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Tradition and Change in Legal English
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Verbal Constructions in Prescriptive Texts
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Foreword

‘When I choose a word,’ Humpty Dumpty said, in a rather scornful tone, ‘it just means what I choose it to mean – neither more nor less.’ ‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’

Lewis Carroll, Through the Looking Glass

I would like to thank Maurizio Gotti for his encouragement and numerous suggestions and for providing the initial ‘spark’ which led me to bring together my joint interests in verbal constructions and legal English.

A number of people have helped me in a variety of ways while writing this book. I would like to thank in particular Ylva Berglund, Ilse Depraetere, Kate Haworth, Chris Heffer, Paul Larreya, Elena Seoane and Nicholas Smith. Their comments and suggestions have been extremely valuable to me. Of course, I alone am responsible for any remaining inaccuracies in the book.

As ever, my thanks go to my wife Lucia and my daughter Vivien for their support and for putting up with me while I was writing this.
Most people manage to get through life without ever acquiring a detailed knowledge of the laws which regulate their daily lives. The specialized knowledge of such matters is essentially the domain of the so-called legal professions, constituted mainly by lawyers and judges who are crucially involved in the job of interpreting the laws and regulations that have been drafted.

Interpreting the intention of the lawmakers and those who drafted a particular law inevitably entails a detailed scrutiny of the language used. It could be a question of defining the boundaries of given lexical items. For example, in recent years there has been much discussion within the European Union as to which ingredients may or may not be included in the production of chocolate. At which point does chocolate legally cease to be chocolate and have to be labelled – by law – as something else? The so-called EU Chocolate Directive in force since August 2003 lays down specific criteria as to how terms such as ‘chocolate’, ‘milk chocolate’ and ‘cocoa powder’ must be used, as well as allowing a maximum of five per cent of non-cocoa vegetable fats to be used – a measure contested by a number of chocolate-producing companies that consider the inclusion of such fats as conflicting with the ‘essence’ of what chocolate is meant to be.

The mere absence of a definite article in an expression can give rise to heated and prolonged interpretative debate. For example, the famous United Nations Security Council Resolution 242 of 22 November 1967, drawn up by British Ambassador Lord Caradon following the occupation of territories by Israel, calls for the “withdrawal of Israeli armed forces from territories” occupied in the recent conflict”. The wording has been passionately disputed for decades by international lawyers because of the lack of the word the before ‘territories’ in the English version (and also in its Russian equivalent), whereas the

Where I deem it necessary in this volume, the relevant parts of citations will be italicized so as to focus more easily on the point in question.
definite article is present in both the Spanish and French versions. Does this therefore entitle Israel merely to make minor border adjustments by selecting which territories the Resolution applies to, or does it entail giving back all of the territories that it had occupied? Such issues have affected – and continue to affect – the daily lives of millions of people.

Coming closer to the specific subject area of this volume, namely verbal constructions in prescriptive legal English, there are even cases where the choice of a modal auxiliary – shall or may – can potentially determine the outcome of a US presidential election. For example, the contested electoral result of November 2000 between the Democrat candidate Al Gore and the Republican George W. Bush led to judges from Florida’s Supreme Court having to resolve the conflict between one electoral law of 1951 which states that:

(1) If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing returns shall be ignored, and the results shown by the returns on file shall be certified.

while another portion of the law, enacted in 1989, affirms that:

(2) If the returns are not received by the Department by the time specified, such returns may be ignored and the results on file at that time may be certified by the Department.

The former entails an obligation to ignore all returns after a certain date, whereas the latter confers discretionary power – returns may either be ignored or they may alternatively be taken into account.

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2 The literature on the question of the omission of the definite article in Resolution 242 is vast. For a succinct overview see Rosenne (1971); see also ‘Statements clarifying the meaning of U.N. Security Council Resolution 242’, at http://www.mfa.gov.il/mfa/go. Šarčević (2000: 205) points out that the original draft resolution in Spanish did not contain the article but it was subsequently revised and aligned with the French text.

If law and the interpretation of the law have strict connections with the study of language, it is also true that legal language is often considered to be beyond the comprehension of the non-expert because it is so markedly different in many ways from the type of language used in day-to-day life. Moreover, it is widely held that this is the result of a deliberate – and rather devious – policy on the part of the legal profession:

To say that historically, legal language has tended toward the complex rather than the simple is a vast understatement. Yet this is also true of scientific language […]. While few would argue that medical language is intended to mislead, perhaps more would accept that legal language does so (Barleben 2003a).

According to the Law Reform Commission of Victoria, Australia, one of the causes for the complexity and verbosity of legal drafting was because legal fees were calculated according to the length of the document. Moreover, clerks often adopted very large handwriting and wide margins in order to make the document even longer (Tiersma 1999: 41). However, the “extreme linguistic conservatism of legal English” (Crystal / Davy 1969: 194) is also the result of a reluctance to take risks by adopting new and untested modes of expression, given that any modification in the wording of a clause may be construed as implying that there is also a change in meaning.

It has been observed that ever since the Norman Conquest legal English appears to have always been out of tune with common usage (Maley 1994: 11). For centuries the language of the law has been criticized for being abstruse and long-winded, written in a jargon that only experts themselves can understand. King Edward VI is quoted as saying in 1550 “I would wish that […] the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them; which thing shall most help to advance the health of the Commonwealth”; in his diary entry for 25 April 1666, Samuel Pepys speaks of the “obscurity” of English law “through multitude of long statutes” (both quotes cited in Conway 2002: 1).

There is an abundance of references to legal language in imaginative literature: in Gulliver’s Travels Jonathan Swift lampoons the class of lawyers: “This society hath a particular cant and jargon of
their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, of right and wrong” (cited in McBeth 2002: 6); Charles Dickens, who worked as a legal clerk in 1827, often satirized the legal profession and the language of its practitioners in his novels, notably in *Bleak House*, but also in *Pickwick Papers, Oliver Twist, Nicholas Nickleby, Our Mutual Friend* and *Great Expectations*, among others. In the opening page of *Bleak House* (1853/1964: 18) members of the High Court of Chancery are

mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horsehair warded heads against walls of words and making a pretence of equity with serious faces, as players might.

Such complaints are not restricted to writers from the British Isles but can be found in all the major English-speaking countries as, during its colonial history, Britain not only exported its legal system but also the language that went with it. Referring to sections of Australia’s *Income Tax Assessment Act* of 1936, one judge commented that “While both subsections present difficulties of construction, the former is drafted with such obscurity that even those used to interpreting the utterances of the Delphic oracle might falter in seeking to elicit a sensible meaning from its terms” (cited in Conway 2002: 1). The text in question reads as follows:

(3) A disposal of an asset that did not exist (either by itself or as part of another asset) before the disposal, but is created by the disposal, constitutes a disposal of the asset for the purposes of this Part, but the person who so disposes of the asset shall be deemed not to have paid or given any consideration, or incurred any costs or expenditure, referred to in paragraph 160ZH(1)(a), (b), (c) or (d) or 3(a), (b), (c) or (d) in respect of the asset.

As we shall see shortly, calls for the use of plain language in drafting laws continue to be a major issue, in both academic and non-academic circles. And one particular modal auxiliary – which we will be looking at in considerable detail in this volume, namely *shall* – has come under a concerted attack from several quarters, even if there is resistance
to its demise by more traditionally-minded practitioners for whom “it tends to infuse a document with the smell of old port and oak paneling” (Nunberg 2001: 3). There are also other scholars and legal experts, however, who advocate keeping shall for more solidly linguistic and pragmatic reasons, and not just on grounds of nostalgia, as we shall see later in this volume.

Until the 1970s most legal experts who displayed an interest in legal language had largely done so in a rather piecemeal, empirical fashion, without necessarily acquiring a specific competence in linguistics. On the other hand, this was hardly their fault in that there were very few published works that were relevant to their particular needs and interests, as linguists themselves had generally not focused their attention on the specific features of legal language. The only partial exception to this was in the field of the philosophy of law where the works of Charles S. Peirce, J.L. Austin and John Searle had already entered the mainstream of the writings of a number of legal theorists. On the other hand, Peirce, Austin and Searle themselves were only marginally interested in the question of legal language.

It was only after the dissemination of works such as Mellinkoff’s The Language of the Law and Crystal and Davy’s Investigating English Style, both published in the 1960s, that legal registers within a language began to constitute an area of scientific interest for linguists. Contemporaneously linguists were stressing the importance of the cohesive devices operating in a text (cf. Halliday / Hasan 1976), and by the mid-1970s discourse analysis had emerged as an autonomous and fascinating new area of linguistics that offered fresh insights into how language works (such pioneering works include Sinclair / Coulthard 1975 and Coulthard 1977). But as recently as 1987 it was still possible to assert that:

Despite the glaringly obvious fact that both legal theory and legal practice are, and always have been, heavily dependent on the tools of rhetorical and linguistic analysis, no coherent or systematic account of the relationship of law to language has ever been achieved (Goodrich 1987: 1).

However, over the last two decades there has been a burgeoning of studies in the relationship between law and language, sometimes carried out by legal scholars but in particular by linguists who have ana-
lysed the phenomenon from a multiplicity of viewpoints – from the perspectives of genre and discourse analysis (Bhatia 1983b, 1993; Conley / O’Barr 1990; Danet 1980, 1984; Goodrich 1987; Hoey 1985; Klinck 1992; Kurzon 1986, 1994, 1997; Maley 1985, 1994; Shuy 2001; Stygall 1994, 2002; Tiersma 1999; Trosborg 1991, 1995, 1997), semiotics (Jackson 1985, 1994, 1995; Kevelson 1988, 1989; van Schooten 1999), forensic linguistics (Berk-Seligson 2002; Cotterill 2002; Gibbons 2003; Hollien 2001; Lieberman / Sales 1997; McMenamin 2002; Olsson 2004), modality (Bennett 1989, 1990; Foley 2001; Gotti 2001; Kimble 1992a; Lauridsen 1992, 1993) and so forth. Not only has the written form been examined in depth, in recent years there has been considerable scientific interest in the dynamics of spoken language in legal contexts, especially in courts. Indeed, there are academic journals, such as Forensic Linguistics, which are almost exclusively dedicated to analysing the spoken language and the law.

Perhaps it is still true that no coherent or systematic account of legal language exists, but there have been numerous invaluable insights made by scholars into various aspects of the relationship between language and law so that today one may speak of the study of legal language as having a reasonably solid scientific basis.

Moreover, coinciding with – indeed, supplementing – the development of a growing interest by linguists in legal language was the rise of what has become known as the Plain Language Movement, originating in the 1970s, which called for a radical overhaul of ‘officialese’ and ‘legalese’ – terms generally used disparagingly to refer to the complexity of bureaucratic and legal language – in order to make them more comprehensible to ordinary citizens (Baldwin 1999; Balfour 2002; Benson 1984–85; Cutts 1995; Dick 1980; Eagleson 1990, 1994, 1998; Elliott 1991; Felsenfeld / Cohen / Fingerhut 1982, Felsenfeld 1983; Hathaway 1983a, 1983b, 1985; Kelly 1986; Kimble 1992b, 1994–95; Maher 1996; Wydick 1994). Although the movement has not been exclusively concerned with legal language, it has tended to concentrate its attention on legalese more than any other genre. The upshot of this interest has been the publication of a staggering number of manuals dedicated to the techniques of drafting legal documents (Adler 1990; Asprey 2003; Australian Office of Parliamentary Counsel 2000; Block 1992; Butt / Castle 2001; Charrow / Erdhardt 1986; Child 1992; Close 1998; Dick 1995; Dickerson 1986; Garner 2001;
Many of the publications on legal language by the proponents of the Plain Language Movement could be described as technical rather than academic. Their underlying purpose, in most cases, has been a practical one, namely that of trying to bring about changes in the drafting of documents so as to make them more comprehensible to the wider public. However, there has been a degree of overlap – which, if anything, has increased over the years – between academic research and the Plain Language Movement. One obvious area where the two concerns meet is that of applied linguistics, where issues have been raised such as how one goes about teaching legal English to non-native speakers. Given the complexity of most legal language, applied linguists have inevitably debated the need of finding ways of making it more accessible while adhering to sound pedagogical principles.

One of the best-known and most frequently-cited scholars of legal English, Vijay Bhatia, has theorized the need for the ‘easification’ – as opposed to the simplification – of legal English (Bhatia 1983b). Indeed, Bhatia is careful to distinguish between easification and simplification, given the negative connotations often associated with the latter in the sphere of applied linguistics. For example Cownie / Addison (1995) claim that the simplification of legal texts “does not help the students to develop efficient textual processing strategies which they can then use on the complex texts which will form part of their studies”, whereas Bhatia convincingly makes a case for focusing on and identifying the basic grammatical and semantic elements that underlie the often intricate structure of legal texts. Nevertheless, despite the growing interest of scholars in applied linguistics and legal English, it is still the case that “There are very few published materials which cover English for Academic Legal Purposes (EALP)” (Cownie / Addison 1995).
Some of the questions raised by the advocates of Plain Language have been taken up and extensively debated in academic circles, such as what the communicative function of a prescriptive text should be. Should a law be written for the general public, given that they are the people who will be directly affected by it? Or should it be written for legal experts, since they are the ones who will have the task of interpreting how it is to be applied in the real world? Are certain aspects of the law so intrinsically complex that they cannot possibly be written in a language that the ordinary citizen can easily understand? Or is this just an excuse for those in the legal profession to maintain their exclusionary hold over an area that has allowed them to preserve a number of socioeconomic privileges for centuries?

Such questions go to the heart of what law is about. If nothing else, they have called into question the role of law and the role of language within the field of law. It is even possible that we are on the brink of changes that could completely revolutionize the legal sphere. What if the Parliaments of all the major English-speaking countries decided to adopt the suggestions of the Plain Language Movement, as is already starting to happen on a limited (generally federal) scale in certain parts of the English-speaking world, e.g. in Australia, New Zealand, Canada and South Africa? What would be the consequences not just in linguistic terms but in terms of the relationship between citizens, legal experts and the law?

These and related questions are discussed in more detail later in this volume, and we shall be looking at the future of the language of the law in English, with a brief outline of the state of play in each of the major English-speaking countries.

My intention in this book, however, is not to take into consideration legal English as a whole, but rather to focus on one particular aspect of legal English, i.e. the verbal constructions that are used in prescriptive legal texts. My reason for choosing to concentrate on verbal constructions is that, to the best of my knowledge, no study has yet been undertaken in the field of legal language that takes all verbal constructions into account. There have been numerous essays and articles that have, for example, taken into consideration individual verbal constructions, such as the modal auxiliary shall (Asprey 1992; Bennett 1989, 1990; Eagleson / Asprey 1989a, 1989b; Foley 2001; Gotti 2001; Kimble 1992a; Nunberg 2001; Williams 2006a, whereas in this
volume my intention is to examine not only all of the modal and semi-modal forms to be found in prescriptive legal texts but also all of the indicative forms and even non-finite constructions (in particular the -ing form and the -ed participle), two areas that have tended to be rather neglected by legal linguists.

Moreover, without making any claim to providing an exhaustive analysis of the phenomenon, I was also curious to discover the situation of verbal constructions in contemporary prescriptive texts in English at a world level rather than just concentrating on one country or geographical area. The data and examples that I provide throughout the volume reflect this ‘worldwide’ interest. One of the main reasons for my curiosity in comparing texts from a wide range of sources was because of the changes that have been proposed – and which, in some cases, have been accepted – as a result of the influence of the Plain Language Movement. Given the fact that the English-speaking countries most receptive to change so far are neither the United Kingdom nor the United States, i.e. the two nations whose legal language has been the most widely studied, it was therefore necessary to examine the legal language in other English-speaking countries in order to highlight some of the innovative characteristics of the language of legal documents in English. Indeed, one of the main aims of this book has been to analyse some of the differences between texts that have been deliberately drafted in an innovative way with the more traditional drafting of texts, and to evaluate whether or not, and to what extent, such changes are justified.

As will be clear to the reader just by glancing at the way the various chapters are structured, in order to be able to focus on the way verbal constructions are used in prescriptive legal texts in English, I have provided a lot of background information relating not just to the general characteristics of legal discourse but to some of the principles of law in general. This seemed to me to be essential so that I could provide a reasonably exhaustive framework within which to make my observations relating specifically to verbal constructions, especially in view of the multiplicity of sources of prescriptive texts in English and of the current situation of flux in the language of legal documents mentioned earlier which tends to suggest that we could be on the verge of epoch-making changes. Without wishing to push the parallel too far, as with the outpouring of creative writing in English in recent
decades where much of the vibrancy and linguistic inventiveness has come from the ‘periphery’ of the English-speaking world from Britain’s former colonies and dominions, such as India, Sri Lanka, Australia, South Africa and Nigeria, so with the readiness to experiment with new forms of legal language, it is the legislative bodies in countries such as South Africa, Canada, Australia and New Zealand that have tended to take the lead with respect to the linguistically more conservative drafters in the United Kingdom and the United States of America.

In Chapter 1 of this volume I start by defining what exactly is meant by legal language, the language of the law, the language of legal documents and prescriptive legal texts. Briefly, I am referring to texts that are constituted by laws, directives, treaties, conventions, regulations, and legally binding contracts, i.e. where written rules are laid down. For reasons of space and homogeneity I will be analysing texts that are wholly prescriptive and will be ignoring, for example, court judgments on the grounds that such judgments are not completely prescriptive but are generally constituted by a description of the case in question before the final verdict is given. Moreover, again for reasons of space and homogeneity, within the category of prescriptive legal texts I will be concentrating mainly on legislative texts, ranging from international conventions to municipal laws, and will be largely ignoring other types of legally binding texts such as contracts or wills. My sources of reference are based on texts from all of the major English-speaking countries, namely the United Kingdom, the United States, Eire, Canada, Australia, New Zealand and South Africa. A number of texts come from international organizations, in particular the European Union, the United Nations and the International Labour Organization. All of the examples I provide throughout the book come from authentic texts, that is to say, not only are they taken from real texts, they are also sources of authority and not merely, for example, translations of authoritative texts. After a brief introduction regarding the situation of legal language in English in the world today I outline some of the main features that distinguish the language of legal documents from other types of discourse. I then discuss the make-up of a typical prescriptive legal text, with its division into preliminary, principal and final provisions.
In Chapter 2, entitled ‘The linguistic and pragmatic functions of prescriptive legal texts’ I start by looking more specifically at some of the issues in the language of legal documents involving verbal constructions, with an analysis of speech act theory, performativity, the question of what constitutes an enactment, and so forth. I then examine in some detail both the communicative function and the pragmatic function of a prescriptive text, before going on to analyse the question of vagueness v. precision in legal texts.

Chapter 3 begins with a succinct account of the verbal system in English, in particular in relation to tense, aspect and modality. While both the verbal system and modality in English have been very widely studied, surprisingly little has been written about these issues in relation to legal English, though there has been a greater amount of interest displayed by linguists in recent years. This then leads on to an analysis of the temporal framework within which prescriptive legal texts operate which involves attempting to answer questions such as whether such texts are essentially collocated in the future, as the widespread use of the shall auxiliary might seem to suggest, or whether they refer to the present, as the even more widespread use of the present indicative – a trait common not only to English but especially to a number of other languages such as French and Italian – would seem to suggest.

In Chapter 4 I outline the criteria I have adopted in compiling what I have labelled as my ‘World data’ which constitutes the basis of a small corpus of prescriptive texts deriving from a variety of sources. In Chapter 5 I examine in turn each of the most frequently-used modal and semi-modal verbal constructions in prescriptive legal texts in English, focusing especially on the most characteristic verbal constructions to be found, above all shall and may, the forms that help to give prescriptive legal English its distinctive ‘flavour’. This is followed by a brief section on the imperative and subjunctive forms. I then analyse each of the main indicative forms, particularly the present simple which turns out to be the most commonly-used finite verbal construction in prescriptive texts as a whole. After analysing the use of the passive form in legal English I take into consideration the non-finite verbal constructions present in prescriptive legal texts, an area which perhaps deserves greater attention from linguists, also in view of the frequency of such constructions as the non-finite -ing form as well as
(to a much lesser extent) non-finite participial forms, especially in the initial sections of some legal texts in preambles etc.

Chapter 6 is concerned with the future of the language of the law in English with specific reference to the claims and influence of the Plain Language Movement in the English-speaking world and the effects that this might have in terms of changing the status and frequency of use of certain verbal constructions, notably *shall* and *must*. I also take into consideration data I have compiled from a selection of prescriptive texts (from Australia, South Africa and New Zealand) where *shall* has been completely eliminated. The final chapter contains my conclusions, followed by bibliographical and Internet references.
I. Legal Language and Prescriptive Legal Texts

Books and articles which deal with law and language will tend to include expressions such as *legal language*, *the language of the law* or (less commonly) *the language of legal documents*, so it will first be necessary to identify what is meant by each of these terms before we can go on to establish the boundaries of the expression ‘prescriptive legal texts,’ which clearly comes within the wider category of legal language. Let us begin by outlining the distinction made by Trosborg (1995: 32), who affirms that ‘the language of the law’ is to be distinguished from other uses of ‘legal language’, the former being adopted as the expression referring to “language as realized specifically in legal documents, i.e. texts covered by the scope of statute law and common law, namely (i) legislation, and (ii) simple contracts and deeds.” The expression ‘legal language’ is used here as an umbrella term to refer to legal discourse in general, whereas Trosborg uses the expression ‘the language of the law’ to refer to one specific area of legal language, i.e. to written, prescriptive texts, which suggests the idea of ‘authority speaking’, as it were (or, if we wish to convey more accurately Trosborg’s definition of the expression, of ‘authority writing’), whereas the expression ‘legal language’ refers to any form of legal discourse which can range from the language of legal documents to the law reports published in newspapers to certain forms of oral language such as legal directions which is read out to jury members.

Maley (1994: 13) also observes that there is not one legal discourse but a set of related discourses and she goes on to highlight the characteristics of four types of legal discourse, starting with

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1 I am very grateful to Chris Heffer for his observations relating to this section.
2 In this volume I shall be using the word *text* in the sense generally accepted by linguists and discourse analysts, i.e. as “the written record of a communicative event which conveys a complete message. Texts may vary from single words (for example Stop!, EXIT) to books running to hundreds of pages” (Nunan 1993: 124-125).
judicial discourse, i.e. the language of judicial decisions, either spoken or written, which, when collected in reports, make up what is known as case law. She then goes on to identify courtroom discourse as that used by judges, counsel, court officials, witnesses and other participants, it being a form of “interactive language, peppered with ritual courtesies and modes of address, but otherwise perhaps the closest approximation to everyday speech of all public legal discourses.” On this latter point Heffer,3 who has examined in depth the language of jury trial, likewise points out that witness examination does not include the types of registral features (e.g. modal use, legal binomials etc.) which are common to both written and oral forms of ‘legal language’; he labels these hybrid forms of communication from legal professionals to lay people as ‘legal-lay discourse’. The third category defined by Maley is that of the language of legal documents, which embraces contracts, regulations, deeds, wills, Acts of Parliament, or statutes, and is quintessentially legal and formal. Finally, Maley identifies the discourse of legal consultation, i.e. that between lawyer and lawyer or between lawyer and client.

Thus we can see that what Trosborg calls ‘the language of the law’ corresponds to what Maley calls ‘the language of legal documents’. Elsewhere Maley refers to ‘the language of the law’, e.g. “It was not until 1650 […] that English became the official language of the law. […] It would be a mistake to suggest, however, that the language of the law reached its definitive form in the Middle Ages and has remained unaltered ever since” (1994: 12). However, Maley’s interpretation of ‘the language of the law’ would appear to be wider than Trosborg’s and would seem to include other forms of legal discourse besides that of legal documents. Indeed, this would appear to be the way in which the expression ‘the language of the law’ is often treated by scholars,4 i.e. it relates to the authoritative nature of

3 Personal communication. Chris Heffer’s book on the language of jury trial is scheduled to be published by Palgrave Macmillan in 2005.
4 However, like Trosborg, Šarčević (2000: 8) also restricts the expression ‘the language of the law’ to written texts alone: “In special-purpose communication the text is formulated in a special language or sublanguage that is subject to special syntactic, semantic and pragmatic rules […]. Legal texts are formulated in a special language generally known as the language of the law.”
legal language, which may well be predominantly contained in legal
documents but may also include, for example, oral verdicts expressed
by judges. Hence, the expression ‘the language of legal documents’
will be used here when specifically referring to prescriptive written
texts that are legally binding. The expression is also the title of Crystal
and Davy’s classic chapter on this particular type of legal English.

We shall now explore more closely the nature of the language
of legal documents by citing from their essay (Crystal / Davy 1969:
193-194) in relation to its communicative function – or perhaps, from
the point of view of the outsider, it would be more accurate to speak
of its *un*communicative function:

Of all uses of language it [the language of legal documents] is perhaps the
least communicative, in that it is designed not so much to enlighten language-
users at large as to allow one expert to register information for scrutiny by
another […]. It is a form of language which is about as far removed as
possible from informal spontaneous conversation. It is essentially visual
language, meant to be scrutinised in silence.

We can thus identify three features which characterize the language of
legal documents:

- its exceptionally high degree of *formality*;
- its *professionally exclusive* – some would say exclusionary –
nature. It is the language of experts, i.e. of a restricted professional
group;
- its ‘*archival*’ nature insofar as much legal writing consists of
normative information relating to rights and obligations which are
officially recorded in case it should ever need to be consulted and
used in the future (Jackson 1995: 112).

Of course, some of these features (notably the fact of pertaining to a
restricted professional group) may also apply to other types of legal
discourse. Bhatia also stresses the communicative as well as the
professional aspects connotating legal language in general which

encompasses several usefully distinguishable genres depending upon the
communicative purposes they tend to fulfil, the settings or contexts in which
they are used, the communicative events or activities they are associated with,
the social or professional relationship between the participants taking part in
such activities or events, the background knowledge that such participants

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bring to the situation in which that particular event is embedded and a number of other factors (1993: 101).

A closer analysis of the concept of genre may help us to define our terms of reference more precisely. Swales provides a functional definition of genre (1990: 58) as comprising a class of communicative events, the members of which share some set of communicative purposes. These purposes are recognized by the expert members of the parent discourse community, and thereby constitute the rationale for the genre. This rationale shapes the schematic structure of the discourse and influences and constrains choice of content and style.

Bhatia (1993: 13) also underlines the tactical aspects of genre construction:

Most often it is highly structured and conventionalized with constraints on allowable contributions in terms of their interest, positioning, form and functional value. These constraints, however, are often exploited by expert members of the discourse community to achieve private intentions within the framework of socially recognized purposes.

It is claimed that this tactical factor plays a significant role in the concept of genre as a dynamic social process, as against a static one (Trosborg 2001: 23).

At this point it is worth introducing the concept of *discourse community*. Within the sphere of legal language we are referring to that group of professional people who earn their living through their daily dealings with and expert knowledge of the language of the law, a group which also includes judges and those who actually draft legal texts as well as lawyers. Trosborg (2001: 27) speaks of the *esoteric audience*, i.e. the ‘insiders’ to a legal document, composed of “the Parliament which lays down the law, the lawyers who draft the laws, the lawyers who interpret the laws, and the court who passes judgement according to the laws”, and the *exoteric audience*, i.e. the ‘outsiders’ to a legal document, composed of citizens “who must obey the laws” (*ibid*.). However, Trosborg herself (2001: 27-28) acknowledges that this division into an active professional community and passive receivers is an oversimplification of reality because the latter
have the opportunity of reacting to the product of the expert originators and influence them to modify their texts so that these become more user-friendly. Thus, as a consequence, attempts have been made to remedy this problem by making legal discourse more reader-friendly, giving rise to the whole Plain Language movement, which has taken place for example in the US and England.

One of the fundamental characteristics of legal language is its complexity: as Crystal has observed (1995: 374):

Legal language is always being pulled in different directions. Its statements have to be so phrased that we can see their general applicability, yet be specific enough to apply to individual circumstances. They have to be stable enough to stand the test of time, so that cases will be treated consistently and fairly, yet flexible enough to adapt to new social situations. Above all, they have to be expressed in such a way that people can be certain about the intention of the law respecting their rights and duties. No other variety of language has to carry such a responsibility.

As was mentioned in the Introduction, those who earn a living from the legal profession have long been criticized for deliberately adopting a type of language that the average layperson cannot understand. It is also widely recognized that, even where there is no overt attempt to obfuscate the meaning of a legal text, certain drafting habits tend to be so deeply ingrained that it comes as second nature to many drafters to adopt obscure lexical items and expressions and a certain type of legalistic phraseology that an outsider would normally find off-putting and which is often known as *legalese*. The term can also be used in a neutral way, i.e. as referring to the conventional language in which legal documents are written, the jargon of the legal discourse community. However, it usually has negative connotations and is more generally thought of as indicating a style that uses the abstruse technical vocabulary and syntax of the law. Adjectives such as ‘wordy’ or ‘turgid’ are often associated with legalese. It has been defined as “the obscure and complicated style of many legal documents […] one of the few social evils that can be eradicated by careful thought and disciplined use of a biro” (Cutts 2001), and as “the language of lawyers that they would not otherwise use in ordinary communications but for the fact that they are lawyers” (Stephens
and is very often stigmatized as something which “is a block to communication” (ibid.) for most laypersons.

1. Prescriptive v. descriptive legal texts

Within the field of written legal language a distinction is generally made between its two primary functions, i.e. the regulatory and the informative, that is, between the prescriptive and the descriptive. Šarčević (2000: 9) observes that:

Legal texts whose function is primarily prescriptive include laws and regulations, codes, contracts, treaties and conventions. Such texts are regulatory instruments containing rules of conduct or norms. Accordingly, they are normative texts which prescribe a specific course of action that an individual ought to conform to or, as Kelsen puts it, will be subject to sanction […]. Today it is generally agreed that normative instruments prescribe how the members of a given society shall act (command), refrain from acting (prohibition), may act (permission) or are explicitly authorized to act (authorization).

Prescriptive legal texts thus come under the wider heading of normative texts, though it should be borne in mind that the latter also include texts of a non-legal nature insofar as they also have to do with moral, ethical and religious norms which may have no legal status.

Purely descriptive legal texts are “written by legal scholars such as legal opinion, law textbooks, articles, etc. Such texts constitute what is known as legal scholarship or doctrine, the authority of which varies in different legal systems” (Šarčević 2000: 9). Many descriptive legal texts thus come under the generic heading of academic discourse, an area that has attracted the attention of a growing number of linguists and discourse analysts in recent years. Although there will be references throughout this volume to such descriptive texts – a number of which can be found in the bibliography – they do not constitute the subject matter of our analysis here.

In between these two clearly defined groups of legal texts there are also so-called hybrid texts which contain both prescriptive and
descriptive features, e.g. judicial decisions and instruments used to carry on judicial and administrative proceedings such as actions, pleadings, briefs, appeals, requests, petitions, etc. (Šarčević 2000: 9). Although the language of court proceedings has also been widely studied from linguistic and pragmatic perspectives in recent years, it will not form part of our enquiry in this volume. This is partly because I wish to concentrate my attention on the specificity of the verbal constructions to be found in the written form of prescriptive legal texts, whereas the language of court proceedings is primarily oral, i.e. it is based on the dynamics of oral communication, even if some of it may subsequently be transformed into the written form. Furthermore, if one examines, say, the written text of a judicial decision, it is typically divided into three parts: a) a summary identification of the issues or questions of law raised (technically known as the major premise); b) a description of the case being judged (the so-called minor premise) in which the facts are established, generally conveyed in the past tense and constituting the bulk of the text; and c) the verdict in which the judge applies the law to the facts (the so-called conclusion). In other words, it is the descriptive element – as opposed to the prescriptive element – that usually predominates in the texts containing judicial decisions.

These categories of prescriptive, descriptive and hybrid texts roughly correspond to those established by Bhatia (1983a: 2) who distinguishes between three types of written legal English on the basis of their communicative function: 1) legislative or statutory writing; 2) academic writing, including research journals and legal textbooks; and 3) juridical writing, which includes court judgements, case-books and law reports.

Of course, the boundary between what is and what is not strictly legal is not always crystal clear, and there may be cases where a text can be defined as having quasi-legal status, as in certain types of informal agreements to be found on the Internet where one gives one’s consent or approval by clicking a mouse but without actually signing one’s name. Such quasi-legal texts will sometimes be taken into account in this volume if they are of interest from a linguistic point of view.
2. Legal language, legal systems and the English-speaking world

The type of language used today in the various countries and organizations where legal texts are drafted in English naturally derives from the model of written legal discourse originating in Great Britain and which has evolved through the centuries. It reflects the principles of the common law system – which contrasts with the civil law system of continental Europe – and also Britain’s political, cultural and linguistic history. Many of the more commonly used legal terms such as *court*, *magistrate*, or *judge* are a product of the Norman period when legal documents were drawn up in Latin or French\(^5\) rather than English which only reappeared as the language of officialdom in the late 14\(^{th}\) century. Moreover, both Latin and French also held prestige value in their usage (Barleben 2003b), with the result that the language of the law in English continued to borrow hundreds of terms and expressions from these languages, and the legal use of French was not officially abandoned in England until 1731. This fact also helps to account for the special lexical mixture that typifies legal English today, with Old and Middle English words surviving through the centuries, such as *aforesaid* or *forthwith*, together with Latinisms such as *habeas corpus* or terms of French origin such as *plaintiff* or *appeal*. It has been observed that the first Acts of Parliament written in English appeared at the end of the fifteenth century (Barleben 2003b; Tiersma 1999: 21).

Through colonization, Britain – which had long dominated its neighbouring island, i.e. Ireland – spread its idiosyncratic legal system and legal language to other countries around the world, notably to the United States, Canada, Australia, New Zealand and South Africa where there were substantial communities of white settlers, as well as to countries such as India where English is recognized as one of the

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5 Tiersma (1999: 20-21) points out that the Normans were accustomed to writing legal language in Latin and that the first statute in French only dates from 1275, i.e. over two hundred years after the Conquest. This was followed by a transition period, but by 1310 the normal language for statutes was French.
official languages. Naturally, over the years each community has adapted the language and legal institutions to its own particular needs, but the basic characteristics of legal language are similar throughout the English-speaking world, even if the specific details of the way legal texts are drafted in various English-speaking countries may differ markedly from one country to another. Moreover, the English versions of legal texts drafted in the various international organizations existing today such as the United Nations or the European Union reflect the same underlying pattern of usage with, for example, the United Nations largely following American conventions – e.g. in the use of *through* in “steps envisaged in paragraphs 4 through 7 and 10 below” in Security Council Resolution 1511 of 16 October 2003 on Iraq – while the EU tends to follow British English conventions when drafting texts in English.

3. The specificities of prescriptive legal texts in English\(^6\)

The main features of prescriptive texts in legal English are generally well-known, the most commonly mentioned being:

- the inclusion of archaic or rarely used words or expressions;
- the inclusion of foreign words and expressions, especially from Latin;
- the frequent repetition of particular words, expressions and syntactic structures;
- long, complex sentences, with intricate patterns of coordination and subordination;
- the frequent use of passive constructions;
- a highly impersonal style of writing (Maley 1985: 25).

Let us now take a brief look at each of these features in turn:

\(^6\) Parts of this section can be found in a modified form in Williams 2004b.
3.1. Archaic or rarely used words and expressions

One of the most characteristic features of the language of the law is the inclusion of words and expressions – generally archaic – which are only used in the legal sphere. These may take the form of adverbial expressions such as hereinafter or heretofore; verbs such as to darraign (to clear a legal account or settle an accusation or controversy); nouns such as surrejoinder (the answer by the plaintiff to a rejoinder by the defendant); adjectives such as aforesaid, and so on. There are also countless multiword expressions in which at least one of the terms tends to be archaic such as malice aforethought or residuary devisee or concurrent tortfeasors.

3.2. Foreign words and expressions, especially Latinisms

As was mentioned earlier, English legal language is heavily imbued with lexical items and expressions deriving in particular from French and from Latin, largely the result of centuries of Norman domination of England in the sphere of politics, law and religion. Besides the vast number of terms of Norman origin that are still used daily in English legal language, many are now practically unknown outside legal circles, such as attainder (the loss of civil rights through conviction for high treason), but such terms have nonetheless become ‘naturalized’ as English words. Other expressions have preserved all of their Frenchness, such as profits à prendre, also known as the right of common, where one has the right to take the fruits of the property of another, or autrefois acquis, i.e. formerly acquitted of a crime. A more recent example of a French expression used in contemporary legal English is acquis communautaire, which refers to the entire body of European Union law.

A large number of foreign lexical items or expressions in legal texts come from Latin, such as ex parte (on behalf of), in situ (in its original or natural position) or ratio legis (the reason for, or principle behind, a law). It should be borne in mind that the Latin used by the legal profession was adapted to the needs of English law and that it eventually developed into something called Law Latin (Tiersma 1999: 25).
3.3. Frequent repetition of particular words, expressions and syntactic structures

Another characteristic of legal language is the repetition of words, expressions and syntactic structures instead of using, for example, pronoun references or other types of anaphora. This may take the form of an almost obsessive repetition of a given lexical item as in the example below where the word *chair* together with the variant *vice-chair* is repeated 13 times out of a total of 120 words.

(1) Powers of vice-chair 11. Where (a) a member of a Board is appointed to be vice-chair either by the Assembly or under regulation 10, and (b) the chair of the Board has died or has ceased to hold office, or is unable to perform the duties of chair owing to illness, absence from England and Wales or any other cause, the vice-chair shall act as chair until a new chair is appointed or the existing chair resumes the duties of chair, as the case may be; and references to the chair in Schedule 3 shall, so long as there is no chair able to perform the duties of chair, be taken to include references to the vice-chair.\(^7\)

The main reason for such repetition is to ensure without any shadow of doubt that there can be no ambiguity as to what is being referred to. Outside legal discourse, such repetition would be deemed as extremely odd, even comic.

Besides this repetition of certain lexical items, the ‘flavour of the law’, as it has been described by some scholars, is also enhanced by the frequent use of multiword prepositional structures such as *in respect of*, *in accordance with*, *pursuant to* etc.

3.4. Long, complex sentences, with intricate patterns of coordination and subordination

As is well known, even today written legal English tends to be sparing in its use of punctuation. Some earlier statutes were formulated as one sentence without any punctuation except for a final full stop, though Crystal and Davy (1969: 200-201) point out that

\(^7\) Section II of the *Local Health Boards (Constitution, Membership and Procedures) (Wales) Regulations* 2003.
It is not true that legal English was always entirely punctuationless, and in fact the occasional specimens which were intended for oral presentation – proclamations, for instance – were quite fully punctuated. The idea of totally unpunctuated legal English is a later development [...]. By degrees the tradition grew up that commas, periods and so on had no part to play in legal writing, and some authorities went so far as to say that when they did occur they were to be accorded no recognition in the interpretation of meaning – something that could be got only from the words themselves.

Although reforms in punctuation have been slowly introduced throughout the centuries, a striking characteristic of contemporary written legal discourse continues to be that of sentence length. Even today it is not uncommon to find sentences running to hundreds of words, especially in preambles, with complex patterns of coordination and subordination. As has been observed, coordination at all levels, and of all kinds of structures is extremely common in legal texts (Crystal / Davy 1969: 204).

Bhatia has pointed out that:

most legislative provisions are extremely rich in qualificational insertions within their syntactic boundaries [...]. The qualifications seem to provide the essential flesh to the main proposition without which the provision will be nothing more than a mere skeleton, of very little legal significance (1993: 111).

Very often these qualifications create so-called syntactic discontinuities whereby “legal draftsmen try to insert qualifications right next to the word they are meant to qualify, even at the cost of making their legislative sentence inelegant, awkward or tortuous but never ambiguous, if they can help it” (Bhatia 1993: 112). Here is an example of a discontinuous verbal phrase where the modal shall is detached from the main verb be by the adverbial phrase for the purposes of this section (another example can be found in (1)):

(2) A person who on the qualifying date is a member of a board of directors or other governing body of a qualifying body shall, for the purposes of this section, be treated as having his principal or only place of work on that date, and for the period during which he has been a member of that board or
governing body, at the premises in respect of which the entitlement to appoint by that qualifying body arises.\textsuperscript{8}

The following sentence not only contains cases of both subordination and coordination but also highlights four different cases of syntactic discontinuity, coming respectively after if, are, may and including:

(3) If, after informing the supervisory authority concerned under subsection (3), any measures taken by the supervisory authority against the insurance undertaking concerned are, in the opinion of the regulatory authority, not adequate and the undertaking continues to contravene this Act, the regulatory authority may, after informing the supervisory authority of its intention, apply to the High Court for such order as to the Court may seem fit, in order to prevent further infringements of this Act, including, insofar as is necessary and in accordance with the Insurance Acts 1909 to 2000, regulations made under those Acts and regulations relating to insurance made under the European Communities Act 1972, the prevention of that insurance undertaking from continuing to conclude new insurance contracts within the State.\textsuperscript{9}

3.5. Frequent use of passive constructions

Another commonly stressed aspect characterizing legal language is the frequent use of passive constructions. This, of course, is not just a characteristic of legal discourse but also applies to other written registers such as scientific discourse and the language of journalism. Approximately one quarter of all verbal constructions in prescriptive legal English take the passive form (Williams 2004a: 231). In the following passage we find four consecutive verbal constructions in the passive:

(4) The acronym EURES shall be used exclusively for activities within EURES. It shall be illustrated by a standard logo, defined by a graphic design scheme. The logo shall be registered as a Community trade mark at the Office for

\textsuperscript{8} Section 5(5) of City of London (Ward Elections) Act 2002.

\textsuperscript{9} Section 21(4) of the Republic of Ireland’s Unclaimed Life Assurance Policies Act 2003.
Harmonization in the Internal Market (OHIM). It may be used by the EURES members and partners.\textsuperscript{10}

We shall return to the question of the use of the passive in Chapter 5.5. At this juncture it may be worth pointing out that there are growing calls by the Plain Language Movement to reduce the number of passive constructions,\textsuperscript{11} especially where no agent is expressed, mainly on the grounds that the failure to specify who is being authorized etc. may lead to ambiguity and confusion. However, other scholars (e.g. Charrow / Charrow 1979: 1325) assert that passives in legal English do not constitute an outstanding source of confusion.

3.6. Impersonal style

As has been noted, using passive forms is one of the most common methods of emphasizing the impersonal in all languages (Šarčević 2000: 177). Virtually all legislative texts are written exclusively in the third person singular or plural. One of the few exceptions to this general rule of ‘impersonalization’ is to be found at the beginning of constitutional documents, such as the Preamble to the 1997 South African Constitution where the first-person plural pronoun and possessive adjective are used:

\begin{quote}
\textit{We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa}
\end{quote}

\begin{thebibliography}{9}
\bibitem{article5} Article 5 of the EU Commission Decision of 23 December 2002 implementing Council Regulation (EEC) No 1612/68 as regards the clearance of vacancies and applications for employment.
\bibitem{eleanaseoane} In her paper ‘Changing Styles: On the Recent Evolution of Scientific British and American English’ presented at the Thirteenth International Conference on English Historical Linguistics in Vienna, 23-28 August 2004, Elena Seoane observes that there have been analogous calls to reduce the use of passive constructions in scientific journals by what she refers to as the ‘science-for-everyone’ movement as a reaction against the traditionally detached and alienating style used by many writers in favour of more ‘democratic’ and user-friendly forms of discourse. She also notes that there has indeed been a marked decrease in the frequency of passive constructions in scientific journals in recent years, particularly in American publications.
\end{thebibliography}
belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic [...].

The generalized use of the third person in legislative texts helps to reinforce the idea of impartiality and authoritativeness. Where, for example, a provision is applicable to everybody, the sentence either begins with every person, everyone etc. when expressing an obligation or authorization, or no person, no one etc. when expressing a prohibition, as in these articles (referred to as sections here), respectively 13 and 32, from the same Constitutional Charter:

(6a) Slavery, servitude and forced labour
No one may be subjected to slavery, servitude or forced labour.

(6b) Access to information
(1) Everyone has the right of access to – (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.

Another characteristic of written legal English is the fact that:

it is so highly nominal; that is, many of the features in any given stretch are operating within nominal group structure, and the long complicated nominals that result are noticeable by contrast with the verbal groups, which are relatively few, and selected from a restricted set of possibilities (Crystal / Davy 1969: 205).

A related trait that is mentioned by several scholars of legal language (e.g. Tiersma 1999: 77-79) is the tendency to resort to nominalization, i.e. where noun phrases are used in preference to verb phrases. Nominalization occurs where verbs are transformed into nouns, e.g. when the verb to amend is nominalized into to make an amendment. For example, the following sentence from article 38 of Canada’s 1982 Constitutional Charter:

(7) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized [...]

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could be reformulated more concisely (using seven words instead of ten) as:

(8) *The Constitution of Canada may be amended* by proclamation issued by the Governor General under the Great Seal of Canada where so authorized […].

Nominalization is seen as one of the devices that accounts for the excessive ‘wordiness’ of many legal documents, and most legal drafting manuals suggest reducing the amount of nominalization by preferring, where possible, the equivalent verb phrases as a means of making legal texts shorter and less turgid. On the other hand, nominalization has the advantage of allowing for the juxtaposition of adjectives next to the noun, whereas verbs may be preceded by adverbs which are less numerous than adjectives.

4. The structure of prescriptive legal texts

The structure of prescriptive legal texts in English obviously varies, even quite markedly, between one country and another; drafting conventions may also change depending on whether the text is, for example, a piece of municipal, federal, regional or national legislation, an international treaty, a resolution, or a directive etc. Moreover, not only each country but also each international organization such as the United Nations or the European Union has its own drafting procedures and practices. Finally, it should also be borne in mind that the drafting procedures in some countries have changed in recent years or are in the process of being reformed. Most legislative texts are typically divided into what are technically referred to as preliminary, principal, and final provisions. We shall examine each in turn. However, it should be stressed that these are only approximate guidelines in that there is often no clear boundary line delineating each category, and

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12 I am very grateful to Kate Haworth for her observations relating to this section.
there may be a considerable degree of overlap, especially between preliminary provisions and substantial provisions.

4.1. Preliminary provisions

Most prescriptive texts (but not all, some Canadian jurisdictions being an exception) begin with a so-called long title, e.g. Robin Rigg Offshore Wind Farm (Navigation and Fishing) (Scotland) Act 2003, or Resolution providing for the transfer of funds from the Motor Fuel Tax Fund of the County Cook, Illinois to the Public Safety Fund of the County of Cook, Illinois. Historically, early Acts in England did not have titles at all but were strung together, each one constituting a ‘chapter’ in a statute. The convention of providing long titles goes back to the late 15th century when printers wanted to break up the text, which they did by inserting long titles. In fact, early courts considered that the long title was not part of the Act itself. Subsequently, parliamentary officials added a title after an Act was passed, giving rise to the convention still generally in use today that a law now has a long title and a short title (Elliott: 1991).

After the long title there may be some form of preamble which sets out the context in which the text was drawn up and what the purpose and scope of the law or regulation etc. is meant to be. According to the EU’s Joint Practical Guide for persons involved in drafting Community legislation, a preamble means everything between the title and the enacting terms of the act, namely the citations, the recitals and the solemn forms which precede and follow them (European Union 2003: 7). Preambles, which are especially common in resolutions and treaties, can sometimes stretch to several pages, usually comprising just one sentence interspersed with a number of semi-colons. Speaking of English statutes in the early 19th century, Jeremy Bentham commented that “Of all instruments of longwindedness, the most unmerciful is that which is called a Preamble. It is a sort of excrescence growing out of the head of a section” (cited in Elliott 1991).

As we shall see on several occasions throughout this volume, not everyone uses legal terms in the same way. For example, recitals
have been defined as “[a] part of a deed of conveyance of sale indicating the effect and purpose of that deed and stating the history of the property to be conveyed. They are not essential to the deed’s validity” (Curzon 1983: 308-309). A recital is generally considered, however, as referring to an individual clause within a preamble – and this is the meaning that we shall be giving to the term in this volume. For example, referring to the Preamble of the 1957 Treaty of Rome, one scholar affirms that:

In the first recital the contracting parties express their determination ‘to lay the foundations of an ever closer union among the peoples of Europe’ […]. In the second recital, the contracting parties express their resolve ‘to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe’ (Harris 2000: 111).

The recitals the author refers to are contained in the following text:

(9) Preamble
His Majesty The King of the Belgians, the President of the Federal Republic of Germany, the President of the French Republic, the President of the Italian Republic, Her Royal Highness The Grand Duchess of Luxembourg, Her Majesty The Queen of the Netherlands,
1) Determined to lay the foundations of an ever closer union among the peoples of Europe,
2) Resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe […].

In EU legislation all recitals are numbered. Another example where a recital is explicitly interpreted as coming within a preamble is the following:

(10) The Board hereby finds that all of the recitals contained in the preamble to this Resolution are full, true, and correct and does hereby incorporate them into the Resolution by this reference.13

Typically, preambles contain a number of so-called *citations*, usually clauses beginning with non-finite *-ing* forms and/or *-ed* participles, and/or a number of ‘*whereas* clauses’ in which the word *whereas* may be repeated at the start of each separate clause, as in this EU Directive of 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data:

(11) The European Parliament and the Council of the European Union
Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,
Having regard to the proposal from the Commission (a),
Having regard to the opinion of the Economic and Social Committee (b),
Acting in accordance with the procedure referred to in Article 189b of the Treaty (c),
(1) *Whereas* the objectives of the Community, as laid down by the Treaty, as amended by the Treaty on European Union, include creating an ever closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community, ensuring economic and social progress by common action to eliminate the barriers which divide people, encouraging the constant improvement of the living conditions of its peoples, preserving and strengthening peace and liberty and promoting democracy on the basis of the fundamental rights recognized in the constitution and laws of the Member States and in the European Convention for the Protection of Human Rights and Fundamental Freedoms [...].

This particular preamble contains a further 71 clauses – each beginning with *whereas* – followed by the wording “Have adopted this Directive”. This use of the present perfect construction coming at the end of the preamble, generally known as the *agreement clause*, is a typical feature of treaties, the generic term denoting all types of international agreements. As in this particular case, it is not uncommon for the grammatical subject of *have adopted* to be separated from the verbal construction by several pages, running to hundreds – sometimes even thousands – of words, thus emphasizing the artificiality and oddity of this type of construction (Cutts / Wagner 2002: 9).

Sometimes in the drafting of more recent texts the *whereas* clauses have been restructured so that the word *whereas* only occurs

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once at the beginning. Some authors (e.g. Elliott 1991) suggest that *whereas* clauses should be avoided altogether by drafters and replaced by some less archaic formula.

The preamble – assuming there is one – is generally followed by the so-called short title (though in the UK the section giving the short title normally comes at the end of statutes). For example, in the following Australian legislative text, the long title provided is *An Act about a goods and services tax to implement A New Tax System, and for related purposes*, while under the heading *Short title* the wording is as follows: “This Act may be cited as the *A New Tax System (Goods and Services Tax) Act 1999*.”

Legal texts in English contain a so-called *enactment clause* which, as regards laws passed, for example, in the United States, New Zealand and the UK, includes the passive imperative construction (the so-called jussive subjunctive) in the enacting formula – or ‘promulgation formula’ (Trosborg 1995: 32) – *Be it enacted by...*. In Canadian law the active form is used: “Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows”, while in South Australian law the wording is further simplified to “The Parliament of South Australia enacts as follows”.

In British law the enactment clause includes the enacting formula *Be it enacted, by the Queen’s Most Excellent Majesty ..., or* some variation on the theme, as in this piece of local legislation:

(12) **WHEREAS—**
(1) The Nottingham City Council (“the council”) was established under the Local Government Act 1992 (c. 19) as a unitary authority for the city of Nottingham (“the city”):
(2) The council wishes to reduce the incidence of offences under the Theft Act 1968 (c. 60) by regulating trade in second-hand goods: [...] 
May it therefore please your Majesty that it may be enacted, and be it enacted, by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.  

It has been hypothesized that *Be it enacted ...* means neither *It is hereby enacted ...* nor *Let it be enacted ..., but rather *Let it be*

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15 *Nottingham City Council Act 2003.*
recognized as having been enacted ... . In other words, the enactment formula performs the speech act of certification which enhances its official status (Jackson 1995: 58-59; Maley 1994: 20). We shall be returning to the question of enactment clauses and speech acts later on.

The texts of some legislations, e.g. Canada’s and South Africa’s, have so-called purpose clauses in which the objective of the law is briefly described (the purpose of a long title is roughly the same), e.g.:

(13) The purposes of this Act are
    (a) to provide a procedure for the prosecution of contraventions that reflects the distinction between criminal offences and regulatory offences and that is in addition to the procedures set out in the Criminal Code for the prosecution of contraventions and other offences; and
    (b) to alter or abolish the consequences in law of being convicted of a contravention, in light of that distinction.16

Such clauses are also a feature of some non-English legal texts, for example those of Switzerland. Moreover, there are calls (e.g. Cutts / Wagner 2002) for purpose clauses to be more widely introduced into all legal texts so as to make them more user-friendly to a wider public.

Some preliminary provisions include so-called application provisions, while almost all contain interpretation provisions, otherwise known as definition provisions (though in the UK interpretation and definition provisions tend to be at the end of statutes). Application provisions – which Bhatia (1993: 104) calls ‘stipulation rules’ – specify under which conditions and to which persons or groups of persons the text in question applies, e.g.:

(14a) APPLICATION OF ACT
    3. This Act applies in respect of crops grown in Canada, except such wheat and barley as are grown in the designated area as defined in the Canadian Wheat Board Act.17

(14b) APPLICATION OF THIS ACT
    1) Chapter II of this Act applies to all employees and employers.

16 Section 4 of Canada’s Contraventions Act 1992.
17 Section 3 of Canada’s Advance Payments for Crops Act 1976-77.
2) Except where Chapter III provides otherwise, Chapter III of this Act applies only to designated employers and people from designated groups.

3) This Act does not apply to members of the National Defence Force, the National Intelligence Agency, the South African Secret Service, or the South African National Academy of Intelligence.\(^\text{18}\)

Application provisions thus define the scope of a given law or regulation etc. They can sometimes be found in the principal provisions as well.

Interpretation or definition provisions, which can sometimes be highly numerous, generally consist of a series of definitions or clarifications of particular words and expressions that will recur throughout a given section or throughout the rest of the text, e.g.:

\[(15a) \text{ ‘life assurance’ means insurance of a class specified in Part A of Annex I to the Life Regulations of 1994 the text of which Annex is set out for convenience of reference in Schedule 1.}\(^\text{19}\)

\[(15b) \text{ As used herein, the term mortgage shall signify the plural or the singular, dependent upon the composition of the mortgage pool.}\(^\text{20}\)

\[(15c) \text{ In this section- ‘the 1992 Act’ means the Further and Higher Education (Scotland) Act 1992 (c.37); ‘graduate’ means a person who, having undertaken a course of higher education at a publicly-funded institution (a) has been awarded a degree in respect of such course; or (b) has not been awarded such a degree but, on ceasing to undertake such course, satisfied the academic requirements for the award of such a degree […]}.\(^\text{21}\)

Sometimes it is not easy to distinguish between scope and definition, as the EU’s Joint Practical Guide has observed by providing the following example (European Union 2003: 13):

\[(16) \text{ Article 1 — For the purposes of this Directive, ‘vehicle’ means any motor vehicle intended for use on the road, with or without bodywork, having at least four wheels and a maximum design speed exceeding 25 kilometres per hour.}\]

\(^{18}\) Section 4 of South Africa’s Employment Equity Act 1998.

\(^{19}\) Section 2 of the Republic of Ireland’s Unclaimed Life Assurance Policies Act 2003.


\(^{21}\) Section 1(3) of the Education (Graduate Endowment and Student Support) (Scotland) Act 2001.
hour, and its trailers, with the exception of vehicles which run on rails, agricultural or forestry machinery, and public-works vehicles.

Šarčević (2000: 153) has observed not only that definition provisions are widely held to be prescriptive but also that for some scholars their prescriptive nature is underlined through the more traditional use of *shall mean* as opposed to the indicative *mean*, though the effective difference between the two is difficult to pinpoint, as can be seen in these two texts drafted by the same institution:

(17a) *Scope of Employment shall mean* tasks assigned in a job description, letter of appointment, or other specific written documents.22

(17b) *Scope of S.U.N.Y. Employment means* involving or relating specifically to job responsibilities, research activities, assigned coursework, sponsor funded or contracted activities or other activities an individual is expected to carry out pursuant to their Employment.23

Citing Driedger (1976: 13), Šarčević remarks that “the *shall* of older definitions did not impose an obligation to be obeyed or disobeyed but merely expressed the authoritative power of the lawmaker to create rules of law” (2000: 153).

4.2. Principal provisions

Legal definitions are not only to be found among the preliminary provisions of a text, but may also be included in the principal provisions (sometimes known as main provisions), i.e. within the body of the text which includes the dispositions known as ‘substantive provisions’. This partly depends on the drafting conventions of a given country or organization, and also on the type of definition in question: definitions are sometimes classified as being either *explanatory* or *stipulative*. It is more likely that the former will be contained in the preliminary provisions, while stipulative provisions

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may well be inserted among the principal provisions, often without
their being specifically formulated as definitions. It has been said that
stipulative definitions alter the ordinary meaning of words by
narrowing or enlarging their sense or by creating a wholly new
meaning for them (Bowers 1989: 173) and they can also be considered
as having a lawmaking function, whereas explanatory definitions do
not alter the conventional meaning of a term.

As has been pointed out (Šarčević 2000: 156), stipulative
provisions read like ‘real’ provisions rather than as definitions as such,
and instead of verbs such as means or signifies or includes often
followed by the definition in inverted commas, expressions like is
deemed to be or is/are or is to are used, e.g.:

(18a) The amount of any unpaid penalty imposed under this Act in relation to an
assessment is deemed to have been set aside by the employer and kept
separate and apart from the employer's own property on and from the date the
obligation to pay the penalty arises, and that amount is deemed to be held in
trust for the Board on and from that date.24

(18b) In Schedule 5, the amounts set out in column 2 are the amounts specified for
financial year 2003/04 for the purposes of the enactments listed in the
corresponding entries in column 1 (which make provision as to the net
borrowing of the bodies mentioned in that column).25

(18c) Where a letter is sent in accordance with subsection (7) payment is to be
regarded as having been made at the time at which that letter would be
delivered in the ordinary course of post.26

Substantive provisions, however, are principally concerned with
laying down legal commands (or orders – see Kurzon 1986: 21),
requirements, prohibitions, permissions and authorizations.

A distinction is commonly made between mandatory and
directory norms. A mandatory provision is not only legally binding, it
entails that the performance of a specific act is required; failure to act
accordingly is a punishable offence. The verbal form in the main
clause usually contains the auxiliary shall, e.g.:

24 Section 3 of Alberta’s Workers’ Compensation Amendment Act, Chapter 35
(Supp.), 2000.
25 Section 1 (5)(2) of the Budget (Scotland) Act 2003.
26 Section 6 (48) (8) of the UK’s Anti-social Behaviour Act 2003.
(19) The driver of any vehicle, knowingly involved in an accident resulting in injury or death to any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene until he has fulfilled the requirements of subsection (c) of this section.27

Sanctions for non-compliance are sometimes provided in the text, e.g.:

(20) Any person who shall violate this subsection shall be fined not less than $2,500 nor more than $5,000, or be imprisoned for a period of 180 days, or both. The term of imprisonment required by this subsection shall be imposed only if the accident resulted in death or injury to a person other than the driver convicted of violating this section.28

The initial verbal construction in (20) introduces us to one of the topics that we shall be examining in more detail in Chapter 5, i.e. the various meanings that can be attributed to shall in legal discourse. Clearly, on both grammatical and pragmatic grounds (it is used in a subordinate construction, and a legislator would never authorize a person expressly to violate the law being drafted), shall is devoid of any command function here but would appear to be used merely to enhance the ‘flavour of the law’.

Mandatory provisions such as the ones cited in (19) and (20) are to be found in statutes, i.e. they are law and are enforceable by the state against any individual, whereas directory provisions may be found, for example, in codes of conduct where a breach is essentially a private (civil) matter between individuals and where the range of sanctions is more limited than it is under statute law. Let us examine the following:

(21) In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.29

27 Art. 1(a) of the Act concerning certain motor vehicle accidents 2003 enacted by the State of New Jersey.
28 ibid.
In theory, there is a clearly stated obligation for law enforcement officials to behave in a certain way, thus suggesting that it is mandatory. Indeed, it is likely that that is how it would be interpreted by most legal experts. But pragmatic experience tells us that it is unusual for a state authority to take disciplinary action against a law enforcement official for not complying with the code except in cases of gross violation, which would seem to suggest that the provision in practice may only have directory force.

Other instances of a directory provision expressing a requirement as opposed to a command are more self-evident. Such cases are particularly common in administrative regulations and are sometimes conveyed using must rather than shall, e.g.:

(22) Notices mailed to more than one person in the same household must be sent separately to each person.\(^{30}\)

Prohibitions can likewise have either mandatory or directory force, as is clear in the two examples provided below, the first being mandatory (and part of statute law), the second directory (the company has no power over the rights of individuals):

(23a) No person shall overdrive, overload, torture, cruelly beat, neglect, or unjustifiably injure, maim, mutilate, or kill any animal, or cruelly work any animal when it is unfit for labor, whether it belongs to that person or to another person.\(^{31}\)

(23b) Promotional credits and referral credits cannot be applied relative to Contest/Raffle and Complimentary memberships.\(^{32}\)

Once again, as with legal requirements, prohibitions with directory force are more likely to be found in administrative regulations. As we have seen in (23b) above it is sometimes possible to find cannot being used in prohibitions, though may not, shall not or must not are all used


\(^{31}\) Subdivision 1 of Chapter 343.21, Overworking or mistreating animals, Minnesota Statutes 2003.

much more frequently (surprisingly Kurzon (1986: 23) fails to include *may not* and *cannot* in his observations about prohibitions):

(24) During the term of the loan or credit facility, you *may not withdraw* your consent to our ongoing collection, use or disclosure of your personal information in connection with the loan or other credit arrangement you have with us or have guaranteed.33

Permission is generally conveyed in the affirmative through use of the modal auxiliary *may*, as in these two examples:

(25a) Any State Party *may propose* an amendment and file it with the Secretary-General of the United Nations.34

(25b) National legislation *may recognise* union security arrangements contained in collective agreements.35

In both cases the permission issues from an unexpressed authoritative source which is clearly identifiable as being the respective law-making authority (Kurzon 1986: 20). Permissions not only allow for a certain course of action to be undertaken, they also allow for the non-performance of such action. In other words, permission entails discretion, leaving the person or institution concerned the freedom to choose whether or not to perform the action or comply with the situation specified.

Some scholars distinguish between permissions and authorizations. The latter confer power on a person or authority to perform an act which otherwise that person or authority would be without power to perform (Šarčević 2000: 145), e.g.:

(26) Where the initial period provided for in paragraph 1 is shorter than 60 days, Member States *may grant* the competent public authority the power to extend the initial period to 60 days following notification where the problems raised

33 Privacy Agreement of Scotiabank Group at http://www.scotiabank.com/cda/content/0,1608,CID847_LIDen,00.html.
34 Art. 50(1) of the UN *Convention on the Rights of the Child* of 20 November 1989.
35 Section 23(6) of the South African *Constitution* 1997.
by the projected collective redundancies are not likely to be solved within the initial period.\textsuperscript{36}

In such cases the question of the mandatory or discretionary nature of the authorization conveyed by \textit{may} is not always clear, and judges have ruled in both senses, according to the particular circumstances of each individual case. We shall be returning to the functions of command, prohibition, permission and authorization in prescriptive legal texts in greater detail in Chapter 5 when we discuss the various meanings to be attributed to \textit{shall}, \textit{may}, \textit{must} and so on.

Again, depending on the particular conventions used by the drafting body, some substantive provisions include not only the dispositions which order, prohibit, permit or authorize but also the so-called \textit{procedural} provisions and \textit{administrative} provisions. In UK statutes they are nearly always contained in the Schedules as opposed to the main body of the text. In other texts procedural and administrative provisions are considered as being separate from the substantive provisions proper. Procedural provisions have to do with how and by whom things will be done and they include dispositions for setting up bodies in charge of implementing the law in question and delineating the functions of such bodies, or financial arrangements, or the preparation of protocols etc. For example, Section 21(1) of the UK’s \textit{Crime and Disorder Act} 1998 states:

\begin{quote}
(27) Before making an application under (a) section 19(19) above; (b) subsection (7)(b)(i) below, the local authority shall consult the relevant chief constable.
\end{quote}

Administrative provisions are often related to procedural provisions, but the former have more to do with, for example, ensuring equity of treatment for all persons affected by the law or regulation, or ensuring bureaucratic efficiency etc., e.g.:

\begin{quote}
(28) Subject to Section 69.03, where an employee becomes eligible for a new rate of allowance or other payment under these directives because of a change in
\end{quote}

classification or pay, the effective date of eligibility shall be the effective date of the change.  

4.3. Final provisions

The final part of a prescriptive text tends to be rather technical and may contain provisions which, for example, amend previous laws, although some legislative conventions keep amending acts distinct from – and therefore prior to – final provisions, e.g. in European Union legislation. An example of an amendment provision is as follows:

(29) 1. The Firearms Act 1968 shall be amended as follows. 2. – (1) In section 3(5) (false statements with a view to purchasing or acquiring firearm etc.), for the words “make any false statement” there shall be substituted the words “knowingly or recklessly makes a statement false in any material particular”.

Instead of amending clauses from previous laws, the new draft may sometimes repeal them, often by inserting the characteristic legal adverbial of performativity hereby (see Chapter 2.1.) before the verb repeal:

(30) Sub-paragraph (a) of paragraph 39 (statement in notes to accounts of reason for allotting shares) is hereby repealed.

Final provisions sometimes include transitional provisions which set out special rules governing the shift from one set of legislated rules to another. They may be classified separately with respect to final provisions, as in Québec’s Miscellaneous, transitional and final provisions of an Act to amend an Act respecting labour standards and other legislative provisions (2002, chapter 80), Section 86:

38 Schedule 2(1) of the UK’s Firearms (Amendment) Act 1997.
The Regulation respecting the notice of collective dismissal (R.R.Q., 1981, c. F-5, r.1) remains in force until it is replaced by a regulation made under section 89 of the Act respecting labour standards (R.S.Q., chapter N-1.1).

These transitional provisions may sometimes come under the wider heading of consequential provisions which outline what the effects of the present law will be, though in the UK consequential provisions often tend to be amendments to other legislation made necessary by the new statute.

Final provisions may also include so-called commencement provisions which specify under which conditions a law or agreement may come into force, e.g.:

This Agreement shall enter into force when it has been signed on behalf of governments whose subscriptions comprise not less than sixty-five percent of the total subscriptions set forth in Schedule A and when the instruments referred to in Section 2 (a) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before September 15, 1960.40

Finally, a distinction is usually made between annexes and schedules. The former generally set out the implementation details of a law or provide further information or specification that is relevant to the law in question, as in the six Annexes to the EU Nature Legislation relating to the Habitats Directive (92/43/EEC) which outline in detail, for example, which animal and plant species require particular protection and which methods of capturing and killing animals are prohibited. Schedules, on the other hand, contain technical specifications and requirements, e.g. details of the proceedings of a board, or salary scales for particular professional groups in a law regulating pay and conditions, or an exhaustive list of the allotments of land involved in a Land Act, and are generally considered to be separate from annexes, though sometimes annexes are included under the heading of schedules, and vice versa.

II. The Linguistic and Pragmatic Functions of Prescriptive Legal Texts

In this chapter we shall be examining some of the main linguistic and pragmatic functions of prescriptive legal texts. In particular we shall analyse the respective importance of their communicative function and of their pragmatic function. This will entail introducing some of the claims of the Plain Language Movement, a topic that will be taken up again in greater detail in Chapter 6 where we weigh up the pros and cons of questions such as whether or not the modal auxiliary \textit{shall} should be done away with. On the other hand, the questions raised by the Plain Language Movement affect so many vital issues relating to legal English, including the choice of verbal constructions, that it is not possible to relegate them to just one chapter in the book. Before analysing the communicative and pragmatic functions of prescriptive texts we shall begin by introducing some of the basic tenets of speech act theory and performativity, which will lead us into the sphere of enactment, an area that is more specific to the language of legal documents.

1. Speech act theory, performativity and enactment

As is well-known among linguists and philosophers of law, in 1962 Austin introduced his classical speech act theory. His ideas were later developed by Searle (1969), and Austin revised his original work in 1975. One of the basic distinctions Austin initially made was between what he called constatives, which have truth value, and performatives, which do not – as Aristotle had observed, a prayer is a sentence, but is neither true nor false (Allen 2003: 1). Later Austin revised this distinction and hypothesized the existence of locutionary, illocutionary and perlocutionary acts. A performative utterance (or
performative written statement) is used to perform an action; indeed, as Austin says, to issue such an utterance *is* to perform the action, such as naming a ship (‘I name this ship *Liberté*’) or declaring a meeting closed. In order to be able to perform such utterances successfully, certain circumstances – known as felicity conditions – must be met. The function of the performative verb is to name the illocutionary act being performed.

According to Kurzon (1986: 1), within the speech act theory “the legal performative is considered the most straightforward, trouble-free example of the performative utterance, and the performative utterance is in turn the most straightforward class of speech acts”. My view is that the question of performatives in legal language is a little more complex than Kurzon asserts.

We must first distinguish between explicit performative clauses and implicit performative clauses. The former contain a verb that names the illocutionary point of the utterance, such as authorize, name, declare, prohibit etc. In some recitals, e.g. in resolutions, we find a wide range of explicit performative verbs, usually in the non-finite *-ing* form, as in the opening sentence of this United Nations resolution:


Moreover, within the main body of resolutions we find explicit performatives expressed in the present simple tense, generally at the beginning of each clause:

(2) The Council of the European Union […] *calls on* Member States and *invites* the Commission: 1) to tap the information society’s potential for people with disabilities and, in particular, tackle the removal of technical, legal and other

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barriers to their effective participation in the knowledge based economy and society.²

Such texts are typically structured as follows: first, the name of the authorizing body, generally followed by a series of subordinate clauses such as whereas clauses or performative clauses beginning with -ing forms or -ed participles, followed by a series of finite performative verbal constructions in the present simple tense.

In most other types of legislative texts explicit performative clauses are rarely found within the body of the law because it is hardly ever the text itself which actively performs illocutionary acts. However, as we shall see, not infrequently a legislative text may authorize or declare the performance of an illocutionary act.

Explicit performative acts tend to be associated in particular – though by no means exclusively – with the spoken language, and are generally uttered in the first person singular (I resign), though the first person plural is also commonly used in certain quasi-legal documents, e.g. in petitions:

(3) *We, the undersigned, pledge to boycott Proctor & Gamble products until you cease testing on animals*³

whereas legislative texts, as we have already observed, are almost exclusively drafted in the third person. It is only in contexts such as constitutional preambles that one may find performatives with the first person plural in legal texts, as in the opening sentence of the United States Constitution:

(4) *We the People of the United States […] do ordain and establish this Constitution for the United States of America.*⁴

A type of legally binding text where one frequently finds explicit performatives in the first person singular is in wills, e.g.:

3 At http://www.thepetitionsite.com/takeaction/.
Implicit performative clauses do not necessarily contain a verb naming the illocutionary point of the utterance but can be construed as being essentially performative in nature. In other words, the clause can be restructured so as to bring out its performative character. For example, Article 13 of the 2001 *European Union Treaty of Nice* contains the sentence:

(6) Such acts and decisions shall not form part of the Union acquis.

This is an example of an implicit performative clause which could be transformed into an explicit performative clause by being reworded as follows:

(7) This Treaty prohibits such acts and decisions from forming part of the Union acquis.

Seen from this perspective, prescriptive legal texts contain an abundance of implicit performative clauses: indeed, most main clauses in legal texts can be considered as such. According to Trosborg (1997: 105-106) in her study of *shall* in British statutes, over 65% of instances of *shall* occur with non-human subjects which could not be given orders or assigned obligations.

Palmer (1990: 70) argues that when expressing deontic meaning, i.e. when regulating human behaviour (see Chapter 3.1.3. on the various types of modality), the modal auxiliaries *shall*, *may* and *must* are intrinsically performative:

> The criterion of being performative may be taken as a starting-point for defining the deontic modals. They give (or refuse) permission, lay an obligation, or make a promise. Moreover, there will normally be no past tense, for by their nature performatives cannot be in the past; the act takes place at the moment of speaking.

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In the case of prescriptive texts the latter statement is true insofar as the law is seen as ‘continually speaking’ (see Chapter 3.2.).

As was mentioned in Chapter 1.4.3., the adverbial hereby is strongly associated with performativity and, as has been observed above, it is often to be found in legal English in the first person singular in documents such as wills etc.:

(8a) \( I \text{ hereby bequeath } \) to the National Hospital Development Foundation […] the following.\(^6\)

(8b) \( I \text{ hereby declare } \) that, immediately after my death, I wish my body to be offered to the Washington State University Program in Basic Medical Sciences (WWAMI Program), to be preserved and used in such a manner, as the University deems desirable for educational and scientific purposes.\(^7\)

However, in legal texts hereby does not collocate exclusively with verbal constructions in the indicative form of the present simple, i.e. the tense normally considered as the one expressing performativity, but it can also collocate with shall, e.g.:

(9a) A fee program shall hereby be established pursuant to this chapter of the Marin County Code\(^8\)

(9b) Section 1.5. of the Agreement shall hereby be amended and restated in its entirety as follows\(^9\)

(9c) Section 1: This organization shall hereby be known as the Columbia Biological Society and shall hereafter be referred to as the CBS. Section 2: The officers of said organization shall hereby form the Executive Board and shall hereafter be referred to as the E-Board.\(^10\)

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\(^6\) At www.uclh.org/donation/nhdffwill.pdf.

\(^7\) Anatomical Gift Form of Washington State University at http://www.wsu.edu/~wwami/body_donor/Anatomical%20Gift%20Form%20Revised.pdf.

\(^8\) Section 1 of Ordinance No. 3399 of the Marin County Board of Supervisors Amending Title 23 of the Marin County Code, at www.co.marin.ca.us/depts/.

\(^9\) Section 1 of Amendment No. 1 to the Registration Rights Agreement of Oncle Inc. at http://contracts.onecle.com/opinion/allied.reg1.1999.05.26.shtml.

Sec.2-15. All references to Councilman herein shall hereby be changed to Councilmember.\(^\text{11}\)

The City of Berkeley shall hereby establish a program encouraging courteous driving and cycling.\(^\text{12}\)

In such cases, however, it would appear that, in spite of the presence of the marker of performativity hereby, we are once again dealing with cases of implicit performative acts rather than explicit performative acts, in that the law authorizes or formally declares the performance of an illocutionary act but does not actually perform the act itself.

Cases of shall collocating with hereby in the first person singular or plural can occasionally be found not only in municipal regulations and ordinances but also in contracts e.g.:

\(I\text{ }\text{shall}\text{ }\text{hereby}\text{ }\text{agree}\text{ }\text{to}\text{ }\text{the}\text{ }\text{terms}\text{ }\text{of}\text{ }\text{this}\text{ }\text{contract}\text{ }\text{and}\text{ }\text{certify}\text{ }\text{that}\text{ }\text{all}\text{ }\text{information}\text{ }\text{submitted}\text{ }\text{on}\text{ }\text{this}\text{ }\text{form}\text{ }\text{and}\text{ }\text{all}\text{ }\text{attached}\text{ }\text{documents}\text{ }\text{are}\text{ }\text{true}\text{ }\text{and}\text{ }\text{accurate.}\text{ }\text{13}\)

Here the person in question promises to agree to the terms of the contract etc., but does not actually perform the act of agreeing. From a purely pragmatic point of view, of course, the difference between using shall or the present simple is minimal: once the document has been signed the person in question has in effect performed the act of agreeing. The presence of shall tends to suggest that, at the moment of reading the clause, the person has not yet signed the document. It would appear, then, that in such texts shall co-occurs with hereby where the drafter is effectively referring to the performance of the situation taking place immediately after the statement in question has been made, whereas with the present simple the entailment is that the

\(^{11}\) Article 2 ‘Officers’ of the Charter of the City of Alameda, California, at http://www.ci.alameda.ca.us/gov/city_charter.html.


\(^{13}\) Acceptance Sheet of ‘Generator Certification’ of Triple M Farms, Inc. of Franklin, Kentucky, at http://www.triplem.ws/mlf_soil.pdf.
completion of the performance occurs contemporaaneously with its being written down.

_Hereby_ can also collocate in texts with _may_ or _must_, e.g.:

(11a) Any active and contributing member of the Employees’ Retirement System who has vested retirement benefits _may hereby claim and purchase_ credit in the Employees’ Retirement System for up to four years’ time for employment by the Alabama Legislature prior to 1979 […]\(^\text{14}\)

(11b) Users of this site _must hereby acknowledge_ that any reliance upon any materials shall be at their sole risk […]\(^\text{15}\)

As when _shall_ is used, the sentences do not refer to cases of actualization, i.e. to a _real_ present and to a real performance as they do in cases such as (8a), but merely to a hypothetical situation which may or may not already exist and which may or may not entail a performance.

Another marker of performativity in legal writing is the use of emphatic _do_, as we saw in (4) in the preamble from the United States _Constitution_. As Tiersma has observed (1999: 104), _do_ is similar to _hereby_ in that both signify that the following verb is actually performing an operative legal act. Sometimes both markers of performativity can be found together, e.g. in wills:

(12) I, Elvis A. Presley, a resident and citizen of Shelby County, Tennessee, being of sound mind and disposing memory, _do hereby make, publish and declare_ this instrument to be my last will and testament, _hereby revoking any and all wills and codicils by me at any time heretofore made_.\(^\text{16}\)

A commonly-held notion relating to performativity is that the progressive form cannot be used because the action is conceptualized as punctual, i.e. as beginning and ending at the time of utterance or of writing (Declerck 1991b: 177). Of course, in legally binding texts


\(^{15}\)Disclaimer of Steelworld company, at http://www.steelworld.com/disclaimer.asp.

\(^{16}\)At http://www.ibiblio.org/elvis/elvwill.html.
drafters studiously avoid using the progressive form with performative verbs precisely because in such contexts progressivity would tend to suggest incompleteness or would imply the temporary nature of the situation. However, it is occasionally possible to find cases of the progressive form being used with performatives in less formal realms of legal discourse, such as when writing the minutes of a local council meeting, e.g.:

(13) As you know, the Clerk of Committees is currently out on an extended sick leave. We are all wishing her a speedy recovery. It is not clear how long she will be absent. Therefore, in accordance with Title One, Section 2-9 of the Woburn Municipal Code, I am hereby appointing Jean Graham as the temporary clerk for the Licensing Commission and the Board of Appeals.  

From the context it is clear that the appointment is perceived as having a highly provisional quality, hence the speaker’s recourse to the progressive form. A further paradox as regards legal English and performativity is the presence of the adverbial forever collocating frequently with punctual, i.e. non-durative, performative verbs, as in:

(14a) The undersigned program and its members or said participants parent/guardian do hereby consent to his/her participation in this Urban Nationals Squash Tournament and do forever release, acquit, discharge, and covenant to hold harmless Northeastern University [...].

(14b) I hereby and expressly forever waive my so-called ‘droit moral’ or moral rights of authors, or any similar rights which may be conveyed under any applicable federal, state, or international law.

In such cases the actual performance of the activity may be punctual, but its effects are permanent from that moment onwards, as if it were

18 Northeastern University Department of Campus Recreation Urban Nationals Release Form, at http://www.squashbusters.org/Squash%20Release%20and%20Reservation.doc.
being constantly performed. The law is not only ‘continually speaking’, it is also endlessly reiterating the activity in question.

Speech act theory has been extensively debated within legal doctrine, particularly by philosophers of law, and one of the major issues raised concerns the age-old question of what it is in language that creates a legal obligation or prohibition etc. For example, returning to (6), does the authoritativeness of the clause derive from the actual wording of the sentence, i.e. does it hinge on the obligation implicit in shall? And what if shall were replaced by the present simple, i.e. “Such acts and decisions do not form part of the Union acquis”, would the sentence lose some or all of its binding force? Or does the obligation really emanate from the enacting clause which precedes the body of the law?

Enacting clauses were first introduced into prescriptive texts in English several centuries ago as a means of ensuring that what was written was respected as having legal value. This was understandable from a psychological point of view because it was evidently felt necessary at the time to stress that certain documents had prescriptive value while most others did not. Until relatively recently in legal history every clause in British legislation had to be preceded by an enactment clause: “And be it further enacted”. The fact that enactment clauses had to be repeated obsessively throughout a prescriptive text is indicative of the need to underline the idea that everything contained within the text was legally binding. It is quite astonishing to find that almost exactly the same formulaic expressions employed in enactment clauses in Early Modern English are still used today in various English-speaking countries (see Gotti 2001: 93-95).

But over the centuries, if the wording has remained practically unaltered, surely the psychology of both the drafter and of the addressee of the prescriptive text has changed: no one today doubts the legal validity of the written word of a law-producing body such as a national Parliament, but not, I would argue, because of the presence of the enactment clause, which has become something of an archaic formality, but essentially because it is widely accepted that whatever law is issued by, say, a national Parliament, is considered as being legally binding. In other words, if the average citizen in South Africa reads, say, the following sentence from the Constitution:
Everyone is equal before the law and has the right to equal protection and benefit of the law it is interpreted prescriptively rather than descriptively precisely because it is contained in a text that is known to have legal value, even in cases where the present indicative is used rather than shall or must, auxiliaries which tend to highlight the special (i.e. prescriptive) nature of the verbal construction.

Written documents in English have constituted the law itself for well over five hundred years (Tiersma 1999: 38), i.e. for more than twenty generations. In short, I would argue that most modern societies have reached a sufficient degree of social maturity and cohesion – even in a country such as South Africa which was plagued with a racist government and discriminatory legislation until not so long ago – that enactment clauses have become little more than a formality. Enactment clauses belong to a bygone era and in most legal systems have long become fossilized. It is essentially the context in which the text is produced that endows it with prescriptive force, not so much the presence of some formulaic expression handed down from the late Middle Ages when the status and reliability of a written document were a good deal shakier than they are today.

2. The communicative function and the pragmatic function of prescriptive legal texts

Few people, even the most ardent traditionalists who wish to preserve the distinctive characteristics and ‘flavour’ of legal language in English with its ‘hereinafters’ and its Latinisms, could take issue with one of the underlying claims of the Plain Language Movement, namely that some legal English is excessively ornate and impenetrable in meaning not just to the average citizen but even to members of the legal professions themselves on some occasions.

However, another of the main accusations against legalese made by proponents of Plain Language, i.e. that legal texts have usually been drafted without making any attempt for them to be
understood by the people who are actually affected by the text in question, has aroused considerable debate, both inside and outside the legal professions.

Naturally, opinions on the issue are wide-ranging from those who are adamantly convinced that legal texts must always be drafted so that they can be understood by ordinary people with no legal training, to those who staunchly believe that such a policy would actually end up by damaging the ordinary citizen because, they claim, law is an intrinsically complex subject which in many cases cannot be simplified in its meaning or purpose without running the risk of being so vague that it would become worthless. In other words, the job of interpreting laws and contracts should be left in the hands of experts.

It should also be pointed out from the outset that each of the two extremes has a vested, rather than an objective, interest in espousing its particular viewpoint. While in no way wishing to detract from the merits or intentions or ideals of the Plain Language Movement in general, it is undoubtedly true that a growing number of its proponents today earn a living from the services they offer in, for example, redrafting texts for local government bodies, insurance companies and so on. On the other extreme, the legal professions have thrived for centuries through being the sole interpreters of the law, so it is understandable that some of its members may fear that redrafting texts in a language that the average citizen can understand constitutes the thin end of the wedge which could lead to a drastic reappraisal of the standing and privileges of lawyers and judges in society. However, it needs to be repeated that the demands of legal practitioners cannot simply be reduced to those of self-interest. As has been observed,

most of the conservatism is nothing more than a reliance on forms of language that have proved effective in achieving certain objects. The principle is that what has been tested and found adequate is best not altered [...]. Lawyers subscribe more than most people to the beliefs that it is impossible to alter form without in some way changing content (Crystal / Davy 1969: 213).

The issue may be clarified by examining both the communicative function and the pragmatic function of prescriptive legal texts. We shall begin by looking at the former. If we reduce the concept of the communicative function of a text to its most basic terms, most written
texts, whether they be advertisements, personal letters, novels, pieces of legislation or insurance policies, presuppose that there is a sender – i.e. an addresser (or two or more addressers) – who is responsible for the wording of the text, and that the text is aimed at a receiver – i.e. an addressee (or two or more addressees). In the case of a personal letter, both addresser and addressee are easily identifiable; with a novel, the (usually identifiable) writer may have in mind some ideal reader,20 but the published work is clearly destined for a generically defined ‘public’ of readers.

In the case of a prescriptive legal text such as a law, the addresser is no longer an individual but a variety of people who put the text together in different stages and add modifications before arriving at a final draft which then has to be approved before becoming ‘law’. For example, in British statutory law, a government bill must pass through various stages to become an act. It may be introduced by either the House of Commons or the House of Lords. It goes through the following stages in both Houses: first reading, second reading, committee, report, and third reading. In the House of Commons, most bills are referred to a Standing Committee usually consisting of about 20 MPs, and every clause and schedule21 is examined, possibly amended, and voted on. Further amendments may be suggested during the various readings. If the amendments are agreed upon, the bill is given the royal assent after which it becomes an Act of Parliament. In Canada the process is very similar: all bills must pass through nine parliamentary stages before becoming law: notice of introduction, introduction and first reading, second reading, committee study, report state, third reading, consideration by the other House, royal assent, and proclamation (Šarčević 2000: 56). The final text of a statute is thus the product of a collaboration involving parliamentarians and legislative drafters: the former largely determine the content while drafters are responsible for ensuring that the policy

20 Or ‘model reader’, to use Eco’s (1994) well-known expression, an ideal type whom the text not only foresees as a collaborator but also tries to create.

21 Under the British system the main provisions of a bill are known as clauses, while in Acts of Parliament they are known as sections. Further provisions – often of a more technical nature – are known as schedules in both bills and acts.
can be expressed in appropriate legal language so as to achieve the desired effect.

But who is the text actually for? Or, more to the point, who should it be for? For example, a law granting greater protection for children against paedophiles is clearly written for the benefit of persons under the age of eighteen, but it is hardly likely to be read by them, nor would it be feasible for it to be written in a style that, say, even a twelve-year-old could understand. A strong case could be made here for ensuring that the law should be easily understood above all by legal experts who would need to deal with concrete cases in which the law had to be applied. But what about a law, say, which aimed at strengthening the protection for consumers and extending their rights? Would it not be paradoxical to draft a law that most consumers themselves would have difficulty in interpreting without the help of a trained expert?

The authors of the European Union’s Joint Practical Guide for persons involved in drafting Community legislation have certainly taken to heart the emphasis in recent years on placing the European citizen at the centre of the legislative process: “The drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously, and of the persons responsible for putting the acts into effect” (European Union 2003). It is worth noting en passant that – as can be seen in the opening verbal construction in the above citation – the EU’s commitment to clear drafting has not led to the banishment of shall.

However, this central claim of the Plain Language Movement, i.e. that legislation should be drafted so that it can be understood by ordinary citizens, has been disputed on a number of grounds. First of all, there is the so-called “public readership dimension”. According to Hunt:

In discussing plain language in legislative drafting, I fear that we are effectively talking in the dark. Those who advocate the use of plain language in legislative drafting are making one very large – and I say, unwise – assumption. That assumption is that members of the public are interested in reading raw legislation. However, this premise is less than well established. In the absence of substantive evidence that such public interest in legislation
exists, I believe that the arguments in favour of plain language legislative drafting are very weak indeed (Hunt 2002a: 4).

In other words, it is argued that while the adoption of plain, simple language may be a valid criterion when writing, say, leaflets or guides or forms to fill in that are designed to be informative and communicate to members of the public, it is essentially a waste of time dedicating energy and resources to something that the general public is not interested in. According to Hunt, who bases his remarks on the situation in Ireland, even when the government has given people the opportunity to discuss plain language legislative drafting, interest has been minimal; he consequently wonders whether it is “reasonable to ask drafters to play to an audience who are not even in the auditorium” (2002a: 5). He concludes that:

The lay person does not seem to concern him or herself directly with the intricacies of legislation. The principal readers of our laws appear to be those who implement, administer and enforce the law. Some of those who fall into this category are regulatory authorities, the police force and the judiciary – all of whom would approach a legal text with a considerable understanding of the law. The contention that laypersons are a key audience in the context of legislation, simply does not stand up. If it is established that the key audience for legislation is not lay persons, but rather is lawyers, judges, regulators, law enforcers, interest groups etc., then the arguments in favour of using plain language seem unconvincing (Hunt 2002a: 6).

Hunt argues that one of the reasons for this indifference on the part of the public is because these days people are aware of their basic rights and they know that such rights cannot be overturned by the whim of the legislator. In other words, public indifference towards reading laws can even be interpreted in a positive light as a sign of socio-political maturity. On the other hand, it could be counter-argued that widespread public indifference towards reading laws is the result of centuries of ingrained tradition: even today the average layperson still does not expect to be able to understand a piece of legislation, just as most people still ignore the small print in contracts on the assumption that it will be too technical for them to fathom out its meaning and implications. But if all legislation and contracts were written in plain English, and if laypersons rather than legal experts were the primary
addressees of all prescriptive legal texts, this might eventually lead to people taking a greater interest in such matters.

However, this in turn leads to the question of whether it is a realistic – or even a desirable – objective to draft all prescriptive texts in plain language. Even if the guiding principles behind a piece of legislation may be perfectly clear, for example in a fiscal law aimed at benefiting specific groups of people, there may be cases in which it is necessary to enter into intricate detail in order to take into account all of the various categories of would-be beneficiaries. However much those drafting the piece of legislation may try to avoid using legalese, the final result will almost certainly be a document that stretches to several pages and is of a highly technical nature, i.e. a text that most laypersons would still probably find unreadable.

It must be said that this point is generally conceded by proponents of Plain Language, particularly by those who have actually attempted to redraft a prescriptive legal text and have come up against the conflicting demands of trying to make it comprehensible to the non-expert without compromising its exhaustiveness in covering the often daunting number of situations it is called upon to deal with. The criterion that every single text must be comprehensible in all its parts to the layperson would seem to be untenable, given the complexities of certain aspects of the real world which some laws are required to regulate. And, as has been observed, even in simple areas the law sometimes has to be set out in considerable detail (Jenkins 1999). On the other hand, there is no doubt that most existing texts would benefit from applying some of the criteria of Plain Language and that, where feasible, drafters should also take into account the legitimate requests of the general public to avoid legalese wherever possible. Undoubtedly, in the past most texts were written by legal experts to be understood only by other legal experts. The general public – or sections of it – may have been the beneficiaries of such texts but they were not the direct addressees of the lawmakers. This was also the result of centuries of tradition: most legal experts deemed that, by and large, the system and raison d’être of drafting texts in a given way had worked. One of society’s most conservative and prestigious groups using one of society’s most conservative genres of language saw little reason for rocking the boat.
But western society has changed: it is less deferential, less tolerant of entrenched privileges, more demanding of institutions and organizations, private and public, to be accountable for their actions. The consumer movements of which Plain Language is just one expression are indicative of this general mood and desire for change, and their often strident protest which aims to empower the ‘man/woman in the street’ and extend the rights of ordinary citizens cannot simply be dismissed as populism. In all likelihood, only a tiny minority of the people living in the multicultural Britain of the 21st century are aware that any financial law passed by Parliament must still include the following enactment clause:

(16) Most Gracious Sovereign, WE, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom in Parliament assembled, towards making good the supply which we have cheerfully granted to Your Majesty in this Session of Parliament, have resolved to grant unto Your Majesty the sums hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

Clearly, the archaic expressions the clause contains are an irrelevance in the modern world, a relic from the past. Surely it is time to move on, to find a language and lexis that is more in tune with the values and aspirations of today’s society. In this particular case, of course, most people would have no problem in understanding what is meant, even if it is expressed in an outdated, verbose style whereas, as we have seen on various occasions, there are also cases in texts where the meaning is almost impossible for the non-expert to decipher. The following citation from the Uniform Law Conference of Canada says it all in 20 words: “An Act should be written as much as possible in ordinary language, using technical terminology only if precision requires it” (Uniform Drafting Conventions 2003).

These words lead us back to the question of finding a balance between the need to produce texts in a clear, simple, everyday language and ensuring that this does not entail any degree of ‘dumbing down’, which means accepting the idea that there may still be sections of a prescriptive text that will be extremely technical and
beyond the comprehension of most laypersons. In brief, then, the drafting of a prescriptive text solely on the basis of the communicative function of the text is inadequate and flawed as an underlying criterion. What needs to be taken into consideration is above all the pragmatic function of the text, i.e. what it is meant to do. To cite Hunt (2002a: 2):

In contrast to the fairytale of Cinderella – statutes were never intended to be a bed-time read. They were never intended to be entertaining, browsed through, or read from cover to cover. [...] Statutes are drafted for an altogether different purpose – statutes are drafted so as to give effect to policies and principles in law – which will invariably be subject to close scrutiny and interpretation by the Courts. [...] In legislation, words are chosen for a specific purpose [...] for their precise meaning and consistency of meaning – so that ideally, all who read those words will be united in their understanding and interpretation.

Hunt in turn cites Jenkins in a memorandum submitted to the Select Committee on the Modernisation of the House of Commons:

A Bill’s sole reason for existence is to change the law. The resulting Act is the law [...] A consequence of this unique function is that a Bill cannot set about communicating with the reader in the same way in which other forms of writing do. It cannot use the same range of tools. In particular, it cannot repeat the important points simply to emphasise their importance or safely explain itself by restating a proposition in different words. To do so would risk creating doubts and ambiguities that would fuel litigation. As a result, legislation speaks in a monotone and its language is compressed. It is less easy for readers to get their bearings and to assimilate quickly what they are being told than it would be if conventional methods of helping the reader were freely available to the drafter (cited in Hunt 2002a: 3).

So while the aim of attempting to make prescriptive legal texts understandable to the layperson is a laudable one, and much can be done to make legal language considerably clearer than it is at present, the communicative function may in certain circumstances have to give way to the overriding pragmatic function of the text, which is to “to give effect to policies and principles in law”. This in turn leads us onto the next major debating point vis-à-vis legal language and the application of Plain English criteria: does the adoption of a clear, simple style using everyday terminology make the text more vague or
more precise? And is maximum precision in a prescriptive text always a desirable objective?

3. Vagueness v. precision

The question of vagueness and indeterminacy in law has long fascinated legal scholars. First of all, we need to distinguish between two aspects of vagueness in law: the first is of an essentially philosophical nature and has to do with whether and in what circumstances vagueness in the wording of a prescriptive text might actually be inevitable or even necessary. The second is of a more pragmatic nature and is concerned with ensuring the maximum degree of clarity in a text so as to avoid unnecessary confusion and ambiguity. Clearly, any lengthy discussion of the first aspect of this question, to which hundreds of articles and essays have been dedicated over the years, would take us way beyond the scope of this present volume, so the main issues involved will only be outlined very briefly. There is a strong tradition among philosophers of law which justifies the role of vagueness and indeterminacy in law (see, for example, Endicott 1997, 2000, 2001) while there are also scholars, e.g. Sorensen (2001), who take the opposite view. The famous legal theorist Hart observed that every rule has a core of certainty and a penumbra of doubt (1961: 119). Indeed, it is often claimed that all words have a degree of vagueness about them (even the concept of vagueness cannot be pinned down precisely); for example, to take the classic philosophical case, it is generally agreed that one grain of sand does not constitute a ‘heap’ whereas millions of grains of sand do. But how many grains of sand must be removed before the heap ceases to be a heap? This is known as the so-called ‘Sorites Paradox’ (Williamson 1994), and its applications to law are manifold, e.g. when defining the precise boundaries of the adjective reckless in the following clause:
Every person convicted of reckless driving under the provisions of this article shall be guilty of a Class 1 misdemeanor.  

Even if the law specifies in detail (as the Code of Virginia does) particular cases that are deemed as constituting reckless driving, it is practically impossible to foresee and specify every single circumstance. The impossibility or irrelevance of achieving absolute precision is sometimes expressly acknowledged by the law itself, e.g.:

All dimensions stated in any description of works shall be construed as if the word ‘approximately’ were inserted before each such dimension.

There are a number of lexical items, particularly adjectives such as reasonable, fair or satisfactory, which are designedly imprecise and permit of a subjective interpretation by a third party such as a judge (Hunt 2002a: 9; Tiersma 1999: 3).

A number of metaphors have been used to refer to vagueness (Luzzati 1999), from the concept of ‘open texture’ to ‘fuzziness’, ‘penumbra’ and ‘fog’. The EU campaign for clearer legislative drafting rules is called ‘Fighting the Fog’. ‘Fog’ is considered here as something that needs to be fought against, thus implying that vagueness in drafting legislation has negative connotations. Indeed, as we have already stated elsewhere, one of the major concerns for drafters is that of trying to remove any possible source of ambiguity in interpretation from a prescriptive text. And it is in this respect that the role of Plain Language has raised considerable controversy. It has been argued that:

Plain language is not necessarily clear language. A concept expressed in plain language will not always carry a clear and unambiguous meaning. Utilising plain language in legislative drafting is likely to increase the incidence of vagueness and ambiguity in legislation – this is a consequence which drafters cannot allow to occur (Hunt 2002a: 6).

22 Code of Virginia, Section 46.
23 Section 9 of the Robin Rigg Offshore Wind Farm (Navigation and Fishing) (Scotland) Act 2003.
24 Details can be found at http://www.europa.eu.int/comm/translation/en/ftfog/.
The simplicity of a document, it is claimed, is mainly an aesthetic feature. The question as to whether the document is useful is an entirely different issue (Hunt 2002a: 11). Hunt concludes that there is a need to recognize that the principal function of a legislative drafter is to enshrine policy in an accurate and precise manner, and that in doing so it must recognize that the communication of the law is an entirely different task (2002a: 14), and “there must be a recognition of the limitations of plain language – a recognition that like the glass slipper of Cinderella – plain language is not a ‘one size fits all’ device” (2002a: 17).

As Mellinkoff puts it (1963: 294): “Lurking in the dark background is the always present, rarely voiced lawyer’s fear of what will happen if he is not ‘precise’ in the way that the law has always been ‘precise’”. The question of introducing plain language at the risk of actually making legal texts more ambiguous rather than more precise has also been raised by the Legislative Commissioners’ Office of the Connecticut General Assembly (2000: 8), this time viewed from a historical perspective:

Although the goal is plain language, the drafter is hobbled by certain facts: one is that some statutes, although being amended today, have been around for fifty or one hundred years. If the drafter suddenly uses modern, plain language in the middle of an older statute, the reader (and often a court) is left to guess whether the change was merely an attempt to ‘clean up’ the language or whether the legislature intended some substantive change. Another fact is that some bills may become new statutes that will be around fifty or a hundred years in the future and what is plain language today may not be plain language in the future. Because of these two facts, drafters should not abandon style and usage conventions too readily.

On the other hand, it could be counter-argued that the introduction of plain language principles in prescriptive texts cannot be expected to transform a complex text into one that is totally clear, unambiguous, and wholly comprehensible to the layreader. As Joseph Kimble has pointed out (1992b: 14), “it is no criticism that Plain English cannot be precisely, mathematically defined. Neither can ‘reasonable doubt’ or ‘good cause’. Like so many legal terms, it is inherently and appropriately vague.” Moreover, it is generally conceded that “where clarity and precision are truly at loggerheads, precision must usually
prevail. But the instances of actual conflict are much rarer than lawyers often suppose.” Kimble also asserts (1994-95):

Of course, legal writers must aim for precision. But plain language is an ally in that cause, not an enemy. Plain language lays bare the ambiguities and uncertainties and conflicts that traditional style tends to hide. At the same time, the process of revising into plain language will often reveal all kinds of unnecessary detail. In short, you are bound to improve the substance – even difficult substance – if you give it to someone who is devoted to being intelligible.

Furthermore, Crystal (1995: 377) has observed that there has been no sudden increase in litigation as a result of the emergence of plain language materials. It has also been pointed out that:

In the business world, many governments have interceded to legislate for Plain English usage. In countries like Australia, companies can face legal sanction should they be found to have intentionally misled consumers with contracts that contain confusing, unintelligible language. It seems that some of the most successful implementations of plain English in business come when the state actually legislates the necessity for plain English in contractual documents in order to protect the public interest (Law Reform Commission of Victoria) (Barleben 2003a).

In short, then, the introduction of plain language can certainly lead to an improvement in terms of the clarity of the text with respect to the way many texts have been traditionally drafted. However, it should be borne in mind that there is an intrinsic vagueness in any term or expression that is used, and that there are situations in law where there may be valid reasons for leaving concepts vague.
III. Tense, Aspect and Modality in Prescriptive Legal Texts in English

1. Tense, aspect and modality: introduction

Having analysed some of the main features of the language of the law in English, the specificities of prescriptive legal texts, and some of their principal communicative and pragmatic functions, we can now proceed to look at some of the features characterizing verbal constructions within such texts, starting with a general overview of the situation of tense, aspect and modality in English before concentrating our attention on the peculiarities of the various verbal constructions and the ways they are used in prescriptive texts.

Clearly, in a volume dealing predominantly with verbal constructions in prescriptive legal texts, it would be impossible to deal exhaustively with questions relating to tense, aspect or modality in English in general. At the same time it might be worth saying a few words about each of these features of the English language so as to provide a framework within which to analyse such constructions in a more coherent way.

First of all, it should be pointed out that verbal situations can be classified as either: i) processes, where there is a change of state or a transition into a state, e.g. to thicken, to reduce; ii) actions, which usually involve a conscious ‘human’ element carrying out the action, e.g. to draft, to ride; iii) events, where something happens without any agentive force necessarily intervening,¹ e.g. to happen, to collapse; and iv) states, which exist without any energy being required to keep them going, e.g. to own, to contain.

¹ This definition differs with respect to that of Heine for whom an event can be “performed by some controlling agent” (1995: 29).
1.1. Tense

As regards tense, we can begin by stating the well-known concepts that tense is the grammaticalized expression of location in time (Comrie 1985: 9) and that different languages express these grammatical categories in different ways. It has been observed that the notions that are most commonly grammaticalized across the languages of the world are simple anteriority, simultaneity, and posteriority, i.e. past, present and future if we assume that the present moment is the deictic centre (Comrie 1985: 11). Moreover, tense is not just expressed through its grammatical structure (conveyed in the difference between, say, *I went* and *I'll go*), but also by means of lexicalization. For example, by adding the adverbial *tomorrow* we unambiguously locate the sentence *I'm going* in the future time sphere rather than in the present. (For an exhaustive treatment of the tense system in English, see Declerck 1991a).

As will be analysed in more detail further on, prescriptive legal texts rarely look back into the past; they are essentially anchored in the present and projected towards the future. This is not such a typical feature of other types of legal discourse such as the language of judicial decisions where the facts relating to the court case in question are often conveyed in the past tense (in the following example in both the simple past and the progressive past), e.g.:

(1) On 23 July 1995, Mrs Withers' son, Thomas Sheehan, was killed in a road traffic accident when the vehicle in which he was travelling, which was being driven by Mrs Delaney, left the road and went into a ditch. The vehicle was a Citroën C 15 D diesel van normally based in Ireland. It was a two-seater vehicle with seats for the driver and a front passenger. Thomas Sheehan was sitting behind the front seats, in a covered area with no seating.²

However, one type of prescriptive text that often looks back to the recent past (even if the performative verb is naturally located in the present) is, for example, the United Nations resolution, as in:

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² EU Order of the Court (First Chamber) of 14 October 2002 (Withers v. Motor Insurance Bureau of Ireland), points 10 and 11.
The General Assembly [...] Strongly condemns the atrocious and deliberate attack on the United Nations Office in Baghdad on 19 August 2003, which killed fifteen United Nations staff members, the largest number ever in one incident, and seven others, and wounded more than one hundred persons.3

In this particular case, as with the excerpt from the court case, we are dealing with events anchored in the real world which actually happened. However, in the majority of cases in prescriptive texts, the situations described – or, rather, prescribed – are of a hypothetical nature, and reference to situations where past tenses are used is to an unreal world, as in:

The purposes for which an inspector may enter premises under this section are as follows: [...] (d) to ascertain how much of any type of gasoline-based fuel is on hand, and how much has been bought or sold by the person, and from whom it was purchased and to whom it was sold.4

It would be superfluous to provide detailed information at this stage about the differences between the various tenses used in the English language in general. The question of tense specifically related to prescriptive texts will be examined in greater detail in Section 2.

1.2. Aspect

The first of the extracts we examined above from judicial discourse, where out of eight finite verbal constructions we find three in the progressive form and five in the simple (non-progressive) form, illustrates another major difference between the language of case law and that of prescriptive legal texts, namely the greater frequency of use of the progressive form in the former.

The choice between the progressive form as opposed to the simple form relates to aspect rather than tense. All eight verbal constructions are located in the past time sphere, but whereas the

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3 UN General Assembly Resolution 57/338 Condemnation of the attack on United Nations personnel and premises in Baghdad, 15 September 2003.
4 Section 13(3) of the Manitoba Biofuels and Gasoline Tax Amendment Act 2003.
simple forms convey the idea that the verbal situations are seen in their entirety, i.e. they present the totality of the situation referred to (Comrie 1976: 3) and there is no explicit reference to any internal phase or to any feature of the temporal flow (Huddleston / Pullum 2002: 117), the progressive forms convey the idea that the verbal situations are seen “from the inside, as it were” (ibid.) – they refer to their so-called ‘internal temporal constituency’ (Comrie 1976: 3). For example, in (1) the information that Thomas Sheehan “was killed in a road traffic accident” and that “he was travelling” in a vehicle, using first the simple form and then the progressive form, indicates that the situation of his being killed is seen in its entirety, without being broken down into a beginning, a middle and an end, whereas the situation of his travelling is seen at some middle stage while still in progress. The former conveys the idea of completeness, the latter of incompleteness; in this case the travelling is interrupted and terminated by the fatal accident before having the chance to reach its ‘natural’ conclusion. (For a general overview of aspect see Comrie 1976; for a more detailed analysis of aspect in English see Williams 2002a).

It is a well-known fact that the more formal the type of discourse the less frequent the use of the progressive form, the less formal the greater the use of the progressive. On the basis of the data that I compiled for a recent article (Williams 2004a: 226), progressive forms constitute less than 0.4% of the total number of finite verbal constructions in prescriptive legal texts in English, whereas on the basis of the ‘World data’, i.e. the larger corpus I have compiled for this volume, progressive forms account for just over one per cent of the total of finite verbal constructions (see Chapter 4.1.). This figure would seem to be in very close agreement with that to be found in the ARCHER corpus (A Representative Corpus of Historical English Registers) which includes texts from as early as 1650 and which likewise shows a frequency of the progressive form of one per cent in legal texts (Hundt 2004: 61).

Besides conveying the idea of the incompleteness of a situation in progress, the use of the progressive form often suggests that the situation is of a temporary nature. Clearly, such connotations of incompleteness, of situations in progress, and of temporariness are at odds with the desire by lawmakers to stress the idea of the certainty
and unlimited applicability of the law. Not only do lawmakers generally wish to be as exhaustive as possible so as not to leave room for interpretative doubts, they are also concerned with conveying the idea that the norms laid down are valid at all times and in all circumstances.

In the case of (1), the extract comes within the communicative function which might generically be referred to as ‘story-telling’ and, as with most stories in English – real or imaginative – it is told predominantly in the simple past tense, especially when there is the need to delineate the temporal sequence of events, while the past progressive form is frequently used to fill in the background by providing further detail. Moreover, when referring to or summing up, say, a case which has already been heard before a lower court, the judge may also frequently resort to the simple past tense, e.g.:

(4) Since it considered that the answer to the first question could be clearly deduced from its existing case-law and rendered unnecessary any examination of the second and third questions, the Court, in accordance with Article 104(3) of the Rules of Procedure, informed the national court that it intended to give its decision by reasoned order and invited the persons referred to in Article 20 of the EC Statute of the Court of Justice to submit any observations which they might wish to make in that regard.\footnote{EU Order of the Court (First Chamber) of 14 October 2002, cit., point 14.}

However, as we shall see in Chapter 5.4.3., on the basis of the ‘World data’ the occurrences of the simple past tense in prescriptive legal texts represent less than four per cent of all finite verbal constructions. Of the non-modal verbal forms, it is the present simple that predominates, constituting over 43% of all finite constructions, modal and non-modal. We shall be returning to the way the present simple is used in prescriptive texts in particular in Chapter 5.4.1.

\textit{Aktionsart} plays a major role within the sphere of aspectual concerns (Williams 2002a: 69-86). For example, the question as to whether a verb is \textit{stative} or \textit{non-stative} strongly influences its capacity for taking the progressive form: non-statives can always take the progressive form, while statives may or may not, with a few stative verbs, e.g. \textit{to belong} or \textit{to possess}, being almost completely resistant to the progressive form.
Other parameters connected with Aktionsart include *durativity* and *non-durativity*, i.e. whether the verbal situation is perceived as having duration or whether it is deemed as being punctual and having practically no duration (all situations, however brief, take place in time). For example, in the following sentence – article 7 of the UN Convention of the Rights of the Child of 1989 – the first verbal construction consists of a dynamic, i.e. non-stative, verb in the passive form which refers to what would probably be considered as a non-durative situation,\(^6\) whereas the second verbal construction consists of a stative verb which is durative (stativity is generally incompatible with non-durativity) in that the right to a name continues throughout a person’s life from birth onwards:

(5) The child *shall be registered* immediately after birth and *shall have* the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

If we introduce a third element constituting Aktionsart, namely that of *telicity* and *atelicity*, then we could define the first verbal situation as an *achievement*, and hence as telic. Telicity has to do with whether a verbal situation is oriented towards a goal, from the Greek *telos* = objective. Statives are inherently atelic, i.e. they merely express situations which exist but which do not tend towards any goal. As regards the question of telicity / atelicity, non-statives are conventionally classified (Vendler 1967) as:

- *activities*, which are atelic in that they do not tend towards a goal, as when we say ‘the law is always speaking’;
- *achievements*, which are telic\(^7\) in that the situation is considered as punctual and goal-oriented because once the goal has been achieved the situation ceases to exist. In the case above, once

\(^6\) Here we should take into consideration cultural and pragmatic factors: in some countries the registering of a birth may be thought of as a quick formality requiring at most a few minutes to complete; elsewhere the bureaucracy may be such that registration may be deemed as a durative situation (in Vendlerian (1967) terms, an accomplishment rather than an achievement) lasting days before all the required documentation is ready.

\(^7\) Ilse Depraetere (personal communication) points out that not all scholars consider achievements to be telic.
registered, the act of registering is deemed as having definitively ended;

- **accomplishments**, which are durative, goal-oriented activities that come to an end once the objective has been accomplished, as when we read:

(6) In 1995, the Oregon legislature *changed the law* relating to window tinting on motor vehicles\(^8\)

where the activity of changing the law requires a certain amount of time to complete and is goal-oriented because once the law is changed the activity ceases.\(^9\)

Another feature of aspect that needs to be taken into account is whether or not a verbal situation is to be considered as referring to a single state or occurrence or whether it is iterative (Williams 2002a: 60-67). For example, in the following example taken from Section 45 of the Canadian *Constitution* of 1982, i.e.:

(7) Subject to section 41, the legislature of each province *may exclusively make laws* amending the constitution of the province

the verb phrase *may exclusively make laws* must be classified not only as being an accomplishment (making laws, like making cakes, is a durative, goal-oriented activity where once the individual law – or cake – has been successfully completed the activity ceases, until the next one requires completion) but also as being iterative.\(^10\) On the

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\(^8\) Cited from http://www.keizer.org/police/Patrol/Traffic.
\(^9\) Confusingly, Huddleston and Pullum (2002: 118) classify activities and accomplishments as both coming under the heading of processes, whereas we shall be assuming in this volume that a process refers to a change of state or to a transition within a state.
\(^10\) Obviously, when the verb is followed by the singular noun phrase, i.e. ‘to make a law’, it is more self-evidently an accomplishment rather than the plural ‘to make laws’ where it is precisely the iterativity of the situation that tends to give it a more atelic, activity-like connotation. It is still, however, in my view an accomplishment in that there is always the ‘finished product’, i.e. the newly-completed law, that results from the law-making process, no matter how often it is reiterated.
other hand, a provision such as Section 57 of the same statute, which states that

(8) The English and French versions of this Act are equally authoritative

obviously refers to a single, uninterrupted state of affairs.

1.3. Modality

*Mood* and *modality* refer to two separate but interrelated phenomena. Mood has been defined as a morphosyntactic category of verb forms (Gotti / Dossena 2001: 10) and is most usually applied to inflectional systems of the verb, as in the contrast between indicative, subjunctive and imperative in such languages as Latin, French and German. As far as English is concerned, historical change has more or less eliminated mood from the inflectional system (Huddleston / Pullum 2002: 172). Modality is centrally concerned with the speaker’s attitude towards the factuality or actualization of the situation expressed by the rest of the clause (Huddleston / Pullum 2002: 173); or, to put it another way, it is the addition of a supplement or overlay of meaning to the most neutral semantic value of the proposition of an utterance, namely factual and declarative (Bybee / Fleischman 1995: 2).

As regards verbal constructions in English, modality is primarily associated with the so-called ‘central modal auxiliaries’, namely *will*, *would*, *shall*, *should*, *may*, *might*, *can*, *could* and *must*. However, modality is not only expressed by verbal mood, but also by modal verbs and by a considerable range of grammatically and syntactically quite diverse items, the most common being verbal, adverbial, adjectival and nominal expressions. The so-called ‘lexical modals’ – which express the same kind of meaning as the modal auxiliaries but do not belong to the syntactic class of auxiliary verbs – include adjectives such as *possible* or *necessary*, adverbs such as *perhaps* or *surely*, verbs such as *allow* or *require*, and nouns such as *probability* or *permission* (Huddleston / Pullum 2002: 173).

Whereas a purely factual statement such as *The judge wears a wig* or *He was banned from driving for six months* is typically conveyed by using the indicative form, a modalized statement puts the
proposition onto a non-factual plane, e.g. *The judge may wear a wig* or *He must have been banned from driving for six months*. We can distinguish between three types of modality:

- **epistemic modality.** Deriving from the Greek word for knowledge, epistemic modality is concerned with the speaker’s degree of knowledge regarding a proposition and is frequently associated with the idea of possibility or probability, e.g. *You may be right* or *It could be raining*. Epistemic modality is generally considered to be the easiest type of modality to identify;

- **deontic modality.** Deriving from the Greek word for ‘binding’, this kind of modality is primarily concerned with imposing an obligation or prohibition, or with granting permission or authorization. Deontic modality comes within what is sometimes known as *root modality* (Coates 1983) because it is considered by some linguists as constituting the ‘root’ meaning of the modal auxiliaries, with epistemic modality subsequently deriving from deontic modality. Prescriptive legal texts clearly come within the scope of deontic modality;

- **dynamic modality.** This type of modality has only started to enter the ‘mainstream’ of modality studies in recent decades and is the hardest of the three to identify. It classifies those uses of modal verbs which express ability and disposition – e.g. *She can easily beat everyone else in the club* – and cannot be categorized as deontic modality (expressing an order or permission issuing from the speaker/writer) or epistemic modality (expressing an inference by the speaker/writer). Dynamic modality has been widely studied by Palmer (1990, 2001) and is applied to modal expressions not just of ability but also, for example, of power or prediction. Some scholars, e.g. Biber *et al.* (1999: 485), prefer to include dynamic modality under the broader heading of epistemic modality, while others such as Bybee / Fleischman (1995: 13) prefer not to use the term at all.

As has been frequently pointed out (e.g. Coates 1983), there is a considerable degree of fuzziness between the boundaries of the three categories in question, with each of the central modal auxiliaries assuming a wide range of different meanings and nuances, according to the context in which an utterance is made. For example, the
The judge may wear a wig can have either an epistemic meaning (expressing possibility), or a deontic meaning (expressing the idea that such a situation is permissible). Similarly, the sentence Juries can take their time before giving their verdict can have either a deontic meaning (expressing permission) or a dynamic meaning (expressing ability). The work of lawyers and judges not infrequently involves attributing the precise modal meaning to a clause.

It has been observed that:

Questions concerning modality are central to the analysis of specialized discourse, as the choice and use of its various elements often represent a signal of markedness typical of a specific text type or of a particular discipline, and often constitutes one of the characterizing conventions on which a certain specialized genre is based (Gotti / Dossena 2001: 13).

As we shall see, modality is a central feature of prescriptive legal discourse.

Although we shall be dealing mainly with deontic modality in this volume, and the question will be analysed in detail particularly in Chapter 5.2. on finite verbal constructions, we shall also be referring to both epistemic modality and dynamic modality from time to time.

2. The temporal dimension of prescriptive legal texts

According to MacCormick (1978: 104), one of the leading contemporary legal theorists, legal rules “do not present a model of the world but a model for it.” These few words concisely convey the idea that the content of prescriptive legal texts derives from the real world of facts but is projected towards the ideal world of how things ought to be. Belonging as they do to the sphere of deontic modality, the temporal dimension of such texts would seem to partake of the present and of the future simultaneously. On the one hand, as Maley (1987: 28) has affirmed, “The authority of the statute/text is reinforced and given continuity by an assumption or fiction that the words of the
statute are continually speaking: ‘A statute once passed is deemed to be perpetual’ (Hampson v. Pizzinato 1965, New South Wales Reports).” On the other hand, it has also been observed that “The legislature when it enacts statutes (or Acts of Parliament as they are most often called) proposes to control action, usually only in the future, by the words contained in the legislation” (Derham / Maher / Waller 1971: 201, cited in Maley 1985: 27).

Hence, without taking into consideration the specific content of a given prescriptive text, the mere fact that it has been enacted as law entails that it is ‘continually speaking’ in the present, even in cases where it unambiguously refers to future actions and situations, as in:

(9) The Commission should examine, on the basis of the report to be submitted at the latest by 15 March 2005, the possibility of extending access rights for rail passenger transport, and present an appropriate proposal to that effect.12

The idea that the words of a law are continually speaking, an expression which uses the present progressive construction, implies a situation that is permanently in progress, though in actual fact what is being referred to here would seem to be more akin to a state of affairs than to an activity, in spite of the presence of the verb speak, for the term is used here metaphorically (the words of a law are inanimate and hence cannot ‘talk’ in the normally accepted sense of the term) and is simply a more colourful way of saying that the law has constant validity.

Elliott (1989) has observed that “Some jurisdictions (Canada and New Zealand for example) have legislation stating that an Act is to be regarded as ‘always speaking’. In Canada, this has helped legislation to be written in the simple present tense; in New Zealand, to date, it has not.” However, Elliott was writing in 1989, and since then some of the legislation passed in New Zealand has been drafted

11 The expression was already used by George Coode in 1842: “If the law be regarded while it remains in force as constantly speaking…” (cited in Elliott 1989).

in accordance with the criteria of the Plain Language Movement, such as the *Cadastral Survey Act* 2002 which contains 260 instances of the present tense out of an overall total of 512 finite verbal constructions.

Of course, except in those rare cases where the prescriptive text specifies that it is also retroactive (see Garzone 2001: 157-158) and thus applies to situations existing prior to its enactment, its validity, i.e. its condition of always speaking, usually only begins once it has been enacted. As I have pointed out elsewhere (Williams 2004a: 224), a prescriptive text can be said to have left-hand boundedness but is unbounded to the right,13 apart from those cases known as ‘sunset laws’ which are specifically drawn up to be enforceable for a limited period of time and hence also have right-hand boundedness (see below).

In most cases the type of temporal world that a prescriptive text inhabits is a non-deictic one, i.e. it does not usually refer to specific dates in the real world but to a theoretical time sphere that has equal validity at any given moment, as in Article 6, para. 3, of the Consolidated Version of the *Treaty on European Union* 2002 which states:

(10) The Union shall respect the national identities of its Member States

and clearly has validity irrespective of whether or not the number, or even the identity itself, of Member States subsequently changes.

However, there are frequently cases in prescriptive texts which do make deictic time references, e.g.:

(11) The report to be drafted by the Commission by 31 December 2003 pursuant to Article 10(2) of Regulation (EC) No. 1543/2000 shall also analyse the cost/benefit ratio of the work carried out.14

13 Boundedness can be succinctly defined as the quality of being finite, i.e. of having (or not having) temporal boundaries. For a bibliography on boundedness, see Bob Binnick’s extensive online bibliography at http://www.scar.utoronto.ca/~binnick/TENSE/bound.html.

The fact that the prescriptive rules laid down as ‘a model for the world’ are perpetually valid (until they are superseded by a new set of rules) means, of course, that they refer to all moments including not just the here and now but also the future. In this respect, it is particularly fitting that by far the most ubiquitous modal verbal construction in prescriptive texts in English over the last few hundred years has been the auxiliary *shall* which, as is well known, performs a double function as both a marker of futurity (*I shall leave tomorrow*) and as a modal verb expressing, among other things, obligation when used in the second or third person singular or plural (*You shall stay here till I tell you to move*). As Gotti has observed (2001: 93), this double possibility of expressing both obligation and futurity is implicit in the very nature of regulative acts.

One of the major characteristics of deontic modality is precisely the fact that, unlike epistemic modality, it is intrinsically connected with ‘futurity’, since it qualifies the speaker’s attitude towards the realization of the events to which reference is made in the utterance (Gotti / Dossena 2001: 12). This obviously applies not only to *shall*, but also to the other modal auxiliaries to be found in prescriptive legal texts, notably (in terms of frequency) *may*, as well as *must, should* and *can*. In short, when prescribing what people may or may not do, the law cannot but regulate their behaviour or situation prospectively with respect to the present moment. It is rather like saying “From now on this is how things will (or, rather, shall) be”. To quote Huddleston and Pullum (2002: 184):

> Deontic modality generally applies to future situations: I can oblige or permit you to do something in the future, but I can’t oblige or permit you to have done something in the past. Deontic modality can combine with past or present situations only with general requirements, conditions, options etc., as in […] Candidates *must have completed at least two years of undergraduate study*.16

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15 In its modal sense, *shall* can also be used with the first person singular or plural to make polite suggestions or to offer to do something, as in *Shall we change the subject?* or *Shall I carry that for you?*

16 As Ilse Depraetere (personal communication) has pointed out, however, it could be argued that such cases of perfect *must* should be considered as entailing a (non-deontic) requirement rather than a (deontic) obligation.
It is not only the regulation of how people or bodies should or should not behave that is to be viewed prospectively; the same criterion also applies to application or definition rules where the main verb is generally formed by the present indicative rather than shall, e.g.:

(12) ‘premises’ means any land, building or part of a building and for these purposes, ‘building’ includes a temporary or moveable structure.¹⁷

Even if the definition such as the one provided above is of a generic nature, it must be viewed as applying exclusively to the law in question, and hence as having validity in both the present and the future, but not the past. As has already been mentioned in Section 1.4.1., the prescriptive (and prospective) nature of such definitions is sometimes further underlined by the inclusion of shall, as in:

(13) The term ‘escalator’ shall mean a power driven, inclined continuous stairway used for raising and lowering passengers.¹⁸

There are occasionally cases, however, in which the present indicative is used in main clauses where the prospective – and prescriptive – force of the clause would appear to be weak, e.g.:

(14) Article 1
This Regulation lays down the detailed rules for applying Article 9 of Regulation (EEC) No 2019/93, as amended by Council Regulation (EC) No 442/2002.¹⁹

Here this introductory article seems to read more as a brief description of the specific function of the Regulation rather than as a prescriptive norm, though elsewhere we can find shall being introduced into a similar context and endowing the clause with the (more familiar)

¹⁷ Chapter II, Part 1, of Nottingham City Council Act 2003.
prescriptive ‘flavour of the law’, which is further enhanced here by the use of *shall* in two subordinate clauses:

(15)  Article 1
This Regulation *shall lay down*: (a) the criteria for establishing what a tiered priced product is; (b) the conditions under which the customs authorities *shall take* action; (c) the measures which *shall be taken* by the competent authorities in the Member States.\(^{20}\)

In the vast majority of cases, however, where the present indicative is used in main clauses in prescriptive texts, the meaning is clearly meant to be taken as referring to both present and the prospective future and as having prescriptive force:

(16)  The national flag of the Republic *is* black, gold, green, white, red and blue, as described and sketched in Schedule 1.\(^{21}\)

The present simple is usually little more than a stylistic variation on the more commonly used *shall* construction:

(17)  The national flag of the Republic *shall be* the flag the design of which is determined by the President by proclamation in the Gazette.\(^{22}\)

Indeed, as was stated in the *Introduction*, in many European legal systems, e.g. those of France and Italy, the indicative present simple is even more widely used in prescriptive texts than it is in English.

Where there is the need to refer explicitly to the future without the clause being endowed with prescriptive force, the *will* auxiliary is often used, as in:

(18)  With a view to furthering the objectives of this Article, the provisions of this Article *will be reviewed* in accordance with Article 48.\(^{23}\)

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\(^{21}\) Section 5 of the South African Constitution 1997.

\(^{22}\) Section 2(1) of the Interim South African Constitution 1994.

\(^{23}\) Article 17(5) of the Consolidated Version of the *Treaty on European Union* 2002.
Interestingly, the second most frequently-used indicative tense used in prescriptive texts is the present perfect. Much has been written on this particular tense in English, and one of the most commonly noted features is the connection between past and present, i.e. any construction using the present perfect in a main clause indicates that the situation begins in the past but invariably has some connection with the present, a concept which is often referred to as ‘current relevance’, even if there are some cases where the concept would not seem to be particularly apt.24

The vast majority of cases where the present perfect is used in prescriptive texts are constituted by subordinate clauses and, as is well known, such clauses are not necessarily located in the present perfect time sphere – indeed, in prescriptive texts they are generally located in the ‘prospective’ present-cum-future time sphere outlined above – but usually tend to indicate the completion of a given situation – i.e. they are used perfectively – with respect to the situation referred to in the main clause, e.g.:

(19) After that matter has been raised before the European Council, the Council may act in accordance with the first subparagraph of this paragraph.25

However, we do find the present perfect being used systematically in main clauses, for example at the end of treaties, as in the final clause of the Consolidated Version of the Treaty on European Union:

(20) IN WITNESS WHEREOF the undersigned Plenipotentiaries have signed this Treaty. Done at Maastricht on the seventh day of February in the year one thousand nine hundred and ninety-two.

24 Such cases might include sentences with adverbial expressions such as in the past, e.g. “There is only one quarantine facility in the Republic called Lissen Hall. Lissen Hall tells me that they now (2003) usually have available spaces, but in the past, they have sometimes been booked up for months in advance” (http://movetoireland.com/ movepag/petover.htm), where the idea of current relevance is, at best, extremely weak (see Williams 2002a: 186-195).

In such cases the use of the present perfect suggests that the signing of the text has current relevance with respect to its enactment.

2.1. Sunset legislation

As was briefly outlined above, one notable exception to the general concept that a prescriptive text has permanent validity is constituted by so-called ‘sunset laws’ which automatically terminate at the end of a fixed period unless they are formally renewed.

Sunset laws were first introduced in the United States in the 1970s as a means of imposing a limit on the life of executive or advisory bodies (often known as quangos) that had been set up. Colorado was the first US state to investigate the possibility of using this kind of legislation to control its public bodies. The Colorado Act of 1976 provided for the automatic extinction of thirteen regulatory and licensing agencies in 1977 unless their continued existence could be justified. Since then many other States have enacted sunset laws. If the legislature does not act to continue the agency, it automatically terminates or 'sunsets'. So-called ‘Sunset Committees’ have been set up to review each year the operations of state agencies scheduled for review in the sunset law or in the agency’s enabling law.

Sunset legislation has now been adopted in the US to cover a wide range of issues, such as the phasing out over a two or three year period of the use of toxic chemicals in public buildings, grounds, parks, schools and roadsides adopted by the City of San Francisco and elsewhere.

Other countries have adopted sunset laws too. In the United Kingdom in 2001, for example, the passage through Parliament of a controversial anti-terrorism measure was eased when the government announced that the new powers it gave to the police and other

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26 The coining of the term ‘sunset’ applied to legislation is attributed to Craig Barnes, a Denver lawyer: “It’s like the end of the day for these agencies, and it’s inexorable” (cited in Tony Licata, ‘Sunset Laws’ at http://www.lib.niu.edu/ipo/ii770221.html).

27 See the anonymous ‘Into the Sunset. Time Limits on Government Agencies’ at http://www.80ideas.net/idea/4.html.
agencies would be subject to a sunset limitation and review.\textsuperscript{28} Sunset provisions were also introduced in US anti-terrorism legislation passed shortly after the terrorist attacks of 11 September 2001, in Section 224 of the so-called \textit{Patriot Act}:

\textbf{(21) } (a) IN GENERAL- Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

(b) EXCEPTION- With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect.

Sunset legislation may also be introduced in fields characterized by rapid change, e.g. in technology-related issues such as the Internet, which need updating periodically. Furthermore, sunset clauses may sometimes be inserted in cases where there is uncertainty about the possible effects of a law.

Sunset clauses are sometimes included in contracts. For example, some insurance policies may include sunset clauses stating that the coverage lasts for a limited time beyond the expiration date of the policy, so if a policy has a sunset clause after five years and expires on 31 December 2003, then any claims made after 31 December 2008 will not be covered.

Although sunset laws have been criticized by some on the grounds that they introduce a further layer of bureaucracy and are too time-consuming to implement, given the imposition to revise legislation periodically, they are generally considered as a way of actually getting rid of wasteful bureaucracies or of pragmatically dealing with specific issues over a limited period. Indeed, one

\textsuperscript{28} A compromise was reached whereby Government Ministers refused to accept the proposed sunset clause establishing that the law should expire automatically after one year, but it was agreed that seven “wise people” would be allowed to review the legislative measures after two years. Another British law containing a sunset clause is Part I the \textit{Electronic Communications Act} of 2000 which specifies that if a statutory scheme has not been set up within five years then the Government's power to set one up lapses.
Canadian proponent of sunset legislation has suggested that “Maybe every bill passed by Parliament should come with a ‘sunset clause’ which would automatically repeal any measure which isn't working or isn't cost-effectively achieving its stated objective.”

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IV. The ‘World Data’ Corpus

In this Chapter we shall look at some of the main features of the ‘World data’, i.e. the corpus of prescriptive texts specially compiled for this volume. The texts are as follows:

United Kingdom
Employee Shares Scheme Act 2002 (1547 words)
Robin Rigg Offshore Wind Farm (Navigation and Fishing) (Scotland) Act 2003 (1719 words)
The Local Health Boards (Constitution, Membership and Procedures) (Wales) Regulations 2003 (6030 words)
Children (Leaving Care) Act (Northern Ireland) 2002 (3711 words)
Arms Control and Disarmament (Inspections) Act 2003 (1148 words)
Tobacco Advertising and Promotion Act 2002 (4878 words)
Nottingham City Council Act 2003 (6072 words)
Hereford Markets Act 2003 (866 words)
Transas Group Act 2003 (1714 words)
Subtotal: 27,685 words

European Union
Consolidated Version of the Treaty on European Union 2002 (9397 words)
Council Decision 2003/170/JHA on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States (2029 words)
Commission Decision of 23 December 2002 implementing Council Regulation (EEC) No 1612/68 as regards the clearance of vacancies and applications for employment (1939 words)
469 as regards the specific aid arrangements for the smaller Aegean Islands in respect of vineyards (669 words)
Council Decision of 29 June 2000 on a financial contribution from the Community towards the expenditure incurred by Member States in collecting data, and for financing studies and pilot projects for carrying out the common fisheries policy (2030 words)
Regulation No 782/2003 of the European Parliament and of the Council of 14 April 2003 on the prohibition of organotin compounds on ships (2924 words)
Subtotal: 23,059 words

United States
Animal Disease Risk Assessment, Prevention, and Control Act 2001 (2018 words)
Making continuing appropriations for the fiscal year 2002 resolution (2193 words)
Ordinance relating to the Seattle Center Department; authorizing the Seattle Center Director to execute an agreement with The Vera Project for 2003 and 2004 for presentation of an all-ages music and art program (5515 words)
Missouri Revised Statutes: Chapter 312 Nonintoxicating Beer (9739 words)
Chapter 377: Nevada City-County Relief Tax Law (2109 words)
Subtotal: 21,574 words

International organizations (other than the EU)
UN Convention on the Rights of the Child of 20 November 1989 (7575 words)
UN Security Council Resolution 1511 of 16 October 2003 (1751 words)
ILO Seafarers’ Identity Documents Convention (Revised) 2003 (8752 words)
Subtotal: 18,078 words
Australia

*Wool International Privatisation Act 1999* (3870 words)

*Constitution of the Central Australian Tourism Industry Association* (5256 words)

*Northern Territory Government, Office of the Commissioner for Public Employment Part 6 – Compulsory transferees* 1997 (1157 words)

*New South Wales Consolidated Acts – Smoke-free Environment Act* 2000 (3730 words)

Subtotal: 14,013 words

Canada

*New Brunswick Ambulance Services Act* 1990 (2718 words)

*Ontario Sars Assistance and Recovery Strategy Act* 2003 (4110 words)

*Association of Manitoba Municipalities Incorporation Act* 1999 (873 words)

*Manitoba Biofuels and Gasoline Tax Amendment Act* 2003 (3653 words)

Subtotal: 11,354 words

South Africa

*Intelligence Services Act* 2002 (10,767 words)

Subtotal: 10,767 words

Ireland

*Unclaimed Life Assurance Policies Act* 2003 (9418 words)

Subtotal: 9418 words

New Zealand

*Cadastral Survey Act* 2002 (9125 words)

Subtotal: 9125 words

This corpus of 36 texts comprises a total of 145,073 words. The overall number of finite verbal constructions is 7168, thus producing the figure of one finite verbal construction for every 20.2 words. The results are as follows:
<table>
<thead>
<tr>
<th></th>
<th>number of occurrences</th>
<th>%</th>
<th>frequency per 1000 words</th>
</tr>
</thead>
<tbody>
<tr>
<td>present simple</td>
<td>3116</td>
<td>43.5</td>
<td>21.5</td>
</tr>
<tr>
<td>shall</td>
<td>1621</td>
<td>22.6</td>
<td>11.2</td>
</tr>
<tr>
<td>may</td>
<td>950</td>
<td>13.3</td>
<td>6.5</td>
</tr>
<tr>
<td>present perfect</td>
<td>338</td>
<td>4.7</td>
<td>2.3</td>
</tr>
<tr>
<td>past simple</td>
<td>261</td>
<td>3.6</td>
<td>1.8</td>
</tr>
<tr>
<td>must</td>
<td>233</td>
<td>3.3</td>
<td>1.6</td>
</tr>
<tr>
<td>should</td>
<td>158</td>
<td>2.2</td>
<td>1.1</td>
</tr>
<tr>
<td>will</td>
<td>112</td>
<td>1.6</td>
<td>0.8</td>
</tr>
<tr>
<td>be to</td>
<td>65</td>
<td>0.9</td>
<td>0.4</td>
</tr>
<tr>
<td>would</td>
<td>55</td>
<td>0.8</td>
<td>0.4</td>
</tr>
<tr>
<td>present progressive</td>
<td>51</td>
<td>0.7</td>
<td>0.4</td>
</tr>
<tr>
<td>imperative</td>
<td>48</td>
<td>0.7</td>
<td>0.3</td>
</tr>
<tr>
<td>can</td>
<td>36</td>
<td>0.5</td>
<td>0.2</td>
</tr>
<tr>
<td>present subjunctive</td>
<td>30</td>
<td>0.4</td>
<td>0.2</td>
</tr>
<tr>
<td>past perfect</td>
<td>28</td>
<td>0.4</td>
<td>0.2</td>
</tr>
<tr>
<td>could</td>
<td>18</td>
<td>0.3</td>
<td>0.1</td>
</tr>
<tr>
<td>past progressive</td>
<td>13</td>
<td>0.2</td>
<td>0.1</td>
</tr>
<tr>
<td>might</td>
<td>12</td>
<td>0.2</td>
<td>0.1</td>
</tr>
<tr>
<td>need not/be</td>
<td>9</td>
<td>0.1</td>
<td>0.1</td>
</tr>
<tr>
<td>future progressive</td>
<td>5</td>
<td>0.1</td>
<td>0.0</td>
</tr>
<tr>
<td>ought to</td>
<td>4</td>
<td>0.1</td>
<td>0.0</td>
</tr>
<tr>
<td>present perfect progress</td>
<td>2</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>be about to</td>
<td>1</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>have to</td>
<td>1</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>would + progressive</td>
<td>1</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Total</td>
<td>7168</td>
<td>100</td>
<td>49.4</td>
</tr>
</tbody>
</table>

Table 1. Distribution, percentages, and occurrences per 1000 words of finite verbal constructions of the ‘World data’ corpus.
1. Criteria for selecting the ‘World data’

The criteria adopted in compiling the data are as follows:

i) *Unabridged texts*. The texts are considered in their entirety, including titles and preambles.

ii) *Inclusion of all finite constructions, both in main clauses and in subordinate clauses*. The decision to include all finite verbal constructions, irrespective of whether they occur in main clauses or subordinate clauses, is based on the criterion that the object of analysis is that of exhaustively examining the functions and frequency of occurrence of all verbal constructions within prescriptive texts, not of restricting my analysis exclusively to the prescriptive functions of the verbal constructions. One of the main consequences of the decision to include all finite constructions is that the ‘World data’ reveals a strikingly high proportion of indicative forms, particularly the present simple. Indeed, indicative forms constitute roughly 53 per cent of the entire total, with modal, semi-modal, subjunctive and imperative forms making up the remaining 47 per cent.

As an indication of the kind of difference involved if main clauses alone are taken into consideration, two of the texts, namely *ILO Seafarers’ Identity Documents Convention (Revised) 2003* and *Ontario Sars Assistance and Recovery Strategy Act 2003* (hereafter abbreviated as *ILO* and *Sars* respectively) have been analysed after excluding all the finite verbal constructions in subordinate clauses. In both texts the result is an overall drop in the number of finite verbal constructions of almost exactly 50 per cent (in *ILO* from 252 to 128, in *Sars* from 467 to 239). In other words, the finite verbal constructions in both texts are distributed more or less equally between main clauses and subordinate clauses. But whereas the number of cases of *shall* when subordinate clauses are not taken into consideration remains exactly the same in *Sars* (28 cases), and only declines slightly in *ILO* from 101 to 90 (in the latter text there is a similar drop of about 11 per cent in uses of *should*, from 83 to 73), there is a 50 per cent drop in occurrences of the present simple in *Sars*.
(from 160 to 80), and a much greater drop in ILO from 197 occurrences to 54. But while it is worth highlighting the fact that the distribution of the data would change considerably if finite verbal constructions in main clauses alone were taken into consideration, with a marked rise in modal forms and a corresponding fall in the percentage of occurrences of indicative forms, it is not one of the objectives of this volume to make a detailed comparison between the relative statistics of the ‘World data’ taken as a whole and those that would emerge if the verbal constructions in subordinate clauses were not taken into account.

Moreover, it should be pointed out that not all the verbal constructions in main clauses in prescriptive texts necessarily express prescriptive force. For example, as we have already outlined, at the end of preambles the present perfect is frequently used in main clauses (often with the subject separated from the verb by a series of recitals), where the semantic function of the clause is to illustrate, prior to the specification of the actual rules, which authority has agreed to the laying down of the rules, e.g.:

(1) The European Parliament and the Council of the European Union […] have adopted this regulation.1

Furthermore, there may be occasions within a prescriptive text where it is necessary to describe a situation before going on to regulate it. For example, in Section 2 entitled ‘Findings and Purposes’ of the US Animal Disease Risk Assessment, Prevention, and Control Act 2001, it is stated as follows:

(2) Congress finds that (1) it is in the interest of the United States to maintain healthy livestock herds.

where the verb finds clearly has no prescriptive force. Conversely, there may also be cases where prescriptiveness is expressed even by the verbal construction in a subordinate clause, as in the following:

(3a) The form of the document and the materials used in it shall be consistent with the general specifications set out in the model, which shall be based on the criteria set out below.

(3b) Notwithstanding paragraph 7 above, a template or other representation of a biometric of the holder which meets the specification provided for in Annex I shall also be required for inclusion in the seafarers' identity document, provided that the following preconditions are satisfied: [...] (b) the biometric shall itself be visible on the document and it shall not be possible to reconstitute it from the template or other representation.2

Indeed, it is even possible to find cases in prescriptive texts where the verbal construction in the main clause has a descriptive function while the verbal construction in the subordinate clause is used prescriptively:

(4) The details are set out in Annex II hereto, which may be amended in the manner provided for in Article 8 below [...].3

Hence we must avoid making the simplistic equation that a main clause has prescriptive force whereas a subordinate clause does not.

iii) Legally binding texts drafted by authoritative bodies. The texts come in a wide range of guises, from international conventions, resolutions, regulations and directives to acts of national or local legislation. The question of how to weight the various types of texts, i.e. how many municipal laws or international conventions should be included, is subordinate to my aim of trying to obtain a reasonably representative idea of the distribution of finite verbal constructions in prescriptive texts without privileging one particular type within the relatively broad category of legally binding texts drafted by authoritative bodies. It is in fact possible to subdivide the 36 texts into three main groups: 15 (constituting in all approx. 57,000 words) are concerned with local or regional matters, 10 (approx. 47,000 words) have to do with regulating national issues, while 11 are of international scope (approx. 41,000 words). Other types of

2 Respectively, article 3(1) and article 3(8) of ILO Seafarers’ Identity Documents Convention (Revised) 2003.
3 Article 4(1) of ILO Seafarers’ Identity Documents Convention (Revised) 2003.
prescriptive documents such as contracts and wills have not been included in order to give greater homogeneity to the data. Of the 36 texts taken into consideration, two may be deemed as displaying borderline features, namely Constitution of the Central Australian Tourism Industry Association which may be classified as a quasi-legal document, and Ordinance relating to the Seattle Center Department; authorizing the Seattle Center Director to execute an agreement with The Vera Project for 2003 and 2004 for presentation of an all-ages music and art program which, even if it comes under the category of an ordinance, contains certain features that are akin to those of a contract. In no other way, however, do these two texts present features that make them differ significantly from the other 34.

iv) Variety of sources. There are texts from all of the major English-speaking countries as well as from three major international institutions (the European Union, the United Nations and the International Labour Organization). A summary of the breakdown of each subgroup is provided in table form below.

<table>
<thead>
<tr>
<th>Subgroup</th>
<th>Number of words</th>
<th>%</th>
<th>Number of texts</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>27,685</td>
<td>19.1</td>
<td>9</td>
</tr>
<tr>
<td>EU</td>
<td>23,059</td>
<td>15.9</td>
<td>8</td>
</tr>
<tr>
<td>US</td>
<td>21,574</td>
<td>14.9</td>
<td>5</td>
</tr>
<tr>
<td>UN and ILO</td>
<td>18,078</td>
<td>12.5</td>
<td>3</td>
</tr>
<tr>
<td>Australia</td>
<td>14,013</td>
<td>9.7</td>
<td>4</td>
</tr>
<tr>
<td>Canada</td>
<td>11,354</td>
<td>7.8</td>
<td>4</td>
</tr>
<tr>
<td>South Africa</td>
<td>10,767</td>
<td>7.4</td>
<td>1</td>
</tr>
<tr>
<td>Eire</td>
<td>9418</td>
<td>6.5</td>
<td>1</td>
</tr>
<tr>
<td>New Zealand</td>
<td>9125</td>
<td>6.3</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>145,073</td>
<td>100</td>
<td>36</td>
</tr>
</tbody>
</table>

Table 2. Number of words, percentage of overall total, and number of texts used in each subgroup constituting the ‘World data’ corpus.

Here too the question of how much weight to give to each particular country, institution or area is extremely complex. Moreover, there are a number of variables which alter the distribution ratios according to
one’s interpretation of the data. If I had simply chosen one subgenre of prescriptive texts such as UN resolutions, or EU directives, or municipal legislation, the results would obviously have been much more homogeneous; on the other hand they would not have given an idea of the general situation of finite verbal constructions in contemporary prescriptive texts at a world level but only, say, of one particular subgenre, perhaps from just one geographical area or international institution.

We shall take a very brief look at each of the nine subgroups in order to highlight some of the choices involved in attempting to achieve a reasonable degree of representativeness of the data, and also to indicate where the texts came from. First of all, as can be seen from Table 2, none of the nine subgroups represents as much as 20 per cent of the overall total of the ‘World data’ in terms of word count. The texts from the United Kingdom represent the largest subgroup, a reflection of the key role that the UK has played over the centuries as the originator of legal English. Like all the other texts comprising the ‘World data’, these texts were taken from the Internet: those from the UK were taken from the official website at www.hmso.gov.uk/. They comprise a mixture of national acts of parliament, laws emanating from the devolved regional assemblies of Scotland, Wales and Northern Ireland, and pieces of local legislation from parts of England.

The second largest grouping is composed of EU legislative texts, all of which can be found at www.europa.eu.int/. Besides the Consolidated Version of the Treaty on European Union 2002, which is the largest text of this subgroup, the other texts are made up of (relatively short) directives, decisions and regulations. It should be pointed out that all of the EU texts that have been selected are authoritative in the sense that they are the source of law rather than merely (non-authoritative) translations of authoritative texts. At the same time, such is the nature of EU legislation that there is no guarantee that English was the original source language of all of the texts. On the other hand, the fact that the texts are all authoritative seemed to me a valid enough criterion for classifying them as prescriptive texts written in English and hence worthy of inclusion as part of the ‘World data’.
There are two other European texts in the corpus, namely *ILO Seafarers’ Identity Documents Convention (Revised) 2003* and Eire’s *Unclaimed Life Assurance Policies Act 2003*. The former is taken from the official website (www.ilo.org/) of the International Labour Organization, an institution originally founded in 1919 and based in Geneva; the latter is a text drafted by the Irish parliament and available at www.gov.ie/. If we put all of the European texts together we end up with a total of almost 70,000 words, i.e. just under half of the total for the ‘World data’ as a whole. Again, given that the official languages of the ILO are Arabic, Chinese, English, German and Russian, there is no guarantee that the text originated in English. However, as with the EU texts, the fact that the English version is considered to be authoritative would seem to warrant its inclusion. It is a moot point as to whether the type of English adopted by the ILO leans more towards that of British legal English or towards that of American legal English: the very spelling of the name of the institution itself reflects its rather hybrid nature, with the British spelling of *Labour* with the inclusion of the ‘u’ and the American spelling of *Organization* with a ‘z’ rather than an ‘s’.

The third largest subgroup of texts is that of the USA.4 The British and American texts combined constitute an overall total of a third of the entire corpus, which mirrors the importance of these two nations, respectively as the country that spawned legal English throughout the world and as the largest English-speaking nation. The three texts from the subgroup entitled ‘International Organizations’ comprise not only the above-mentioned ILO document but also two texts from the United Nations, both available at www.un.org/, which could also be considered as gravitating within the American sphere of influence in linguistic terms, also given the fact that the UN

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4 Of the American texts, *Animal Disease Risk Assessment, Prevention, and Control Act 2001* is available at www.aphis.usda.gov/; *Making continuing appropriations for the fiscal year 2002* resolution at www.cfo.doe.gov/; *Ordinance relating to the Seattle Center Department; authorizing the Seattle Center Director to execute an agreement with The Vera Project for 2003 and 2004 for presentation of an all-ages music and art program*, available at www.cityofseattle.net/leg/; *Missouri Revised Statutes: Chapter 312 Nonintoxicating Beer* at www.moga.state.mo.us/; *Chapter 377: Nevada City-County Relief Tax Law* at www.leg.state.nv.us/.
headquarters are in New York. The texts from international institutions (EU, UN and ILO) thus constitute roughly 28 per cent of the overall total, the remaining 72 per cent being made up of texts drafted within individual English-speaking countries.

If the combined word count of texts for the UK and the US is approximately 49,000, i.e. 34 per cent of the total, the texts from the remaining five English-speaking countries, namely Australia, Canada, South Africa, Ireland and New Zealand, constitute about 55,000 words, i.e. roughly 38 per cent of the total. It should be borne in mind that in three of these countries, i.e. Canada, South Africa and Ireland, English is only one of the official languages used in the drafting of legislative texts. Taking into consideration the word count of the texts from all five countries, it can be observed that Australia is weighted slightly more heavily than the others, whereas the other four have been given approximately the same weight (between 9,000 and 11,000 words each).

Summing up, then, I have tried to ensure that the overall make-up of the ‘World data’ is reasonably balanced in terms of providing data that roughly reflect the situation of finite verbal constructions used in contemporary prescriptive texts in English at a world level. Clearly, the validity of the data can only be verified by building up much larger corpora not only in terms of the number of texts but also

5 Paradoxically, the UN Convention on the Rights of the Child, one of the two UN texts included in the corpus, has not been ratified by the United States, the only member of the UN besides Somalia that has refused to do so.

in terms of the typology and provenance of the texts, for example by compiling corpora of prescriptive texts from individual countries or institutions, or by compiling corpora of, say, municipal legislation and comparing the data from two or more English-speaking countries. The data provided here can constitute no more than an initial overview of the situation as a whole.

v) Ellipsis. The number of occurrences of finite verbal constructions also includes ellipted forms. For example, the sentence:

(5) An inspector may examine and take samples of fuel on any premises that the inspector is allowed to enter under this section, including fuel in any tank, container or other receptacle.

is considered as containing two occurrences of *may* in that the auxiliary is taken as given before the verb *take*. This seemed to me the only way of having a true idea of the number of cases of finite verbal constructions in which auxiliary forms were actually used, whether explicitly or implicitly, and of counterbalancing the fact that, for example, in affirmative cases of the present simple in the active form every verbal construction is automatically counted simply because there is nothing that can be ellipted in the verbal construction itself. In the following sentence one cannot but count *makes*, *assents*, *participates* and *acquiesces* as four separate instances of the present simple:

(6) A person commits an offence who (a) makes, or assents to or participates or acquiesces in the making of, (i) a false or misleading statement in an application […].

The same principle also applies to passive constructions where, in some cases, two auxiliaries at a time have been ellipted, e.g. in the following sentence where *may be* has been ellipted before *served*:

---

7 Section 13(5) of the *Manitoba Biofuels and Gasoline Tax Amendment Act 2003*.

8 Section 18(1) of the *Manitoba Biofuels and Gasoline Tax Amendment Act 2003*. 

106
If the name or address of any person on whom any notice or other document required or authorised to be served under the provisions of this Act cannot after reasonable enquiry be ascertained, the document may be given or served by either (a) leaving it in the hands of a person who appears to be the owner of, resident in or employed in; or (b) leaving it conspicuously affixed to some part of, the premises being used or to be used for trading regulated under the provisions of this Act.\(^9\)

Cases of ellipsis with passive constructions naturally include indicative forms such as the present simple: for example, in the following sentence are has been ellipted before offered:

Subsections (1) and (5) shall not apply to transactions involving goods that (a) are acquired outside the city; (b) are neither sold nor offered for sale in the city; and (c) are not kept within the city.\(^{10}\)

The upshot of applying this principle of including ellipted verbal constructions is that every text had to be gone through clause by clause: it was not possible simply to search automatically for the number of cases of, say, shall in a text. In any case, this ‘manual’ search, clause by clause, was the only way of ensuring identification of all the various indicative forms to be found in a given text (for example, in establishing whether means is the third person singular of the verb to mean or a noun). The word count given for each of the texts refers to the actual number of words to be found in that text, i.e. ignoring all cases of ellipsis, whereas the number of instances provided of the various finite verbal constructions in my ‘World data’ does take ellipsis into account. This means that, for example, in ILO Seafarers’ Identity Documents Convention (Revised) 2003, the original text contains 98 instances of shall and 27 of may, whereas if we allow for cases of ellipsis these figures increase, respectively, to 101 and 28. In some texts the discrepancy between the two figures can be quite marked. For example, in the following sentence alone there are 13 instances of ellipted may:

For the purposes of this Act, an inspector may, at any reasonable time, do any one or more of the following:

---

\(^9\) Section 20(2) of Nottingham City Council Act 2003.

\(^{10}\) Section 5(8) of Nottingham City Council Act 2003.
(a) alone, or with such other persons as the inspector considers necessary, enter and inspect any premises,
(b) examine and inspect any apparatus or equipment in any premises,
(c) take such photographs, films and audio, video and other recordings as the inspector considers necessary,
(d) for the purpose of analysis, take samples of any thing to determine whether the provisions of this Act and the regulations are being complied with in relation to the premises,
(e) take samples of any thing, other than for the purpose of analysis, that the inspector reasonably believes may be used as evidence that an offence has been or is being, committed under this Act or the regulations,
(f) require records or documents to be produced for inspection,
(g) examine, inspect and copy any such records or documents and, for that purpose, take away and retain (for such time as may, for that purpose, be reasonably necessary) any such records or documents.11

On average, ellipted forms account for approximately five per cent of the total number of finite verbal constructions.12 I am aware that there is no perfect solution to the question of ellipsis when analysing corpora and that in other studies there may be valid reasons for preferring a straightforward word count. In the end, it is a question of purpose. One of the main aims in this particular volume is to have a clear idea of the number and distribution of finite verbal constructions within prescriptive texts, and this could only be achieved by taking ellipsis fully into account.

vi) Length of text. Texts were never chosen a priori on the basis of the patterns of concentration of finite verbal constructions to be found. However, one criterion for automatically excluding a text was that of

excessive length. Precisely because I wanted to have as much variety as possible in terms of geographical provenance and type of prescriptive text, and because I did not want the results to be skewed as would have been the case had I taken into consideration particularly lengthy texts, I decided that the maximum number of words allowed for an individual text would be approximately 10,000 words. One result of this essentially random selection of the 36 texts is that three of them happen to be completely devoid of *shall*, namely Australia’s *Wool International Privatisation Act 1999* and New South Wales Consolidated Acts – *Smoke-free Environment Act 2000*, and New Zealand’s *Cadastral Survey Act 2002*.

vii) *Age*. Because I wanted to have an idea of the contemporary situation of verbal constructions in prescriptive texts, another criterion for excluding a text was that of age, though in three cases it was not possible to establish the exact year in which the texts were first drafted. Of the 33 remaining texts the oldest – the UN *Convention on the Rights of the Child* – dates back to 1989.

viii) *Simple v. progressive forms*. Unless specifically stated, the various categories of verbal constructions listed in Table 1, e.g. ‘*shall*’ or ‘*present perfect*’, are to be taken as excluding progressive forms.

One preliminary observation that is worth making is that the data differ markedly with respect to the data I had compiled for my previous article (Williams 2004a: 228). Below I provide the eight most significant results of the data relating to that article in terms of percentages of occurrences:

<table>
<thead>
<tr>
<th></th>
<th>shall</th>
<th>present simple</th>
<th>may</th>
<th>present perfect</th>
<th>must</th>
<th>should</th>
<th>will</th>
<th>can</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>54.7</td>
<td>25.4</td>
<td>11.2</td>
<td>3.3</td>
<td>1.5</td>
<td>0.7</td>
<td>0.6</td>
<td>0.6</td>
</tr>
</tbody>
</table>

Table 3. Distribution of finite verbal constructions as percentages in the ‘Translation data’ compiled for Williams (2004a).

The most striking discrepancy concerns the distribution patterns of the two major verbal constructions used in prescriptive texts, i.e. the present simple and *shall* where we can observe a complete reversal in
frequency distribution in the two sets of data. There are a number of reasons that may explain this discrepancy:

First of all, the data in Table 3, which I shall henceforth refer to as the ‘Translation data’, are based on an extremely limited set of texts – eight in all – constituting little more than 30,000 words altogether. This was because my aim when compiling the ‘Translation data’ was a completely different one with respect to my purpose in this volume. In the former I was interested in comparing the verbal constructions used in English and Italian in specific texts, and a small number of texts proved to be sufficient for my purposes. Moreover, the largest of the texts in the ‘Translation data’ – the Italian Constitution – was not an authentic legal text but merely a translation from the Italian original.

Secondly, in the ‘Translation data’ I had explicitly not taken into consideration any preambles but only the main body of the texts. Preambles tend to contain very few cases of shall but often contain a considerable number of instances of the present simple, for example in the form of performatives.

Finally, in the ‘World data’ several of the texts contain a number of (sometimes lengthy) definition provisions where there is generally a very high concentration of instances of the present simple such as means, is taken as etc., whereas such provisions play only a very minor role in the texts constituting the ‘Translation data’.

If we concentrate on the ‘World data’ alone as presented in Table 1, the most interesting features would seem to be:

- the strikingly high predominance, as was mentioned earlier, of the present simple with respect to any other verbal form, almost twice as common as shall, the verbal form traditionally most closely associated with legal English, and the overall predominance of indicative forms with respect to modals;
- the concentration of three verbal forms in prescriptive texts, namely the present simple, shall and may, which constitute over three quarters of all finite verbal constructions;
- the relatively lowly status of must, representing little more than three per cent of all finite verbal constructions. The relative infrequency of must is also highlighted by Trosborg 1995: 42 in her data relating to legislative texts and contracts in the field of
English Contract Law; indeed, on the basis of her data, “The modal *must* (deontic use) was not observed at all as illocutionary force indicator of a directive in statutes, and it was employed only infrequently in contracts (0.6%)” (1995: 50).
V. Verbal Constructions in Prescriptive Legal Texts

Having analysed the salient features of prescriptive legal texts in English and also the criteria adopted in selecting the texts comprising the ‘World data’, we are now in a position to be able to examine the verbal constructions used, both finite and non-finite. It should be pointed out that while the statistical data to which we shall be referring are based on the 36 texts making up the ‘World data’, the examples illustrating the various functions of the verbal constructions may sometimes be taken from other sources, including codes, regulations and contracts and even one or two quasi-legal documents.

1. Finite verbal constructions: introduction

We shall begin by looking at the finite verbal constructions adopted in prescriptive texts. By finite constructions I am referring to all those forms which express number (singular and plural) and tense, whereas non-finite constructions express neither number nor tense. Rather than simply run through the list of the most frequently-used finite constructions purely on the basis of numerical occurrences, starting with the present simple then passing to shall, I have divided them into three subgroups: a) modals and semi-modals; b) mood; and c) indicative forms.
2. Modals and semi-modals

The modal and semi-modal auxiliaries have been grouped together since they can all be used to express modality. The semi-modal forms examined here are be to, need not and have to.\(^1\) Other semi-modals such as dare or be going to have not been included simply because there are no occurrences of such forms in the ‘World data’. As is the custom in most studies of modality (e.g. Coates 1983; Palmer 1990, 2001), will has been included among the modal auxiliaries even if, as we shall see, it tends to be used in prescriptive texts in a predominantly non-modal way, i.e. as a ‘pure’ indicator of future tense in opposition to shall which normally conveys an unmistakably prescriptive quality to the verbal construction. We shall begin by examining the modal auxiliary that has, for centuries, been inextricably linked to the language of the law in English.

2.1. Shall

There is the joke of the hapless Frenchman floundering in the sea off the Brighton coast who shouted “I will drown and no one shall save me.” So no one did. This nicely illustrates some of the subtleties of the English modal system that can so often puzzle non-native speakers. What, of course, the Frenchman does not realize is that will with the first person can express determination, whereas shall in the second or third person singular or plural expresses a command – it has a directive function.\(^2\)

But where did this deontic meaning of shall originate? Before going on to analyse the various ways in which it is used in contemporary legal texts, it may be worth briefly looking at the

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1 The latter is frequently included among the semi-modals on the basis of its semantics (Depraetere & Reed 2006).

2 In certain highly formal contexts it is also possible to express a prophecy, and not a command, in the second or third person using shall, as in ‘This kingdom shall know happier days’.
history of the auxiliary which, more than any other, is associated with legal English.

In Old English *ic sceal* meant *I am obliged to* (cf., for example, Barber 1994: 162), also including the idea of owing (e.g. money). *Shall* continued to be closely associated with the idea of obligation until the 16th century when it began to assume ever more clearly its current meaning in most contexts outside legal English, namely as an auxiliary expressing future tense.

Linguists are divided as to whether to consider *shall* and *will* as being primarily modal auxiliaries which subsequently acquired a ‘purely’ future (and hence non-modal) meaning or whether they should be viewed as indicating primarily future tense but which have also retained a variety of modal meanings. For example, Huddleston and Pullum do not recognize a future tense for English (2002: 208) and acknowledge that this view goes against generally accepted linguistic theory.

The development of *shall* in legal discourse and its preference over *will* is said to have grown from the need to avoid ambiguity: according to Rissanen (2000: 122) “the aim of neutrality and generality favoured the choice of a single auxiliary to indicate the neutral future, and in this context the natural choice was *shall*, which was the more depersonalized of the two and frequently used when obligation was involved”. Citing statistical data from the Helsinki Corpus over a seventy year period beginning in 1420, Rissanen traces the increasing usage of *shall* in legal documents, while also noting the opposite trend in less formal genres; fiction, romance and private letters each display a propensity away from the less personal auxiliary *shall* (Barleben 2003b). The distinctiveness and ubiquity of *shall* in legal English was already present, then, in Early Modern English statutes: Gotti (2001: 90-91) provides statistics showing that *shall* represented 81% of all cases of modal verbs, followed at a great distance by *may* (13%) and *will* (2%). *Might, can, should* and *must* are rarely to be found in early English statutes.

*Shall* continues to constitute one of the most characteristic features of legal English today, whereas its use outside legal discourse is on the decline in favour of *will* (Gotti 2003b; Leech 2003). However, it has been observed that:
The tendency, when using the words as simple markers of the future, to confine *shall* to the first person (for example, *I shall*, *we shall*), and *will* to the second and third (for example, *it will*, *you will*) is relatively recent, and even today is not universal: in Northern England you often hear *Shall you go?* where a Londoner says *Will you go?* (Barber 1994: 162).

The fact that there has been an overall decline in *shall* in contemporary English, especially with the second and third persons singular and plural, has meant that the specificity of its use in normative discourse has been further highlighted over the years. This has also meant that it has gradually acquired an ever more archaic quality which, depending on one’s point of view, endows it with the authoritativeness of tradition or, vice versa, makes its replacement by something more up to date ever more urgent.

Certainly, the ubiquity of *shall* in prescriptive legal texts over the last few centuries is understandable given that it originated as a way of conveying obligation, and hence of expressing deontic (‘root’) modality which, as has been observed already, is intrinsically projected towards regulating behaviour and situations located in the future. Moreover, with its increasing tendency towards ‘depersonalization’ – or ‘impersonalization’, as Šarčević (2000: 176) has defined it – it was to become even more well-suited for use in a type of discourse which generally went to great lengths to avoid any kind of personalized references, eschewing almost entirely the first and second persons singular and plural in favour of the more neutral third person. With hindsight, it might be said that the major problem with *shall* was that, with its combined connotations of obligation, futurity and depersonalization, it was so well-suited to legal discourse that drafters tended to insert *shall* liberally into texts where it was often quite superfluous, a habit which still continues into the present day. Suffice it to say that *shall* is easily the most commonly-used modal auxiliary in prescriptive legal texts in English today, accounting for almost 23 per cent of all finite verbal constructions, and is almost twice as common as its nearest modal rival, *may*.

It is therefore not surprising to find that, through its “traditional promiscuity” (Garner 1998: 940), *shall* is used to cover a wide range of meanings, though its ‘core’ meaning in prescriptive texts would appear to be that of expressing authoritativeness by imposing some form of obligation (Williams 2006a). This may be done by
explicitly identifying the person(s) or body that is bound to carry out the obligation, as in:

(1) Not later than 1 year after November 9, 2000, and on an annual basis thereafter, the designated authorities shall submit a report to Congress on the efforts of the United States Government to enforce the provisions of this section and the adequacy of the resources to do so.³

Very often, however, the obligation is a generic one laid down without any specification as to who should carry it out, e.g.:

(2) Unleaded Gasoline shall comply with the most recent ASTM D439-77 or the latest edition Standard Specifications for Automotive Gasoline.⁴

This non-specific obligation is often conveyed using the passive form, e.g.:

(3) The census shall be taken as of the first day of April of each such year, which date shall be known as the ‘mid-decade census date’.⁵

though, of course, the agent may sometimes be expressed, e.g.:

(4) A radio survey and any periodical inspection relating to items included in a radio survey (a ‘periodical radio inspection’) shall, if it is to be carried out in the United Kingdom, be carried out by a surveyor appointed by BT and application for such survey or inspection shall be made to BT.⁶

Shall is also widely used – much more frequently than may – in negative constructions when expressing prohibitions,⁷ e.g.:

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³ Section 1308 on the Prohibition on importation of dog and cat fur products in the US Code Collection at http://www4.law.cornell.edu/uscode/19/1308.html.
⁷ On the basis of statistics relating to 20 of the 36 texts, shall not occurs more than six times more frequently than may not, with 103 occurrences of the former as opposed to 13 of the latter. However, other negative constructions with shall or may as can be found in (5a) have not been taken into account. It
No person shall, at the same time, fill two (2) municipal offices, either in the same or different municipalities.8

In accordance with article 1 of the Declaration on Territorial Asylum of 14 December 1967, States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.9

In such cases, there would seem to be no difference in terms of illocutionary force between shall and may.

In all the examples given so far the use of shall would appear to be relatively easy to justify insofar as we are dealing with the regulation of behaviour. Even in (2) the expression “Unleaded Gasoline shall comply …” should be read as meaning that all persons must comply with the norm in question and should be considered as an implicit performative (see Section 1.6). But, as Foley points out (2001: 192), there are some cases in which it is used to give purely discretionary authority, e.g.:

If it sees fit, the authority shall seek the views of data subjects or their representative.

Here there would seem to be a contradiction between the meaning of the if clause, which allows the authority to use its discretion (if it sees fit), and the obligation on the authority implicit in the main clause through the presence of shall: given the context, may would seem to be a more appropriate alternative to shall.

As has already been pointed out in Section 1.3, there is also an abundance of cases – for example, in definition provisions – where the inclusion of shall would seem to be redundant and where the present simple would seem to be preferable, e.g.:

is also worth noting that in the 20 texts examined must not occurs 11 times, i.e. almost as frequently as may not.

8 61.080 ‘Incompatible Offices’ in Kentucky State laws, at http://www.lrc.state.ky.us/KRS061-00/080.PDF.
9 Article 7 of UN General Assembly Resolution 3074 (XXVIII) of 3 December 1973.

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‘Normal retirement age’ *shall mean* age 60, except that it *shall mean* age 62 for a participant whose participation commences or recommences on or after 1 January 1990.10

Moreover, in subordinate clauses *shall* often seems to be inserted purely “as a kind of totem, to conjure up some flavour of the law” (Bowers 1989: 294), e.g.:

The laws of the State of Vermont shall apply in all instances not covered by this Chapter, *provided that the provisions of this Chapter shall be applicable* to all snowmobiles operated within the Town of Wallingford, Vermont except as otherwise declared and determined by the laws of this State.11

Such has been the custom in drafting legal texts since at least the 15th century (see Gotti 2001: 95-96 for historical examples), particularly in hypothetical clauses, frequently introduced by *if*, as in the following provision which contains three cases of *shall* occurring in subordinate constructions, two of which with an *if* clause, including a rare example in a prescriptive legal text of a progressive construction, followed by an equally rare perfect construction headed by *shall*:

Any person being an owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, amusement or recreation, including but not limited to any inn, hotel, restaurant, eating house, barber shop, billiard parlor store, public conveyance on land or water, theater, motion picture house, public education institution or elevator, *who shall refuse to permit* a blind person to enter or use any such accommodations when such accommodations are available, for that reason that such a person is being led by a dog guide shall be guilty of a misdemeanor *if such dog guide shall be wearing* a harness and further *if such a person shall first have presented* for inspection credentials issued by an accredited school for training guide dogs which has been approved by the veterans administration.12

However, it should be observed that such redundant cases of *shall* in subordinate clauses in prescriptive texts are far less frequent today

11 §3301 of 2001 *Ordinance Regulating Snowmobiles* of the Town of Wallingford (Vermont).
than they used to be. The inclusion of *shall* in hypothetical clauses would seem to be the approximate equivalent of the subjunctive form so commonly found in subordinate clauses in prescriptive texts written in French or Italian, though Huddleston and Pullum (2002: 195, note 60), who also agree that in subordinate clauses there is no semantic difference between *shall* and the present simple in legal language, argue that the use of *shall* in such clauses is comparable to that of *should*. In such cases *shall* would seem to have no modal function whatsoever; it is purely ornamental, and thus constitutes one of the so-called ‘unnecessary words’ that Plain Language proponents consider as making legal English excessively wordy – a legacy from the past which many contemporary drafters still adopt on the basis of a centuries-old tradition rather than for reasons of clarity. On the basis of the criteria (which differ slightly from my own) and statistics provided by Foley (2001: 194) relating exclusively to EU legal texts in English, about half of all uses of *shall* are superfluous. On the other hand, we cannot simply conclude that *shall* would best be eliminated from all subordinate clauses because there are cases where its use would appear to be absolutely appropriate insofar as it expresses the function of mandatory obligation (Williams 2006a), e.g.:

(10a) States Parties shall ensure that a child *shall not be separated* from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

(10b) No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions *shall conform* to such minimum standards as may be laid down by the State.\(^\text{13}\)

Thus the ‘core’ semantic function of *shall* of denoting a duty which has mandatory effect holds irrespective of whether it is found in main clauses or in subordinate clauses, and irrespective of whether it is used to express a prohibition or to impose an obligation.

\(^\text{13}\) Respectively, Article 9(1) and Article 29(2) of the UN Convention on the Rights of the Child 1989.
2.2. May

The second most commonly-used modal auxiliary in legal English is *may* which can be found in one in seven of all finite verbal constructions. Together with *shall*, *may* is the only other modal auxiliary (based on statistics from the LOB and Brown corpora) in which usage in legal English is greater than it is in general usage (Foley 2001: 193). As is well known, in affirmative contexts in legal discourse its primary meaning is that of conferring discretionary power, either directly or indirectly, e.g.:

(11a) A registered society *may*, if it has a common seal, *execute* a document by affixing that seal to it.

(11b) An Order in Council under this section *may contain* such transitional, incidental or supplementary provision as appears to Her Majesty to be necessary or expedient. 14

In negative contexts *may* expresses prohibition:

(12a) The state *may not unfairly discriminate* directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.15

(12b) *No restrictions may be placed* on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.16

As has been observed above, *shall not* still tends to be much more widely used than *may not* in legal texts, except of course in those cases where *shall* has been entirely done away with, as in the South African *Constitution* of 1997, e.g. in Section 89(2):

14 Both citations from the UK *Co-operatives and Community Benefit Societies Act* 2003.
15 Section 9(3) of the South African *Constitution* 1997.
16 Article 15(2) of the UN *Convention of the Rights of the Child* 1989.
(13) Anyone who has been removed from the office of President in terms of subsection (1) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.

However, in subordinate clauses, unlike shall, which generally adds no particular modal meaning to the verbal expression other than highlighting its legalistic nature, may sometimes expresses modal values that are not connected to discretionary power or prohibition but, for example, to possibility (Palmer 1990: 50-51). In the following example we have a clear instance of may expressing (deontic) discretionary power in the main clause and (epistemic) possibility in the subordinate clause:

(14) The officer may seize and detain (a) any apparatus or records which he has reasonable grounds for believing may be required as evidence in proceedings for an offence in respect of a contravention of any regulation.17

It is occasionally possible to find cases of epistemic may in main clauses of legal texts, as in the initial clause of the second sentence here from Article 9 of the UN Convention on the Rights of the Child of 1989:

(15) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2.3. Must

The original meaning of must was that of being allowed or of being able to do something (Mitchell / Robinson 1990: 114). It is not clear how it came to acquire its meaning of obligation or duty, which

17 Section 8(5) of the UK’s Radio Equipment and Telecommunications Terminal Equipment (Amendment No. 2) Regulations 2003.
already existed by the early 13\textsuperscript{th} century. The gradual spread of \textit{must} signifying obligation was to lead to the weakening of this modal meaning of \textit{shall} which, with the notable exception of legal English, assumed ever more markedly the value as a marker of future tense. These days, as is well known, \textit{must} expresses an obligation involving a ‘commitment’ – i.e. an endorsement – on the part of the source issuing the obligation, which distinguishes it from \textit{have/has to} where the obligation is usually seen as being external with respect to the source issuing the obligation. It is for this reason that \textit{have/has to} is so rarely used in legal discourse: \textit{must} automatically entails that it is the law itself that imposes the obligation; \textit{have/has to} generally has no such entailment (Palmer 1990: 69-70).

That said, it is interesting to note that, even though \textit{must} is the modal auxiliary in English most strongly associated with obligation in general usage, and obligation is a central feature of legal discourse, its presence in prescriptive texts taken as a whole was and still is by no means common, constituting little more than three per cent of all finite verbal constructions today. However, as we shall see in greater detail in Chapter 6, in texts where \textit{shall} has been eliminated there is a tendency to resort to \textit{must} to a much greater degree.

Referring to general usage in English, Palmer affirms (1990: 74) that “In a sense \textit{shall} is stronger than \textit{must}, in that it does not merely lay an obligation, however strong, but actually guarantees that the action will occur.” While there may be many cases outside legal discourse where this is true,\textsuperscript{18} my impression is that in the language of the law in English the tendency is rather the opposite: precisely because \textit{shall} is used so abundantly and ‘promiscuously’ in legal texts, and is even used sometimes in subordinate clauses where it has no prescriptive force, \textit{must} tends to be preserved for cases where expressing strong mandatory obligation or urgent necessity. Cases of strong mandatory obligation can be found, for example, in:

\begin{quote}
18 One need merely think of the instances where ‘weak’ \textit{must} is used, for example, as a marker of polite invitation, as in ‘You must come and have a meal with us some time’.
\end{quote}
Every person when commanded to do so by an officer seeking to arrest an offender, *must aid and assist* in making the arrest, and *must obey* the commands of the officer in respect thereto.19

All hunters (including all persons accompanying hunters) *must possess* a permit to access Steinhatchee Springs. This brochure, when signed serves as a permit for all 2003-2004 hunt seasons and *must be* in possession of the hunter while hunting.20

Cases of urgent necessity can be seen in the final verbal construction of (15) from the UN Convention on the Rights of the Child, or in the two instances in which it is used in the following UN Security Council Resolution 1511 of 16 October 2003 on Iraq:

Underscoring that the sovereignty of Iraq resides in the State of Iraq, reaffirming the right of the Iraqi people freely to determine their own political future and control their own natural resources, reiterating its resolve that the day when Iraqis govern themselves *must come* quickly [...] Unequivocally condemns the terrorist bombings of the Embassy of Jordan on 7 August 2003, of the United Nations headquarters in Baghdad on 19 August 2003, and of the Imam Ali Mosque in Najaf on 29 August 2003, and of the Embassy of Turkey on 14 October 2003, the murder of a Spanish diplomat on 9 October 2003, and the assassination of Dr. Akila al-Hashimi, who died on 25 September 2003, and emphasizes that those responsible *must be brought* to justice.

Thus, because *must* is used relatively sparingly in most legal texts, it may sometimes be used to convey this idea of enhanced obligation with respect to *shall* which, in turn, tends to be used to convey enhanced obligation with respect to the present simple (see Section 5.4.1.). Generalizing, then, there would therefore appear to be three levels of prescriptive force in English legal texts ranging upwards in terms of strength from the present simple to *shall* to *must*.

However, there are also cases in which *must* is used without there being any particular sense of urgency or strong obligation, i.e. where *shall* or even the present simple would be equally efficacious, e.g.:

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19 Section 99-3-5 of the Mississippi Code of 1972, as amended.
Two or more local governments may by joint resolution create a public body, corporate and politic, to be known as a regional port authority. The resolution creating a regional port authority must create a board of not less than five commissioners.21

Each member of the authority before commencing the member's duties shall take an oath to administer the duties of that office faithfully and impartially and that oath must be filed in the office of the Secretary of State.22

As can be seen in all of the citations involving must here, the decision as to whether strong mandatory obligation, urgent necessity or weak obligation is inferred depends on the particular context. Not assisting a police officer who is attempting to make an arrest would almost certainly be seen by the courts as a serious offence; failure to file an oath in the office of the Secretary of State would probably be deemed as less serious.

*Must* can sometimes be used in prohibitions instead of *may* or *shall*, e.g.:

Police officers must not receive private or special advantage from their official status.23

No person must lift any load the weight of which is likely to injure him.24

In both cases here the use of *must* would seem, once again, to reinforce the mandatory nature of the prohibition. It is even possible to find the *must not* construction in ‘whereas’ clauses; the example provided below constitutes an instance of what has been referred to as an implicit performative, where the command function is conveyed indirectly insofar as the persons or bodies to whom the prohibition applies are not specified:

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21 Section 7-14-1102, *Regional Port Authority* (1) of the Montana Code Annotated 2003.
22 Title 4, Chapter 33, §1602, Section 2 of *Maine Governmental Facilities Authority*.
23 *Law Enforcement Code of Conduct* of the City of Clive, Iowa.
(20) [...] Whereas this Directive must not affect the obligations of the Member States concerning the deadlines for transposition of the Directives set out in Annex I, Part B [...].

It is also worth observing at this point (the question will be taken up in greater detail in Chapter 6) that in prescriptive texts where shall has been eliminated, drafters tend to resort not only to must but also to must not with much greater frequency than is generally the case with texts where shall is preserved. For example, in New South Wales Consolidated Acts – Smoke-free Environment Act 2000, ten of the 15 occurrences of must take the negative form. Section 19 of the Act reads as follows:

(21) (1) A person must not, without reasonable excuse, resist, obstruct, or attempt to obstruct, an inspector in the exercise of the inspector’s functions under this Act. Maximum penalty: 5 penalty units. (2) A person must not impersonate an inspector. Maximum penalty: 5 penalty units.

Not only the choice of non-stative verbs (resist, obstruct, attempt to obstruct, impersonate) but also the adverbial “without reasonable excuse” in para. (1) underline the idea that the use of must not is connected here to the forbidding of unreasonable behaviour.

One characteristic of must in prescriptive legal discourse with respect to its general usage in other contexts is that there is generally no mistaking its underlying meaning of obligation. Outside the realm of prescriptive texts, must frequently has epistemic meaning (e.g. You must be mad) or it may be open to both an epistemic and a deontic reading if the context is not clarified (e.g. You must study a lot) (Coates 1983; Palmer 1990). In other types of non-prescriptive legal discourse there may be a degree of ‘fuzziness’ where must is used, as in the following citations which can be interpreted either as referring to an obligation or as constituting a necessary conclusion:

The term ‘president or chairman’ must be taken as meaning not only the holders of these offices but also the vice-president or vice-chairman, and the term “member of a board of directors” includes alternate members.  

It is true that we have often stated that such conclusions of law are binding upon us on appeal if they are supported by the trial courts’ findings [...]. When used in this context, however, the phrase ‘supported by the findings’ must be taken as meaning ‘required by the findings’ or ‘correct in light of the findings.’ Only conclusions of law which are ‘supported’ in such manner by the findings are binding on appeal.

In addition to its substantial interest in timely prosecution, the Government has a concomitant interest in assuring a defendant a fair trial. Second, the court must conclude that forced medication will significantly further those concomitant state interests.

The last two citations come from sentences by the US Supreme Court. In the language of the courts epistemic must is often to be found, which is unsurprising given that the role of the judge is to arrive at conclusions and pronounce judgments and, as Palmer (1990: 53) has pointed out, epistemic modality does not express a factual assertion, but makes a judgement.

It has been asserted (Palmer 1990: 103-104) that must can also be interpreted as having a dynamic modal meaning when rules and regulations are reported, e.g. in law reports or in newspapers:

A spokesman for Devon County Council’s Weights and Measures Department said ‘Where a landlady says her place is “two minutes from the sea” it must not mean by jet aircraft’.

However, this function of dynamic must would appear to be extremely rare in prescriptive texts precisely because, as has already been observed, the source of authority is the law itself; hence the almost total concentration of cases of deontic must in prescriptive texts. Indeed, no case of dynamic must has been found in the ‘World data’.

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2.4. Should

According to Huddleston and Pullum (2002: 186), deontic should “is usually subjective, indicating what the speaker considers ‘right’ – whether morally (One should always tell the truth) or as a matter of expediency (We should buy now while the market is depressed)”: it is also weaker than must in that it implies that the speaker feels doubtful about the actualization of the situation (Declerck 1991b: 378) and hence allows for non-actualization. Should therefore comes within the range of what has been defined as ‘medium strength’ modality (Huddleston / Pullum 2002: 186). Not surprisingly, then, given the general desire by lawmakers to avoid ambiguity where possible, the role of should in prescriptive legal texts is fairly limited, constituting slightly over two per cent of all finite verbal constructions in prescriptive texts. Replacing shall or must with should in most legal texts would be tantamount to an invitation to start litigation procedures. Unlike must or shall, should expresses what has been defined as ‘escapable obligation’ (Declerck 1991b: 378). However, there are cases where should would seem to be the most appropriate modal form to be used in prescriptive texts, for example when enunciating general guidelines and principles which often have strongly moral or ethical overtones, e.g.:

(24a) Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons should therefore be able to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons should be entitled to quality education and training that fully respect their cultural identity; and all persons should be able to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.29

(24b) 1. States Parties shall recognize for every child the right to benefit from social security, including social insurance and shall take the necessary measures to

achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.\(^{30}\)

In this latter case, while a child’s right to certain benefits is recognized as a legal obligation, a degree of leeway is conceded as to the way in which such benefits are granted. This is understandable given the fact that the text is an international convention signed by almost all countries belonging to the UN and therefore needs to be broad enough to cover an almost infinite range of situations. Hence the use of the ‘medium-strength’ modal should and the adverbial hedge where appropriate. Indeed, it is especially in international legal texts laying down general principles rather than specific obligations that should may more easily be found.

While should is relatively uncommon in statute law, it may be found with greater frequency in codes or regulations, and there are a few texts where should would seem to be little more than a variant on shall. For example, the Irish Code of Practice of 1993 (Duties and Responsibilities of Employee Representatives and the Protection and Facilities to be afforded them by their Employer) drafted by the Labour Relations Commission contains 29 instances of should as opposed to only nine of shall (all of the latter, moreover, occur in the two Appendixes), e.g. Article 4:

(25) Employee representatives should be elected/designated in accordance with the appropriate trade union rules and procedures and, where relevant, in accordance with employer/trade union agreements. These procedures and agreements should ensure that such representatives will be representative of the trade union members concerned. Such representatives should normally have a minimum of one year’s service in the undertaking or establishment concerned; their appointment as employee representatives should be confirmed in writing by the union to the employer and the union should provide relevant information, advice and training to employee representatives on their principal functions and duties. Nothing in this Code precludes an employer from providing additional training.

Should can also be found in negative contexts in some quasi-legal texts, where it tends to suggest a very strong warning not to do something rather than an explicit prohibition:

(26a) Legal and financial professionals may start the incorporation process via a secure on-line form. Online incorporation should under no circumstances be used by anyone without consulting legal counsel.31

(26b) Usernames and Passwords should for no reason be used by any other employee.32

In some cases the function of should can be likened to that found in formal instructions in general, for example relating to competitive examinations or job applications or form-filling, e.g.:

(27a) Overseas students should apply using the standard Cambridge Application form, and their application should reach us by the usual mid-October deadline. In addition, they MUST apply separately to UCAS […]

(27b) Internal candidates should not participate in the evaluation of other candidates.33

Shall, may and must are the three modal auxiliaries that are primarily associated with deontic modality, and in certain contexts the present simple can also be considered as fulfilling a deontic function in prescriptive texts. But the case of should would seem to be much more context-bound. For example, in (24a) it cannot be said that an obligation is laid down when affirming that “All persons should therefore be able to express themselves and to create and disseminate their work in the language of their choice” – it is merely stating how

32 The University of Memphis Operating Procedures (Access to the University’s Student Information System) 1994.
things ought to be, not how they must be. On the other hand, in (26b) there is an undeniable element of ‘behaviour regulation’ in the sentence even if it does not have the full force of an unambiguous prohibition. Palmer (1990: 82) ends up by treating should and ought to as cases of dynamic necessity, “though they sometimes have highly deontic characteristics”.

The weak or non-existent deontic strength of should with respect to must is clearly illustrated in UN Security Council Resolution 1511 on Iraq. Whereas the Security Council emphasizes that those responsible for murderous terrorist attacks in Iraq “must be brought to justice”, at the same time it

(28) Resolves that the United Nations, acting through the Secretary-General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its vital role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government.

Here there is no explicit obligation to involve the United Nations further in Iraq, merely the assertion that greater involvement would be a good idea.

The weak or non-existent deontic strength of should is a common feature in subordinate clauses, e.g.:

(29) National authorities shall assess, in accordance with national law and according to the seriousness of the threat, whether the Member States concerned should be informed.34

It is worth observing that ought to is hardly ever used in prescriptive texts – there are only four occurrences of ought to in the ‘World data’ as opposed to 158 of should – as it tends to be considered as insufficiently formal and to refer to contingent situations relating to the immediate future rather than to general principles that will continue to have validity in the long term. When referring to present and future situations, then, ought to is hardly ever an option in

34 Article 5/1) of EU Council Decision 2003/170/JHA of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States.
prescriptive texts, whereas it can occasionally be found in the perfect form when referring to counterfactual past situations, e.g.:

(30a) Subsection (1) applies to any information or material received by the former member during, or subsequent to, the former member's employment or other service with the Intelligence Services or the Academy, as the case may be, that was marked as classified or that the former member knew or ought reasonably to have known was classified.35

(30b) [...] if the bankruptcy is annulled on the ground that the person ought not to have been adjudged bankrupt or on the ground that the person's debts have been paid in full, that person shall become eligible for appointment as a member on the date of the annulment.36

In such cases there is no discernible difference between ought (not) to have and should (not) have. Similarly, in the example below, should have could be replaced by ought to have without any change of meaning:

(31) The subsequent Saturday must not be more than 28 days later than the day when the election should have been held.37

Should can also be used in prescriptive texts in the protasis of a conditional clause – in a construction typical of formal English “with a zero-conjunction and inversion, provided that the verb of the conditional clause is a modal form” (Declerck 1991b: 425), e.g.:

(32) Should there be any major difficulties in implementing a joint action, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solutions shall not run counter to the objectives of the joint action or impair its effectiveness.38

35 Section 27(2) of South Africa Intelligence Services Act 2002.
36 Schedule 2,1(a) of the Local Health Boards (Constitution, Membership and Procedures) (Wales) Regulations 2003.
37 Section 288(2) of the New South Wales Local Government Act 1993.
2.5. Will

Referring to the Old English period, Mitchell and Robinson (1990: 115) have observed that “The original function of willan seems to have been the expression of wish or intention”, and “it is sometimes found expressing natural disposition to do something, and hence habitual action”. Besides being the most widely used marker of futurity in English today, will has preserved the modal meanings of strong volition or intention (e.g. I will give up smoking) and of natural disposition (e.g. He will park in the strangest places). Unlike shall, however, it does not express obligation, and hence its use in legal texts is generally limited to expressing future situations where there is no implicit suggestion of obligation, e.g.:

(33) The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments.39

In this particular case, the eventuality of a common EU defence policy – which, as the Preamble to the Consolidated Version of the Treaty on European Union states (using a modal expressing a high degree of doubt as to its actualization), “might lead to a common defence in accordance with the provisions of Article 17” – carries no obligation with it, so will is more appropriate than shall in this context. However, occurrences of will are relatively rare in prescriptive texts (even fewer than should) because, in most cases where a clause is meant to refer expressly to the future, it is generally associated with the idea of obligation, and hence shall is normally used, e.g.:

(34) As of 1st January 2004 dangerous goods and marine pollutants shall be shipped only in accordance with the IMDG Code Edition incorporating Amendment 31-02.40

40 Marine Notice No. 31 of 18 December 2002 issued by the Marine Survey Office, Dublin.
The difference between prescriptive *shall* and non-prescriptive *will* is clearly conveyed in the following:

(35) […] this plan *shall specifically address* how homeless persons, as defined in section 11302(a)(2)(C) of this title, (and the families of such persons) *will be brought* into the program.\(^{41}\)

Sometimes, however, particularly in negative constructions, the context may be such that the actual difference between *will*, *shall* and *may* in expressing prohibition is in fact minimal, and it may be possible to find all three forms being used more or less interchangeably, as in the Ashdown Forest Byelaws where we find, for example, these five consecutive byelaws:

(36)  Byelaw 8. No unauthorised person *will take or destroy* any Forest vegetation.  
Byelaw 9. No unauthorised person *will take* any wood from the Forest.  
Byelaw 10. No unauthorised person *shall take, snare, trap or kill* any animal, bird (including nests or eggs), insect or fish, or *have in his possession* any gun, trap, net or snare that could be used for these purposes.  
Byelaw 11. No unauthorised person *shall erect* any hut, booth, tent, stall, post or hurdle upon the Forest.  
Byelaw 12. No unauthorised person *may dig up* any stone or turf or in any way *disturb* the surface of the Forest soil.\(^{42}\)

Occasionally we can find *will* being used in subordinate clauses in prescriptive texts where it has a modal meaning of volition, e.g.:

(37) The Chairperson of the Authority, or his designee, shall have a reasonable time in which to inspect the items so delivered, to determine if the Authority *will accept* them.\(^{43}\)

Even more rare is the use of the future progressive form in a subordinate clause:


\(^{42}\) Ashdown Forest (Sussex) Byelaws “made by the Conservators of Ashdown Forest under the powers conferred on them by the Ashdown Forest Act 1974”, at http://www.ashdownforest.org/html/byelaws.html.

\(^{43}\) Article 11 of City of Pittsburgh Equipment Leasing Authority, Pittsburgh, Pennsylvania, Proposal ELA 35-03, *Pre-owned Vehicles.*
(38) If the Authority will be considering a turnpike toll increase at a meeting, the Authority shall give notice of that meeting in at least two (2) newspapers of general circulation in counties having a population of more than Five Hundred Thousand (500,000) according to the latest Federal Decennial Census, stating that the Transportation Authority will be considering a turnpike toll increase.44

In this particular case the future progressive expresses the (conditional) idea of a planned future situation being actualized as a matter of course (see Williams 2002a: 202-208).

2.6. Be to

The quasi-modal form (also known as the semi-auxiliary) be to + infinitive can express an arranged future. It differs from the present continuous in that it normally denotes either an official plan or decision or a scheduled action imposed by an outside will (Declerck 1991b: 116). Moreover, apart from this use, be to can also convey modal ideas (e.g. obligation or necessity resulting from an order or prohibition), and the be + passive infinitive construction is often used in notices and instructions (Swan 1997: 93). In theory, then, the construction would appear to be well-suited to being applied to prescriptive texts. In practice its use is rather limited, even if there are calls for it to be used more widely than is currently the case, e.g. by the Australian Office of Parliamentary Counsel (2000: 19). Indeed, as we shall see in Chapter 6, in certain texts – notably from New South Wales – where shall has been completely done away with, there is a much greater recourse to the be to construction. One plausible reason why it tends to be rarely used could be that, in main clauses in prescriptive texts, the be to construction would seem to be no more than a stylistic variant with respect to those well-established markers for laying down obligations or duties, namely shall or must. However,

there are a number of cases in which this semi-modal form can be found, as in these quasi-legal texts:

(39a) LoveByte Connectors *are to inform* members of any changes in activities planned via the communication mode requested by the member not later than three days before the event.  

(39b) For transactions where there is a conflict of interest and for those where specific authorization by the customer is required, the information included in the facsimile legend hereinafter *is to be provided* and the date of the customer’s authorization must be expressly indicated.

*Be to* can also express an obligation in subordinate clauses:

(40) Where a dangerous drug, other than a dangerous drug specified in Part III of the First Schedule, *is to be lawfully supplied* to any person (hereinafter referred to as ‘the recipient’) otherwise than by, or on a prescription lawfully given by, a registered medical practitioner, the person supplying the dangerous drug (hereinafter referred to as ‘the supplier’) shall not deliver it to a person who purports to be sent by or on behalf of the recipient [...].

Generally, however, *be to* has no directive function in subordinate clauses but indicates, rather, a pre-condition which must be fulfilled so that some other situation may occur:

(41) Provider means the person who *is to establish* or has established a personal pension scheme or any successor in relation to the provision of benefits as described in section 653A(2)(b) of the Taxes Act.

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45 Article 5 of *Terms and Conditions for Use of LoveByte Connection by LoveByte Connectors*.

46 Instructions for filling in Form “G1” in *Consob Regulation 11522 of 1 July 1998 implementing the provisions of intermediaries of legislative decree 58 of 24 February 1998 as amended by Consob resolutions*.

47 Section of Enactment of Chapter 134, *Dangerous Drugs Ordinance*, Section 32(1), of 30 June 1997, Hong Kong.

2.7. Would

*Would* is traditionally used quite frequently in the language of the courts (Facchinetti 2001: 144), though rarely to express tentativeness; in most cases it has a narrative function in the reporting of cases, thus featuring also instances of reported speech (Facchinetti 2001: 146). As a general rule, drafters of prescriptive texts prefer to avoid using verbal constructions that could lead to ambiguities of interpretation, hence conditionals such as *would, could* and *might* are used relatively sparingly. However, there are cases in normative texts where a non-deontic conditional of the second type is required in order to outline some hypothetical situation, e.g.:

(42a) Nothing in the foregoing shall be construed so as to affect the practice of medicine & surgery or any other recognized profession or occupation by a person duly licensed by the State of New Jersey to engage in such practice, profession or occupation and whose license *would lawfully authorize* the tattooing or body piercing.\(^{49}\)

(42b) The proposed extension by reason of its design, height, bulk, mass, depth and close proximity to the boundaries of the site *would result* in an overbearing and unneighbourly form of development, detrimental to the amenities of the occupiers of the nearby properties. It *would thereby be* contrary to policies ENV 19, 23 and 24 of the adopted Unitary Development Plan 1996 and BLT 11, 15, and 16 of the emerging Unitary Development Plan - First Review.\(^{50}\)

In the latter case, relating to the conditions for refusing to allow house extensions, the regulations have not been devised to deal with actual instances of unlawful extensions but consist in laying down the parameters for acceptable extensions and in highlighting the reasons why certain proposals and criteria would be deemed as unacceptable.

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\(^{49}\) Section 2(E) of Stratford Borough Council (New Jersey State) *Ordinance to Regulate the Tattooing and Piercing and Its Establishments Within the Borough of Stratford*, 1998.

\(^{50}\) REF 1 *Impact on Neighbours Only in Refusal Conditions of House Extensions*, London Borough of Richmond on Thames, 2002.
2.8. Can

Although outside legal discourse *can* is frequently used deontically (above all in the interrogative form), especially in informal spoken and written contexts, e.g. when asking and granting permission, it is not commonly used in affirmative statements in prescriptive legal discourse. *May* and *shall* are the modal auxiliaries most widely used in affirmative contexts when granting permission. However, instances of deontic *can* in affirmative clauses are to be found, albeit extremely rarely (and hardly ever in legal statutes), in prescriptive texts:

(43a) The user is authorised to use the software for the development of applications and new software which *can be used* exclusively on TechnoTrend hardware.\(^{51}\)

(43b) Whoever requires an employee to work in any mill or factory on any legal holiday, except to perform such work as is both absolutely necessary and *can lawfully be performed* on Sunday, shall be punished by a fine of not more than fifteen hundred dollars.\(^{52}\)

In both instances here it is through our understanding of the context – also by means of the ‘deontically harmonic’ adverbials, respectively *exclusively* and *lawfully* – that a directive reading would appear to be the one intended by the drafters of these texts, even though a non-deontic interpretation cannot be entirely ruled out, especially in (43a). In the following the deontic reading is further reinforced by the subsequent explanatory clause in the text:

(44) The law provides a very limited exception when manufacturers *can require* work on holidays as follows: if the manufacturing work being performed is both 1) ‘absolutely necessary’ and 2) ‘*can lawfully be performed* on Sunday’ meaning that ‘for technical reasons [it] require[s] continuous operation […],’ employees *can be required* to work. M.G.L. ch. 136, § 6(6). Otherwise work must be voluntary.

\(^{51}\) Article 2(2) of the *Software License Agreement*, Software Development Kit, “TT-PCline budget” and the “BDA-Driver” of Techno Trend AG.

\(^{52}\) Manufacturers’ Note to the Massachusetts Blue Laws (revised 3 May 2000), regarding *Restrictions on business openings on Sundays and holidays.*
In other words, work on Sunday is expressly allowed by law (as opposed to being a mere possibility) because of the technical requirement of continuous operation. On the other hand, can is widely used in other realms of (non-prescriptive) legal discourse, especially in contexts where the purpose is to explain what is allowed by the law, e.g.:

(45) When responding to a problem region somewhere in the world, the Council first tries to find a peaceful resolution to the situation. However, in cases where this proves ineffective or insufficient, the Council, with the permission of host countries, can authorize the deployment of troops from member nations to help enforce or maintain a brokered peace.53

In such cases where permission-granting provisions of the law are being reported, as above, the meaning of can and may is often ambiguous: both can be interpreted not only deontically (the writer is reporting that this is what the law allows) but also dynamically (the writer – who is not the source of authority – is stating that this is what can or may happen). In view of this potential ambiguity, can is often preferable to may because the latter in non-deontic contexts tends to convey a more hypothetical degree of possibility and thus suggests a greater chance of non-actualization with respect to can.

Cases of dynamic can are to be found occasionally in prescriptive texts, as in the clause of this loan agreement, a good example of turgid legalese where modals (can, shall or may), indicative verbs (release, discharge and agree), prepositions (for, upon, or by), adjectives (past, present and future) and nouns (matter, cause or thing) often come in threes:

(46) I, for myself, my heirs, legal representatives and assigns, hereby release, discharge and agree to hold harmless the ASPCA, its past, present and future representatives, officers, directors, agents, employees, successors and assigns, from and against any and all liability related to the loan of the trap(s), including, but not limited to, all actions, causes of action, suits, covenants, claims, and demands whatsoever for any thing and for any reason, in law or

equity, which against the ASPCA, its past, present and future officers, directors, agents, employees, successors and assigns, I, my heirs, executors, successors and assigns ever had, now have, or hereinafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever in connection with and/or arising from my use or the loan of the trap(s).  

In prescriptive texts deontic can occurs much more frequently in negative clauses than it does in affirmative ones, expressing prohibition, like may not, shall not or must not:

(47a) Prohibitions: (a) A name cannot begin with more than seven numbers unless the seventh number is followed by a space(s) or letter(s); (b) Entity identifiers, such as ‘corporation’, ‘incorporated’, ‘limited’, ‘limited liability company’, ‘limited liability partnership’, ‘business trust’, ‘professional corporation’ or ‘limited partnership’ or any abbreviation or derivation thereof cannot be used with an assumed business name unless all the registrants on the assumed business name are entities identified in the name.  

(47b) ‘Public policy’, the principle which holds that no one can lawfully do that which tends to be injurious to the public or against the public good.

Naturally, negative can is also to be found in prescriptive texts where it expresses the non-deontic meaning of impossibility, as in Article 43(a) of the Consolidated Version of the Treaty on European Union of 2002:

(48) Enhanced cooperation may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties.

55 Article 3 of the Guideline for Determining Business and Entity Name Availability of the Oregon Administrative Rules, Secretary of State, Corporate Division, November 2003.
56 Clause 7 of the definition provision of House Bill No. 1067 of the State of Missouri introduced to amend new sections relating to certain rights and obligations of employers and employees in causes of action for wrongful discharge.
2.9. Could

While *could* has present deontic meaning in the interrogative form in general usage as a more formal or tentative way of asking permission with respect to *can*, it does not have deontic strength in the affirmative form, except when reporting cases of permission granted in the past (*He said we could stay out as late as we wanted*), but it is occasionally possible to find cases of non-deontic *could* in prescriptive texts when referring to some theoretical possibility, e.g.:

(49a) An employer shall not employ an employee to do any work in a relevant period during which the employee has done work for another employer, except where the aggregate of the periods for which such an employee does work for each of such employers respectively in that relevant period does not exceed the period for which that employee *could*, lawfully under this Act, be employed to do work for one employer in that relevant period.57

(49b) A guardian, executor, administrator or other personal representative of the estate of a minor, incompetent or deceased beneficiary […] may execute and file a disclaimer on behalf of the beneficiary within the time and in the manner in which the beneficiary *could disclaim* if living, of legal age and competent.58

2.10. Other modals and semi-modals

2.10.1. Might

Like *could*, *might* can also be used in general English with present deontic meaning in the interrogative form (*Might I suggest you use a knife?*), though only rarely and generally in very formal contexts. It has no deontic meaning in affirmative contexts but indicates theoretical possibility, often implying a strong degree of non-actualization of the situation. Yet *might* can still be found occasionally in prescriptive texts when referring to remote possibility as in this


58 Subd. 2 Right to disclaim, Chapter 525.532, *Disclaimer of interests passing by will, intestate succession or under certain powers of appointment* in Minnesota Statutes 2003.
recital from the Consolidated Version of the *Treaty on European Union* of 2002:

(50) RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which *might lead* to a common defence in accordance with the provisions of Article 17 […].

Here the possibility of arriving at a common European defence is hypothesized, but *might* is used as a hedge, suggesting that there is no strong commitment to ensuring its realization. Another case of hypothetical possibility can be found in the following clause:

(51) The Corporation reaffirms its recognition of the Executive Board of the Association as the representative of the members of the Association, and as the representative of those employees of the Corporation, save and except contract employees who *might hereinafter join* the Association.\(^{59}\)

### 2.10.2. Need not

Although occurrences of *need not* in prescriptive texts are relatively rare, there are occasions when drafters have to express not an outright prohibition but permission not to do something or for something not to be the case, in which case the semi-modal is sometimes used, e.g.:

(52a) Copies of the representations *need not be sent out* as aforesaid and the representations *need not be read out* at the meeting as aforesaid […].\(^{60}\)

(52b) Every funeral establishment shall be under the charge and personal supervision of a Mississippi funeral director licensee or a Mississippi funeral service licensee. The licensee in charge and the licensee with personal supervisory responsibilities *need not be* the same licensee.\(^{61}\)

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59 Article 1 of the *Agreement* between the Corporation of the City of Brantford and the Association of Professional and Administrative Employees of the City of Brantford, Ontario, Canada, of 31 December 2001.

60 Section 161(4) of *Provisions as to resolutions to appointment and removal of auditors*, Companies Act 1963, Irish Statute Book.

61 Sec. 73-11-55, para. 2, of *Licensing requirements for funeral establishments*, in Mississippi Code of 1972 As Amended.
For all buildings or structures erected and all uses of land established after the effective date of the ordinance codified in this chapter or amendment thereto, accessory parking and loading facilities shall be provided as required by this article. However, where a building permit has been issued prior to the effective date of the ordinance codified in this chapter and provided that construction is begun within six months of such effective date and diligently prosecuted to completion, parking and loading facilities as required hereinafter need not be provided.62

The negative particle not is not an essential requirement after need; sometimes negation is expressed by other means, e.g.:

The board of supervisors may authorize the destruction or disposition of any written requisition received by the purchasing agent which is more than three years old. Such requisitions need not be photographed, reproduced, or microfilmed prior to destruction and no copy thereof need be retained.63

If the day for the regular meeting shall fall upon a holiday, the meeting shall be held seven (7) days later and no notice thereof need be given.64

2.10.3. Have to

Given the fact that the have to construction is used to convey an obligation where the source of authority is generally external with respect to the speaker/writer, not surprisingly it is only very rarely found in prescriptive texts because of the risk of potential ambiguities of interpretation, whereas it is well suited to – and very frequently occurs in – legal doctrine, i.e. in the works of legal scholars commenting on the law, or in explanatory or illustrative texts of a less academic nature, such as quasi-legal information issued by local authorities, e.g.:

64 Section 2 of Article X, Directors’ Meetings of the Killearn Homes Association, Tallahassee, Florida.
All vehicles have to comply with the same specification [...]. Taxis in the Cherwell District have to be white and have TAXI written on the side, with the exception of ‘London type Cabs’ which can be any colour.  

or by legal firms advising on consumer rights, as in this online ‘Collection of Goods Notice Helpsheet’:

What period of notice should you give that you intend to sell the goods? By law you have to give a reasonable period of notice, to enable the owner of the goods to collect them.

Nevertheless, there are occasional occurrences of have to in prescriptive texts in English, e.g.:

The transferred loans that are not cleared before the date of the promulgation of the rules hereof have to be registered as a complementary means at the local exchange control organ from the date of promulgation to end-1989.

Initial isolation distance: The minimum distance, in metres, at which people have to be kept from the centre of the spill. Initial isolation zone: A circular area centered on the center of a spill and of radius equal to the initial isolation distance from which all persons have to be removed.

In the two cases above there would appear to be no noticeable difference between have to and must or shall: the source of authority would seem to emanate from the text itself. However, in the latter case the perspective of the drafter might perhaps be that of envisaging a situation in which some other authority (e.g. the police) is responsible for ensuring that people are kept away from the spill.

It may be no coincidence that on the basis of a survey I have carried out on the Internet using the Google search engine, the

66 http://www.legalhelpers.co.uk/landlord/collectgoods_helpsheet.asp.
67 Article 12 of The Rule on Administration of Registration of Foreign Exchange (Transferred) Loans 1989, Representative Office in Canada, China Council for the Promotion of Trade, China Chamber of International Commerce.
majority of cases where *have/has to* can be found in normative contexts in English occur in texts from non-English-speaking countries. This would seem to suggest that some non-native drafters may not always perceive the difference between *must* and *have to* and may tend to assume they have identical meaning. On the other hand, we can find one or two instances drafted in English-speaking countries where *have to* occurs in less rigidly formal contexts in quasi-legal texts, e.g. in municipal rules and regulations which may also include imperatives, another verbal construction not commonly found in prescriptive texts, such as:

(57) 9. The City of Frisco is not responsible for any lost or stolen items. Please do not leave personal items unattended. 10. All persons *have to vacate* Community Parks no later than 12.00 p.m.\(^{69}\)

3. Mood

3.1. Imperatives

We have already mentioned the highly unusual and formulaic imperative to be found in enactment clauses (*Be it enacted …*). Here, of course, we need to distinguish between the imperative *function* of the construction with its clearly subjunctive *form*. On a purely formal level, what we are dealing with here is an optative subjunctive where subject and auxiliary have been inverted (Palmer 2001; Fischer 1992: 249). There are also cases of similar – and equally archaic – formulae where the passive subjunctive form still has an imperative function in prescriptive texts, e.g.:

(58a) Section 2. *Be it further ordained*, that Chattanooga City Code Supplement No. 1, Part II, Chapter 4 (1998), codifying ordinances as previously adopted and amended, be construed to be cumulative in effect […]\(^{70}\)

\(^{69}\) Pavilion and gazebo reservations, *Rules and Regulations for the use of facility*, City of Frisco, Texas.

\(^{70}\) An Ordinance of 2000 to amend the Chattanooga City Code, Part II, Chapter 4, known as “The Chattanooga Air Pollution Control Ordinance”.
and, be it further resolved, that the American Library Association considers sections of the USA PATRIOT Act are a present danger to the constitutional rights and privacy rights of library users and urges the United States Congress to 1) provide active oversight of the implementation of the USA PATRIOT Act and other related measures [...]71

The formula Be it (further) resolved is particularly common in recitals.

Besides such cases where the passive subjunctive form is used to express an imperative function, we can sometimes find the more standard forms of the imperative in prescriptive texts, particularly in technical provisions involving omissions, insertions, substitutions and amendments, e.g.:

(59a) After section 7 of the 1965 Act insert ‘Capacity of society and power of committee to bind it’72

(59b) 5.(1) Section 4 – omit ‘the First Schedule’, insert ‘Schedule 1’73

(59c) Amend section 33 of the National Heritage Act 1983 (c.47) (general functions of the Historic Buildings and Monuments Commission for England) as follows74

as opposed to the more impersonal, non-imperative forms such as:

(60a) After paragraph 112 there is inserted ‘Deduction for contribution to plan trust’75

(60b) For section 30 there shall be substituted the following section [...].76

71 Extract from the Resolution on the USA Patriot Act and Related Measures that Infringe on the Rights of Library Users, adopted by the American Library Association on 29 January 2003.
72 Section 15(3) of the UK’s Co-operatives and Community Benefit Societies Act 2003.
73 Section 4 of Queensland’s Pharmacy Amendment By-law 1991.
74 Section 1(1) of the UK’s National Heritage Act 2002.
75 Section 1(3) of the UK’s Employee Share Schemes Act 2002.
76 Schedule 1 of a Bill to abolish the right to compensation in respect of certain planning decisions; and to amend Article 121(1)(c)(iv) of the Planning (Northern Ireland) Order 1991.

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Imperatives necessarily have a directive function and in English they imply the existence of the second person pronoun you (singular or plural), thus theoretically infringing the general rule of depersonalization of prescriptive legal language which usually avoids any references to the first or second person, singular or plural. However, it is interesting to note that in Romance languages such as Italian (or French) the equivalent to the imperative used in generic instruction-giving, e.g. inserire, sostituire – as opposed to giving specific instructions to a specific person, e.g. inserisci, sostituisci – is the neutral (depersonalized) infinitive form, an option not available in English (Williams 2002b: 1251).

Other cases where the imperative form may sometimes be found, also in the negative form, include quasi-legal texts such as certain types of contracts or municipal notices where a more personal, less formal style is adopted with respect to, say, that of national or international laws, and drafters may often adopt a more direct approach by using verbs in the second person. For example, a frequent disclaimer made by private companies advertising on the Internet is as follows:

(61) Legal information: terms and conditions. If you do not agree to any of the statements made herein, please do not use our services. By purchasing our services, you agree to be bound by the terms of this agreement.77

As we shall see in Chapter 6, there are calls from the Plain Language Movement to move away from the impersonal style of drafting typical of bureaucratese and legalese to one which addresses citizens more directly, using the second person and imperative forms more frequently. While the effects of such calls urging for a more direct approach are already visible in the presentation of information from official bodies such as local councils, health authorities, immigration authorities etc., and also in certain types of contracts, it is difficult to see how the use of the second person and of the imperative form could be introduced successfully on a wider scale in the drafting of legislative texts. Indeed, according to Šarčević (2000: 176), the

77 http://www.freecardirectory.net/disclaimer.html.
tendency, for example, in French legal language is towards an ever greater degree of impersonalization.

3.2. Subjunctives

As is well known, the subjunctive in English is only used in highly restricted cases. We have already mentioned above the peculiarity of the passive form of the subjunctive imperative to be found in the enactment clauses of most English-speaking nations, *Be it enacted that* … . Here we shall be examining those cases of the present subjunctive which occur in subordinate clauses such as conditionals and concessives. Declerck (1991b: 353) has observed that “this use is extremely formal (even archaic) in Br.E. (though it is somewhat more common in Am.E.).” Not surprisingly, then, the present subjunctive tends to be found in prescriptive legal texts with greater frequency than it is in most other genres. Although the present subjunctive is not confined to the verb *be*, it is only the latter verb which has preserved a specific morphology to denote subjunctive mood whereas all other verbs use the indicative forms, though without the final *s* in the third person singular. Given the fact that, unlike Italian or French, English does not inflect to distinguish between the subjunctive form and the indicative, it often becomes impossible to establish whether a particular verbal construction is to be considered as expressing subjunctive mood or not. With *be* subjunctive mood is unambiguously expressed. Typical examples of present subjunctive *be* in prescriptive texts are as follows:

(62a) Councillors should adopt exemplary standards of conduct in respect to form and manner of communication with clients of Council irrespective of whether they be representatives of the public sector or private sector.78

(62b) Client. A person who has an agency agreement with a broker for brokerage service, whether he or she be buyer or seller.79

78 From the *Code of Conduct* for Councillors 2000 of Beaudesert Shire Council, Queensland.

79 Clause (6) of the definition provision contained in Chapter 27, Article 4 of the *Real Estate Consumer’s Agency and Disclosure Act*, revised 2002, of the State of Alabama Real Estate Commission.
While the subjunctive is found more readily in conditional clauses in prescriptive texts, it occurs occasionally in concessive clauses as well. The following citation, taken from a sports code of the 1940s, contains an interesting array of subjunctives included in one conditional, one temporal, and two concessive clauses:

(63) The Striker is out ‘Caught’ – If the ball, from a stroke of the bat or of the hand holding the bat, but not the wrist, be held by a Fieldsman before it touch the ground, although it be hugged to the body of the catcher, or be accidentally lodged in his dress.80

In all four cases here, instead of the subjunctive form, the present indicative would be the construction normally used outside formal discourse. However, in other contexts it is the should + infinitive construction that is the one normally used outside legal texts, especially in British English:

(64) A State Agency or any other authority of this State shall not agree, as a condition of receiving federal monies, to comply with any federal regulatory mandate or other requirement that it perform a governmental function within the scope of subsection A, unless all of the following apply […].81

Where the third person plural is used, there is generally no clear way of establishing whether the verbal construction is to be deemed as subjunctive or indicative:

(65) The following players shall be eligible to participate in the Zonal Tournament provided they comply with the formal entry requirements of Article 807 […].82

81 From Article 11 of House Bill 2107 of the State of Arizona, An Act amending Title 41, Chapter 6, Arizona Revised Statutes, by adding article 11; relating to State Regulatory Responsibility.
4. Indicative forms

4.1. Present simple

Linguists analysing verbal constructions in legal English have almost invariably stressed the presence of the so-called central modal auxiliaries, particularly *shall* and *may*, but they have generally overlooked the fact that the most commonly-used verbal construction in prescriptive legal texts is, by a long way, the present simple, constituting – on the basis of the data presented here – well over 40 per cent of all verbal constructions. There are in fact several reasons for this conspicuous presence of the present simple in such texts. First of all, as has already been briefly outlined in the previous chapter, even though *shall* is often employed in subordinate clauses, especially by the more traditionally-minded drafters, proportionally speaking the present simple is used a lot more frequently. One of the most typical prescriptive sentence structures in English is where the present simple is used in subordinate clauses, while the main clause contains *shall* or *may*. In such cases the present simple may be used to cover a wide range of semantic and/or pragmatic functions. For example, it can often be found in *that*-clauses where the conjunction comes immediately after the main verb, e.g.:

(66a) Each Member State *shall ensure that* its liaison officers *establish* and *maintain* direct contacts with competent authorities in the host State or the international organisation, with a view to facilitating and expediting the collection and exchange of information:

(66b) The Director-General *may declare that* any particular premises *cease* to be exempt premises [...].

Such cases as *establish*, *maintain* or *cease* in these two examples would tend to be rendered in the subjunctive form in Romance languages such as French or Italian. And, as has already been


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observed, where *that*-clauses contain a hypothetical element in prescriptive texts it is not unusual to find a *shall* construction in the subordinate clause instead of the more commonly found present simple, e.g.:

(67) Each party *shall ensure that it shall comply* with the provisions and obligations imposed on it by any applicable legislation relating to data protection.84

Other cases where the present simple is frequently used in subordinate constructions are, of course, in *when*-clauses, and in clauses with other conjunctions of time such as *until, before, as soon as, while* etc., e.g.:

(68a) *When a written complaint is lodged* against a member the member should, upon notification of the complaint, co-operate with any inquiry initiated by the Association.

(68b) *[…] while the child is still a relevant child the authority must continue to take such steps until it succeeds.*85

The same also applies to *where*-clauses, e.g.:

(69) *Where the Executive Committee member has* an interest in common with the General membership, then this clause shall not apply.86

The verbal constructions in *if*-clauses and other clauses containing conditional conjunctions such as *whether* or *on condition that* are frequently conveyed in the present simple in prescriptive texts, e.g.:

(70a) For the purposes of paragraph (7)(a) there shall be disregarded any interruption in a former relevant child's pursuance of a programme of education or training *if the authority is satisfied* that he will resume it as soon as is reasonably practicable.

84 Section 7(1) of the Legal Center I.T.S.S. Ltd. *Terms and Conditions* at www. itsolutionstz.com/.
85 Respectively from By-law 1A(16) of *Constitution of the Central Australian Tourism Industry Association* and Section 34C(11) of *Children (Leaving Care) Act (Northern Ireland) 2002*.
86 Section 10(2) of *Constitution of the Central Australian Tourism Industry Association*. 151
Thus the frequency of occurrences of the present simple in prescriptive texts is partly due to the ease with which it can be used in subordinate clauses. Moreover, it should also be remembered that sentences in such texts are generally much longer than average and are typically characterized by subordination (as well as coordination).

A second aspect worth bearing in mind is that, seen from a wider cross-cultural perspective, this concentration of cases of the present simple should not really surprise us because in many European languages it is the present simple that takes the lion’s share in prescriptive texts, even more so than in English. For example, in Italian approximately two-thirds of all verbal constructions in prescriptive texts are conveyed in the indicative form of the present simple (Williams 2004a). Generalizing, it is often the case that where in English we find shall in the main clause and the present simple in the subordinate clause, in Romance languages such as Italian the present simple is used in both main clause and subordinate clause, e.g.:

(71a) The competent Greek authority shall take all the measures necessary to ensure compliance with the conditions to which the grant of aid provided for in this Regulation is subject

(71b) L'autorità greca competente adotta tutte le misure necessarie per verificare il rispetto delle condizioni a cui è subordinata la concessione dell'aiuto previsto dal presente regolamento.  

In other words, it is a general feature in many European countries that the language of the law is written predominantly in the tense that is also the one most widely used in everyday communication: there is

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87 Respectively from Article 12, Annex 1, of the UN Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 21 October 1950 and Section 34D(8) of Children (Leaving Care) Act (Northern Ireland) 2002.

nothing distinctive or archaic about it. Neither is it particularly projected towards the future or overtly modal in the way that _shall_ has become in English. And neither would there appear to be widespread calls for it to be replaced by, say, modal auxiliary verbs expressing obligation, prohibition or discretionary choice such as _dovere_ or _potere._

Whereas _shall_ or _may_ tend to be used frequently in main clauses which regulate human behaviour (i.e. when telling people what they must do or are allowed to do, or must not do), the present simple (as we have seen in Chapter 1.6.) is the verbal construction that is necessarily used when conveying explicit performatives, to be found abundantly in resolutions, e.g.:

(72a) The Security Council [...] 1. _Stresses_ the obligation of all States and other actors to comply fully with resolution 733 (1992) and resolution 1356 (2001), and _reaffirms_ that non-compliance constitutes a violation of the provisions of the Charter of the United Nations[^89]

(72b) The Council of the European Union [...] _underlines:_ the vital importance of an inclusive approach (e-inclusion) by all stakeholders to the information society and the need for this to be reflected throughout the implementation of the eEurope 2005 Action Plan[^90]

In such cases the authority in question actually performs the act of stressing or reaffirming or underlining in its entirety.

Another major reason for the high concentration of the present simple in prescriptive texts in English is that it is very widely used in main clauses which refer to more technical situations such as definition provisions or repeal clauses or amendment clauses or commencement provisions, e.g.:

(73a) The definitions in this section _apply_ in these regulations. ‘Act’ _means_ Part I of the Canada Labour Code


[^90]: EU Council _Resolution of 18 February 2003 on the implementation of the eEurope 2005 Action Plan_ (2003/C48/02).
The question arises as to the exact value to be given to present simple constructions in main clauses in English legal texts. Are they to be considered as having a directive function, like shall? Indeed, is the present simple to be viewed as being nothing more than a stylistic variation of shall which covers exactly the same semantic space? Certainly, the fact that we sometimes find cases in definition provisions or commencement provisions where shall is used (admittedly only occasionally in repeal clauses or amendment clauses) would seem to point to a substantial equivalence of meaning. As I have mentioned elsewhere (Williams 2004a: 241), there can be no mistaking the authoritativeness of the present simple in this type of context; that is to say, none of its authoritativeness is lost, it does not somehow become slightly less prescriptive and assume vaguely descriptive connotations. On the other hand, it may be the case that the shall construction can slightly enhance or reinforce the authoritative quality of the sentence in particular contexts.

We may conclude, then, that the present simple in main clauses has essentially the same degree of authoritativeness as shall: the latter, at most, highlights its directive function more visibly, as it were. I therefore feel a case can be made for defining the present simple in prescriptive legal English as the ‘normative indicative’, just as it is in, say, French and Italian. This means that in main clauses in prescriptive texts the present simple conveys deontic modality: it adds

91 Both citations are from Canada Industrial Relations Regulations, 31 January 2002.
92 Both citations are from the Council of the Law Society of Scotland Act 2003.
93 Even here, however, we can sometimes find shall being used, e.g. in “Article II, Section 2 shall be repealed and the following Sections enacted in its place” (at http://www.harrisburgusfa.org/documents/BylawAmendment200301) and “Section 101.1 of the International Plumbing Code, as adopted, shall be amended to read […]” (at http://www.buildingcodes.jocogov.org/pdfs/ARTICLE %25205).
an overlay of meaning94 to the neutral semantic value of the proposition by imposing an obligation. To read that “‘Act’ means Part I of the Canada Labour Code”, knowing that the sentence is contained in a prescriptive legal text, entails that that is how the term ‘Act’ must be interpreted by law within the context of that particular piece of legislation. There is nothing ‘neutral’ or descriptive about it; the utterance has prescriptive force.

4.2. Present perfect

As has been observed in Chapter 2.1.4., the present perfect is the second most commonly-used non-modal construction in prescriptive texts. Its main uses have already been outlined, so it would seem superfluous to reiterate these points in detail. The vast majority of cases of the present perfect occur in the simple form and are to be found above all in subordinate clauses where they express the idea of completion. Therefore they frequently come after adverbials or prepositions such as until or provided that or after, or occur in conditional clauses after if or unless, e.g.:

(74a) An authorisation for the purposes of subsection (1) of this section must be given […] if no period is there mentioned, until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.95

(74b) A person must not be nominated as a member of the panel unless he or she has consented in writing to be nominated.96

Very occasionally it is possible to come across cases of the progressive form of the present perfect in subordinate clauses, as in

(75) Where it appears to an authority that a person [...] (b) whom it has been advising and befriending under Article 35A; or (c) to whom it has been giving

94 Paul Larreya (personal communication) suggests that the expression ‘illocutionary force’ might be more appropriate than ‘meaning’ here.
95 Section 29G of the UK’s Co-operatives and Community Benefit Societies Act 2003.
96 Section 262(2) of the New South Wales Local Government Act 1993.
assistance under Article 35B, proposes to live, or is living, in the area of another authority, the authority must inform that other authority.  

Here the progressive form is used because it is deemed necessary to include the eventuality that the advising, befriending and giving of assistance may still be ongoing activities, whereas the simple form (whom it has advised and befriended .. to whom it has given assistance) would suggest that such activities had already been completed and essentially belonged to the past. 

As was stated earlier, present perfect constructions tend to occur in main clauses at the end of preambles or treaties. In preambles a series of recitals generally separates the subject from the main verb. The standard formula for preambles to United Nations conventions is the following:

(76) The States Parties to the present Convention […] Have agreed as follows.

4.3. Past simple

Generally speaking it is unusual for prescriptive texts, which are essentially projected towards regulating present and future situations, to refer to situations located in the past. However, such is the variety of cases that prescriptive texts are required to regulate that it may sometimes be necessary to use the past tense, e.g. when referring to the situation existing before the present text becomes law:

(77) Decision 93/569/EEC is hereby repealed. However, it shall continue to apply to operations in respect of which an application was submitted before the entry into force of this Decision.

While the above clause refers to a ‘real’ past, i.e. to a time prior to the coming into force of the Decision in question, the following clause

97  Section 35C(1) of the Children (Leaving Care) Act (Northern Ireland) 2002.
98  As in the preambles to the UN Convention on the Rights of the Child 1989 or the UN Convention Against Sexual Exploitation 1995.
refers to a purely hypothetical non-deictic past situation in which it is imagined that an undertaking took a decision leading to collective redundancies:

(78) In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.\(^\text{100}\)

As we have already seen in Chapter 3.1.1., in other realms of legal discourse – notably in the language of the courts – the past tense is used with considerable frequency, generally when outlining the sequence of facts that constitute the judicial case in question. Moreover, as has been observed in Chapter 3.2., within the sphere of prescriptive legal texts there is one variety in which the past simple may be found with greater frequency, namely in resolutions which are often drawn up to deal with contingent situations relating to, say, major tragedies or emergencies, as in UN Security Council Resolution 1368 of 12 September 2001, passed the day after the terrorist attacks by Al Qaeda in the United States:

(79) The Security Council [...] Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington D.C. and regards such acts, like any act of international terrorism, as a threat to international peace and security.

4.4. \textit{Present progressive}

It was noted earlier in Chapter 3.1.2. that progressive forms are extremely rare in prescriptive texts, which is a clear indication of the latter’s high degree of formality. Nevertheless, there are occasions in which the present progressive form can be found, for example in order to convey the idea that a given situation is – or may theoretically be – in progress:

Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.\textsuperscript{101}

When enhanced cooperation \textit{is being established}, it shall be open to all Member States.\textsuperscript{102}

In the latter case, the substitution of the progressive form by the simple form would completely change the meaning of the sentence implying a sequence of events rather than simultaneity: with the progressive form, \textit{when} has the meaning of \textit{during the time that}, whereas with the simple form \textit{when} is similar in meaning to \textit{after}.

Sometimes the present progressive form is used to convey the idea that the situation in progress is of a temporary nature, e.g.:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.\textsuperscript{103}

\textbf{4.5. Past perfect}

There are also occasional instances in which the past perfect is used in prescriptive texts, for example when hypothesizing about situations located in an unreal past in which a given situation is anterior to another which is already located in the past, e.g.:

In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate […]

\textsuperscript{101} Article 9(1) of the \textit{UN Convention on the Rights of the Child} 1989.
\textsuperscript{102} Article 43b of the Consolidated Version of the \textit{Treaty on European Union} 2002.
\textsuperscript{103} Article 22(1) of the \textit{UN Convention on the Rights of the Child} 1989.
believed that [...] one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonpayment thereof [...]  

5. Voice: Passive v. active form

As was briefly outlined in Chapter 1.4., another of the bugbears of the Plain Language movement is what is deemed as an excessive use of the passive form in legal English. Authors of legal drafting manuals often repeat George Orwell’s famous dictum from his essay of 1946 ‘Politics and the English Language’: “Never use the passive where you can use the active”.

One of the main criticisms of the passive form in legal English is that, because it can be used without specifying an agent, it can be ambiguous and even misleading. In actual fact, it is precisely because there is no need to specify the agent that drafters frequently resort to the passive construction, e.g.:

(83a) The Radio Equipment and Telecommunications Terminal Equipment Regulations 2000 as amended (“the Principal Regulations”) shall be further amended in accordance with this regulation.  

(83b) The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

In cases such as the latter clause which comes from an international convention signed by a large number of countries, it may not be possible to specify the agent without drawing up a long (and probably incomplete) list of bodies that might be responsible for communicating ratification.

104 Sec. 892 – Making extortionate extensions of credit – of Title 18, Part I, Chapter 42, of the US Code Collection, at http://www.law.cornell.edu/uscode/18/892.html.

105 Section 2 of the UK’s Radio Equipment and Telecommunications Terminal Equipment (Amendment No. 2) Regulations 2003.

106 Article 17 of the ILO Safety and Health in Mines Convention 1995.
Where the agent is expressed, it would indeed often be possible to transform the passive construction into an active one. And while there would seem to be little or nothing gained in terms of clarity of expression, by adopting the active form we thereby reduce the number of words used which, given the wordiness of most prescriptive texts, would seem to be a worthwhile objective. For example, the following contains an agentless passive construction in the main clause which cannot therefore be converted into the active form, whereas the passive construction in the subordinate clause could be transformed into the active form without any loss or change of meaning, i.e.:

(84) A power given by subsection (1), (2) or (3) may be exercised so as to impose restrictions or conditions on the body or person by whom the function concerned is to be discharged\(^{107}\)

which becomes:

(85) A power given by subsection (1), (2) or (3) may be exercised so as to impose restrictions or conditions on the body or person who is to discharge the function concerned.

6. Non-finite verbal constructions

Crystal and Davy assert (1969: 205) that “Much of the special flavour of [nominal] groups, and indeed, of legal language, generally, results from a fondness for using non-finite clauses, which in many other varieties would probably be replaced by finite clauses.” All verbs can have non-finite forms in English with the exception of modal auxiliaries. Moreover, non-finite forms are almost exclusively confined to use in subordinate clauses. There are three types of non-finite constructions in English: the infinitive form, the -ing form, and the -ed participle. Within the genre of prescriptive legal texts, two non-finite structures in particular play a rather special role, the non-

\(^{107}\) Section 1(4) of the *Council of the Law Society of Scotland Act* 2003.
finite -ing forms and the -ed participles. We shall examine each of the three non-finite constructions in turn.

6.1. Non-finite -ing forms

Swan (1997: 277) observes that:

When -ing forms are used as verbs, adjectives or adverbs, they are often called ‘present participles’. (This is not a very suitable name, because these forms can refer to the past, present or future.) When they are used more like nouns, they are often called ‘gerunds’. In fact, the distinction is not really as simple as this, and some grammarians prefer to avoid the terms ‘participle’ and ‘gerund’.

For our purposes here we shall adopt the term ‘non-finite -ing form’ and concentrate largely on occurrences at the beginning of clauses.

The non-finite -ing form is widely used in initial position in clauses in prescriptive texts, especially in preambles to resolutions. For example, the famous UN Security Council Resolution 242 of 22 November 1967 on the Israeli-Palestinian crisis begins as follows:

(86) The Security Council,
Expressing its continuing concern with the grave situation in the Middle East,
Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,
Emphasizing further that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter,
Affirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East […]

The citation highlights two of the typical features of non-finite -ing forms in prescriptive texts:

a) they constitute a syntactic discontinuity, inserted between the subject (The Security Council) and the main verb (Affirms) which, as has been observed in Chapter 1.5.1., can sometimes be separated by a series of recitals consisting of several hundred words altogether;
b) the verbs used are generally performatives such as *reiterate, call for, deplore* or *acknowledge*.

On the basis of a survey I have made of 60 preambles taken from a variety of international texts such as UN Security Council Resolutions, European Treaties, and other international conventions, the most frequently adopted verb in the non-finite *-ing* form is *recalling*, followed by *reaffirming, noting, welcoming* and *recognizing*.\(^{108}\) Occurrences of these five performative verbs in the non-finite *-ing* form constitute slightly under half of all the occurrences of verbs in the non-finite *-ing* form in initial position in clauses in preambles.

Not all of the verbs in non-finite *-ing* forms are performatives, however. Sometimes they are statives expressing an opinion, e.g. *being convinced*, as in:

(87) The General Assembly,

  […] *Being convinced* that an increase in the membership of the Security Council can only improve its ability to ensure peace and security throughout the world […]\(^{109}\)

While the majority of cases of the non-finite *-ing* form come in the guise of the so-called present participle, e.g. *affirming* or *emphasizing*, approximately one case in eight is constituted by the so-called perfect participle, made up of *having + past participle*. By far the most frequently used perfect non-finite *-ing* form in preambles is constituted by the expression *having considered*, which occurs, for example, in UN Security Council *Resolution 1504* of 4 September 2003, the text of which is cited in full here:

(88) The Security Council,

  *Recalling* its resolution 1503 (2003) of 28 August 2003,

  *Noting* that by that resolution the Council created a new position for Prosecutor for the International Tribunal of Rwanda,

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\(^{108}\) There is an exhaustive list of the possible non-finite expressions that can be used in preambles, as well as the finite verbs that can be used in operative clauses, in UNA-USA (2002).

Noting that by its resolution 1503 (2003) the Council welcomed the intention of the Secretary-General to submit to the Council the name of Mrs. Carla Del Ponte as nominee for Prosecutor for the International Tribunal for the Former Yugoslavia,

Having regard to Article 16(4) of the Statute of the International Tribunal for the Former Yugoslavia,

Having considered the nomination by the Secretary-General of Mrs. Carla Del Ponte as Prosecutor of the International Tribunal for the Former Yugoslavia,

Appoints Mrs. Carla Del Ponte as Prosecutor of the International Tribunal for the Former Yugoslavia with effect from 15 September 2003 for a four-year term.

Unlike the performative verbs which are conveyed using present participles and which enhance the idea of the ‘law always speaking’, the perfect non-finite -ing form conveys the idea of completion of a situation which precedes the moment of ratification of the resolution. Other perfect -ing forms frequently to be found in preambles include having heard, having examined and having determined.

6.2. Non-finite -ed participles

Although over 85 per cent of verbal constructions occurring in initial position in clauses in preambles are constituted by non-finite -ing forms, there are also numerous occurrences of non-finite -ed participles, as in UN Security Council Resolution 1443 of 25 November 2002, which alternates between clauses beginning with the -ing form and clauses beginning with -ed participles:

(89) The Security Council,

Recalling its previous relevant resolutions […],

Convinced of the need as a temporary measure to continue to provide for the civilian needs of the Iraqi people until the fulfilment by the Government of Iraq of the relevant resolutions […] allows the Council to take further action […],

Taking note of the Secretary-General’s report S/2002/1239 of 12 November 2002,

Determined to improve the humanitarian situation in Iraq,

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of Iraq […].
On the basis of my survey on preambles, the most popular \textit{-ed} participle is \textit{concerned}, followed by \textit{determined} and \textit{convinced}. These three participles alone constitute around three-quarters of all occurrences of \textit{-ed} participles in initial position in clauses in preambles. While the non-finite \textit{-ing} forms are typically constituted by performative verbs (this is not necessarily the case in perfect \textit{-ing} forms), non-finite \textit{-ed} participles typically express a (collective) state of mind, generally of concern about a situation or of determination to resolve it. Sometimes the state of mind is one of outright consternation: \textit{shocked}, \textit{outraged}, and \textit{alarmed} are some of the participles that have been used in the preambles of UN Security Council resolutions.

As is often the case with non-finite \textit{-ed} participles in other realms of discourse (cf., for example, Williams 2006b), it is not always easy to decide when they are to be considered as the past participle of verbs or simply as adjectives. For example, in the following:

\begin{quote}
\textbf{(90)} The Security Council, \\
Deeply \textit{shocked} and \textit{alarmed} by the deplorable consequences of the Israeli invasion of Beirut on 3 August 1982 [...]\footnote{UN Security Council Resolution 517 of 4 August 1982.}
\end{quote}

the terms \textit{shocked} and \textit{alarmed} should probably be interpreted as adjectives rather than as participles of the verb \textit{to shock} and \textit{to alarm} in their ellipted passive form. Further confirmation of this derives from the fact that it is also possible to find terms in initial position in clauses in preambles which have a purely adjectival function such as \textit{aware}, \textit{anxious} or \textit{mindful}, e.g.:

\begin{quote}
\textbf{(91a)} The Security Council, \\
[...] \textit{Anxious} that all possible steps shall be taken to preserve security in the area, within the framework of the General Armistice Agreement between Egypt and Israel (…).\footnote{UN Security Council Resolution 107 of 30 March 1955.}
\end{quote}

(91b) The Security Council,
[...] Mindful of its duties and responsibilities under the Charter of the United Nations for the maintenance and preservation of international peace and security [...].

6.3. Infinitives

There is relatively little to be said about the third type of non-finite construction – the infinitive – in prescriptive texts. The structure noun + infinitive can be used in general English in both the active and the passive form (things to do, things to be done), and if the subject is the person or thing that the action is done to, passive infinitives are normally used after be (Swan 1997: 273). Hence there is a tendency to use the passive infinitive after nouns in some prescriptive texts, for example in headings, e.g.:

(92) Copies of rules and procedures to be made available on request

The Board must, if requested by any person, provide to the person a copy of the rules and procedures relating to disciplinary matters under this Part.

The compulsory nature of the passive infinitive structure in the heading is confirmed by the use of must in the wording of the clause itself. In practice the passive infinitive structure here essentially functions as an ellipted form of the be to construction where is/are have been omitted.

7. Concluding remarks

Even a brief look through this chapter on the various types of verbal constructions that can be found in prescriptive legal texts in English will give the impression of extreme complexity, in view of the fact that there are occurrences of almost every form of verbal construction, with very few exceptions, e.g. be going to. Given the wide range of
circumstances and phenomena that such texts are required to cover, often in considerable detail, it is hardly surprising that drafters should need to resort to a wide variety of moods, modal verbs and tenses, from the imperative and the subjunctive to the past perfect progressive. At the same time, we should never lose sight of the fact mentioned in Chapter 4, i.e. that over three-quarters of all finite constructions in prescriptive texts fall within just three verbal forms, the present simple, shall and may. In other words, while the subject matter may often be extremely complex and technical and beyond the comprehension of the average layperson, the underlying structure of such texts tends to be relatively uniform and standardized since their basic function is essentially the same: that of laying down the rules for present and future behaviour with respect to a particular area of human activity. The principle of sticking to tried and tested modes of expression has generally overridden any desire by drafters to experiment with new forms. It is therefore particularly significant that, after centuries of linguistic conservatism, there should be calls in certain quarters to move away from the formulae, including some of the verbal constructions, that have characterized the language of the law for so long. We shall now go on to consider in greater detail some of these calls for change and how they have been applied by legislative drafters in certain English-speaking countries.
VI. The Future of Legal Texts in English and Possible Effects on Verbal Constructions

So far we have examined in detail the verbal constructions, both finite and non-finite, to be found in contemporary prescriptive legal documents in English. As has already been observed on several occasions, the general situation would appear to be relatively homogeneous insofar as, at a macrolevel, there are generally few striking discrepancies between the types of verbal constructions used in the various countries, bodies and organizations which draft prescriptive legal texts in the English language. On the other hand, as we have seen, at a microlevel, there can sometimes be marked differences between individual texts in terms of style and drafting rules which inevitably influence the choice of verbal constructions used.

Moreover, as has already been observed, it is quite possible that we have come to a turning point in the way such texts are drafted, and that over the next few decades a number of major changes will be introduced which will irrevocably alter the format of prescriptive legal texts, abandoning a centuries-old tradition of drafting rules and customs.

It is, of course, a distortion of reality to depict the body of contemporary prescriptive legal texts as some kind of monolithic edifice in which cracks are starting to appear. Language – even in such a conservative genre as that of legal English – is always on the move, evolving and adapting to new situations, even if this particular genre has managed to hang on to countless lexical items and expressions over the centuries which, at best, sound quaint but more often than not prevent the average person without a legal background from fully understanding what a text is supposed to mean.

Let us now turn to the phenomenon which has already become sufficiently influential to give rise to a number of substantial changes in individual prescriptive legal texts and which could potentially lead to nothing less than a revolution in the drafting practices of future
legal texts. In the first part of this Chapter I describe the evolution and the objectives of the Plain Language Movement in the English-speaking world. I then go on to analyse the advantages and disadvantages of applying the criteria of the Plain Language Movement to the drafting of legal texts before embarking on a more specific analysis of certain prescriptive texts where shall has been deliberately removed as a result of the influence of the Plain Language Movement.

1. The Plain Language Movement

As was noted in the Introduction, complaints about the complexity and verbosity of legalese have been around for a long time: calls for a reform of legal language are by no means confined to the last few decades. On the other hand, such appeals tended in the past to be of an essentially isolated nature made by individuals, albeit of considerable social standing. Besides those who have criticized or satirized legal language, there is also a tradition of famous people in the English-speaking world who have called for language in general to be spoken or written in ‘plain English’,¹ such as Bertrand Russell in his essay of 1951 ‘How I write’, or George Orwell in his essay of 1946 ‘Politics and the English language’.

It is a well-known fact that in the United States Mellinkoff (1963) took issue with the jargon of legal English, a subject he would return to in some of his later works. The beginning of the Plain Language Movement in law is generally considered to date from around 1970 when Citibank in New York set out to convert a promissory note to Plain Language which they adopted in 1973 and set a train of events in motion that resulted in almost 30 states in the US having legislative requirements for consumer documents in the

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¹ The adjective plain is clearly meant to have a positive meaning here with its connotations of sincerity, forthrightness, and clarity, though in many other contexts plain tends to be a synonym for drab or ugly, as when describing, say, traditional English cooking or a person’s physical appearance.
insurance and banking fields to be written in easily understood language (Stephens 1991). In other English-speaking countries it took a little longer before Plain Language principles began to penetrate the legal sphere.

By the early 1970s, the National Council of Teachers of English in Britain were passing resolutions dealing with “dishonest and inhumane uses of language and literature by advertisers” and “semantic distortion by public officials, candidates for office, political commentators, and all those who transmit through the mass media” (cited in Barleben 2003a). This was just one symptom of a wider movement that developed and grew into a concerted call for language change at a grassroots level with the active support of thousands of people, almost all of whom are unknown to the wider public. Moreover, it is a movement that has taken root, more or less contemporaneously, in all of the major English-speaking countries, from the UK to the United States, Canada, Australia, New Zealand, and South Africa. Tom McArthur has affirmed that in all the history of the language there has never been such a powerful grassroots movement to influence it as the Plain English Campaign (cited in Plain English Campaign 2004). Indeed, according to one leading proponent of Plain English, it is no longer appropriate to speak of it as a movement as “it has evolved to become a product, a business, an industry, or a professional service” (Balmford 2002: 1).

In Britain, Plain Language, with a capital P and a capital L, first began to take shape in 1979 through the creation of the Plain English Campaign by the pioneering Chrissie Maher and Martin Cutts, both Liverpudlians. Some of the tactics they used in the early days for “fighting the jargon monster” (Australian Broadcasting Corporation 1998), to use Maher’s words, were wantonly provocative and aimed at publicizing and stigmatizing the ‘gobbledegook’ often to be found in official documents. One such publicity stunt was that of shredding reams of forms in front of the Houses of Parliament; another was that of setting up an annual ‘Golden Bull’ award for the worst piece of officialese, where the ‘winner’ received by post a parcel containing real tripe (winners these days receive a ‘Golden Bull Trophy’ instead of tripe because of health regulations!). A publicized winner of the Plain English Campaign’s ‘Foot-in-Mouth Award’ in December 2003
was the US Defence Secretary Donald Rumsfeld for the following statement:

(1) Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know.

The early proponents of Plain Language tended to come from outside the legal professions and should probably be seen as one of the many expressions of the consumer movement which was spreading throughout a number of western countries at the time. Indeed, the aim of the Plain English Campaign was not just restricted to reforming legalese but to making all formal documents – including bureaucratic regulations, contracts, and laws – more comprehensible to the average citizen. In other words, one of the main priorities of the Plain Language Movement was – and still is – that of modifying the communicative function of official texts in general which, of course, also includes legal texts. It has been observed that initially the Plain Language Movement focused on the social benefits of clear legal communication: improving access to justice, and enabling consumers to make more informed decisions (Balmford 2002: 3). The Plain English Campaign continues to campaign on issues such as the need for clearer food labelling.

During the early years the Plain Language Movement grew rapidly, but it also came up against considerable hostility, especially (though not exclusively) from certain sectors of the legal professions and officialdom. Various attempts were made to discredit the movement: it was argued that the simplifications proposed by Plain Language supporters would only end up by ‘dumbing down’ official documents and create further confusion, and that there was no urgent need to reform legal texts because most citizens never bothered reading them in the first place; and it was claimed that lawyers, judges and politicians generally had no real problems in interpreting legalese.

Nevertheless, by the 1980s the Plain Language Movement had already gained the support of a growing number of people from within the legal and academic professions, such as Professor Joseph Kimble of the Thomas Cooley Law School in the US, who rebutted the
accusations that had been made. The support of a number of legal experts and law scholars was fundamental also because they often acted as a bridge between the grassroots members and those government officials who actually welcomed the idea of overhauling the language of officialdom. By the early 1990s the first concrete results of the campaign began to filter into isolated pieces of legislation, such as the New South Wales *Local Government Act* 1993. This was followed by – among others – Canada’s *Alberta Act* 1996 and the drafting of the South African *Constitution* of 1997.

Of course, the Plain Language Movement influenced a number of key decision-makers not just in government but also in business and, on the whole, those key decision-makers tend to be more interested in the economic benefits of Plain Language improvements in efficiency, effectiveness, and customer satisfaction. Balmford (2002: 3) claims that:

> Where the plain language movement has really succeeded is in its debate with the legal profession about whether plain language is accurate, certain, and precise. Plain language won that debate. This is shown by the fact that in most English speaking countries, the legal profession no longer argues that it is impossible for a document to be on the one hand, clear and user-friendly; and on the other hand, accurate, certain, and precise.

Let us now briefly examine the situation in some of the major English-speaking countries, and also in the European Union, over the last two decades or so as to the effectiveness of the Plain Language Movement in bringing about changes in the drafting of legislation.

### 1.1. The United Kingdom

The Plain English Campaign still remains the major reference point for the Plain Language Movement in the UK; it also provides – as do other organizations – services for rewriting legal documents and for training people in the techniques of plain language.

The major legislative developments in the UK have been the new rules for civil procedure which have simplified the rules used in court proceedings. Moreover, there are various official guides and documents on legal matters written in plain English such as the
‘Asylum Appeals in Scotland and Northern Ireland – A plain English guide’ by the Immigration Appellate Authority. The Inland Revenue has also set up the Tax Law Rewrite project. But according to First Parliamentary Counsel Sir Christopher Jenkins, “these are luxuries not routinely available” (Jenkins 1999).

There have also been calls – albeit isolated ones – within both Houses of Parliament to apply the principles of the Plain English Campaign to parliamentary drafting. For example, Brian White, MP for Milton Keynes North East, led a debate on language in parliamentary drafting in which he suggested “using, wherever possible, plain English instead of legalese in parliamentary bills, adding a ‘purpose clause’ in each Act of Parliament to make clear what the new law is intended to do, and letting Plain English Campaign independently test every draft bill on the public to find any potential confusion” (quoted in Plain English 2000: 1).

1.2. Eire

Despite the relative indifference for many years on the part of the Irish government to the introduction of a plain language policy, the adoption of plain language in Ireland is said to be making slow but steady progress (Hunt 2002b: 1). Moreover, in recent years there have been a few signs of governmental interest such as the 2001 Drafting Manual prepared by the Office of the Parliamentary Counsel which recommends the use of plain and simple language “in so far as that is possible without giving rise to ambiguity” (Hunt 2002b: 2).

1.3. The European Union

The European Union is an area where the Plain Language Movement has met with mixed success. It has been said that “As a new legal order in which language is uniquely unfettered by tradition and, at the same time, the object of a singularly well-resourced attempt at language engineering, the EU provides an interesting crucible for language reform and descriptivist-prescriptivist perspectives. For example, a semantic analysis of shall and the modals in general is
essential for machine translation initiatives […] and an understanding of the use of shall will figure prominently both stylistically and semantically in implementing the policy of transparency, i.e., making the legal instruments of the EU more readable for the average citizen” (Foley 2001: 185). In actual fact, the legal language of the EU is more shackled to tradition than may first appear, mainly because each Member State brings its own linguistic habits with it, but partly because traditions have already been consolidated in earlier international organizations such as the United Nations or the International Labour Organization. That said, it is, of course, true that there has been a search to harmonize not only legislation but also the lexical items and expressions used in drafting multilingual documents.

Initially the EU institutions seemed reluctant to accept any criticism of the way documents were drafted, but over the years there has been growing acknowledgement in some quarters that there is considerable room for improvement, and the European Commission, through the initiative of translators working in the EU such as Emma Wagner, has recently launched its ‘Fight the Fog’ campaign “to encourage authors and translators to write more clearly, and the recent Seville European Council called for written Council conclusions to be concise and simplified” (Peter Hain, UK Minister for Europe, cited in Cutts / Wagner 2002: 3). Moreover, in the Preface to the EU’s Joint Practical Guide (European Union 2003) for persons involved in the drafting of legislation within the Community institutions, it is affirmed that “Since the Edinburgh European Council in 1992, the need for better lawmaking – by clearer, simpler acts complying with principles of good legislative drafting – has been recognised at the highest political level.”

The need for clarity of language is particularly pressing in an international organization such as the EU where documents need to be uniform in all of the languages into which they are translated. The Interinstitutional Agreement of 22 December 1998 on Common Guidelines for the Quality of Drafting of Community Legislation, together with the Joint Practical Guide, stresses that Community Legislation should be clear, simple, precise and readily understandable by the public and economic operators (cited in Balmford 2002).

Within the EU the Swedish government has been particularly active in promoting plain language initiatives; for example, in 1993
the Plain Swedish Group (Klarspråksgruppen) was appointed by the government to encourage state agencies all over Sweden to start Plain Language projects (Plain Swedish Group 2004). In Italy the Progetto Chiaro! has been promoted by the Department for Public Administration to encourage clarity and simplicity in administrative language and avoid bureaucratese, with a ‘style manual’ (Fioritto 1997) and awards for clear writing, like the ‘Plain Language’ awards in Sweden and the ‘Crystal Marks’ awarded in the UK by the Plain English Campaign.\footnote{Calls for the use of Plain Language in legal texts would appear to be fairly universal. For example, in Japan the Penal Code was amended in 1995 because of the difficulties in interpreting the previous code which was heavily influenced by the Japanese legal tradition which began by imitating its Chinese counterpart (see the abstract by Mami Hiraike Okawara at http://www.outreach.utk.edu/ljp/archives/2_1/LJP21/wales.html).}

However, other sectors of the EU are still generally opposed to any major reform in the language used in drafting EU regulations, directives or laws. For example, the Committee on Legislative Technique claims that the use of archaic language and legalese is not a serious problem in Community legislation (cited in Cutts / Wagner 2002: 27).

\subsection*{1.4. The United States}

As has already been observed, it is generally recognized that the first major success for the Plain Language Movement in the legal field occurred in the US in the 1970s. By 1991 Plain Language had been applied to consumer contracts, residential leases and personal insurance policies, to legal and administrative forms prepared for public use, to regulations, to statutes and bylaws and to explanatory materials about the law and government services prepared for the public (Stephens 1991).

However, while Plain Language entered the syllabuses of American law schools many years ago, and courses in legal writing have become a standard feature of a large number of law schools today, it took rather longer for the concept to be accepted in government circles. One noteworthy breakthrough came on 1 June
1998 when President Clinton’s Memorandum on Plain Language was issued requiring all Executive Departments and Agencies to use plain language.

On the other hand, the Plain English Movement is influential in certain states such as Michigan where, for example, the Subcommittee on Lawsuits promotes plain English in lawsuit papers, and Plain Language is regularly featured in articles in the *Michigan Bar Journal*, edited by Joseph Kimble for the State Bar’s Plain English Committee (Hathaway 2003).

1.5. Canada

The Canadian government uses Plain Language consultants in every province. Being a nation where both English and French are recognized as the official drafting languages, there is also a thriving Plain French Movement. The first ‘Plain Language law’ in Alberta was the *Financial Consumers Act* of 1991.

The Canadian Securities Administration, the federal Department of Finance, the British Columbia Securities Commission, the Office of the Alberta Auditor General, and the Canadian Bankers’ Association are all in favour of using Plain Language, while in Ottawa there is the headquarters of PLAIN (Plain Language Association International), the Plain Language Network, a growing all-volunteer non-profit organization of Plain Language advocates and professionals (PLAIN 2003) formed in 1993 with members from various countries.

1.6. Australia

Plain Language began to penetrate government offices in parts of Australia relatively early on. For example, the Law Reform Commission of Victoria, under the direction of its Chairman David St. L. Kelly, had already begun publishing papers such as ‘Legislation Legal Rights and Plain English’ by 1986. It has been observed that in Australia “companies can face legal sanction should they be found to have intentionally misled consumers with contracts that contain confusing, unintelligible language. It seems that some of the most
successful implementations of plain English in business come when the state actually legislates the necessity for plain English in contractual documents in order to protect the public interest (Law Reform Commission of Victoria)” (Barleben 2003a).

A number of major law firms are now committed to Plain Language and have rewritten their precedents in Plain Language and trained their lawyers in Plain Language skills. Some of the firms even provide plain rewriting services. Australia’s largest law firm has prepared consulting and support services agreements for Microsoft in Plain Language; those documents are now being used as a model for Microsoft’s services agreements in many countries.

1.7. New Zealand

Several law firms in New Zealand provide Plain Language services. On a governmental level, tax legislation is currently being rewritten following the criteria of Plain Language. The New Zealand Law Commission Legislation Manual (1996: 34-35) says

[…] the advantages of plain language drafting are many, and they outweigh the disadvantages. For not only will plain language legislation make the law more accessible to those unversed in it, and less tortuous to those who are legally trained, but it will ultimately be more cost-effective – since users will require less time and less assistance in interpreting and applying it.

1.8. South Africa

Some law firms in South Africa have begun establishing Plain Language practices. But the major success has been at the governmental level, notably with the drafting of the 1997 Constitution and the Labour Relations Act of 1995. In both cases the influence of Phil Knight, a Canadian lawyer and Plain Language expert called in as adviser to the Constituent Assembly, has been crucial (Plain Language Conference 1997).
2. Plain Language proposals for reforming legal texts

As has already been stated, the objectives of the Plain Language Movement are by no means limited to overhauling legal language alone but concern officialese and bureaucratese as well. However, as our interest here is specifically restricted to prescriptive legal texts we shall be focusing on that area alone, even if several of the suggestions made by Plain Language proponents are equally applicable to other spheres as well. Some of the most recurrent proposals that have been aired (e.g. Asprey 2003; Australian Office of Parliamentary Counsel 2000; Kimble 1992b; New Zealand Law Commission Legislation Manual 1996) as a way of making legal English more accessible are as follows:

- eliminating archaic and Latin expressions
- reducing the length of the average sentence
- including a ‘purposive’ clause or statement at the start of each piece of legislative text which summarizes the purpose of the text in question
- removing all unnecessary words
- ensuring that the text can be understood by any reasonably intelligent person from outside the legal profession
- reducing passive verbal forms by using active constructions wherever this is feasible
- reducing nominalizations by rephrasing the expression using the original verbal form
- replacing shall by must or the present simple, or in some cases by may.

Some writers have also included other suggestions such as switching where possible to the second person, e.g. through the use of imperatives, as a means of bringing the text closer to the reader rather than using verbs in the third person which enhances the degree of impersonalization. However, such proposals are usually made when referring to official guides, application forms, and so on, rather than to prescriptive legal texts.
2.1. Possible effects on verbal constructions: the end of shall?

It would be beyond the scope of this volume to examine each of the proposals listed above in detail, so we shall focus specifically on the question of verbal constructions and how they might be affected if the principles of the Plain Language Movement were widely adopted by drafters of prescriptive texts. Calls for the total removal of shall from future legal drafts are plentiful. The presumption that shall is ambiguous in legal English is by no means new. In 1842 the famous English barrister George Coode wrote:

The attempt to express every action referred to in a statute in a future tense renders the language complicated, anomalous, and difficult to understand. If the law be regarded while it remains in force as constantly speaking, we get a clear and simple rule of expression, which will whenever a case occurs for its application, accurately correspond with the then state of facts. The law will express in the present tense facts and conditions required to be concurrent with the operation of the legal action.

This citation is quoted by Elliott (1989) who affirms that “Lawyers seem particularly attached to the word shall. The attachment is unhealthy and unnecessary. Our legal writing would take a great leap forward if the word were purged from legal writing”.

Section 11 of Kimble’s ‘A modest wish list for legal writing’ (2000) is entitled ‘Give shall the boot – use must for required actions’ and is worth citing in full:

Nobody uses shall in ordinary speech. Nobody says, “You shall finish the project in a week.” So unless lawyers can make a case for shall, it should be relegated to the heap – along with aforesaid, to wit, and all the rest. Lawyers may argue that they use shall consistently to impose a duty and that shall has a settled meaning in law. Not true and not true. Lawyers regularly misuse shall to mean something other than has a duty to.

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3 One commentator wryly suggests: “Banish shall from your vocabulary, unless you are singing Gospel songs. Most legal writing commentators advocate abolishing use of the word shall. First, it creates confusion because it often is used to mean something other than has a duty to. Second, nobody uses shall in common speech anymore, except perhaps the Amish or other somewhat isolated sects” (Oregon State Bar 2001: 14).
• “There shall be no right of appeal.” (Change shall be to is. You are not imposing a duty; you are declaring a legal fact or policy.)
• “Days’ shall be defined as calendar days, unless otherwise specified.” (Change shall be defined as to means. Same reason as in the first example.)
• “No professor or employee shall individually resolve or attempt to resolve a suspected violation.” (Change shall to may. You are not negating a duty; you are negating permission.)
• “Appropriate sanctions shall include any one or more of the following. . . .” (Omit shall. Better yet, identify the agent. If you are imposing a duty, make it “The hearing panel must impose one or more of the following sanctions.” If you are granting permission, make it “The hearing panel may impose one or more of the following sanctions.”)

Shall has become so corrupted by misuse that it has no firm meaning. It can mean must, should, will, may, or is. No wonder, then, that Words and Phrases takes 93 pages to summarize the more than 1200 cases interpreting shall (Kimble 2000).

Lauchman (2002: 47) similarly takes issue with shall: “Shun the ambiguous shall. The word is used vaguely in five distinct ways, and it requires interpretation. Good writing never forces the reader to interpret. What’s more, shall is notoriously off-putting. It is a ‘dead’ word never heard in everyday conversation.” Lauchman suggests using may for permission (‘Materials may (not shall) be used only in the research room’), should when recommending a course of action (‘You and your financial institution should (not shall) agree on how invoice information will be provided to you’), will when indicating the future (‘Our facility will (not shall) reopen on September 1’), and the present simple when stating a fact (‘The contracting officer is (not shall be) responsible for ensuring that the terms comply with the Federal Acquisition Regulations’). He categorically affirms “Never suggest legal obligation. State it. To state legal obligation, use must. There is no ambiguity in this word” (ibid.).

The Australian Office of Parliamentary Counsel argues along the lines of George Coode that shall “is ambiguous, as it can also be used to make a statement about the future. Moreover, in common usage it’s not understood as imposing an obligation. Say must or must not when imposing an obligation, not shall or shall not. If you feel the need to use a gentler form, say is to or is not to, but these are less direct and use more words. We shouldn’t feel any compunction in using must or must not when imposing obligations on the Governor-
General or Ministers, because *shall* and *shall not* were acceptable in the past" (2000: 19).

On the other hand, according to a number of drafting manuals, *shall* still performs its task adequately and does not require substitution. For example, the *Guide to drafting legislation* of the Connecticut General Assembly states that “A requirement is indicated by the use of *shall*. Permission or authority is indicated by the use of *may*. A prohibition is indicated by negating permission (*no person may*) or by putting a requirement in the negative (*no person shall*). As a rule of thumb, use *shall* only as a substitute for *must*. If, in non-statutory writing, *must* could be substituted without changing the meaning or making the wording nonsensical, *shall* is used correctly” (2000: 9-10). The Guide then goes on to illustrate cases of where *shall* may substitute *must*: “The applicant shall submit the form on or before December….” Here *shall* means *must* and is correct. ‘The commissioner shall be authorized to issue….’ Here the use of *shall* is archaic. Reword as ‘The commissioner may issue a license…’. ‘Each member of a regional council of governments shall be entitled to one representative on the council.’ Change to ‘*is* entitled to’. ‘The court shall consider the following factors in determining what conditions of release shall reasonably assure the appearance of the arrested person in court ….’ The first use of *shall* is correct but the second use is not. Change to ‘*will* reasonably assure….”’ (2000: 10).

However, the number of cases where *shall* is used in which there is the risk of interpreting a clause as being ‘purely’ future without there being any kind of obligation would appear to be minimal, firstly because the auxiliary *will* exists if the drafter wishes to indicate a possible future scenario without laying down binding obligations, as in:

(2) The Music Library's BEC *will be notified* by the Music Building's BEC that a hurricane warning has been declared. The university *will be declared* closed and all persons *will be instructed* to leave the campus except those assigned duties in the plan.4

Secondly, it is precisely because *shall* is not generally used in the third person except to indicate a mandatory or directive function that it is so much favoured in prescriptive texts. In other words, if the drafter wishes to highlight the directive function of the clause – as is normally the case in prescriptive texts – then *will* is almost automatically discarded simply because it lacks obligative overtones. In short, the alleged ambiguity existing in relation to the dual role of *shall* would appear to be more theoretical than real (Williams 2006a).

Another frequently repeated accusation made of *shall* is that it is archaic, a ‘dead word’ which needs removing, like deadwood from the undergrowth. Such calls come in particular from the United States where *shall* is indeed much less commonly used in everyday conversation than it is, for example, in most parts of the United Kingdom and hence can be much more easily stigmatized as being a relic from a bygone era, a word positively reeking of “old port and oak paneling”, as we mentioned earlier. Now while in Britain people inside and outside the legal profession consider legal English to contain a number of highly obscure and archaic expressions, I think it would be true to say that the presence of *shall* is perceived as being less quirky and anachronistic than it is by their American counterparts. Objections to *shall* in legal texts in the UK tend to stem more from its overuse and ensuing ambiguity than from its being seen as old-fashioned. Even if *shall* is undoubtedly on the decline in the UK in everyday usage (Leech 2003), it is still sufficiently widely used, especially in the interrogative form, for it to be seen as still part of the living tissue of English rather than as something that has inexorably withered away.

However, the objection to *shall* by American scholars is worthy of serious consideration, for if it is widely held among the American population to be an irrelevance rather than an object of respect, then there are good grounds for trying to find a satisfactory alternative. Paradoxically, despite the fact that the initial success of the Plain Language Movement in the legal sphere occurred in the United States, and despite the vociferous objections raised to *shall* by the likes of Joseph Kimble, to date there would appear to be few visible signs of a willingness by US drafters to introduce *shall*-free prescriptive texts. One reason for the reluctance by many drafters (not only in the US) to do away with *shall* is, of course, the question of what would be the
most suitable replacement. If, say, *must* were introduced on a much larger scale than is the case at present to express obligation, it has been hypothesized that “*must* would rise to the point where the word would differ distinctly from that in the general language and, in this respect, risk becoming a new *shall*” (Foley 2001: 194). This may be rather an exaggeration in that *must* is already used in general British English to express obligation; however, the fact remains that it is not widely used in general American English with deontic meaning; even with epistemic meaning *have to* is much more widely used instead of *must* in American English than is the case in British English. Indeed, as Smith (2003: 248-249) and Leech (2003) have pointed out in their diachronic studies of modal auxiliaries, deontic *must* is on the decline in both British English and American English. The same is also true of Australian English (Collins 1991).

Given the fact that *must* currently occurs in only about three per cent of all finite verbal constructions in English legal texts, whereas *shall* occurs in around 23 per cent of all finite verbal constructions, promoting *must* to the status of main auxiliary indicating obligation in prescriptive texts might possibly be a risky enterprise, especially in the United States, a country where *shall* has largely disappeared from everyday language but where *must* can hardly be said to be flourishing. Even in Britain a “dramatic fall” (Leech / Smith 2002) in the general use of *must* has been registered in the period between the early 1960s and the early 1990s, while there has been a rise in the use of *have to* “which in 1991 is more frequent than *must* in both written and spoken corpus data” (*ibid*.). On the other hand, it could be argued that the history of a language is full of fluctuations in word frequency and that the relative decline in the frequency of *must* in general use over the last few decades should not necessarily influence drafters in their choice of verbal constructions, especially given that it does not have any of the archaic connotations that pertain to *shall*.

At this juncture it may be enlightening to take a detailed look at some of those legislative texts where *shall* has been completely removed, such as the New South Wales *Local Government Act 1993* or the South African *Constitution* of 1997, in order to verify whether or not there has been any loss in expressive force or semantic precision.
2.2. Shall-free data

In Chapter 4 we examined in detail the situation and distribution of verbal constructions in contemporary prescriptive texts as seen from a world perspective by taking into consideration the data relating to a total of 36 texts deriving from a variety of sources in the English-speaking world. As was mentioned, of the 36 texts analysed three were actually shall-free, thus giving a ratio of one in twelve. However, I have also compiled some data relating exclusively to shall-free texts, which can be summarized as follows (statistics for the first 16 finite verbal constructions in order of frequency are provided):

<table>
<thead>
<tr>
<th>Verbal construction</th>
<th>Number of occurrences</th>
<th>%</th>
<th>Frequency per 1000 words</th>
</tr>
</thead>
<tbody>
<tr>
<td>present simple</td>
<td>4954</td>
<td>52.0</td>
<td>29.3</td>
</tr>
<tr>
<td>may</td>
<td>1735</td>
<td>18.2</td>
<td>10.3</td>
</tr>
<tr>
<td>must</td>
<td>1308</td>
<td>13.7</td>
<td>7.7</td>
</tr>
<tr>
<td>be to</td>
<td>406</td>
<td>4.3</td>
<td>2.4</td>
</tr>
<tr>
<td>present perfect</td>
<td>394</td>
<td>4.1</td>
<td>2.3</td>
</tr>
<tr>
<td>past simple</td>
<td>316</td>
<td>3.3</td>
<td>1.9</td>
</tr>
<tr>
<td>would</td>
<td>92</td>
<td>1.0</td>
<td>0.5</td>
</tr>
<tr>
<td>present progressive</td>
<td>53</td>
<td>0.6</td>
<td>0.3</td>
</tr>
<tr>
<td>will</td>
<td>52</td>
<td>0.6</td>
<td>0.3</td>
</tr>
<tr>
<td>can</td>
<td>51</td>
<td>0.5</td>
<td>0.3</td>
</tr>
<tr>
<td>could</td>
<td>35</td>
<td>0.4</td>
<td>0.2</td>
</tr>
<tr>
<td>present subjunctive</td>
<td>28</td>
<td>0.3</td>
<td>0.2</td>
</tr>
<tr>
<td>should</td>
<td>26</td>
<td>0.3</td>
<td>0.2</td>
</tr>
<tr>
<td>past perfect</td>
<td>26</td>
<td>0.3</td>
<td>0.2</td>
</tr>
<tr>
<td>need not</td>
<td>9</td>
<td>0.1</td>
<td>0.1</td>
</tr>
<tr>
<td>imperative</td>
<td>8</td>
<td>0.1</td>
<td>0.0</td>
</tr>
</tbody>
</table>

Table 1. Distribution, percentages, and occurrences per 1000 words of the 16 most frequently used finite verbal constructions of ‘Shall-free data’ (overall total of finite verbal constructions: 9522).

Unlike the ‘World data’ which is constituted by 36 relatively short texts making up a total of roughly 145,000 words, the ‘Shall-free data’
is based on just five texts, two of which are very lengthy and are not included in the ‘World data’, whereas the other three are also included in the ‘World data’. The texts comprising the ‘Shall-free data’ are as follows:

New South Wales *Local Government Act* 1993 (120,145 words)
South African *Constitution* 1997 (31,982 words)
New Zealand *Cadastral Survey Act* 2002 (9125 words)
Australia *Wool International Privatisation Act* 1999 (3870 words)
New South Wales *Consolidated Acts – Smoke-free Environment Act* 2000 (3730 words)

The overall word count is thus greater for the ‘Shall-free data’ – 168,852 words – than it is for the ‘World data’. On the other hand, it should be borne in mind that 90 per cent of the shall-free data is based on just two texts and will therefore tend to reflect the particular preferences and idiosyncrasies of a limited number of drafters, such as the frequent recourse to the semi-modal *be to* structure in the New South Wales *Local Government Act* 1993 and the marked use of *must* in the South African *Constitution* 1997.

Once again, as with the ‘World data’, I have counted the number of finite verbal constructions including cases of ellipsis, rather than providing a ‘straight’ word count of the number of instances of, say, *must* or *may* (see Chapter 4.1. for a discussion of the criteria adopted). It may be interesting at this stage to compare the two sets of data, i.e. the ‘World data’ and the ‘Shall-free data’ in order to see where the 22.6 per cent of occurrences of *shall* have been redistributed in *shall*-free texts. I shall therefore reproduce again the distribution percentages for the ‘World data’:

184
<table>
<thead>
<tr>
<th>Verbal construction</th>
<th>Number of occurrences</th>
<th>%</th>
<th>Frequency per 1000 words</th>
</tr>
</thead>
<tbody>
<tr>
<td>present simple</td>
<td>3116</td>
<td>43.5</td>
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Table 2. Distribution, percentages, and occurrences per 1000 words of finite verbal constructions of the ‘World data’ corpus.

The most significant differences in the ‘Shall-free data’ with respect to the ‘World data’ would appear to be as follows:
• a rise of almost nine per cent in the present simple, from over 43 per cent in the ‘World data’ to 52 per cent in the ‘Shall-free data’;
• a massive increase in the use of must, from just over three per cent in the ‘World data’ to well over 13 per cent in texts where shall has been done away with;
• a significant rise in may in the ‘Shall-free data’, up from over 13 per cent in the ‘World data’ to over 18 per cent;
• a major increase in the use of the semi-modal be to, which constitutes less than one per cent in ‘World data’ but more than quadruples in the ‘Shall-free data’.

2.2.1. New South Wales Local Government Act 1993

Let us now examine in greater detail the two texts which make up the bulk of the ‘Shall-free data’, starting with the New South Wales Local Government Act 1993.

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</tr>
<tr>
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</tr>
<tr>
<td>present progressive</td>
<td>0.5</td>
</tr>
<tr>
<td>could</td>
<td>0.4</td>
</tr>
<tr>
<td>should</td>
<td>0.3</td>
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<tr>
<td>present subjunctive</td>
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</tr>
<tr>
<td>need not</td>
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</tr>
</tbody>
</table>

Table 3. Distribution of finite verbal constructions in the New South Wales Local Government Act 1993 as percentages.
Table 3 refers to the distribution in terms of percentages of the 15 most frequently-used finite verbal constructions in the text. The New South Wales Local Government Act 1993 is an extremely lengthy document divided into 749 Sections and is completely devoid of shall, except in five cases when citing previous legislation. Several different strategies have been employed by drafters in order to redistribute the ‘load’ normally carried by shall in prescriptive texts, one of which, as was highlighted above, consists in an even higher concentration of occurrences of the present simple. It is not easy to identify those cases in the text where shall would probably have been adopted by more ‘traditional’ drafters, which in itself is probably indicative of the relatively insignificant difference in meaning between the present simple and shall in many cases when laying down a directive function in prescriptive texts. For example, it is easy to imagine a more traditionally-minded drafter using shall not be instead of is not or shall instead of does in the following clauses from Chapter 27:

(3) A council is not given power to regulate activities by other means. For example, the Chapter does not confer power to require a person to hold a periodic licence.

Must is frequently used (in slightly under 10 per cent of all finite verbal constructions) to express obligation, as in Section 166 (‘Public notice of adoption of local policy’) and Section 167 (‘Public availability of public policy’):

(4a) The council must give public notice, in a form and manner prescribed by the regulations (or, if no form and manner are so prescribed, in a form and manner determined by the council), of the adoption or revocation (other than by section 165 (4)) of a local policy.

(4b) (1) A local policy adopted under this Part by a council must be available for public inspection free of charge at the office of the council during ordinary office hours.
(2) Copies of the local policy must also be available free of charge or, if the council determines, on payment of the approved fee.

Must not is often used – much more frequently than may not (there are 123 instances of must not as opposed to 78 of may not in the text) –
when indicating strong prohibition, as in Section 354C (‘No forced redundancy of affected staff members during proposal period’):

(5) The employment of a member of staff of a council that is affected by a proposal (other than of a senior staff member) must not be terminated, without the staff member’s agreement, during the proposal period on the ground of redundancy.

In keeping with the proposal made by the Australian Office of Parliamentary Counsel, the be to form is very frequently used where there is “the need to use a gentler form” of obligation (it constitutes over five and a half per cent of all finite verbal constructions), as in Section 158 entitled ‘Preparation of draft local policy for approval’:

(6) […] (2) A draft local approvals policy is to consist of three parts.
(3) Part 1 is to specify the circumstances (if any) in which (if the policy were to be adopted) a person would be exempt from the necessity to obtain a particular approval of the council.
(4) Part 2 is to specify the criteria (if any) which (if the policy were to be adopted) the council must take into consideration in determining whether to give or refuse an approval of a particular kind.
(5) Part 3 is to specify other matters relating to approvals.

The be to form is even used – rather idiosyncratically – in the negative expressing prohibition where most drafters would probably use shall not, may not, must not or cannot, as in Section 280 (‘Ward election of councillors – method 1’):

(7) (3) The same person is not to be a candidate for election as a councillor by the electors for more than one ward, unless the election is for the mayor as such.

Another form expressing obligation that is sometimes resorted to in the text is the be required to construction, as in Section 53 (‘The council’s land register’):

(8) A council is required to keep a register of all land vested in it or under its control.

It is occasionally possible to find cases of the have to construction in negative contexts with the same semantic value as need not, as in
Section 138a entitled ‘Approval or consent not required to comply with order’:

(9) A person who carries out work in compliance with a requirement of an order \textit{does not have to make} an application under Division 1, 2 or 3 of Part 1 for approval of the work or an application under Part 4 of the \textit{Environmental Planning and Assessment Act 1979} for consent to carry out the work.

However, there are occasional instances of \textit{need not} where its function is the equivalent of ‘It is not necessary that …’, as in Section 610D, para. 2 (‘How does a council determine the amount of a fee for a service?’):

(10) The cost to the council of providing a service in connection with the exercise of a regulatory function \textit{need not} be the only basis for determining the approved fee for that service.

\textit{May} is very widely used in the text, constituting almost one in five of all finite verbal constructions, especially when granting permission, e.g.:

(11a) This Act \textit{may be cited} as the \textit{Local Government Act 1993}.

(11b) The Governor \textit{may}, by proclamation, \textit{constitute} an area as a city.\footnote{Respectively, Chapter 1(1) and Section 206 (‘Constitution of cities’).}

Though less common than \textit{must not} in this particular text, \textit{may not} is also used to express prohibition, as in Section 62, para. 2 (‘Powers of Ministers during emergencies’):

(12) A direction \textit{may not be given} unless the Minister for Land and Water Conservation has obtained the concurrence of the Minister for Health.

\textbf{2.2.2. South African Constitution 1997}

The distribution of the finite verbal constructions in the South African \textit{Constitution} which was drafted in 1996 but came into force in 1997 is,
in some respects, even more striking than that of the New South Wales *Local Government Act* 1993:

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<tr>
<td><em>will</em></td>
<td>0.5</td>
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<tr>
<td><em>can</em></td>
<td>0.4</td>
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<tr>
<td>present progressive</td>
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<td><em>should</em></td>
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<td>imperative</td>
<td>0.1</td>
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<td>present subjunctive</td>
<td>0.1</td>
</tr>
<tr>
<td><em>could</em></td>
<td>0.1</td>
</tr>
</tbody>
</table>

Table 4. Distribution of finite verbal constructions in the South African *Constitution* 1997 as percentages.

Clearly, the most noteworthy feature in the South African text is the enormous use of *must*, constituting 28 per cent of all finite verbal constructions – i.e. almost ten times the mean frequency in the ‘World data’ – whereas the frequency rate of the present simple and also of the semi-modal *be to* are in good agreement with the ‘World data’. On the other hand, *may* has a distribution rate – slightly over 18 per cent – that is almost identical to that of the New South Wales text.

One can only speculate as to the reasons for this extraordinarily high frequency rate for *must*. Let us first of all take a look at an extract from the text – Section 76 *Ordinary Bills affecting provinces* – which contains no fewer than 12 instances of *must* as well as three ‘ellipted’ cases. The extract is also a good illustration as to why the present simple predominates in both the ‘World data’ as well as the ‘Shall-free data’ – there are 14 instances in the extract where the present
simple is used in subordinate (generally *if*) clauses, and only one where it is used in a main clause (*lapses*), while *may* is also used on one occasion in a subordinate clause:

(13) When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill *must* be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
(a) The Council *must* –
   (i) pass the Bill; (ii) pass an amended Bill; or
   (iii) reject the Bill.
(b) If the Council passes the Bill without amendment, the Bill *must* be submitted to the President for assent.
(c) If the Council passes an amended Bill, the amended Bill *must* be referred to the Assembly, and if the Assembly passes the amended Bill, it *must* be submitted to the President for assent.
(d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, *must* be referred to the Mediation Committee, which may agree on –
   (i) the Bill as passed by the Assembly;
   (ii) the amended Bill as passed by the Council; or
   (iii) another version of the Bill.
(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.
(f) If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill *must* be referred to the Council, and if the Council passes the Bill, the Bill *must* be submitted to the President for assent.
(g) If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill *must* be referred to the Assembly, and if it is passed by the Assembly, it *must* be submitted to the President for assent.
(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill *must* be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it *must* be submitted to the President for assent.

In the case of the South African *Constitution*, one probably needs to take into account the exceptional circumstances in which it was written. Besides the crucial presence of Phil Knight, the Canadian lawyer and proponent of the Plain Language Movement on the Constituent Assembly while the text was actually being drafted (which obviously explains the total absence of *shall*), one should also
bear in mind the political context within which the text was drafted, i.e. after decades of enduring one of the most discriminatory regimes in the history of mankind, the South African people – and its leaders – were anxious to make a clean break with the past. This may help to explain the frequent recourse to a modal of strong obligation, i.e. *must*, so as to highlight in unequivocal terms – and using an auxiliary that most people would understand more easily than the more formalistic *shall* – the rights and duties of the population in the new and democratic South Africa.
VII. Conclusions

Having examined the claims of the proponents of the Plain Language Movement and analysed some of the texts where their suggestions have been taken up by drafters, let us conclude by considering whether these *shall*-free prescriptive texts represent a model that can be transferred to the English-speaking world as a whole, in particular to the United Kingdom and the United States, the two most influential law-producing countries in the English-speaking world.

First of all, it should be stated that the texts in question do not, in the end, sound ambiguous or stilted or ‘unnatural’ because of the deliberate policy of avoiding *shall*, with the possible exception of a certain penchant among the drafters of the New South Wales text for the *be to* construction and of the drafters of the South African text for *must*. On the other hand, it is often possible to discern idiosyncratic uses of particular verbal constructions in prescriptive texts where *shall* is used. Indeed, it is precisely because some drafters have overused *shall* that there has been a backlash against it. In all probability most people would not be aware of the absence of *shall* in the texts unless it were pointed out to them. Moreover, my impression, based on my analysis of these *shall*-free texts, is that they do not create situations of semantic or pragmatic ambiguity, nor can it be said that, as they stand, there is something ‘missing’ or inadequate about the texts. In other words, as proponents of the Plain Language Movement have been asserting for years, *shall* can be done away with if necessary in prescriptive legal texts; drafters would seem to have a sufficiently rich array of alternatives at their disposal to be able to compensate for the absence of this traditionally widely-used auxiliary. However, the main test can only come with time as the texts are subjected to the scrutiny of legal experts, for the final word must surely lie with the lawyers and judges who will be required to interpret the wording of the laws. To the best of my knowledge, *shall*-free legislation has not as yet come under fire from legal practitioners as regards the actual
interpretation of the law, but these are issues that can only be definitively dealt with in the long term.

My personal position is that the question needs to be tackled from a pragmatic – rather than a dogmatic – point of view. It is not necessarily the case that abolishing *shall* from prescriptive texts is the solution to the problem. This is particularly true for the United Kingdom and for the United States. In the case of the former, the sheer weight of a certain type of legal tradition, with its emphasis on precedent, makes it harder to introduce changes into texts without this having unforeseeable repercussions on previous legislation, given that very often sections of old laws are incorporated into new laws.

Moreover, in some respects the Plain Language proponents themselves have sometimes been guilty of creating more confusion rather than less by stigmatizing *shall*. One example is where *shall* is categorized as ‘The future tense’ (2003: 98) in Asprey’s (generally interesting and provocative) *Plain Language for Lawyers*. Four pages of this book are dedicated to explaining why it is not necessary to use a future tense in a prescriptive text, while only in the penultimate paragraph on the subject does she actually concede that *shall* “also” expresses obligation (2003: 102), which is surely its primary meaning in prescriptive texts:

One other thing before we leave the topic of the future tense: lawyers like to use the word *shall* not only to express the future, but also in one of its special senses – to express an obligation. This is the ‘imperative’ sense of *shall*: *shall* as a command. If lawyers want to use the imperative *shall* and also draft in the future tense, things can become very confused indeed. It is better to avoid those problems by drafting in the present tense.

But would the present tense always be suitable as a substitute for *shall* in prescriptive texts? For example, if we take the finite verbal construction in the last clause in Article 2 of the Consolidated Version of the *Treaty on European Union*, namely:

(1) The objectives of the Union *shall be achieved* as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community
replacing shall be achieved by, say, are achieved, or must be achieved, or will be achieved, or even are to be achieved smacks to me of a ‘second-best’ compromise rather than a solution, precisely because shall combines the dual functions of obligation and future time reference, both of which play a major role in the language of the law. In this particular context, the shall construction would seem to be ideally suited to conveying the joint connotations of obligation and futurity that are intrinsic in a concept such as the achievement of long-term objectives. The present simple would place the concept too strongly within the present time frame; must would, to my mind, overstate the compulsory nature of achieving the objectives; will would considerably weaken (if not annul) the idea of obligation; while the be to construction would seem to be closest in spirit insofar as it introduces a ‘gentler form of obligation’ than must, but does not add anything that is not conveyed by shall, except for an extra word.

Of course, the Plain Language proponents are undoubtedly right in stigmatizing bad legal drafting and in getting rid of the excesses of wordiness of legalese. Moreover, if the legal professions – particularly the lawyers and the judges – in those areas where shall has been banished from prescriptive texts prove to be perfectly comfortable with the texts, there is no reason for not continuing with the experiment. However, the objections to introducing wholesale changes, such as the removal of shall, by those actually involved in the drafting of legislation in countries like the UK or Eire or the United States, not to mention in international organizations such as the United Nations or the European Union, should not be simplistically viewed as a form of outdated conservatism.

Shall still has a raison d’être in legislative texts. Certainly it has been abundantly overused in prescriptive texts over the centuries and could be profitably done away with in many cases where it is still used in subordinate clauses, and also in a number of main clauses in, for example, definition provisions. Legal language would undoubtedly benefit from the application of more rigorous and scientific criteria as regards the actual drafting of texts. But an overly dogmatic approach, such as the absolute prohibition of using shall, should be avoided. While it is possible to draft shall-free texts which do not generate ambiguity, there would seem to be no real need to abolish shall from all prescriptive texts. It still has a role to play in legal English,
particularly when, as has been shown, it indicates simultaneously obligation and future time reference.
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Eagleson, Robert D. / Asprey, Michèle 1989b. We must Abandon 'Shall'. *Australian Law Journal* 63, 726-728.


Plain English Campaign 2004. At http://www.plainenglish.co.uk. The site contains a large amount of information about the Plain English Campaign, including their online magazine *Plain English*.


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