a statute almost invariably is pure imperative, and where it is not it is usually meaningless.".

3 But some other jurisdictions have adopted this approach too. For example, Ireland: "the Irish Revenue Guide to the Legislative Process says that *shall* may be used for duties, but not in a non-mandatory sense (e.g. 'is guilty of an offence' not 'shall be guilty of an offence')" (Drafting Techniques Group, 2008, p. 9).

4 For an overview of plain language initiatives which have contributed to *shall*-free legislation, see Williams (2015).

*shall* can also have a distinct performative meaning. She gives the following examples: "The declaration *shall* apply … to all supplies …"; "There *shall* be a body corporate to be known as the Charity Commission …" (*ibid.*, p. 99). In these cases, the word *shall* helps to change the world by authoritatively stating certain things. Garzone notes that lawyers know this property from their legal practice as "constitutive". Presumably, one could think of a divorce proceeding where the judge's decision changes the legal status of two persons by authoritatively declaring them divorced. In legal documents, this phenomenon can be observed in the definitions section where a certain meaning is authoritatively ascribed to a certain word, irrespective of whether it is the ordinary meaning of such word. Nevertheless, the prescriptive element is present as well, as suggested by Garzone (*ibid.*, p. 100): "in the case of *shall*, a deontic and performative component co-exist". In fact, in the case of definitions, the obligation has been imposed on the addressees to interpret a word in a certain way, and at the same time the phrase *shall mean* creates a reality in which a certain word has a certain meaning.[5] Overall, this reasoning introduced by Garzone adds another dimension to the debate on the ambiguity of *shall* in legal documents. In addition, it can help to explain the ambiguity of *shall* in the Hong Kong case mentioned above (*HKSAR v Ma Wai-kwan*). One interpretation could be called prescriptive (a duty is imposed on the relevant bodies to formally adopt the laws), and the second constitutive (it is authoritatively stated that the laws will automatically become the laws of the new region).

## 1.2 SPEECH ACTS

The constitutive/performative meaning is closely connected with speech acts. Speech acts are realised by means of explicit and implicit performative verbs.[6] While explicit performative verbs are used in the basic structure (e.g., "I order that …"), implicit performative verbs can be paraphrased in the basic structure (e.g., "You must go now" = "I order you to go"), and they include the verb *shall* (Kurzon, 1986, p. 20). Legal texts, such as legislation, can contain numerous speech acts which are controlled by a single "master speech act" expressed through the enacting formula at the beginning of a statute ("Be it enacted …") (*ibid.*, p. 16). Presumably, a similar master speech act can be found in contracts. In our contract corpus, there were several alternative versions, for example, "It is agreed as follows".

A slightly different approach is pursued by Adams (2017). In his view, a "lead-in" in a contract, which can be expressed as "The parties agree as follows", does not belong to language of performance, but to language of agreement. He does not recommend using *hereby*[7] in a lead-in, claiming that the sentence "The parties *hereby* enter into this agreement" is unacceptable because it can be paraphrased as "The parties by this agreement enter into this agreement", which does not make much sense (*ibid.*, p. 35). In addition to language of performance and agreement, Adams also distinguishes

5 See also "language of performance" in Adams (2017, p. 54), which is directly connected with "a change of status of a person or thing".

6 Austin (1976).

7 The word *hereby* is often seen as a "a further test of performativity" (Kurzon, 1986, p. 38).

language of obligation (where he places *shall* which passes the "has a duty" test), language of discretion, prohibition, and policy. It seems that Adams, having adapted the theory of speech acts to contract language, recognizes solely explicit performative verbs (in Austin's terminology) as capable of creating speech acts, while Kurzon sees speech acts in broader terms, and considers as "performative" also an utterance that contains implicit performative verbs. In this way, while Adams does not consider the lead-in sentence "The parties agree as follows" as a performative utterance because of his formal criteria, the speech act theory advanced by Kurzon would arguably classify such a sentence as a master speech act in the same way as it classified as a master speech act an enacting formula in a statute.

Speech acts can help to explain the current plain language efforts to replace *shall* with more suitable alternatives. According to Searle (1969, p. 22), "[t]alking is performing acts according to rules" and since legal texts are intended to be read by non-experts as well, the readers may struggle with the conventionalised use of *shall* that may be clear to lawyers, but unfamiliar to non-experts. Consequently, a specific speech act may become defective because it will fail to produce the desired effect. Yet the word *shall* can also contribute to the success of a speech act in that it indicates that the speaker is in a position of authority over the hearer (Kurzon, 1986, p. 8), which is one of the felicity conditions described by Searle (1969, p. 64). In this way, the speaker "guarantees that the proposed action be undertaken, since he has the authority to issue such orders" (Kurzon, 1986, p. 21). The power to enforce fulfilment has been noted by Garzone (2013a, p. 107) as well: "*shall* not only imposes an obligation, but also guarantees that the obligation is fulfilled". This aspect of *shall* has some consequences for potential substitutes, for instance the present tense, which does not have these features.

In addition, *shall* creates ambiguity, as it is capable of expressing various types of illocutionary force, ranging from directives (imposing an obligation), commissives (making promises in contracts), to declarations (e.g., definitions). The current efforts to suppress/limit *shall* can thus be understood, in the context of speech acts, as an effort to express the illocutionary force less ambiguously in various ways, rather than having *shall* as a universal device. In this way, directives can be expressed through *must*, commissives can be signalled by *will* (as proposed by Garner), and the present tense can be used in declarations.

The speech act perspective can also shed new light on the "has a duty" test, which serves as a criterion to determine the suitability of *shall* according to the "American rule" (Garner, 2001, p. 940). Kurzon (1986) argues that from the perspective of speech acts, the following sentences are not identical:

a) "The Director *shall give* to the Committee …"
b) "The Director *has the duty to give* to the Committee …"

While the first sentence has the illocutionary force of an order, the second sentence "is the result of an order having been given. It is in fact a description of a state of affairs". In other words, it is a statement (*ibid.*, p. 21). Sentence b) does not meet the criteria for a speech act: it can be true or false and it cannot be paraphrased with the

word *hereby*. Nevertheless, it could be argued that both alternatives ultimately have the same legal effect.

### 1.3 OTHER FUNCTIONS OF *SHALL*: THE DEGREE OF DUTY

Even if we accept the imposition of an obligation as the only correct meaning of *shall*, it can cause problems. According to Kimble (1992, p. 61), what can give rise to litigation is the "degree of duty". In other words, what happens if the imposed duty has not been fulfilled? This issue is probably beyond our linguistic scope, but somehow it is present in the semantics of *shall*. Trosborg (1997, p. 61) quotes Bülow-Møller: "The special use of *shall* is one of the most characteristic markers of the legal register; it means not only 'Do X', but also 'If you don't, we have sanctions'.". Kimble (1992, pp. 73–74) considers cases where the failure to comply can bring about the invalidity of proceedings, or the compliance can be compelled. Drawing on Kimble, Garner (2001, p. 941) voices the same concern: "A major cause of litigation over *shall* … is the relative strength of the word.". Butt (2014, p. 268) formulates this issue as the distinction between direction and obligation, which can both be expressed by means of *shall*. While an obligation is enforceable, directory provisions require certain actions but do not impose any sanctions for the breach.

### 1.4 SUBSTITUTION OF *SHALL*

The criticism of *shall* in legal texts has led scholars to search for alternatives. Some scholars admit difficulties in finding one satisfactory word that would be capable of performing all the functions of *shall*.[8] Garzone (2013a, p. 115) seems rather sceptical about the substitutes and their equivalence to *shall*: "the replacement of *shall* with other forms capable of performing (more or less) the same functions does not always bring a real improvement".

Williams (2006, p. 242) identifies four options as alternatives to *shall* in legislation: *must*, the *be to* construction, the indicative present, and *may* (in its negative form *may not*). Given the obligative meaning of *shall*, most people would use *must* as the most plausible alternative to *shall*.[9] The obvious advantage over *shall* is that it is well-known to non-experts and has no legalistic and archaic connotations. Yet "some drafters consider *must* inappropriately bossy" (Garner, 2001, p. 941).[10] Garner gives an example of two large companies that would be probably unwilling to use *must* in their contract to set out their mutual obligations. In his view, the word *will* would be preferred. By contrast, *must* would be, according to Garner, appropriate in a so-called

8 See Adams (2014, p. 12): "those who wish to banish shall don't agree on what to use instead".

9 "*Must* is the obvious alternative to *shall* when imposing obligations." (Drafting Techniques Group, 2008)

10 See also Butt (2014, p. 271): "Where parties have worked hard to develop mutual cooperation and respect, a too rigorous use of *must* can introduce an unnecessarily adversarial attitude into the document …".

adhesion contract,[11] where one party lacks the bargaining power. While the weaker party would be assigned obligation by means of *you must*, the stronger party would use the expression *we will* to set out its promises. The phrase *we will* is reminiscent of the historical meaning of *will*: intention, wish, desire. Yet some scholars are rather ambivalent about *will* in business contracts. Busk (2017, pp. 50–51) presents the antithetical arguments of two well-known American legal experts (Ken Adams and Bryan Garner) on the use of *shall* or *will* in business contracts. For Adams, the sentence "Able will pay $500 to Baker on June 1, 2018" expresses future time, failing to create an obligation for Able to pay the money. By contrast, Garner argues that in "American English, *will* — not *shall* — is the ordinary verb of promise" (*ibid.*, p. 51). This uncertainty around the verbs *will* and *shall* has historical roots. According to Fischer and Van der Wurff (2006, p. 131), "[f]uture time is of course the least certain, i.e. the least factual, of the three time zones, and it is therefore not surprising that a modal colouring … comes to the fore in the use of the 'future tense' auxiliaries *will* and *shall*, which originally expressed intention and obligation".

Adams clearly does not mind the archaic character of *shall* and understands *shall* as being rather close to becoming a term of art and as such quite appropriate in legal language as long as "disciplined use" is maintained.[12] He analyses in detail the use of *must* and *will* in contracts as potential substitutes of *shall*. In his view, *must* can be problematic in that it can express not only an obligation imposed on the subject of the sentence ("The Company *must* reimburse the Consultant …"), but also an obligation imposed on someone other than the subject ("The Closing *must* take place at Acme's offices."), as well as conditions ("To be reimbursed, Acme *must* submit …") (Adams, 2017, p. 60). Adams offers a similar reasoning for *will*: it can express the future and also an obligation imposed on the subject of the sentence or on someone else. Consequently, *must* and *will* as alternatives to *shall* do not seem to resolve the problem of polysemy that was considered the greatest problem of *shall*. Nevertheless, certain influential drafters (Garner, 2001, p. 941; Kimble, 1992, p. 76) do recommend *will* as a substitute for *shall*.

The Drafting Techniques Group (DTG) was reluctant to recommend *will* as an alternative to *shall* because it is normally associated with futurity rather than imposition of obligations: "It is not clear whether the statement 'the Secretary of State will do X' imposes a duty on the Secretary of State." (DTG, 2008, p. 4).

The "modal revolution" noted by Williams (2012) and the disagreement over substitution strategies for *shall* can generate additional work for courts. Busk (2017, p. 51) mentions the case *Lubbock County Water Control & Improvement District v Akin LLC*, in which the phrase "*will* issue catering tickets" was construed by the Texas Supreme

11 "An adhesion contract exists if the parties are of such disproportionate bargaining power that the party of weaker bargaining strength could not have negotiated for variations in the terms of the adhesion contract …" (Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/adhesion_contract).

12 See also Drafting Techniques Group (2008, p. 5): "Some writers favour the use of *shall* in legislation precisely because that is a specialised legal use which signals the word is to be given a particular interpretation".

Court as imposing a duty: "[The phrase] establishes a duty, not a statement of intent. To read this as a statement of mere intent or plan makes the phrase at worst gratuitous and at best a very roundabout and awkward way of stating that Church & Akin is allowed to issue and redeem catering tickets.".[13] Nevertheless, rather than subjecting the meaning of *will* to a rigorous semantic analysis, the court considered other, extra-linguistic factors — namely the fact that the phrase in question was located in a section where the parties stipulated their respective rights and obligations. It is quite imaginable that some scholars would argue that the interpretation of the relevant phrase would have been clearer had the modal verb *shall* been used.

Garzone (2013a, p. 107) observes that *shall* and *must* are not entirely identical. While *shall* "guarantees that the obligation is fulfilled", this element is not present in *must*. She gives an example where the replacement of *must* with *shall* would be unacceptable: "Before making any grant under this section, the Secretary *must consult* with Indian tribes concerning the grant, but in this case he *will* not." (*ibid.*, p. 107). It is the last part of the sentence ("in this case he will not") which makes the substitution of *must* by *shall* impossible because *shall* implies that the fulfilment is guaranteed.

The DTG (2008) took a pragmatic approach to the substitutes of *shall*. Recognizing that a single word as a substitute is not available, the authors presented drafting solutions for various contexts (e.g., for imposing obligations, for creating a statutory body, for repeals, etc.). In its conclusions, the DTG provides a set of recommendations for each context. Thus, it recommends *must* for imposing obligations as "the clearest and most concise current alternative" (DTG, 2008, p. 9).

For the creation of a statutory body, the DTG recommends the phrase *there is to be*. The DTG also considered the use of the present tense, but the sentence "There is a Drafting Techniques Authority" apparently "does not make it clear that the Act itself is creating the body" (DTG, 2008, p. 11) and it suggests that the authority is already in existence.[14] The DTG further discusses the phrase "... is hereby established" but since the *here-* words are not recommended in legislation any more,[15] there is reluctance to use *hereby,* which otherwise clearly indicates performativity.

For application/effect (e.g., "*shall* apply to"), the DTG recommends the present tense. However, the paper suggests that in some cases there could be a difference in performativity. Thus, the sentence "X is entitled to compensation" could indicate that the source of the entitlement is elsewhere, not in the Act itself, whereas "'X shall be entitled to compensation' shows that the Act itself creates the right" (DTG, 2008, p. 16). But even the present tense of an operative legal document ensures performativity through the enacting formula — the "master speech act"[16] (Garzone, 2013b, p. 75). The present tense is further recommended for amendments (e.g., "is amended

13 *Lubbock County Water Control & Improvement District v Akin LLC* is available at: https://caselaw.findlaw.com/tx-supreme-court/1671842.html.

14 See also Garzone (2013b, p. 77) who argues that "there is to be a corporate body" is not identical to "there shall be" because it lacks the guarantee of fulfilment.

15 See *Office of the Parliamentary Counsel Drafting Guidance* (2020, p. 5).

16 However, Trosborg (1997, p. 139) claims that the overuse of *shall* in statutes may be due to the "loss of trust in the continuing declarative force of the enacting clause".

as follows") and repeals. In the case of repeals, the authors consider the semantic distinction between "*shall* cease to have effect" and "ceases to have effect", where the latter might suggest that the repeal is caused by something else.

The DTG has thus proposed substitutes for specific contexts. A different approach has been adopted by Williams (2012, p. 366), who observes that the substitutions may depend on the "normative intensity", where *must* represents maximum strength, *is to / are to* convey medium strength, and the present simple is used for minimum strength. With respect to the present simple, Williams (2006, p. 243) notes that it tends to be used with certain stative verbs (e.g., *apply*), where a strong obligative verb would appear out of place. The approaches presented by the DTG and Williams indicate that the solutions for substituting the word *shall* ought to be comprehensive and detailed. They will probably place much greater requirements on the drafters who must carefully consider the context rather than generously sprinkle every sentence with *shall*s in the hope that the intended meaning will be eventually recovered. It could be an indication of a shift away from the "writerly" legal texts, which are relatively easy to draft[17] (and *shall* certainly helps the drafters as a polysemous word), to the "readerly" texts (Trosborg, 1997, p. 23), which are more reader-friendly.

With respect to EU legislation, the *English Style Guide* (2020, p. 54) has divided enacting terms into the following categories: imperative, permissive, and declarative. The imperative terms impose an obligation or prohibition, and the *English Style Guide* recommends using *shall*. Presumably, this usage corresponds to the "has a duty" test. For the declarative terms the *English Style Guide* recommends the simple present, rather than *shall*. It is possible that this division into imperative, permissive, and declarative terms has guaranteed a systematic approach to *shall*, preventing a potential overuse.

All in all, the present tense seems to be the winner of the "modal revolution" when it comes to legislation. It has been traditionally used in numerous civil law countries, and thus its practicalities have been thoroughly tested. Although there are certain issues connected in particular with performativity, the present tense has become the most popular from among other alternatives, as confirmed by Garzone (2013a, p. 109): "the simple present is the best substitute for *shall*". The performativity issues can be quite elegantly resolved through master speech acts which indicate, at the beginning of an operative document, that the individual clauses are performative. But while the present tense seems appropriate in legislation, it can be problematic in contracts. Adams (2017, p. 65) does not recommend the simple present tense in contracts, claiming that "in standard English, expressing obligations is not one of the functions of the present tense used with the third person". However, we should remember that he recommends a "disciplined use of *shall*" (rather than completely suppressing it), and is therefore under no pressure to find a substitute for all instances of *shall*, unlike the British legislative drafters.

17 "[T]he 'specialized tongue' of lawyers, 'legalese', may even be easier to write because it relies on convention instead of thoughts" (Child, 1990, p. 32).

As suggested earlier, some scholars have voiced their concerns that the suppression of *shall* is admittedly a very visible and easily made change, but does not always bring a "real improvement" (Garzone, 2013a, p. 115),[18] and that greater effort should be made in other, perhaps less visible areas. For example, Adams (2014, p. 12) contends that "[t]he focus on *shall* has drawn attention away from the broader problem, namely the chaotic verb structures". It is true that the overuse of *shall* is problematic, contributing to the semantic bleaching of the word, and thus downgrading the once fully functioning word to a mere stylistic indicator in some cases. Likewise, numerous court decisions cited by Butt (2014) suggest that *shall* can cause practical difficulties. But it must be admitted that the reasoning behind some of the substitution strategies is not entirely convincing. For example, if the major concern about *shall* is its ambiguity and it is proposed to replace *shall not* with *may not*, we do not seem to have resolved the problem because the substitute can be just as ambiguous. Garner (2001, p. 942) provides the following example: "This office *may not* consider applications received after April 30.". It is not clear whether the office has discretion or whether there is a prohibition. Furthermore, the replacement of *shall* with the indicative present can cause some additional difficulties, which some civil countries have already experienced. In the Czech Republic we can think of the provision in the Constitution which states "The President appoints …" ("*Prezident jmenuje …*"). In the recent years there have been heated debates over the obligative nature of such phrase and whether or not the President has any discretion in the matter. Similarly, the argument about the potential for litigation of *shall* seems to call for greater care in the drafting process rather than for the blanket suppression of the word. Williams (2006, p. 254) summarised the situation around *shall* as follows:

> [W]e have witnessed an overall improvement in the quality and clarity of those legislative texts where *shall* has been removed with respect to many traditional texts. But this, to my mind, is because it is much more likely that *shall*-free texts have been drafted following Plain Language criteria as an overall policy. In my view some of the criticism made of *shall* has been a little misguided.

## 2 METHODOLOGY

### 2.1 RESEARCH INTO *SHALL* IN LEGISLATION AND CONTRACTS

Overall, these considerations have shown that the situation around *shall* and its potential substitutes has not yet been entirely clarified and is still very dynamic. The next part of the paper therefore aims to explore the use of *shall* over time and in various genres.

It has already been demonstrated by Garzone (2013a, 2013b) and Williams (2012) that the use of *shall* has significantly declined in British legislation over the last

18 See also Garzone (2013b, p. 79): "the suppression and replacement of *shall* in legislative drafting is not as unproblematic as it is often presented to be in the relevant literature".

decades. Since British legislation is drafted centrally[19] in accordance with the *Office of the Parliamentary Counsel Drafting Guidance* (*OPC Drafting Guidance*, 2020), it is relatively easy to impose certain uniform drafting rules, including the suppression of *shall*.[20] However, this method of standardisation cannot be imposed on lawyers drafting private documents, such as contracts. According to Williams (2012, p. 354), statutes are "more open to change" than private documents. While the drafting of contracts is also subject to conventions because "lawyers rarely, if ever, draft contracts from scratch" (Chesler, 2009, p. 35), it is hard to imagine how a complete ban on *shall* (as has occurred with regard to UK legislation) could be introduced into contract drafting. Although formbooks certainly play a standardisation role in contract drafting, it is questionable to what extent the plain language changes, which have demonstrably affected legislative drafting, have also played a role in contracts. In order to examine that, this paper has set out to compare the use of *shall* in legislation and contracts, thus contrasting public and private legal documents.

For legislation, we have decided to use British legislation, where substantial declines of *shall* have been observed by Garzone (2013a, 2013b), and EU legislation, which still seems to adhere to *shall* (Garzone, 2013a, p. 103). For contracts, we have focused on British and Australian employment contracts and service agreements. The reason for the inclusion of Australian contracts is that in Australia the plain language efforts have been very vigorous and consequently might have affected some contract drafting practices.

The synchronic part of our research has been supplemented with a diachronic part in which we seek to explore the use of *shall* over time, together with some of the proposed substitution strategies. We have selected potential substitutes from the literature (e.g., DTG, 2008; Adams, 2017). For the present tense, which is a potential substitution strategy for *shall*, we have formulated our computer query so as to identify the third person singular (with the ending *-s*). We believe that due to the lack of inflection, the verb forms other than third person singular could include many false results (e.g., "We *shall* pay (or *reimburse* you) for …" or "you *must* not refuse, *fail* to attend or *arrange* appointments …"), in particular due to the tendency to use strings of verbs with one modal auxiliary. Although our results could be consequently slightly biased, we believe that they will provide a more reliable picture than if we had used the tag for the present tense in all persons.

## 2.2 THE CORPORA

Research into legislation has become quite popular among corpus linguists because statutes are dated and readily available. By contrast, research into authentic contracts poses challenges because contracts are usually kept private. Consequently, some researchers[21] have used formbooks for their research into the language of contracts.

19 For more details on the differences between the drafting practices of common law and civil jurisdictions, see Stefanou (2016).

20 "Office policy is to avoid the use of the legislative *shall*" (*OPC Drafting Guidance*, 2020, p. 4).

21 For example, Dobrić Basaneže (2018) in her research into binomial expressions.

Fortunately, it is now possible to access the contracts published via the US Securities and Exchange Commission (SEC). Some companies are required to file their contracts with the SEC, and the contracts are then accessible via Lawinsider.[22]

For this research, we have compiled a number of specialised corpora, as shown in Table 1 below:

| Corpus | Number of documents | Number of tokens |
|---|---|---|
| **UK legislation 1820** | 20 | 121,822 |
| **UK legislation 1870** | 20 | 102,919 |
| **UK legislation 1920** | 20 | 153,163 |
| **UK legislation 1970** | 20 | 198,826 |
| **UK legislation 2020** | 20 | 397,653 |
| **EU legislation 1975** | 40 | 103,516 |
| **EU legislation 2020** | 20 | 159,842 |
| **UK contracts 1998** | 30 | 161,924 |
| **UK contracts 2020** | 30 | 244,134 |
| **AUS contracts 2020** | 30 | 280,817 |

**TABLE 1:** The corpora used for the present research.

The UK legislation corpora only include public general acts, in the "as enacted" version, and no amendments. The EU legislation corpora consist of secondary legislation (regulations, directives, decisions). The year 1975 was chosen on purpose. Although 1970 would have been supposedly more consistent with the dates of the UK legislation corpora, the UK joined the EC in 1973 and, consequently, we believe it is more appropriate to consider texts from the time period when English was established as one of the official languages of the EC. The contracts selected include only employment agreements and services agreements because the type of contract might also influence the language in that the addressees might be consumers or lawyers, respectively (e.g., a consumer contract versus a merger agreement). Although the study is limited to certain types of contracts, we believe that by consistently applying the same criterion over different periods of time and jurisdictions, we are more likely to ensure comparability than if we had randomly chosen various types of contracts. As regards the time periods, we wanted to conduct a diachronic study to see any changes over time. Therefore, we selected the contracts where the date of filing was from 1998 and 2018, so that there is at least a 20-year time span. But since there were not enough contracts from these specific years, we also used contracts from the year before and after. The SEC contracts include very few contracts from before 1995, making it impossible to undertake a larger diachronic study. Likewise, the insufficient number of Australian contracts made a diachronic study impossible.

22 https://www.lawinsider.com/.

The corpora were compiled and analysed through SketchEngine.[23] The values presented are in *ipm* — instances per million words. In this way, it is possible to make comparisons across corpora of different sizes.

## 3 RESULTS AND DISCUSSION

### 3.1 *SHALL* IN CURRENT LEGISLATION AND CONTRACTS

In the first part of our research we examined the use of *shall* synchronically in current British legislation, EU legislation, British contracts and Australian contracts. As can be seen in Figure 1, the distribution of *shall* in these four synchronic corpora is very uneven.

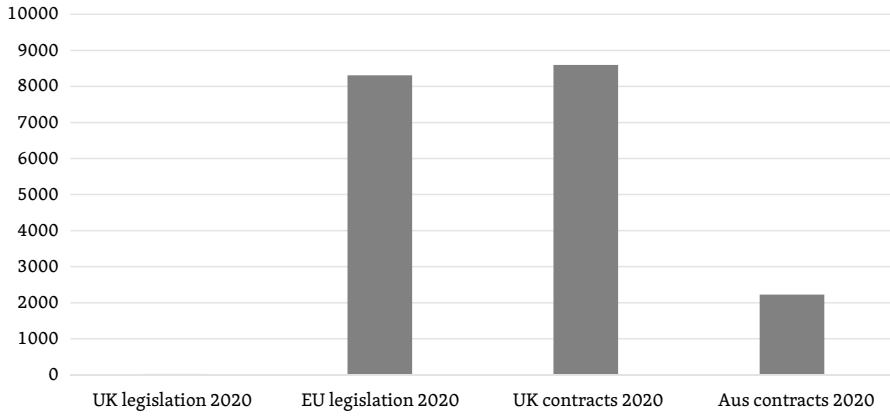


**FIGURE 1:** *Shall* in UK legislation, EU legislation, UK contracts, Australian contracts (ipm).

The UK legislation is practically free of *shall*, consistently with the advice provided in the *OPC Drafting Guidance* (2020). This confirms the trends observed earlier by Garzone (2013a, 2013b) and Williams (2012). By contrast, EU legislation still adheres to *shall*. While the EU has become committed[24] to plain language some time ago, the multilingual environment may make it more difficult to effect ground-breaking changes in the drafting practices: "In a multilingual environment it is a far more complex task to modernize the style of just one language without this having unforeseeable consequences on some or all of the other languages." (Williams, 2015, p. 149). Moreover, as Williams (2015) noted, 95% of the Commission drafters draft in English, but only 13% of them are English native speakers. Presumably, the necessity to draft in a language other than their mother tongue may make the drafters less forward-thinking and more dependent on conventional practices that have already been thoroughly

23 https://www.sketchengine.eu/

24 For some EU plain language initiatives see for example Williams (2015).

tested. Furthermore, the EU drafting guidelines allow a more liberal use of *shall* than the *OPC Drafting Guidance*: "To impose an obligation or a requirement, EU legislation uses *shall* … To impose a prohibition, EU legislation uses *shall not*." (*English Style Guide*, 2020, p. 54). By contrast, the guide does not recommend *shall* in non-enacting terms[25] (annexes or recitals), subordinate clauses, and declarative provisions.

The values for UK contracts are very high compared to British legislation where *shall* is no longer used. It seems that while consensus has been reached on *shall* in legislative drafting, contract drafting is still very conservative, following the time-tested patterns. Several factors can explain this. First, there is substantial inertia in contract drafting, and even if the contract drafters choose to eventually adapt their language in conformity with the plain language rules, such changes may take a long time before they prevail over the traditional practices. Second, the drafting of legislation in the UK is centralised (Stefanou, 2016, p. 137) in the Office of the Parliamentary Counsel and concentrated in the hands of few drafters, while contract drafting is done by thousands of lawyers in a decentralised way. The changes introduced in legislative drafting are due to "linguistic planning" (Garzone, 2013a, p. 113) rather than individual choices of the drafters, and while concerted effort has been made by the Office of the Parliamentary Counsel to update the language of legislation, there is no comparable standardisation body that would be responsible for similar changes in the drafting of private documents. Third, the achievements made in legislative drafting are the result of the rigorous work of plain language exponents, who largely agreed that *shall* was undesirable in legislation. However, it is dubious whether broad consensus could be reached on the suppression of *shall* in contracts among practising lawyers.

However, mere frequency of occurrence of *shall* does not provide a full picture of how *shall* is currently used in contract drafting. As mentioned earlier, the "has a duty test" requires an animate subject. But has this "American rule" been observed in British contracts as well? We have created a random sample of 100 instances of *shall* and calculated animate (meaning agentive, thus including bodies, committees, states, etc.) and inanimate subjects (including the passive). About 60 cases out of 100 were inanimate subjects. Thus, there seems to be a need to use *shall* for other purposes than to impose a duty. Earlier we discussed the distinction between prescriptive (consistent with the "has a duty" test) and constitutive (called "performative" by Garzone, 2013b, p. 73) use of *shall*. In our corpus we identified a whole scale, ranging from purely prescriptive cases to predominantly constitutive ones, as shown in examples 1–5:

1) Employee *shall* vacate the offices of Employer. (prescriptive)
2) The Employee's working hours *shall* be such hours as may be necessary to properly perform the Employee's duties. (prescriptive and constitutive)
3) The Employee *shall* be employed as Head of Global Distribution. (prescriptive and constitutive)

25 "The 'enacting terms' are the legislative part of the act. They are composed of articles, which may be grouped into parts, titles, chapters and sections (see table in Guideline 15), and may be accompanied by annexes." (*Joint Practical Guide*, 2015, p. 24)

4) Employer *shall* have the right to terminate this Agreement … (constitutive and prescriptive)
5) For purposes of this Agreement, the term "Competing Business" *shall* mean a business or a division of a business, conducted anywhere in the world … (constitutive)

The prescriptive element seems to be present even in the predominantly constitutive example (5) where it authoritatively determines the meaning of a particular expression, requiring the addressees to respect that meaning. In this way, *shall* imposes an obligation on the readers to interpret the expression in a certain way. Likewise, example (2) constitutively determines the working hours of the employee, but at the same time requires the employee not to work less and obliges the employer not to exceed these working hours. In example (4) it is constitutively determined that the employer can terminate the agreement under certain circumstances, and everybody else is obliged to respect this right.

The Australian contract corpus suggests that even private documents can be responsive to plain language efforts. Compared to the UK contracts, the ipm for *shall* is almost four times lower. This confirms Adams' (2014, p. 13) claim that "Australian practitioners have gone further than others in purging *shall* from their contracts". The pioneering position of Australia with respect to plain language principles was noted by Williams (2011, p. 140): "Beginning in the US in the 1970s, the [plain language] movement soon spread to Canada and the UK, but it was in Australia and New Zealand that the proposals for restyling legislative texts were first accepted by the Offices of Parliamentary Counsel as early as the late 1980s.". In this way, the Australian drafters, lawyers, and addressees have had abundant time to become acquainted with the plain language principles and the lawyers have been able to incorporate them into the drafting of private documents. Besides, some very vociferous plain language exponents come from Australia, for example Peter Butt or Michele Asprey. According to Balmford (2002), the countries which have embraced the idea of plain language (such as the UK, US, South Africa), are generally responding to "regulatory demand"; for example, in the US the Plain Writing Act 2010 requires official communication to be written in plain language. By contrast, in Australia, many companies see plain language as their competitive edge and they are "committed to plain language in response to client demand" (*ibid.*, section 5.4). Balmford (2002, section 5.3) even predicts that one day "clients everywhere will refuse to pay for legal services unless they are plain". All these factors could account for the fact that the use of *shall* is significantly lower in Australian contracts than in British contracts.

### 3.2 *SHALL* IN UK LEGISLATION OVER 200 YEARS

Figure 2 shows how *shall* was used over the past 200 years and how it was eventually replaced by other items. The 1820 corpus contains the highest frequency of *shall*, amounting to 18,000 instances per million words. In the subsequent corpora the use of *shall* declined. The greatest decline occurred between 1970 and 2020, and the 2020 corpus is virtually free of *shall*. These values indicate that the plain language efforts,

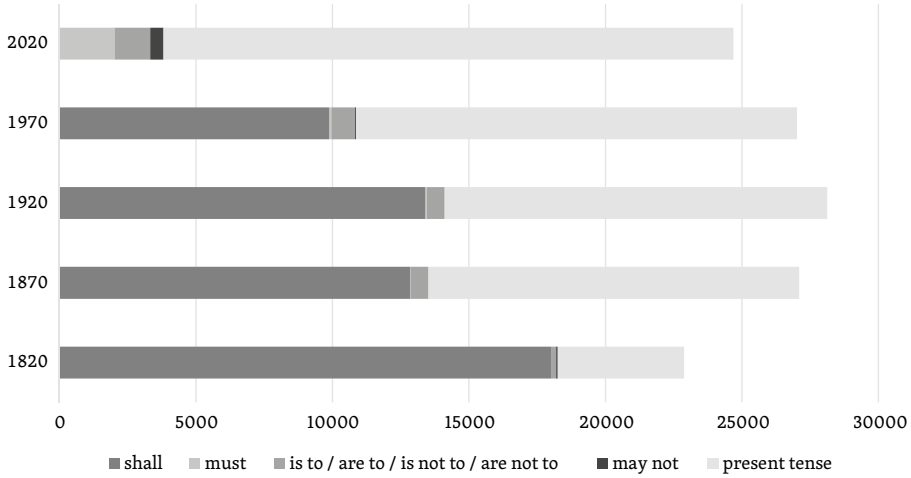


**FIGURE 2:** A diachronic perspective: substitution strategies for *shall* in UK legislation (ipm).

which started in the 1970s, are arguably behind the steep decline in *shall*. A similar trend was observed by Garzone (2013a, p. 113), who suggested in 2013 that the reduction process "may eventually lead to *shall*-free legislation also in the UK". A few years later, we can confirm that Garzone's predictions were fulfilled and current British legislation is indeed *shall*-free.

As far as the substitutes for *shall* are concerned, Figure 2 shows that the suppression of *shall* was largely compensated by a substantial increase in the use of the present tense, *must*, *is to*, and *may not*. The frequency of occurrence of all these substitutes has grown considerably in the last corpus, showing that it is not possible to substitute *shall* with a single substitute, but a variety of options have been deployed.

### 3.3 *SHALL* IN EU LEGISLATION

Figure 3 shows the values for *shall* in EU legislation in the 1975 corpus and the 2020 corpus. The data indicate that in the 1975 corpus the "words of authority" (Garner, 2001, p. 939) are more prevalent than in the 2020 corpus. Such words of authority include *shall*, *must*, *may not* — their frequencies of occurrence are much higher in the 1975 corpus than in the 2020 corpus. Although the values for *shall* are still very significant in the 2020 corpus, the decline with respect to the 1975 corpus is noticeable — the difference is about 30%. Therefore, it seems that the language of EU legislation is slowly and cautiously following the plain language trend. In contrast to British legislation, however, the decline of *shall* was not compensated by the present tense (whose ipm is comparable in both corpora) or by another modal verb.

It is surprising that the use of *must* is significantly more prevalent in the 1975 corpus than the 2020 corpus. We would have expected the opposite trend, with *shall* being partly replaced by *must*, as in British legislation. However, a check of the concordance lines indicates that the use of *must* in these cases was largely confined to

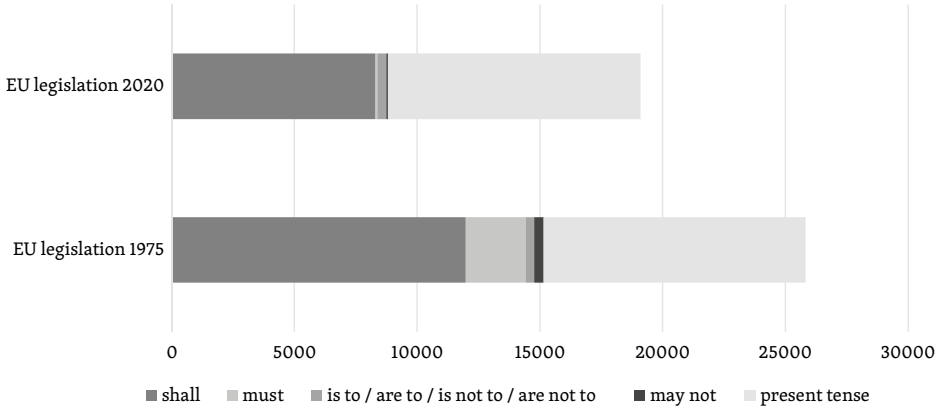


**FIGURE 3:** A diachronic perspective: substitution strategies for *shall* in EU legislation (ipm).

recitals (i.e., non-enacting terms), as evidenced by the word *whereas* in most cases. This seems to be in line with rule 10.29 of the *English Style Guide* (2020), which stipulates that *shall* should not be used in non-enacting terms such as recitals, and alternatives (*must*, *have to*, *is required to*) should be used instead. Likewise, the *Joint Practical Guide* (2015, p. 12) maintains that specific verbs and tenses should be used in specific parts of legal acts: "The choice of verb and tense varies between different types of act and the different languages, and also between the recitals and the enacting terms.". Recitals do not form part of the enacting terms of the legal act:

> The 'recitals' are the part of the act which contains the statement of reasons for its adoption; they are placed between the citations and the enacting terms. The statement of reasons begins with the word 'whereas:' and continues with numbered points … It uses *non-mandatory language* and must *not be capable of being confused with the enacting terms*. (*Joint Practical Guide*, 2015, p. 31, emphasis added).

"Non-mandatory language" here implies that the modal verb *shall* is not used in recitals. However, the high presence of *must* in recitals in the 1975 corpus suggests that at that time *must* was considered non-mandatory language (consistently with rule 10.29 of the *English Style Guide*), probably due to the unshakeable, monopoly position of *shall* (which was used in enacting terms and was clearly mandatory language). Since the 1970s we have witnessed significant repositioning of *shall* in legal language across the globe (due to plain language efforts), with *must* taking over some of the functions of *shall*; consequently, the non-mandatory status of *must* in recitals might have become rather questionable. After all, *must* is currently recommended by plain language exponents as an appropriate substitute for *shall*. Recitals in current EU legal acts contain mostly the modal verb *should*. Thus, in recitals, the modal verb *must* was, in the past, in competition with *should* (but nowadays *must* is in competition with *shall* in many common law countries). For example:

6) whereas the situation on this market *must* therefore be assessed in the light not only of the factors peculiar to the market itself but also of those relating to trends in the aforesaid trade (the 1975 corpus)

In example (6) the modal verb *must* could be quite easily replaced with *should*. Although these two words are not considered synonymous in most contexts, in recitals they could be, as there is no doubt that this part of a legal act does not impose any obligations, but only justifies the measures to be taken. The data from our corpora seem to support this (see Figure 4):

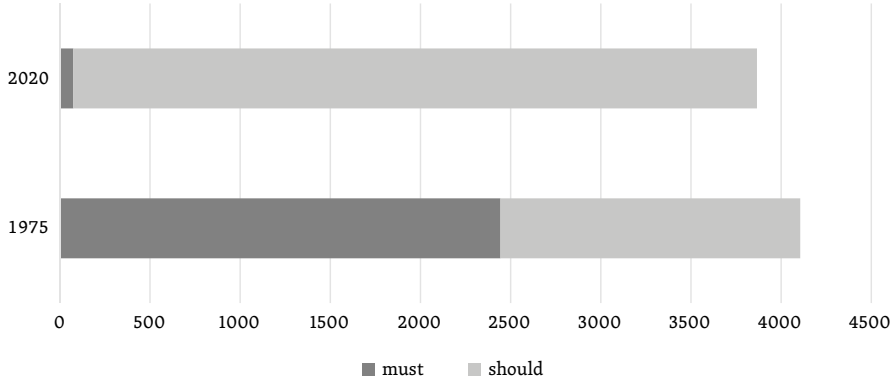


**FIGURE 4:** A diachronic perspective: *must* and *should* (ipm).

While the presence of *must* is very visible in the 1975 corpus compared to the 2020 corpus, the presence of *should* is much higher in the 2020 corpus than in the 1975 corpus. In other words, the decline in *must* in 2020 might have been compensated by an increase in *should*.

Overall, this discussion shows that the repositioning of *shall* and its partial suppression can have an impact on other modal verbs (in this case *must* and *should*), which can lose some of their previous functions and acquire new ones. This seems to fully justify the term "modal revolution" coined by Williams (2012).

### 3.4 *SHALL* IN UK CONTRACTS

Figure 5 shows the use of *shall* and its possible substitutes in British contracts from the years 1998 and 2018. The substitutes were selected based on Adams (2017). Although Adams' work is of American origin and our contracts are British, Adams' book has become iconic worldwide and widely read in the UK. Thus, the substitutes proposed by Adams are relevant to British contracts as well.

Even such a short time span indicates that the plain language trend has found its way into British contracts. From 1998 to 2018 the use of *shall* declined by nearly 40%. As regards the substitutes, there is a noticeable increase in *must*, the present tense, *will*, and *agree to*. The remaining items occurred in rather small frequencies

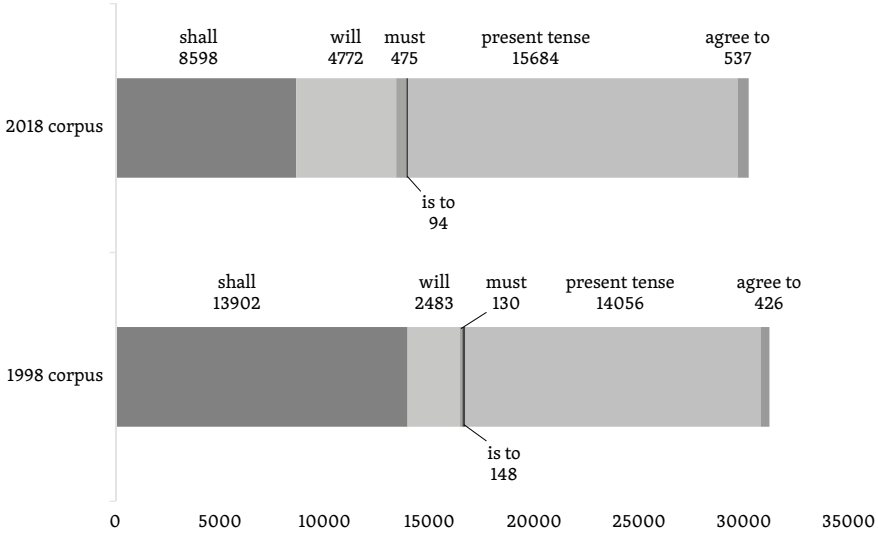


**FIGURE 5:** A diachronic perspective: substitution strategies for *shall* in UK contracts (ipm).

and therefore cannot be considered viable candidates for the replacement of *shall*. The use of the expression *is to* (with the relevant permutations) has declined in contracts (by 36%), showing that this option is not popular among contract drafters. This is in stark contrast to British legislative drafting practices, where *is to* has been given a distinct role[26] and is on the increase. The use of the present tense has not become a dominant option, in contrast to British legislation, where it clearly prevailed over any other substitution strategy.

The increase in the use of *will* and *must* in the 2018 corpus tentatively suggests that contract drafters might have taken on board Garner's (2001, p. 941) advice to use the phrases *we will* and *you must* for parties of unequal bargaining power. Employment contracts are presumably such contracts, because the employer generally has a stronger position than the other party (the employee). Table 2 shows the uses of the phrases *we will* and *you must* in our corpora.

| | *we will* | *you must* |
|---|---|---|
| 1998 corpus | 6 | 0 |
| 2018 corpus | 193 | 201 |

**TABLE 2:** Use of *we will* and *you must*.

26 See DTG (2008, p. 12), who recommend *is to* for the creation of new statutory bodies, offices, courts, and tribunals.

While the 1998 corpus contains very few or no examples of these phrases, the 2018 corpus shows they have become much more popular. The dispersion was not high in the corpora (about 5 documents out of 30), but it could nevertheless suggest a trend for the future.

Overall, Figure 5 confirms that the drafters of contracts are probably becoming sensitive to the controversies surrounding the overuse of *shall* and are willing to adjust their drafting practices by reducing the use of *shall* and by considering other alternatives. Although *shall* still seems popular among lawyers, a 40% decline over 20 years is significant.

## 4 CONCLUSION

This paper sought to examine the current debate surrounding the use of *shall* in legal texts and to analyse the use of *shall* and potential substitution strategies in British legislation, EU legislation, and contracts. It appears that the recent general tendency has been to suppress *shall* in legal texts, backed up by the argument that *shall* is archaic and ambiguous. Yet, there have been some voices from the research community arguing that the substitution strategies may not always bring a real improvement. Certain researchers have made a case for a disciplined use of *shall* in private documents, using the "has a duty" test. Our corpus data suggest that the situation is very varied across genres and jurisdictions. While *shall* has been completely removed from British legislation by now and a robust system of substitution strategies has been put in place, in EU legislation *shall* still thrives, although we have observed a noticeable decline. British contract drafters still adhere to *shall*, albeit to a lesser extent than 20 years ago. Contract drafters from Australia, where plain language is largely seen as a competitive edge for law firms, use *shall* much less than their British counterparts.

With regard to substitution strategies, the situation appears to be very dynamic. While certain substitutes have been recommended for particular uses in British legislation (e.g., *is to* for establishing a statutory body or office, *must* for imposing an obligation, etc.), the situation is much less uniform in British contracts, where standardisation is more difficult to achieve. Thus, it seems that the British contract drafters are following suit as regards the growing aversion to *shall*, but at the same time they are still exploring the available substitutes.

In addition, our analysis of the use of *must* in EU legislation has shown that the decision to replace *shall* may have far-reaching consequences for the whole system of modal verbs (almost reminiscent of the butterfly effect in meteorology); while *must* was used in recitals in the 1970s as non-mandatory language, its repositioning as a substitute for *shall* (and thus recategorization as mandatory language) probably strengthened the position of *should* in recitals.

To conclude, the situation around *shall* is very dynamic at the moment, and although the fate of *shall* is still uncertain, some strong voices from the research community have raised valid arguments in its defence. It seems that we are in the middle of a "modal revolution" (Williams, 2012), and although *shall* has lost some battles (e.g., the suppression of *shall* in British legislation), it seems that a "disciplined use" of *shall*

advanced by Adams (2014, p. 13) could be the desired outcome for private documents, reconciling the legal practitioners' predilection for *shall* with the need to avoid its overuse.

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