UNIVERZITA KARLOVA

Filozofická fakulta

Development of modal verb “shall” in legal English

Modální sloveso “shall” a jeho vývoj právnické angličtině

BAKALÁŘSKÁ PRÁCE

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Studijní obor: Anglistika-amerikanistika

Praha, leden 2021

Acknowledgements

I would like to thank my supervisor Mgr. Ondřej Tichý, Ph.D. for his great advice, feedback, and guidance during the process of writing this thesis. I am also grateful for his patience and kind words.

Thank you to my family for bearing with me.

Furthermore, there is one special person to whom I would like to express my sincerest gratitude: Χρυσόστομος, my beloved partner. Without his infinite support, the process would have been much harder. The energy he poured into supporting me at every step is priceless, and I will be forever grateful for all his kindness and love.

Prohlašuji, že jsem bakalářskou práci vypracovala samostatně, že jsem řádně citovala všechny použité prameny a literaturu, a že práce nebyla využita v rámci jiného vysokoškolského studia či k získání jiného či stejného titulu.

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Souhlasím se zapůjčením bakalářské práce ke studijním účelům.

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Abstrakt a klíčová slova

Bakalářská práce se zaměřuje na zkoumání vývoje užívání modálního slovesa SHALL v právních dokumentech v anglickém jazyce. Modální sloveso SHALL má v právnické angličtině stále své místo a pohledem příruček může ukazovat na preciznost právnického jazyka. Mnohovýznamovost je však v rámci právního jazyka spíše nežádoucím jevem a vzhledem k rostoucímu počtu právních dokumentů a osob, kteří se sepisováním dokumentů zabývají, se postupem času začaly významy modálních sloves rozšiřovat, čímž se úroveň preciznosti snížila a otevřela cestu nejednoznačnosti.

Práce si klade za cíl analyzovat vývoj užívání SHALL v soudních rozhodnutích v daných časových úsecích, nalezené vzorky dále roztřídit na základě sémantiky, kterou popisují slovníky právnické angličtiny, a tím poukázat především na postupný trend růstu v užívání některých významů modálního slovesa SHALL, které zapříčiňují nejednoznačnost ve sféře právních dokumentů. Pro srovnání vývoje, a předně frekvence užívání, se stejnou metodou postupuje i v rámci běžného jazyka, který je analyzován na základě neprávnických korpusů.

Klíčová slova: modální sloves, modalita, shall, právnická angličtina, jazyková změna

Abstract and key words

This BA thesis focuses on examining the development of the use of the modal verb SHALL in legal documents in the English language. The modal verb SHALL still has its place in legal English and, as the manuals indicate, it can point to the precision of legal language. However, ambiguity is a rather undesirable phenomenon in legal language, and due to the growing number of legal documents and drafters, the meanings of modal verbs expanded over time, reducing the level of precision and opening the door to ambiguity.

The BA thesis aims to analyse the development of the use of SHALL in court decisions in given time periods, further classify the samples based on semantics, as described by dictionaries of legal English, and point out the gradual growth in the use of certain meanings of the modal verb SHALL, possibly causing ambiguity in legal documents. To compare the development, and especially the frequency of use, the same method is used within the common language, which is analysed using non-legal corpora.

Keywords: modal verbs, modality, shall, legal English, language change

Table of Contents

List of Tables and Charts

1 Introduction

Legal English, or legal language in general, is seen as a formulaic and hard-to-understand specialized language. The reasons for this perspective that many have, are rather simple. It is true – legal language is formulaic, difficult to understand, and difficult to interpret. That is why there are a plethora of law schools dedicated to teaching their students how to read law, how to use law, and how to interpret it. The interpretational part of law is immensely important, as everything is determined by an interpretation given by courts, lawyers, and other law experts. The interpretation is very much tied to the language, because language is the method of expressing anything regarding the law.

There are certain assumptions surrounding legal language, many of them perpetuated by legal professionals themselves. While there is a large portion of legal professionals who are attempting to revolutionize legal language, it is not as simple. As legal language is not spoken or used in normal discourse, the ways to change it and potentially improve it, are not as limited as in general language. Nevertheless, the evolution in legal language is not particularly something organic, because it is influenced by the methodology used at universities, where law is taught, by the methodology used for drafting contracts and laws, depending on the jurisdiction. The emergence of movements that are attempting to change the formulaic language are constantly at odds with the traditionalist approach.

Therefore, the goal of this thesis is to show that there might indeed be a need to revolutionize how lawyers and judges express themselves, and how the rules that govern social conduct, are written. One of the central discussions has for many years been the modal verb *shall*. While many words in legal language are interpreted differently, compared to their meaning in general language, the modal verbs are the means of imposing something on its recipients. But certainty is diminished when there is a word that is both misused and ambiguous, a word such as *shall*.

Several questions arise when discussing the verb *shall*: is legal language really precise? Can a citizen, to whom the legislation is directed, expect that laws will be interpreted correctly, if there is ambiguity and uncertainty among legal professionals? What should one expect from legal language? And finally, the most crucial for the thesis: has *shall* always been problematic and misused, or is it an issue of the recent decades? To answer these questions, or in attempt to answer them, the thesis provides a theoretical background of legal English and its development, the issues that the current legal professionals are facing, mainly with regards to *shall* and similar problematic areas, and what are all the facets of the language of law that one has to consider. An overview of legal cultures is given, to facilitate better understanding of how English came to be universal.

The research part of the thesis dedicates itself to mapping the development of the verb *shall* in attempt to show the slow progress of legal English and the problems with interpretation of meanings. It further shows that what is expected from legal language, is not necessarily upheld, not in present times, nor in the past.

2 Theoretical part

2.1 Modality

While mood is regarded to be a category of grammar, modality is rather a category of semantics or meaning. Huddleston and Pullum (2002) describe mood as an area concerned mainly with the contrast between indicative, subjunctive and imperative, while the category of modality refers to the speaker's attitude towards the factuality or actualisation of the situation expressed by the rest of the clause and it is expressed mostly by modal verbs. Other ways of expressing modality are, for example, lexical modals such as adjectives *likely, necessary, supposed*; verbs like *permit, require*; or past tense; all of which are out of the scope of this thesis.

Because modality reflects the speaker's judgement, the semantic system is not clearly formally determined (Palmer, 2013). Huddleston and Pullum (2002) differentiate between three dimensions: strength, kind, and degree. *Kind* of modality can be further subdivided into three types: epistemic, deontic, and dynamic modality (Huddleston & Pullum, 2002).

2.1.1 Types of modality

2.1.1.1 Epistemic modality

Epistemic modality, also known as extrinsic modality, is described by Palmer (2013) as the simplest type of modality due to its regularity and clarity; and is further divided into two basic degrees of modality: *possibility* and *necessity*. These involve mainly human judgement of events and situations; therefore, they are mainly subjective. Modal auxiliaries expressing modal "necessity" are *must* and *need*; modal auxiliaries expressing "possibility" are *may* and *can*. *Need* and *can* are restricted to non-affirmative contexts (Huddleston & Pullum, 2002).

The notion of possibility indicated by the modal *may* can be paraphrased by "it is possible" + *that*-clause. Quirk et al. (1985) provide the following example:

> You *may* be right. [It is possible that you are right]. (p. 223)

Quirk et al. (1985) also include the tentative form *might* as an alternative to the modal *may*. The modal *might* is used to indicate less certainty about the possibility (Palmer, 2013).

The main modal *must* is used for expressing the notion of necessity, or "logical necessity", as Quirk et al. (1985) refer to it, and it "implies that the speaker judges the proposition expressed by the clause to be necessarily true, or at least to have a high likelihood of being true" (p. 225). The epistemic *must* is related to certain deductive abilities of the speaker. At times, the line between epistemic and deontic is not as clear, because certain contexts might allow for either interpretation.

2.1.1.2 Deontic modality

Palmer (2013) asserts that "Although the distinction between epistemic modality and the other kinds of modality is fairly clear, the dividing line between deontic and dynamic modality is far less easy to establish." (p. 69) Deontic modality, identically to epistemic, can be categorized into possibility and necessity. It is important to take into account that deontic modality is "essentially performative" (Palmer, 2013, p. 69).

Deontic necessity expressed by *must* implies strong obligation, while deontic possibility expressed by *may,* or *can* denotes permission (Huddleston & Pullum, 2002). Obligation suggests that "the speaker is exercising his authority" (Quirk et al., 1985, p. 225).

The deontic modals are often used for rules and regulations, where the speaker is asserting its authority. Palmer (2013) provides the following example with the modal *must:*

You must keep everything to yourself, be discreet. (p. 74)

Another one of the modals that can denote deontic modality, is the modal *shall*. Interestingly enough, Palmer (2013) suggests that *shall* might be stronger than *must,* because "with SHALL the speaker gives an undertaking or guarantees that the event will take place." (p. 74)

2.1.2 Modal verbs

A comprehensive categorization of modal auxiliaries is provided by Quirk et al. (1985) – in total, there are six categories of verbs intermediate between auxiliaries and main verbs depicted on a main verb scale, ranging from one verb phrases to two verb phrases, and they are the following:

a) CENTRAL MODALS: can, could, may, might, shall, should, will, would, must
b) MARGINAL MODALS: dare, need, ought to, used to
c) MODAL IDIOMS: had better, would rather
d) SEMI-AUXILIARIES: HAVE to, BE about to, BE able to, BE bound to, BE going to, BE obliged to, BE supposed to, BE willing to, etc
e) CATENATIVES: APPEAR to, HAPPEN to, SEEM to, GET+ -ed participle, KEEP + -ing participle, etc
f) MAIN VERB + nonfinite clause: HOPE + to-infinitive, BEGIN + -ing participle, etc (p. 137)

Characteristics of certain modals are described in the previous section, mainly for illustrative and explanatory purposes.

2.1.2.1 Shall

The verb *shall* has a slightly different position among the modals: firstly, it has a dual character – it can be both epistemic and deontic; secondly, there is division between the usage of *shall* in general English and in the professional/academic (legal) sphere. While these characteristics are not exclusive to *shall*, they are emphasized in order to introduce the issue discussed further. In general English, *shall* expresses mostly epistemic futurity (in place of *will*); in the legal sphere, it expresses deontic modality, specifically obligation. However, as research shows, the frequency of the epistemic *shall* has been on a decline for a long time, especially in spoken discourse and general English. The deontic modality of *shall* is still holding its position in legal discourse in the English language.

According to Huddleston and Pullum (2002), one of the deontic uses is the "constitutive/regulative", which is "used in constitutions, regulations, and similar legal or quasi-legal documents. The subject is normally 3rd person". An example of the constitutive/regulative use of *shall* is: "The committee shall meet at least four times per year." Whereas the non-deontic use is then explained by in the following manner: "With a 1st person subject, shall occurs as a variant of will" and one of the provided examples: "I shall never understand why she left" (p. 194).

Hence, one would assume *shall* in legal discourse expresses exclusively deontic modality, however, precisely due to this dual modality, it tends to be used incorrectly; the ramifications and reasons behind the incorrect use of *shall* are discussed in the **Chapter 2.3.2**.

2.2 Legal language

2.2.1 Defining legal language

The term legal language can be used as an umbrella term for the general legal discourse, whereas the term *language of law* describes the sphere of written legal documents of prescriptive character (Williams, 2007). However, the description of the terms is not uniform and varies from author to author, depending on the perspective; for example, Mellinkoff (2004) describes the language of law as the "customary language used by lawyers" (p. 3). The language of law or legal language is at times referred to with expressive terms, such as *lawyers' cant*, *flash language* and other, as the legal profession is criticized for "a type of language that the average layperson cannot understand" (Williams, 2007, p. 27) and has its very specific features that differentiate it from any other specialized language.

Nevertheless, the general definition is not nearly enough to describe the complex and specific language of law, and it is necessary to take into consideration the social aspect of legal language and its position in society. Williams (1945) suggests that language for lawyers is an "instrument of social control" (p. 71). While words are naturally an important element of any discourse or communication, for legal

discourse and legal language, especially in the sphere of legislation, words are a very important tool for the expression of exact and precise ideas. Governance of social conduct and imposition of duties and restrictions on the society is done precisely through the use of legal language, which is characteristically more demanding to learn to use properly due to its formality and specificity.

It is important to point out that legal language in general terms, as a means of social control, is "highly impersonal and decontextualized of whoever is the 'speaker' (originator) or the 'hearer' (reader) of the document. The general function of this writing is directive, to impose obligations and to confer rights." (Bhatia, 1993, p. 188) While legislation is meant for the citizen, the content of it is decided by the governing power of the state, drafted by the legislative powers, interpreted to the citizen by a lawyer or a judge and further influences an enormous scope of social interactions and relations. Hence, legal language as a medium is not limited to only written texts, but expands also to spoken discourse, as Maley (2014) notes: "the language of law is not one homogeneous discourse type but a set of related and overlapping discourse types" (p. 14).

2.2.2 Characteristics

Mellinkoff (2004) characterized legal language in the following manner:

1. Frequent use of common words with uncommon meanings
2. Frequent use of Old English and Middle English words once in common use, but now rare
3. Frequent use of Latin words and phrases
4. Use of Old French and Anglo-Norman words which have not been taken into the general vocabulary
5. Use of terms of art
6. Use of argot
7. Frequent use of formal words
8. Deliberate use of words and expressions with flexible meanings
9. Attempts at extreme precision (p. 11)

When thinking about the main characteristics of legal language as described by Mellinkoff above, part of the community of legal scholars has been attempting to transform methods of drafting to increase intelligibility and decrease the use of jargon and highly technical terms, that can be replaced (where possible) by plainer ones. The movement behind this attempt to reform legal drafting is referred to as the *Plain Language Movement* and will be further discussed in detail in **Chapter 2.2.2**.

Using legal language in a proper manner requires formal education provided by the many law schools around the globe. The register of the world of law needs to be mastered well in order to apply it properly. Ordinary speech and the specialized register of law share certain characteristics, but the properties of legal language, though not being unique only to the language of law, are in their totality a

combination of rules that become a skill learned through several years of study. Yet, it is difficult to achieve uniformity in legal language, and specifically legal English. The nature of legal English is inherently non-uniform due to the existence of multiple legal cultures; while the European Union is mostly dependent on translation from-and-to English, often mirroring the rules and traditions of the member states and creating a hybrid system; common law, while also mirroring different traditions, does not face the issue of translation on such a level. Further issues, similarities, and differences between legal cultures will be discussed separately in the chapter dedicated to distinguishing legal cultures.

Wydick (2005) characterized legal writing as follows:

> We lawyers do not write plain English. We use eight words to say what could be said in two. We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. (p. 3)

The characterization provided by Wydick certainly carries a certain amount of judgement and expressiveness, which is only representative of the passionate discourse around legal language.

2.2.2.1 Precision of language

Legal language or the language of law is often expected to be stable and precise to avoid any kind of confusion and ambiguity. Osbeck (2012) describes the features of good legal writing as follows: clarity, conciseness, and engaging for the reader. The features described by Osbeck, aside from clarity, are rather marginal for the purposes of this thesis, but they help create a comprehensive overview of what lawyers and other legal professionals need to consider when drafting legal documents.

As has been discussed previously, legal language is a special kind of register used in a great variety of settings, and due to its nature, it holds an important position as the language of the rule of law. The requirement of being precise while drafting legal documents is in line with the nature of law. Endicott (2001) discusses the topic of precision, suggesting the following: "(1) that lawmakers use vague laws because precision is not always desirable; (2) that because law is 'systemic', enactments formulated in precise language do not always make precise laws; and (3) that law must perform functions that can only be performed by means of vague standards" (p. 379). Endicott's view suggests the ever-present ambivalent opinion among philosophers of law, linguists, and lawmakers on the proper methods of drafting and the true proper features of legal language. Despite the lack of consensus on the topic, precision, in the end, plays an important role: if the rule of law is to be effective, precision can aid the proper interpretation of a text.

Definition of the term precision is, in itself, not entirely precise. Coleman (1998) defines precision in the following manner: "Precision battles ambiguity and vagueness so that later battles (specifically,

litigation) will be less likely fought. Other aspects of precision, according to my usage, include 'accuracy', and 'completeness' or 'thoroughness'" (p. 393). The discussion remains whether precision can be achieved simultaneously with clarity, another preferable quality to be achieved in legal texts. Coleman compares the two, precision and clarity, in the following manner: "Clarity really includes a range of attributes: brief, simple, comprehensible and concise. Precision, meanwhile, refers to an exactness of expression, to an absence of ambiguity, to an attempt at reducing contestability." (p. 393) The reduction of contestability is a desirable and cost-effective outcome – if the space for interpretation is too extensive and the wording offers multiple explanations, it increases the likelihood of litigation. Courts will step in to offer the most likely interpretation and set precedent for cases alike.

The responsibility for creating well-drafted documents, well-phrased verdict, or judgement, falls on the legal professionals. The sheer number of lawyers and others legal professionals around the globe creates diversity amongst traditions, rules, and methods; having a high position in the world of law does not guarantee quality of the written word, because it is not the only sought-after quality in a legal professional. Knowledge of law does not guarantee a good knowledge of language, therefore the quality of the final product can in terms of language and intelligibility be sub-par; lawyers are not legal linguists.

2.2.2.2 Interpreting the language of law

There are levels of precision that a word might have: not all imprecisions are necessarily wrong, and not everything can be precise. Mellinkoff (2004) asserts that:

> The language of law has never been generally precise, and it is neither possible nor desirable that it become completely so. If the language of the law is to be used most effectively, and then improved some, those limits of precision must be recognized and understood. [...] It is important to the lawyer to make himself aware that his language is not generally precise as it is for him to know the precision that is there. (p. 388)

Despite the fact language might be inherently vague, it does not mean that it cannot be precise.

Nevertheless, it is necessary to evaluate where and when vagueness or imprecision might be desirable because law is not as rigid as one might think. One must consider the fact that law is not a black and white system of rules and regulations. Law is present in many areas and does not always signify a requirement to do something; it also informs, recommends, advises, and explains. For more succinct categorization, Tiersma (1999, pp. 139-141) offers the following classification of legal documents: operative, expository, and persuasive. If law were inherently precise in all its aspects, there would be no need to interpret, therefore a big portion of legal professionals would become redundant. There are aspects of legal drafting where absolute meaning restriction for the sake of precision might produce negative results, because certain space for interpretation allows to adapt to unexpected circumstances.

At the highest levels, the interpretation of law is a task assigned to courts; simply put, decisions of lower courts can be overruled by higher courts, setting precedent for future interpretation. The authoritative power of courts as the institutions for interpretation of law stems from their expertise in law and the constitution-given power to do so. The Czech legal theoretician prof. Aleš Gerloch (2013) lists the following methods of interpretation:

1) linguistic (semantic-grammatic) interpretation: the most common method of interpretation based on the meaning of words
2) logical interpretation
3) systematic interpretation: for example, one of the legal maxims *lex posterior derogat legi priori* (a later statute repeals an earlier one)
4) historical interpretation: based on its origins
5) teleological interpretation: interpreting the purpose of law
6) comparative interpretation: e.g., between legal cultures (pp. 133-138)

As the methods of interpretation described above suggest, linguistic is merely one of the many. Once a term is used and sufficiently defined, either by the statute itself, or later during judicial procedures, likelihood of encountering ambiguity or confusion is rather low.

Interpretation of law is something very closely tied to the principle of certainty, which can be defined as: "'certainty of the law' which focuses on the predictability of the application of the formal law by the judge, the government and the administration, who are in turn bound by the law" (Popelier, 2000, p. 326). What the definition of certainty of law suggests: law should be predictable because it is against all the principles to interpret the same statute in different ways solely to fit a case. Everyone is equal before the law; therefore, haphazard decision-making will create issues and break the principle of certainty (and others set by the constitutions). Interpretation of law requires careful deliberation in line with other laws, statutes, and moral principles.

2.2.2.3 Issues of ambiguity

If a dictionary entry of a word can have multiple meanings, it stands to reason that something similar can happen in the realm of law. General language is the basis for legal language, but further transformed and specialized to fulfil its purpose. Tiersma (2006) brings up an interesting point about the issue, suggesting that meaning of a word is not as exact as people think: "We are not good at defining words, which in any event become indeterminate in marginal cases." (p. 46) Meaning of words are determined by usage in the community, which can often be inconsistent. People are the ones creating language, judging language and changing language – everything is dependent on someone's interpretation and people do not tend to think identically.

Good example of a word with multiple meanings is the word *law* itself. Cambridge dictionary (2021, January 6) provides multiple meanings:

1) "a rule, usually made by a government, that is used to order the way in which a society behaves" - *There are laws against drinking in the street.*

2) "the area of knowledge or work that involves studying or working with the law" - *She's going to study law at university.*

3) *Informally* "the police"

4) "a general rule that states what always happens when the same conditions exist" - *Newton's laws of motion*

In anticipation of having possibly multiple meanings, legal professionals will often avoid using words that have a broad meaning; in such situations, a definition or explanation may be given. There is undeniably a connection to all the methods of interpretation as one of their goals is to help overcome these potential issues of ambiguity. If a definition does not suffice, the methods can be used to interpret or determine the meaning based on certain logical, teleological, and other markers.

Another question is how to define ambiguity. Ambiguity might be defined as the lack of clarity, therefore suggesting uncertainty of meaning, a word capable of being understood in more than one sense (Schane, 2002, pp. 167-170). For purposes of showing potential issues with ambiguity, Schane analysed three cases from the US case-law that were centred around the interpretation of a certain word during judicial proceedings. In one of the cases (*Frigaliment Importing Co. v. B.N.S. International Corp.*), there was an issue of how to interpret the word "chicken" and "what is chicken?" The issue stemmed from a different interpretation of the same word by the plaintiff and the defendant; plaintiff claimed that "chicken' means a young chicken, suitable for broiling and frying", while the defendant was of the opinion that it means "any bird of the genus that meets contract specifications on weight and quality, including what it calls 'stewing chicken." The judge then decided that both interpretations are correct/possible and had to look further into the contract entered into between the two parties, to be able to interpret the exact meaning and decide the case. This specific case is different in the sense that it was regarding a contractual relationship between a buyer and a seller, therefore was not binding for all cases alike. The word chicken could have been very likely interpreted slightly differently in other proceedings, depending on the traditions between contractual parties. Other terms of a legal or technical nature would not be guaranteed such liberty.

The case analysed by Schane (2002) shows the polysemy that can be found throughout any language and might be the cause of problems while interpreting in any scenario, not solely in the sphere of law. But as has been discussed before, law has a different purpose, and the standard for clarity, precision, and other features is higher, as it is part of something governing the relationships between

people. The discussed case is only one of the many where a judge had to deal with an interpretation of a word – it is expected that a word will carry more than one meaning and potentially be a source of an issue. What is more problematic, and is the core of this thesis, is the interpretation of modal verbs, such as *shall*. Whereas deciding to interpret chicken in a certain manner will be final for the specific case, defining and interpreting the modal *shall* will pose more issues. This point will be discussed later on in detail, to provide a comprehensive overview and introduce the core of the thesis.

2.2.2.4 Legalese

"You'll labor to acquire legalese (it's something you *must* understand), and then you'll labor to give it upon your own speech and writing—that is, if you want to speak and write effectively. Legalisms should become part of your reading vocabulary, not part of your writing vocabulary." (Garner, 2001, p. 34) Garner is suggesting one of the current attitudes toward legal writing, specifically "legalese". Most use it, many despise it, many do not understand it, not many defend it. Garner (2013) in his article *Why Lawyers Can't Write* notes an interesting fact, or rather an opinion, about lawyers' ability to write: "While lawyers are the most highly paid rhetoricians in the world, we're among the most inept wielders of words." (p. 24) He attributes it to poor law school education regarding drafting and writing.

Legalese might be seen as an expressive term as some might use it as an insult, but others use it as a neutral descriptive for legal language. Cambridge dictionary (2021b, January 6) defines *legalese* rather simplistically: "language used by lawyers and in legal documents that is difficult for ordinary people to understand". Nevertheless, the discussion hidden behind the term legalese is, as shown in the previous paragraph, one that has been occupying minds of legal and linguistic community for decades. Stark (1985) contributes the obscurity and rigidity of legalese to the actual lawyers' intentions: economic interest, showing off, deception. Both Garner (2013) and Stark are in its core criticizing the obscure, turgid, and formulaic language interspersed with legal jargon. Mellinkoff (2004) provides some examples with its meanings of what could be considered legalese in the section regarding the "frequent use of common words with uncommon meanings":

action	lawsuit
alien	transfer
executed	signed and delivered
save	except
without prejudice	without loss of any rights

And further typical examples of legalese still present in contractual language: *hereafter, herewith, thereafter, thereof, whereby* (pp. 12-13).

A concise examination of the possible reasons behind the state of today's legal language might offer an explanation for legalese. In the **Chapter 2.2.2** of the thesis, Melinkoff's (2004) characterization demonstrated the general nature of legal English. For example, the Latin origin, that can be traced back to the Roman Empire, the use of certain Old French and Anglo-Norman words which have not been adapted into the general vocabulary. Latin (mainly Latin maxims) has remained part of legal language (not exclusive to English) and is still taught in law schools and used in legal writing. Sastri (1988) talks about the difficulty when translating Latin originals into English, as they become significantly more wordy than their Latin counterparts:

- *Sest populi est supreme lex.* (5 words)
- The safety of the people is the supreme law. (9 words) (p. 200)

In his book *A History of American Law*, Friedman (1986) notes that "Law, by and large, evolves; it changes in piecemeal fashion. Revolutions in essential structure are few and far between." (p. 18) While he talks mainly about the evolution of law itself in the Anglo-American environment, the evolution of the language of law, specifically legal English, has seen considerable reluctance and pushback. The success of legal English reforms has been limited. Sastri's (1988) analysis is more open and understanding toward the tradition of legal English and concludes with the following:

> legal writing will continue to be bad only until lawyers start thinking clearly before they write something down. [...] The fact is that the critics, in their eagerness to damn legalese, have been blind to both the historical and contemporary – or, as the linguist would say, the diachronic and the synchronic – requirements of the profession, as well as the role of the lawyer in society. And the Plain English principle, in its turn, makes the lawyer more needed than ever, because he or she has to make sure that the legal concept is not diluted in the process of the vernacularization of law. (p. 215)

The variability of opinion is great among the linguists and theoreticians, but at the same time it is not. In the end, the discussion always leads to *traditional* versus *plain*.

2.2.3 Plain English Movement

The discussion over the standards of statutory drafting began to change when drafters observed that there is a need to reform legal writing. Frederick Reed Dickerson (1909 – 1991), a former professor at Indiana University in Bloomington and author of *Legislative Drafting* (1954), was and still is considered to be an authority on legal writing and the father of modern-day drafting in English. The main stylistic features Dickerson described are clarity, conciseness, consistency (Viswanathan, 2007, p. 487). The

recommendations made by Dickerson closely match the guidelines set forth by proponents of Plain English. David Mellinkoff, the author of the book titled *The Language of the Law* published in 1963, cited in this thesis multiple times, is considered the main personality behind launching the Plain English Movement in the United States. The inception of the movement can be traced back to the beginning of the second half of the twentieth century, however the critique of overly formal and technical language of law has been emerging already in the 19th century.

Plain Language is not concerning only legal discourse, but discourse in general. The goal of Plain Language is to use clear and straightforward language that is engaging for the audience; to achieve the goal, the advice is to "avoid obscurity, inflated vocabulary and convoluted sentence construction. [...] Writers of plain English let their audience concentrate on the message instead of being distracted by complicated language." (*Short Definition of Plain Language*, n.d.)

The renowned professor and attorney Joseph Kimble has been defending Plain Language for many years, debunking myths and misconceptions. There is still a debate whether the plain language approach is effective and makes sense to adapt in legal discourse. In the *Scribes Journal of Legal Writing*, his contribution *Writing for Dollars, Writing to Please*, Kimble (1996-1997) goes over the most common critique plain language faces and gives arguments as to why the criticism is not well-founded:

1. *PL does not mean baby talk or dumbing down the language*
2. *PL and precision are complementary goals, not antagonists*
3. *PL is not subverted by the need of use of technical terms or terms of art*
4. *PL is not just about vocabulary*

Kimble's arguments against the accusations are the following:

1. PL means effective and clear communication
2. PL is more precise than traditional legal writing because it uncovers the ambiguities and errors more than traditional style
3. lawyers have an exaggerated notion of the extent to which legal terms are precise or are settled and unchangeable
4. PL involves all the techniques for clear communication: planning the document, designing it, organizing it (pp. 1-3)

Mentioning the accusations and defence helps demonstrate the issues PL is dealing with and the goals behind it. However, as more jurisdictions adapt plain English, it indicates a gradual shift away from the traditional methods of drafting. Butt (2002) notes that "in many countries, the plain language movement in law is now reasonably well established. In its modern phase, it has been going for over 20 years" (p. 174). At the beginning, the most successful proponents of PL were Australia, New Zealand, and Canada; countries, such as the United States of America, Ireland, and England, were more reserved and hesitant to apply it.

Nevertheless, PL is currently endorsed in multiple countries, including the United Kingdom, Ireland, and the Unites States of America (Kimble, 2013). The Commonwealth Association of Legislative

Counsel (CALC) has "helped to prepare plainer drafting around the world and share knowledge on how to go about it" (p. 46). There are various guidebooks and guidelines for plain English published and written by prominent linguists, lawyers and legal drafters; authors such as Bryan Garner, Richard Wydick, and Robert Eagleson among them. All of which is yet another testament to the increasing importance of the Plain English Movement in the legal sphere.

2.3 Legal English

Around the year 600, King Aethelbert of Kent was responsible for issuing a set of laws in Old English (Tiersma, 1999). While Tiersma suggests that Anglo-Saxons did not have a legal profession, there was a legal language that they developed and various words, such as *manslaughter, murder, right, steal, theft*, *witness*, and many more have remained in use until the present day.

When Christianity began to spread in England after the year 597, the Roman church and Latin influenced language and law in England, as many documents were written in Latin by those with religious training; words, such as *client, conviction, admit, mediate, legitimate* are all of Latin origin (Tiersma, 1999).

The Viking raids and the occupation of certain parts of England meant a new source of influence: the Scandinavian law known as Danelaw. The most important word for legal English of Scandinavian origin is the word *law*. Other words include *gift, loan, sale* (Tiersma, 1999).

A very significant period that influenced legal English in the most profound manner follows the year 1066, the year when England was invaded by William the Duke of Normandy. Norman French brought words, such as *authority, country, council, crown, people, power, state, government*, and other. English was on the decline as the language of legal documents after the Norman Conquest, but the first French statute dates from 1275, suggesting that up until that period, legal language was Latin. Because Latin was a standardized language, as opposed to English and its many dialects, it served as legal language rather well; at times where Latin terms were missing, English was used, thus creating a blend of both (Tiersma, 1999). After 1280 through 1535, oral court proceedings were recorded in Anglo-French. The rise of French as the legal language was influenced by the new class of lawyers around 1200, despite the fact that Anglo-French was declining among the general public.

Later a language used exclusively by legal professionals, known as Law French, was adapted. The language was known for its unintelligibility and had to be studied and learned by legal professionals, as it was separate from the general language. Tiersma (1999) notes that: "The preservation of Law French for hundreds of years after French died out as an ordinary language in England underscores the intertia and linguistic conservatism of the legal profession." (p. 28) In some form, it remained in use until the

17th century. In 1362 the Statute of Pleading was enacted, a statute considered to be the first plain English law (Tiersma, 2008, p. 10). It was requiring for pleas to be led and written in English, even though the statute itself was in French; the statute was not particularly effective, as the requirement to write in English was mostly ignored by lawyers. The final stage for Latin and French as the language of legal proceedings came in 1731.

The United States of America, which was in its majority a former British colony, naturally adopted the English language as the language of law, and with that also common-law and its traditional formality and legalese. Other countries relevant to the thesis where English is the official language of law and the topic of English as the language of international law are discussed below.

2.3.1 English as the universal legal language

As the world of law began to internationalize, naturally a need to adapt a common language arose. Therefore, the universal language, or lingua franca of law, became English. The English language was the most obvious candidate, as English became the means for global communication in the 20th century. But there are other considerations that need to be covered when it comes to law and business, especially when conducted in English. As the previous section that briefly mapped the historical development of legal English demonstrated, legal English has been very closely tied to one of the main legal cultures: common-law. Currently, the division of legal systems can be categorized in the following manner: common-law systems, continental law systems (also known as civil law), religious legal systems (e.g., Islamic culture), public international law, and European Union law. Religious legal systems will not be discussed in this thesis due to their different origins and traditions; the continental systems are similarly left out, as the original language is not English. English being closely related to the common-law system entails certain issues for the universality of it – while the origins of most of the legal systems can be mostly narrowed to the continent of Europe, the traditions and systematization are not identical.

2.3.1.1 Common-law and continental legal systems

Common-law is with certainty one of the two most dominant legal systems of the western world, alongside with the continental legal system. Comparative studies have been dedicated to mapping and explaining the features of the two significant legal cultures for many decades; both cultures share similarities, but they are also very different in certain aspects. The most basic differentiation one could see is the following: common-law is based on precedent and case-law, as opposed to the written, codified law of continental civil law systems. “Judge-made case law versus written law; so called customary law versus statutory, mostly codified law; rule of *stare decisis* versus independence from precedents” (Craig,

n.d., p. 53). However, Craig also notes that the fundamental difference between the systems stems from the "profound diversity of the elementary notions and concepts and of their arrangement that causes, and accounts for, the great difficulties in mutual understanding" (p. 54).

What has been pointed out in numerous comparative studies, is the notion of logic versus experience. Civil law systems are characteristically more deductive, which might be traced back to the Cartesian rationalism theory (Orts, 2017). The British Isles were, in a sense, developing differently – those differences can be observed not only in law, but also art or philosophy. The dominant theory in the English-speaking lands was empiricism that was based on observation and experience. This differentiation between the two philosophical trends suggests the following: continental civil law is a rationalist system that relies on a "coherent system of rules, from which all possible solutions can be deduced." (p. 21) The deductive system of continental law is at odds with the inductive common-law, which not a "strictly codified but it made up of specific cases, the main legal source of which is the precedent." (p. 22)

A judge, whose role in the common-law system is extremely important, creates and refines the law (sometimes it is referred to as judge-made law). In the continental legal systems, the role of the judge is not to create the law but to interpret it in accordance with the codified legislature. Nevertheless, this difference is not absolute, because even in continental systems, case-law is significant for future interpretation. This difference is reflected also in the systematization of courts; continental legal systems prefer the specialization of courts based on the areas of law, rather than having an integrated court system (Orts, 2017).

The differences entail certain functional problems: the principle of equity which in continental systems is seen as the "principle of fairness and justice embodied in the laws" (Orts, 2017, p. 25), division of private law, different Latin maxims, and possible false cognates. These issues arise not only when translating from non-English to English, but also when using English as the original language of a document not governed by the common law.

Despite the fact continental law is not part of the analysis, it is important to consider the differences and similarities, as there is a certain overlap, especially on the international and EU level.

2.3.1.3 International law and the United Nations

International law, or public international law may be defined in multiple ways, depending on the perspective; international law includes:

a) rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals; and

b) certain rules of law relating to individuals and non-states so far as the rights or duties of such individuals and non-state entities are the concern of the international community (Kaczorowska-Ireland, 2015, p. 1)

The origin of international law can be traced back to 2100 BC when the first treaties were recorded. The need for establishing rules governing relationship between citizens and foreigners was important, as empires would expand their territories by raiding close-by cities, and the then societies were divided into social classes that were each regulated by different set of laws, reflecting the hierarchy. The Middle Ages marked the establishment of rules for conduct between merchants.

One of the more significant documents that marked the start of the classical period of international law was the *Treaty of Westphalia*, also referred to as the constitutional treaty of Europe, signed in the year 1648 (Kaczorowka-Ireland, 2015). The classical period lasted until 1815 when Congress of Vienna took place and it resulted in codification of "diplomatic agents and missions, prohibited slave trading and laid the foundations for the free navigation of rivers" (p. 3). The Congress was a milestone in the history of international law and international collaboration.

The twentieth century was a tumultuous period and called for establishment of an international law of peace. The League of Nations founded in 1920 was a failed attempt; the later attempt in 1945, the United Nations Charter, succeeded. New bodies of authority that started generating judgements and overseeing the issues regarding human right were established: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); other tribunals were established for Kosovo, Cambodia, Sierra Leone, etc. – all of which were under the framework of the United Nations (Kaczorowska-Ireland, 2015). Because international law is necessary for the cooperation and coexistence of states, it becomes necessary to establish rules and regulations to govern such cooperation; the General Assembly of the United Nations established the International Law Commission (ICL) as the body tasked with the codification of the international law, which has been active since the year of its conception, 1947.

It is important to note that the UN currently has six official languages: Arabic, Chinese, English, French, Russian and Spanish (*Official Languages*, 2020, June 8). The UN prioritizes multilingualism for the purposes of better and clearer communication and tolerance. In its beginning, the working languages were English and French despite the fact that Chinese, Russian and Spanish were also official languages of the UN. Gradually, the goal to make the UN into a tolerant environment that would not favour one language at the expense of the other, was achieved.

2.3.1.4 European Union law

The beginnings of the European economical and political cooperation were marked by the establishment of the European Coal and Steel Community (ECSC) in 1951. In 1957, the European Economic Community (EEC) was established. The founding countries of ECSC were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Currently, the EU has 27 member states.

As opposed to the UN, the European Union, while not having a constitution per se, does produce a vast amount of codified legislation in forms of regulations, directives, judicial decisions, and other. The status of international law is not identical to the EU, as some are reluctant to acknowledge international "law" precisely for the reason it lacks major codification, and the enforcement of the treaties and principles is not necessarily uniform, because the mechanism is very different to the ones adapted on the national or EU level. The EU obliges its members, who enter the Union voluntarily, to limit their sovereignty and recognize the primacy of the Union law; the task of the EU institutions is to enforce the adherence to and compliance with the law.

Like the United nations, the European Union values multilingualism and clear international communication, democracy, and transparency (*Press Corner*, n.d.). There are 24 official languages of the EU, reflecting all the languages of its members, and the legislation is published in all of these 24 languages. However, it is not always that documents are translated into all the official languages, the following statement is published on the official EU webpage:

> Documents are translated according to established priorities: these depend on the target audience and the purpose. Legislation and documents of major public importance or interest are produced in all 24 official languages. Other documents (e.g. correspondence with national authorities and decisions addressed to particular individuals or entities) are translated only into the languages needed.

The so-called "procedural languages" of the European Commission are English, French and German. The EU does not favour any one language over the other; nevertheless, it is necessary to point out that due to its international aspect, it reaches over the constraints of the European continent, where English might prove to be the more universal language.

To uphold a great quality of communication and transparency, the EU employs a vast number of translators (around 3 000) and interpreters. For the legislative drafters, the EU has issued the *Joint Practical Guide* (2015) that provides guidelines for drafting documents. The first chapter of these guidelines, "General Principles", describes the necessary prerequisites for a good draft:

> **The drafting of a legal act must be:**
>
> > **clear**, easy to understand and unambiguous;
>
> > **simple** and concise, avoiding unnecessary elements;
>
> > **precise**, leaving no uncertainty in the mind of the reader. (p. 10)

The rules for drafting as described by the guide are in line with what is expected from legal language; but upon inspection of the guide, it is interesting to see that there are numerous occurrences of the modal verb *shall*. The EU is deemed the most *shall*-resistant of all the systems (Cooper, 2011), perhaps even indicating increased frequency of use. With this in mind, the following chapter of the thesis is delving into the explanation of the controversial 'shall'.

2.3.2 Misuse of *shall* in legal English

The title of the chapter hints at an issue that there might be a certain issue surrounding the modal verb *shall*. While the chapter dedicated to describing modality and its types was an introductory theoretical background, this one is to be dedicated to shedding light on the issue that *shall* poses in the modern legal English drafting. Bryan Garner, a well-known proponent of plain English and the chief editor of the Black's Law Dictionary, stands behind his statement "delete every shall" (Garner, 2001, p. 105). One of the important reasons for such a statement is that *shall* is grossly misused; as Kimble puts it: "*shall* is the most misused word in the legal vocabulary" (Kimble, 1992, p. 61) Yet, *shall* still remains a very important word in legal English, because it is supposed to impose duty.

2.3.2.1 Reasons behind misuse and overuse of *shall*

Generally speaking, law schools teach the future lawyers that using *shall* is correct, and its use is further reinforced when students read countless judicial decisions, statutes, and regulations, where the modal *shall* is sprinkled through the texts countless times. A comparison with general English might be helpful to explain the phenomenon; Bázlik and Ambrus (2009) have concluded that *shall* is "the verb with the highest frequency in legal English, and the second least frequent central modal in the non-legal settings" (p. 65). In general English, *shall* might be used to imply futurity, rather than impose obligation like the modal *shall.* This can cause issues - first: for the drafter; second: for a lawyer or anyone else who needs to interpret its meaning. The assumption would be that it is expressing obligation, but thorough research of case-law and legislation has shown that it is often used incorrectly, thus creating the unfavourable ambiguity.

Shall is among the "words of authority". Garner (1995) argues that "this word runs afoul of several basic principles of good drafting. The first is that a word used repeatedly in a given context is presumed to bear the same meaning throughout. (*Shall* commonly shifts its meaning even in midsentence.)" (p. 939) Not all the *shall*-critics are necessarily suggesting the complete removal of *shall* from legal drafting – using it correctly might overcome the problems tied to it. But some guidelines have tried to make it a rule to use *shall* solely to express duty without much success. Recommending drafters

to use one meaning of such a volatile verb such as *shall,* and forgetting to take into account for how many years it has already been misused, will only result in yet another incorrect use of *shall.*

2.3.2.2 Semantics of *shall*

The authority for establishing the semantics of *shall* in legal discourse would be the *Black's Law Dictionary* edited by Garner (2004), which describes 5 meanings of *shall* that can be encountered in legal English:

1. Has a duty to; more broadly, is required to <the requester shall send notice>
2. *Should* (as often interpreted by courts) <all claimants shall request mediation>
3. *May* <no person shall enter the building without first signing the roster> When a negative word such as not or no precedes *shall* (as in the example in angle brackets) the word *shall* often means *may*. What is being negated is permission, not a requirement.
4. *Will* (as a future-tense verb) <the corporation shall then have a period of 30 days to object>
5. Is entitled to <the secretary shall be reimbursed for all expenses>.

   Only sense 1 is acceptable under strict standards of drafting. (p. 1407)

As the last sentence of the word entry suggests, the only acceptable meaning is the expression of duty, which has been emphasized in the previous chapters of this thesis. In the *Dictionary of modern legal usage*, Garner (1995) further explores all the potential shades of *shall*, of which there are in total eight. The shades of *shall* are however subtle and at times difficult to discern; for that reason, the analytical part of the thesis will deal only with the 5 basic meanings of *shall* as described in the Black's law dictionary (2004).

Cooper quotes Triebel (as cited in Cooper, 2011) in his essay *Is there a case for the abolition of shall from EU legislation?*: "*Don't use shall for any purpose – it is simply too unreliable.* For the future tense, *will* and not *shall* should be used." (p. 19) McLeod's (as cited in Cooper, 2011) example illustrates the problem of *shall* on a "statutory scheme which provides for the creation of new tenancies":

> '...no application *shall* be entertained unless...' it was made within a specified period.
> Does this mean:
> - If an application is made within the specified period the landlord must grant a new tenancy?
> - If an application is made outside the specified period the landlord has no power to grant a new tenancy?
> - If an application is made late the landlord may (has discretion to) grant a new tenancy?

The provided example can illustrate rather well the potential interpretative issues *shall* creates. If legal texts are supposed to be precise, clear, and unambiguous, *shall* will not cease to be the source of problems as long as it is used, and will inevitably sustain the myth of precision.

2.3.2.3 The Golden Rule of drafting

Dickerson's (as cited in Garner, 1995) description of the Golden Rule of legal drafting is the following:

> The competent draftsman makes sure that each recurring word or term has been used consistently. He carefully avoids using the same word or term in more than one sense... In brief, he always expresses the same idea in the same way and always expresses different ideas differently. (p. 940)

The Golden Rule is simple, to not use the same word in more than one sense.

As has been pointed out, there is not a uniform consensus over how to use *shall* in legal drafting; there are different approaches to the issue which are categorized by Garner (1995) in the following manner: the "American rule"; the "ABC rule"; and without any specific name – the "do nothing" rule. Each one of these rules is different in its treatment of *shall*.

The "American rule" is called so because it is followed by some American drafters, who are attempting to limit the use of *shall* to its one acceptable meaning, as described in *Black's Law Dictionary*, the EU *Join Practical Guide*: expression of duty. However, the application of the rule is inconsistent, mainly due to the nature of the American legal system, and the federal and state division.

The "ABC rule" suggests practically complete avoidance of *shall*, because it is nearly impossible to limit it in a way that would be followed by all drafters. Its name is derived from the three biggest advocates of this rule in the late 1980s: Australia, Britain, Canada – ABC. Unsurprisingly, the ABC rule has infiltrated also the American environment because of the success in the ABC states (Garner, 1995). In addition to the ABC states, other ones have been able to adapt the new drafting rules rather successfully: New Zealand and South Africa.

The last approach, "do nothing" is transparent. Garner describes this approach: "to allow *shall* its traditional promiscuity while pretending, as we have for centuries, that preserving its chastity is either hopeless or unimportant. Of course, that approach breeds litigation..." (p. 940). The motivation for the approach might be many-fold: the want/need to preserve the traditional methods of drafting; the possible reluctancy toward change; or the uncertainty in how to achieve the goal.

2.3.2.4 *Shall* outside the legal world

Gotti (2003) analysed research done on the topic of *shall* and the frequency of the modal verb. He states that *shall* "is relatively rare in the English language; indeed it is the least frequent central modal verb, with an average frequency of about 3.5 per 10,000 words" (p. 268). The data shows that *shall*, while infrequent in many genres, it is still prevalent in the academic discourse (and in the legal sphere).

Shall is semantically mainly deontic and dynamic, the epistemic meaning of *shall* is not as frequent. Quirk et al. (1985) note the following:

> **[d]** Regarding the frequency of the modal auxiliaries, the following findings, based on studies of the SEU, Brown and LOB corpora, are of significant interest:
>
> **(a)** The frequency of individual modals varies greatly from *will* (four times per thousand in spoken BrE) to *shall* (three times per ten thousand words in written English). The marginal modals *ought to*, *need*, and *dare* are in their turn strikingly less frequent than *shall*.
>
> **(d)** Among less frequent modals, *should, shall,* and *ought to* are even less frequent in AmE than in BrE. (p. 136)

Corpus-based research confirms the decline in frequency; Millar (2009) notes that "The decline has been most pronounced for *shall* – a steady fall from over 200 words per million in 1923 to less than 10 words per million in 2006." (p. 200) The data is extracted mainly from Leech's (2003) paper published in the *Modality in Contemporary English,* where he asserts the following regarding modals of obligation: "after a period of expansion in earlier Modern English, the modals have been starting to decline in recent Modern English." (p. 235) Leech's comment is based on research data published in *Corpus Linguists: Investigating Language Structure and Use* by Biber, Conrad and Reppen; specifically, a study based on the ARCHER historical corpus.

2.3.2.5 Possible substitutes

As the critics of *shall* in legal discourse are suggesting the exclusion of *shall* from legal drafting, it is necessary to map all the possible substitutes that might take on the role of *shall*, without taking on the same problems and producing the undesirable imprecision and ambiguity.

Asprey (1992) suggests the following options:

> Must for the imperative shall – whether we want to impose an obligation or a duty, or make a direction, whether or not we do it by contract or statute, and regardless of what the penalty is;
>
> Will for the simple future; and
>
> The present tense for just about everything else – for a statement of fact, legal result or agreement (the law or contract always speaking) (p. 79)

The Plain English Manual (2016) published by the Australian Office of Parliamentary Counsel suggests the similar as Asprey: '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' (p. 20).

3 Material and Method

3.1 Corpus selection and method of analysis

Selecting the proper subgenre of legal texts for analysis was a complicated task. It is possible to combine multiple subgenres in order to analyse the frequency, but a combination of those might produce distorted results; a separate analysis appeared too extensive for a BA. If the main purpose was to analyse deontic *shall* in legislature, one would be inclined to research data in statutes, acts, and legislation in general, as it is the main source that imposes duty; however, due to the fact that legislation is not a constant and it is likely to be amended several times, particularly when a diachronic corpus is in question, it becomes problematic to locate the original version of such legislation, especially digitized and available on the web. Judgements, court decisions and opinions are less problematic: they do not undergo changes and amendments similar to legislation, therefore they are likely to produce more reliable results. Another benefit of court decisions is its representativeness of the less formulaic judge language. While drafting manuals apply mainly to legislation, there is a certain overlap between the court proceedings language and the language of legislation due to its mutual influence, and the requirement to reference legislation/contracts to which the judgement is referring to.

Because the analysis maps the development of *shall*, it was necessary to select a time frame that would be sufficiently representative of changes in its development. As 3 legal systems were analysed: **common-law systems** (specifically USA, UK, and Australia), **international law system** (UN is used as the basic source), and **the EU**, certain criteria had to be taken into consideration.

I chose the year of the Declaration of Independence of America (1776) as the approximate starting point of my analysis, because it marked the separation from UK and its law. A time period of 240 years was analysed, further divided into twelve 20-year periods, forming the subchapters of the research part of my thesis. International law (tied to the UN, specifically ICJ) and EU law was possible to analyse only since its inception, the second half of 20th century, hence they are present only in the last block of 60 years.

Choice of diachronic corpora was an uneasy task, mainly due to the fact that legal corpus linguistics is a fairly new discipline. Pre-existing corpora were selected for USA and the EU. The corpora for UK, Australia, and international law were created for the purposes of this thesis. Opting for the purpose-created corpora was motivated by the fact that especially for Australia and international law, there is no freely available corpus. The sizes of used corpora are not same compared to the pre-existing ones; however, because the frequency is expressed in item-per-million relative frequency, the difference in size of corpora does not distort the results.

The text selection for the UK law corpus was partially inspired by the existing corpus CHELAR. I hand selected texts from ***English law reports***[1] for 1780-1873, the ***United Kingdom House of Lords cases***[2] for 1874-2009, and the ***United Kingdom Supreme Court cases***[3] for 2010-2020. For the text analysis, I used the freeware corpus toolkit **AntConc**. Because the English law reports were available only as PDF scans of the original documents, it was necessary to run them through an Optical Character Recognition (OCR) program. For that, I used the Nitro professional software that allowed me to run PDF documents in batches through the **OCR**, converting them into an editable *.docx* Word document. Because AntConc only allows files in the *.txt* format to be uploaded, it was necessary to convert the Word files – I created a macro in the MS Office Word that allows converting a folder of Word documents into plain text files. The converted documents were then input to AntConc and further analysed for word count, frequency of *shall,* and concordance used for random sampling for the semantic analysis.

The Australian corpus was created similarly to the British one, combining several sources of court cases and law reports. The Australian corpus is compiled starting 1820 (the third period). The texts were compiled per period, not separately by text per file; therefore, the exact number of documents is not recorded. The approximate number of texts per period is 40. **Table 2** records the word and document distribution of the corpora. The OCR method was used identically as described in the previous paragraph.

Source	Period
Legge's Supreme Court Cases (New South Wales)[4]	1820-1860
Law Reports (New South Wales)[5]	1861-1900
State Reports (New South Wales)[6]	1901-1960
High Court of Australia[7]	1961-2020

Table 1. List of sources: Australian corpus

	US		GB		AU	
	Texts	**Words**	**Texts**	**Words**	**Texts**	**Words**
1780-1840	1 563	5 950 197	275	836 754	40	72 560
1841-1900	12 196	33 952 555	90	441 049	120	350 011
1901-1960	14 772	37 186 681	52	382 508	120	350 798
1961-2020	38 733	32 831 594	58	618 055	120	442 395

Table 2. Corpus distribution of texts and words 1780-2020, common-law

[1] http://www.commonlii.org/uk/cases/EngR/
[2] https://www.casemine.com/
[3] https://www.casemine.com/judgments/uk/United%20Kingdom%20Supreme%20Court
[4] https://www.austlii.edu.au/cgi-bin/viewdb/au/cases/nsw/NSWLeggeSC/
[5] https://www.austlii.edu.au/cgi-bin/viewdb/au/cases/nsw/NSWLawRp/
[6] https://www.austlii.edu.au/cgi-bin/viewdb/au/cases/nsw/NSWStRp/
[7] https://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/HCA/

The corpus for international law was compiled using solely **International Court of Justice** judgements and advisory opinions (1960-2020). The texts are available on the official web page of the ICJ[8] in PDF formats, requiring the use of OCR and batch processing method.

For the EU corpus, I used the **EUR-Lex judgements English 12/2016** (available in SketchEngine[9]), which is a compilation of EU judgements starting from the 1950s until the 2010s. The subcorpora are divided into decades, which was useful for my analysis, as I was able to extract the exact word numbers and relative frequency per decade. I also used the option to download the concordance to use a random sample for the semantic analysis (compiling them in MS Excel for in combination with the rest).

	EU		INT	
	Texts	**Words**	**Texts**	**Words**
1961-2020	10 049	41 798 487	37	841 664

Table 3. Corpus distribution of texts and words, EU & international law

In the final part of the research section, I dedicate myself to comparing general and legal English, the details are described in the **Chapter 4.3**.

The analysis is two-fold: the frequency of *shall* + the semantics of *shall* as described by the Black's Law Dictionary (5 meanings). For the analysis of semantics, a random sample out of all the legal systems/countries for the given period was analysed. The frequency is calculated by using the item-per-million formula (n equals the number of occurrences of a word, c equals the actual size of the corpus):

$$i.p.m. = \frac{n}{c} * 1{,}000{,}000$$

3.2 Hypothesis

My hypotheses are for the thesis are:

1. Imprecision in the use of the verb *shall* has been increasing due to its polysemy.
2. The frequency of the verb *shall*, while nowadays scarce in general English, has not been declining so rapidly in legal English, as it has in general English, remaining prevalent in contemporary legal language.

[8] https://www.icj-cij.org/en/decisions
[9] https://app.sketchengine.eu/

4 Research part

4.1 Frequency of *shall*

The first section of the research part is dedicated to analysing the frequency of the verb *shall* between **1780** and **2020**. **Table 4** below shows the distribution of words per **20-year periods** since **1780 to 2020** (column **Words**), alongside the absolute frequency of *shall* in the specific periods and subcorpora (column **Occ.**).

	US		GB		AU		EU		INT	
	Words	**Occ.**	**Words**	**Occ.**	**Words**	**Occ.**	**Words**	**Occ.**	**Words**	**Occ.**
1780-1800	217 828	534	179 180	234	x	x	x	x	x	x
1801-1820	1 621 532	3 297	242 516	346	x	x	x	x	x	x
1821-1840	4 110 837	6 921	415 058	500	72 560	153	x	x	x	x
1841-1860	6 187 256	9 535	110 459	166	130 223	197	x	x	x	x
1861-1880	7 071 221	11 476	195 827	239	107 625	111	x	x	x	x
1881-1900	20 694 078	37 420	134 763	108	112 163	172	x	x	x	x
1901-1920	10 427 868	18 041	104 592	58	107 197	106	x	x	x	x
1921-1940	18 278 214	29 019	110 890	52	120 413	69	x	x	x	x
1941-1960	8 480 599	6 842	167 026	112	123 188	158	x	x	x	x
1961-1980	13 945 508	8 118	213 259	114	114 066	90	1 834 639	2 288	257 734	154
1981-2000	15 867 421	6 549	152 415	118	147 388	110	11 411 044	6 997	172 928	146
2001-2020	3 018 665	1 285	252 381	112	180 941	53	28 552 804	50 052	411 002	238
Total	**109 921 027**	**139 037**	**2 278 366**	**2 159**	**1 215 764**	**1 219**	**41 798 487**	**59 337**	**841 664**	**538**

Table 4. Distribution across (sub)corpora: total word count & occurrences (Occ.) of *shall*, 1780-2020

As the analysis focuses only on the verb *shall* (excluding differently spelled forms, or forms such as *should*), it was not necessary to input CQL queries, a simple query in both the COSCO-US and the **AntConc** manually compiled corpus was sufficient. The COSCO-US results were grouped by years, the data was then downloaded into .xlsx format and further analysed using MS Excel, as it was easier to navigate the data in Excel than the original corpus app. This method was used for all subsequent periods.

In addition, it is important to consider the limitations of the OCR method of converting documents, especially in the first 4 periods, where the documents were many times of lower quality and the OCR would misread certain characters, potentially skewing the total number of words and possibly the occurrences of *shall* in cases, where the OCR would misread the words and interpret them as different letters.

There are differences in the sizes of the corpora, especially when comparing the pre-existing ones (COSCO-US and EUR-lex) to the purpose-compiled GB, AU, and INT corpora. Nevertheless, relative frequency is the optimal tool for such cases when there is a difference in the sizes of corpora and allows for representative results, as described above.

	US		GB		AU		EU		INT	
	i.p.m.	Diff(%)	i.p.m.	Diff(%)	i.p.m.	Diff(%)	i.p.m.	Diff(%)	i.p.m.	Diff(%)
1780-1800	2 451	x	1 306	x	x	x	x	x	x	x
1801-1820	2 033	-17%	1 427	+9%	x	x	x	x	x	x
1821-1840	1 684	-17%	1 205	-16%	2 109	x	x	x	x	x
1841-1860	1 541	-8%	1 503	+25%	1 513	-28%	x	x	x	x
1861-1880	1 623	+5%	1 220	-19%	1 031	-32%	x	x	x	x
1881-1900	1 808	+11%	801	-34%	1 533	+49%	x	x	x	x
1901-1920	1 730	-4%	555	-31%	989	-35%	x	x	x	x
1921-1940	1 588	-8%	469	-15%	573	-42%	x	x	x	x
1941-1960	807	-49%	671	+43%	1 283	+124%	x	x	x	x
1961-1980	582	-28%	535	-20%	789	-39%	1 247	x	598	x
1981-2000	413	-29%	774	+45%	746	-5%	613	-51%	844	+41%
2001-2020	426	+3%	444	-43%	293	-61%	1 753	+186%	579	-31%

Table 5. Item-per-million frequency of *shall*, 1780-2020

Table 5 presents the i.p.m. frequency of *shall* based on the analysis of all the corpora. As has been explained before, the **AU** corpus was compiled starting from **1821** due to certain limitations with regard to available documents. The **EU** and **INT** corpora are included in the last 3 periods starting from **1961**, motivated also mainly by the lack of documents in the selected subgenre in the previous 1941-1960 period.

4.1.1 1780-1800

The first analysed period where only data from GB and US corpora are available, shows a significant difference in the i.p.m. frequency between the two common-law systems. While the GB frequency hovers over 1 000 i.p.m., the frequency of *shall* in the US corpus for the **1780-1800** period crosses 2 000 i.p.m., creating a difference of **1 146 i.p.m.** between the two.

The difference in size of the subcorpora is not very significant, especially when compared to the following periods, therefore it would not be a contributing factor to the difference in the frequencies. A possible explanation between the difference is the previously mentioned declaration of independence of the United States. The switch to an independent system might have initiated a new wave of need for interpretation and re-interpretation of laws and contracts, that were, up until that point, dependent on the British legislature and precedent.

4.1.2 1800-1820

In the following period **1800-1820**, there is a **9% increase** in relative frequency in the GB corpus, while the frequency in the US corpus **decreases by 17%**. However, the relative frequency of *shall* in the US corpus remains above 2 000 i.p.m., while the GB does not go above 1 500.

While in the previous period, the sizes of the subcorpora were comparable, the pre-existing US subcorpus is much larger than the GB subcorpus (US = 1 621 532 words; GB = 242 516 words). However, as the changes in the relative frequency are not as significant, the size of the corpus does not seem to be a contributing factor to the difference between the US and GB frequencies. The possible reason likely remains the same as in the previous period – transformation of the legal system.

4.1.3 1821-1840

With the addition of the AU corpus, new data is available. The AU corpus, while **56 times** smaller than the US corpus, and almost **6 times** smaller than the GB corpus, shows a rather high relative frequency: **2 109 i.p.m.**, which comes close to same values as the US corpus in the previous periods. Interestingly, there is a **17%** decrease in the relative frequency in the US corpus, demonstrating a gradual decrease in the relative frequency of *shall* distributed among the subgenre of legal decisions. GB follows the same declining trend (by **16%**).

The AU corpus shows the highest relative frequency among the three common-law cultures for the **1821-1840** period. The texts for this AU subcorpus were compiled from the cases decided by the New South Wales Supreme Court, which was established only in the 1820s, therefore explaining first: the size of the subcorpus; second: possibly the higher relative frequency – the highest court in the hierarchy with an unlimited jurisdiction in both civil and criminal cases.

4.1.4 1841-1860

In this period, the results show that the frequency in the common-law states was approximately the same, around **1500 i.p.m** for all three, which signifies the following: the frequency in the AU corpus decreased, specifically by **28%** (dropping below 2 000 i.p.m.); and the frequency in the US corpus decreased (continuing the trend from previous periods) by **8%**, indicating a gradual decline in the usage of *shall* in both the US and AU corpus. However, GB breaks the trend in this period, as the relative frequency raises by **25%** compared to the previous period.

Despite the fact that the GB subcorpus for this period is the smallest in size due to the limited number of documents found for this period in the *English Law Reports*, it was the only one of the three common-law systems showing an opposing trend. It is important to point out that there are certain court decisions in which there is a higher percentage of references to certain statutes (the main prescriptive legal documents), and might possibly cause certain fluctuation in the frequency, as the text selection in this period was not particularly motivated by anything else than the necessity to compile enough texts to create a representative subcorpus.

4.1.5 1861-1880

The lowest relative frequency in this period can be observed in the AU corpus, with a **32%** decrease to **1 031 i.p.m.** There is a slight fluctuation present in the GB corpus, as the frequency decreases by **19%**, while in the US corpus, and the declining trend breaks and the relative frequency increases by **5%.**

The size of the US corpus is, compared to the other two corpora, gradually increasing (**7 million word** subcorpus for 1861-1880), while the GB and AU corpus usually fluctuate between 100 and 150 thousand words throughout all the periods. The decrease in the relative frequency in the AU corpus might be caused by the switch to a different source (for this and the following period): the *New South Wales Law Reports*. It is difficult to ascertain to what degree certain courts jurisdictions use *shall*, as it would require further analysis. Court decisions vary depending not only on the jurisdiction, but also the judge and the issue at hand that is decided in the case.

4.1.6 1881-1900

In this period, there is a rather big variation between the three common-law systems. While the relative frequency raises again (by **11%** to **1 808 i.p.m.**) in the US corpus, the frequency in the GB subcorpus drops significantly: by **34%**, falling below 1 000 i.p.m. The AU corpus spikes by almost **50%**, returning to its value in the **1841-1860 period**.

As I described in the chapter dedicated to the methodology, up until 1873, the texts were compiled from the *English Law Reports*, which aside from the **1841-1860 period**, allowed me to compile a subcorpus consisting of a higher number of texts. However, the House of Lords cases database held many documents which were merely two paragraph opinions interspersed with references to statute numbers not particularly relevant for the analysis, and it limited the possibilities, therefore decreasing the number of usable documents.

Going back to the US corpus, when realizing that while the US was its own sovereign state at that point, it was very much influenced by the formulaic language that was adapted from the British traditions. Another important fact to reiterate is that as the United States started producing their own legislation since the declaration of its independence, it motivated a need to interpret the new legislation by courts. Furthermore, the independence motivated a need to differentiate between the two sovereign states also on the language level. The **1861-1880** and **1881-1900** periods were also marked by significant changes in the American society due to the civil war, which was the reason for generating more new legislation subject to interpretation (indicated possibly by an increased number of court judgements, totalling 20 million words in the subcorpus). Therefore, it might explain why the US corpus indicates higher overall frequency than the other two. However, it is a rather speculative explanation which would

require further research that would include also the social and political aspects behind the legislature creation, which currently is not the subject of this thesis.

4.1.7 1901-1920

The relative frequency in the US corpus for the **1901-1920** period is significantly higher than the other two common-law systems. While the relative frequency in the GB corpus has decreased by **31%** to **555 i.p.m.**, the i.p.m. frequency in the US corpus remains above 1 500 (more than a 1 000 i.p.m. difference when compared to the GB corpus). The decrease in frequency in the AU corpus is **36%** compared to the previous period (**989 i.p.m.**), indicating certain fluctuation.

Despite the fact the relative frequency in the US corpus is the highest among the three in this period, it is slightly decreasing when compared to the previous two periods. The size of the subcorpus is almost 50% smaller than in the previous period. The decrease in all of the corpora with regard to size (especially the US corpus) and frequency might have been caused by the changing political environment of the period, as the global powers were turning their attention to the issues surrounding the World War I.

4.1.8 1921-1940

For the 1921-1940 period, in all of the corpora the frequency continually decreases, GB dropping below 500 i.p.m. (469 i.p.m.), which is a **15%** decrease compared to the previous period. The biggest percentual decrease is present in the AU subcorpus (**42%** decrease), the relative frequency higher by approximately 100 i.p.m. than the GB corpus frequency. The frequency in the US corpus continually remains above 1 000 i.p.m. (1 588 i.p.m.).

4.1.9 1941-1960

In both the GB and the AU corpus, there is a significant increase in frequency, GB corpus by **43%** (however only to **671 i.p.m.**, as the frequency in the previous period was already quite low), AU corpus by **124%**, resulting in **1 283 i.p.m.** frequency, therefore creating an anomaly in the analysed data and the previous trend. In the US corpus, the relative frequency continues decreasing without indication of such anomalies, that can be seen in the other two corpora. The relative frequency drops below 1 000 i.p.m. in the US corpus for the first time.

To find the reasons behind these fluctuations and significant changes, is rather difficult. For the US corpus, one reason might be the publication of new drafting manuals which could have potentially motivated a change in the trend of legal document drafting. But to address the increase of the frequency, I would mention the following: while court judgements are one specific subgenre of legal documents, there is great variation among them, because the courts in the common-law systems, as

explained in the theoretical part, are not as strictly separated into areas depending on the type of law, which is more common for the continental systems. I have observed that in the GB court decisions, cases dealing with tax inspection and collection were on many occasions mostly paraphrased statutes and acts, which would have contributed to an increased frequency of *shall*.

4.1.10 1961-1980

The **1961-1980** and the following periods produced the most interesting results thanks to the addition of the international and EU element with regard to frequency. As I have noted previously in the theoretical part of my thesis, EU is deemed to be *shall*-resistant, and as Table 5 shows, the relative frequency in the EU corpus is the highest, reaching **1 247 i.p.m**. The relative frequencies of all the systems, including the newly added international system, are below 1 000 i.p.m., GB corpus indicating the lowest frequency (**535 i.p.m.**) among all the analysed systems.

Of course, the EU corpus is different in size (the US corpus being the only one larger), but there are also other contributing factors to this difference in frequency. The relative frequency of *shall* in international law, for which the ICJ judgements were used, indicates that the tendency of the EU to (over)use *shall* has not been adapted by the UN institutions. However, there is an important difference between the two systems, which has been discussed in the theoretical part of this thesis: the EU is much more heavily reliant on legislature and codified text than the UN institutions are; therefore, when judgements are issued in the EU, the legislature is highly represented in the text of judgements, as interpretation of the EU legislation is very significant for its proper application by the EU member states. This difference is also important for comparing the EU with the common-law systems, which are mainly precedent based.

4.1.11 1981-2000

Interestingly, the frequency in the US system has dropped to the lowest value among all the analysed corpora, which compared to the previous periods, is a first. The relative frequency of *shall* in the US corpus decreased by **29%** compared to the previous period, dropping below 500 i.p.m. The slight fluctuation in the GB corpus does not seem very significant – an increase from **535 i.p.m.** to **774 i.p.m.**

It is necessary to address the sudden **51%** decrease in the EU system: the size of the subcorpus has increased by approximately 10 million words, but the frequency has decreased. It is difficult to assume that it is indicative of an important change, especially when comparing the frequency to the following period, in which the relative frequency raises above 1 000 i.p.m. again, returning to its previous relative frequency.

4.1.12 2001-2020

Considering the 3 types of approaches to *shall* as described in **Chapter 2.3.2.3**, the data indicates that the so-called ABC method adapted in Australia, Britain, and Canada, which attempts to decrease/remove *shall* from the legal discourse, was likely successful. It has to be noted, once again, that the corpora are compiled of court judgements, not legislature. The results for analysis of legislature might show different results. Nevertheless, the lowest relative frequency of *shall* recorded in the results is in the AU corpus: **293 i.p.m.,** a **61%** decrease from the previous period, the most significant decrease among the analysed systems.

Compared to the previous periods, the frequencies among the common-law systems in general are more levelled. The EU system demonstrates the highest relative frequency of *shall* with **1 753 i.p.m.**, a stark difference compared to the AU corpus. The assertion that EU is *shall*-resistant proves to be correct based on the analysed data.

4.2 Semantic analysis of *shall*

Because analysing the semantics of a word, especially one such as the modal verb *shall,* which proved to be problematic, is not necessarily exact, the results should be taken with reservations, as they are not nearly absolute. To interpret the meanings or senses, it was necessary to inspect the context further in cases where the meaning was unclear. Processing the sample, every one of the 5 meanings was assigned a specific colour to simplify the sorting. The task showed itself to be significantly more difficult, because in a number of cases, I was not completely certain about the semantic interpretation.

I opted for compiling the concordances from 3 periods into one, instead of separating the semantic analysis into 12 periods, thus creating the following periods: **1780-1840**; **1841-1900**; **1901-1960**; **1961-2020**.

	1780-1840		1841-1900		1901-1960		1961-2020	
	Occ.	%	Occ.	%	Occ.	%	Occ.	%
1. has a duty to	24	29.63%	17	36.17%	12	33.33%	16	43.24%
2. should	9	11.11%	3	6.38%	3	8.33%	1	2.70%
3. may	15	18.52%	4	8.51%	5	13.89%	7	18.92%
4. will	22	27.16%	11	23.40%	8	22.22%	8	21.62%
5. is entitled to	1	1.23%	4	8.51%	0	0.00%	0	0.00%
6. other	10	12.35%	8	17.02%	8	22.22%	5	13.51%
Total	**81**	**100.00%**	**47**	**100.00%**	**36**	**100.00%**	**37**	**100.00%**

Table 6. Semantic distribution of *shall*, 1780-2020

As **Table 6** shows, the distribution of meanings is not uniform, nor is the meaning of *shall* precise. To obtain the randomized sample, I compiled the concordances from the three 20-year periods into an MS Excel sheet, a procedure that I followed in each of the periods indicated in **Table 5**. To avoid subjective selection of the rows based on ease of interpretation and other potential motives, in the first column of the document, I inserted the **=RAND()** formula which generates a sequence of random numbers, copied the formula to every single row and then sorted the document in an ascending order, from largest to smallest.

	1780-1840	1841-1900	1901-1960	1961-2020
TOTAL HITS	11 985	59 424	54 457	76 424
ANALYSED	100	60	50	50
INTERPRETED	81	47	36	37
AMBIGUOUS	19 (19%)	13 (21.6%)	14 (28%)	13 (26%)

Table 7. Semantic analysis of *shall*: sample distribution

4.2.1 Semantic analysis: 1780-1840

For the **1780-1840** periodization (in total **11 985** rows), I selected the first **100 rows** for the purpose of the semantic analysis. I was able to interpret **81** of the meanings, **19** other were problematic, so I did not attempt to interpret them to not distort the results (see **Table 7**).

The results demonstrate that the modal *shall* has already been a source of possible misinterpretation 240 years ago. The total number of hits of the verb *shall* analysed were **81** (excluding the 19% that I was not able to interpret). The highest percentage of the hits were references to acts, statutes, and legislature in general, demonstrating that the modal *shall* is more prevalent in the prescriptive sphere of law.

Below are examples from the sample for each one of the meanings for **1780-1840**, taken from all three common-law states, the examples are listed in the same order as the meanings recorded in **Table 6**.

(1) ...and *shall* do them no injury or violence by...

(2) ...it *shall* be done by the court...

(3) ...of the Supreme Court, as often as any such doubts *shall* arise...

(4) ...or otherwise he *shall* not recover.

(5) ...who *shall* be entitled to certificates upon the oath of fidelity...

(6) ...all legislative powers herein granted *shall* be vested in congress.

The sixth meaning denominated "other" in **Table 6** is reserved mainly for when *shall* is used mainly to declare facts, in which cases the verb *shall* can be replaced by the verb *be* (in the present tense form *is/are*) with reference to the future.

The results from the semantic analysis also show that while legal language is expected to be prescriptive in certain subgenres of law, the drafters actually seem to be careful with absolute prescriptiveness.

4.2.2 Semantic analysis: 1841-1900

The following period that was analysed is **1841-1900**. As opposed to the previous period, the AU corpus is represented in all of the 20-year subcorpora. The semantic analysis was done on a smaller sample of **47 hits** of *shall*, the exact distribution is shown in **Table 6**. Decreasing the size of the sample was motivated by the above-mentioned reasons – ambiguity and issues with interpretation. The decrease might potentially skew the distribution of the meanings, as the randomized sequence is not driven by any certain criteria; however, as I am limited in my own ability to correctly interpret the senses in all of the cases, decreasing the sample size potentially decreased the percentage of possible incorrect interpretations. I decreased the number of rows to **60** (using round figures for easier orientation). The

total number of occurrences for this period was **59 424**, the method of selecting the 60 different rows for analysis was identical to the previous period – randomised sequence in the Excel sheet. I was able to interpret 47 out of the 60 occurrences of *shall* (21.6% left without interpretation).

The below examples are extracted from the sample used to interpret the meanings. The examples are again in the same order as the meanings in **Table 6**:

(7) ...the board of county commissions *shall* issue the bonds of said county of Johnson...

(8) ...it *shall* be sufficient to mention only the name or names of...

(9) ...but his property *shall* not be so chargeable.

(10) ...then gave reasons for our decision, some of which I *shall* repeat.

(11) It would then be, that no officer of the army *shall* receive any per cent...

(12) The Congress *shall* have power to levy and collect taxes, duties...

The results of the semantic analysis in the **1841-1900** period show a **6.54%** increase in the use of the **1. meaning** (*has a duty to*). This would signify a slight increase in precision, however, the verb *shall* is still distributed across the meanings, as shown in **Table 6**. The **4. meaning** (*will*) has the second highest distribution in the analysed sample.

4.2.3 Semantic analysis: 1901-1960

The sample for the 1901-1960 period consisted of **50** different occurrences of *shall* (decreased from 60). The total number of occurrences per this period was **54 457**. My method for selection remained identical. Out of the 50, I was able to interpret only **36** (leaving 28% without interpretation – an increased percentage of ambiguous occurrences when compared to the previous period).

The below examples are extracted from the sample used to interpret the meanings. The examples are again in the same order as the meanings in **Table 6** (except for the 5. meaning *is entitled to*):

(13) Every employer *shall* pay to each of his employees who is engaged in commerce...

(14) If any witness, so subpoenaed, *shall* fail or refuse to answer questions...

(15) ...no new state *shall* be established nor any grants of land made therein...

(16) In doing so we *shall* emphasize the consequences...

(17) ...a company under the last preceding section *shall* be repayable...

The semantic distribution remains similar to the previous period, but the **5. meaning** (*is entitled to*) drops to 0%. This is most likely caused by the smaller sample and the interpretative issues. Nevertheless, the 1. meaning *has a duty to* remains on the first position followed by the 4. meaning *will*.

There is a slight decrease of occurrences of the 1. meaning compared to the 1841-1900 period (**2.84%** decrease), therefore indicating a decrease in precision for the given period.

The examples in the semantic distribution of the **1901-1960** period listed above and the sample in general, indicate that the meaning which expresses futurity appears mostly in narrative sections, and sections where a judge is commenting on the case.

When interpreting the senses of *shall*, I have to consider the context in cases I am uncertain about the meaning of the specific occurrence. However, examination of the context proved to be futile in an increasing number of cases. In a sense, it is indicative of how specialized the language of law is: without a certain (hard to quantify how much) knowledge of legal English and the legal systems, understanding the meaning, and especially subtleties of legal language, is difficult.

4.2.4 Semantic analysis: 1961-2020

The last analysed period, **1961-2020**, consisted of the semantic analysis of **37 hits**. The total occurrences of *shall* per this period was **76 424.** The sample consisted of **50** occurrences; I was not able to interpret **13** of them (26% without interpretation).

The following examples demonstrate the use of *shall* in the **1961-2020** period, listed in the same order as the meaning of *shall* (except for the 5. meaning *is entitled to*):

(18) Member states *shall* ensure that compliance with requirements set out in....

(19) ...the importer *shall* nevertheless be able to withdraw his goods from customs...

(20) Such access *shall* be allowed, in any event...

(21) ...unless the High Contracting Parties *shall* agree to settlement by some other...

(22) ...the said issues *shall* be referred to as sub-grounds of...

The analysis shows a higher percentage of the duty-imposing *shall*, an increase by **9.91%**.

There are possible explanations behind the change in distribution of the meanings: the attempts to restrict the use of *shall* into only one sense, to impose duty. The methods to achieve this goal are present in the contemporary guidelines for drafting (some of which have been cited in the theoretical part of this thesis), which do not intend to completely remove *shall* from legal writing, but to restrict it, so as to make it more reliable. However, the semantic analysis in general shows that *shall*, despite the attempts, is not used in the desired manner and its semantic distribution still produces potential ambiguity.

4.3 Comparison with general English

To put the data analysed in the previous sections into perspective with the use of *shall* outside of the realm of law, I used the **COHA** corpus available online on the English-corpora[10] web page, which allowed me to look at the frequency in a more detailed manner. After I input the word *shall* into the search engine, I selected the chart view, which showed the data per decade since 1820. I extracted the information into an Excel file, where I further analysed the numbers and created a chart to represent the trend in legal English v. general English, comparing the relative frequency.

Because COHA is a corpus compiled of American English texts, I decided to compare the data only to the COSCO-US data, instead of using all of the analysed systems for comparison. The periodization was done similarly to the previous sections – divided into subperiods of 20 years.

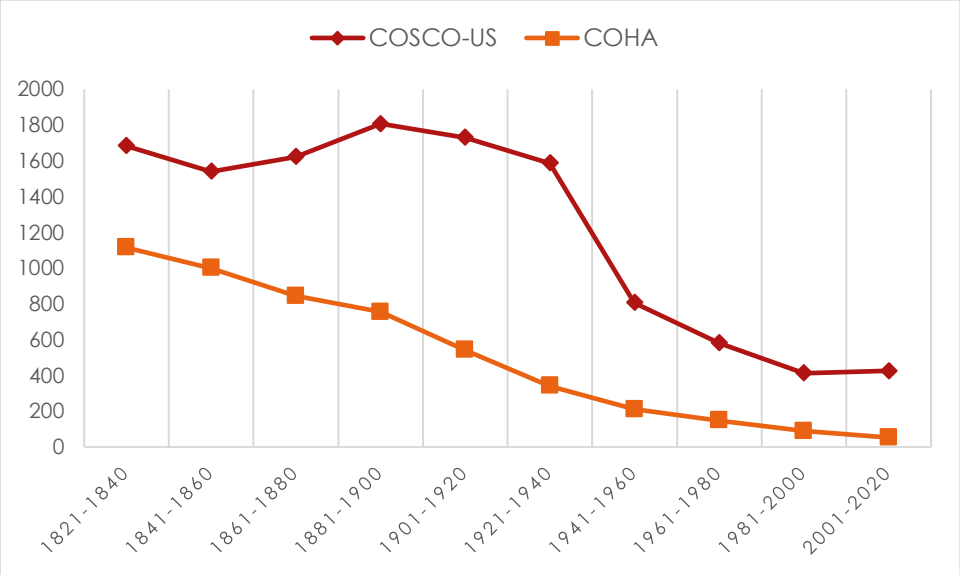

Chart 1. Item-per-million frequency of *shall*, COSCO-US v. COHA

	1821-1840	1841-1860	1861-1880	1881-1900	1901-1920	1921-1940	1941-1960	1961-1980	1981-2000	2001-2020
COSCO-US	1683.60	1541.07	1622.92	1808.25	1730.08	1587.63	806.78	582.12	412.73	425.68
COHA	1115.22	1000.46	844.62	754.33	541.63	341.29	211.07	148.66	89.92	53.21

Table 7. Item-per-million frequency of *shall,* COSCO-US & COHA.

The data extracted from the corpora shows, despite the spikes in the US Supreme Court corpus, a similar trend in the development of *shall* in both the legal English and general English. In both corpora, the use of *shall* has been gradually decreasing, however, the change in general English was more rapid, and the difference between the **1821-1840** and the **2001-2020** periods is:

[10] https://www.english-corpora.org/

- **-95%** for general American English
- **-75%** for American legal English

This difference is a testament to the fact that legal language remains more traditional and is not as flexible as general language.

5 Conclusion

The research part of my thesis has shown that my hypothesis that imprecision in the use of the verb *shall* has been increasing due to its polysemy was not correct. While *shall* shows to be imprecise, the tendency was such already in the first periods of my analysis. I contribute these assumptions to my own misconception about the myth of precision of legal language, as I expected it to be historically more precise, and that more imprecision was introduced only by the increasing number of legislations, drafters, and use of English in more environments and cultures.

In all of the analysed periods, the research revealed that *shall* has always been polysemous in legal usage, which, as shown by the data and the debate around the word, can be explained by the simple fact that while lawyers are knowledgeable in law, it does not entail the need to have exact knowledge of language and linguistics. Furthermore, drafting guidelines and modernization of legal English became a major debate only in the second half of the 20th century.

The analysis of the development of the relative frequency of *shall* confirmed second hypothesis, that the frequency of the verb *shall*, while nowadays scarce in general English, has not been declining so rapidly in legal English, as it has in general English, remaining prevalent in contemporary legal language. Overall, the use of *shall* has been gradually decreasing; but while it has almost disappeared from general use, it is still frequent in legal English and the decrease is not nearly as rapid.

However, the research part of the thesis has limitations due to the legal subgenre selection and the interpretative issues of the ambiguous *shall*. It would be beneficial to delve into an analysis of other legal subgenres to obtain a more comprehensive overview of the development of the modals in legal English. The thesis was partially motivated by the Plain Language Movement in attempt to show that the theories and guidelines proposed by the movement have merit, and the myths surrounding traditional legal language are at times slightly exaggerated. It has hopefully succeeded in both of these goals.

Sources

Asprey, M. (1992). Shall Must Go. *Scribes Journal of Legal Writing*, 3, 79-84.

Bázlik, M. & Ambrus, P. (2009). *Legal English and its grammatical structure*. Praha: Wolters Kluwer ČR.

Bhatia, V. K. (1993). *Analasying Genre: Language Use in Professional Settings*. Routledge.

Butt, P. (2002). The assumptions behind plain legal language. *Hong Kong Law Journal*, 32(1), 173-186.

Cambridge Dictionary. (2021a, January 6). *law definition.* https://dictionary.cambridge.org/dictionary/english/law

Cambridge Dictionary. (2021b, January 6). *legalese definition.* https://dictionary.cambridge.org/dictionary/english/legalese

Coleman, B. (1998). Are clarity and precision compatible aims in legal drafting. *Singapore Journal of Legal Studies*, 1998(2), 376-408.

Cooper, P. K. (2011). *Is there a case for abolition of 'shall' from EU legislation?* RGSL Research Papers.

Craig, P. M. (n.d.). *Structural Differences between Common and Civil Law*. Seminar (Jurist), 9, 50-71.

Endicott, T. (2001). Law is necessarily vague. *Legal Theory*, 7(4), 379-386.

European Commission. Legal Service. (2015). Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation. Publications Office. https://doi.org/10.2880/5575

Facchinetti, R., Krug, M., & Palmer, F. (Eds.). (2003). Modality in Contemporary English. Berlin: Mouton de Gruyter.

Friedman, L. M. (1986). *A History of American Law* (2nd ed.). New York: Simon and Schuster, Touchstone.

Garner, B. A. (2001). *Legal writing in plain English: a text with exercises.* Chicago and London: the University of Chicago Press.

Garner, B. A. (2013). Why lawyers can't write. *ABA Journal,* 99(3), 24-26.

Garner, B. A., Ed. (1995). *A Dictionary of modern legal usage*. New York: Oxford University Press.

Garner, B. A., Ed. (2004). *Black's Law Dictionary*. St. Paul: Thomson West.

Gerloch, A. (2013). *Teorie práva* (6th Ed.). Plzeň: Aleš Čeněk.

Huddleston, R., & Pullum, G. (2002). *The Cambridge Grammar of the English Language*. Cambridge: Cambridge University Press.

Kaczorowska-Ireland, A. (2015). *Public International Law* (5th ed.). New York: Routledge.

Kimble, J. (1992). The Many Misuses of Shall. *Scribes Journal of Legal Writing*, 3, 61-78.

Kimble, J. (1996-1997). Writing for Dollars, Writing to Please. *Scribes Journal of Legal Writing*, 6, 1-38.

Kimble, J. (2013). Wrong - Again - About Plain Language. *Michigan Bar Journal*, 92(7), 44-47.

Leech, G. N. (2003) Modality on the move: The English modal auxiliaries 1961-1992. In R. Facchinetti, M. Krug, & F. Palmer (Eds.), *Modality in Contemporary English* (pp. 223-240). Berlin: Mouton de Gruyter.

Maley, Y. (2014). The language of the law. In J. P. Gibbons (Ed.), *Language and the law* (pp. 11-50). Routledge.

Mellinkoff, D. (2004). *The Language of the Law*. Eugene: Resource Publications.

Millar, N. (2009) Modal verbs in TIME: Frequency changes 1923-2006. In Leech, G. N. (2011). The modal ARE declining. *International Journal of Corpus Linguistics*, 16(4), 547-564. https://doi.org/10.1075/ijcl.16.4.05lee

Office of Parliamentary Counsel. (2016) Plain English Manual. Australian Government.

Official Languages. (2020, June 8). United Nations. https://www.un.org/en/sections/about-un/official-languages/index.html

Orts, M. (2017). Legal English as the Lingua Franca for International Law. *VAKKI Publications*, 8, 17-28. shorturl.at/cnMPY

Osbeck, M.K. (2012) What is good legal writing and why does it matter. *Drexel Law Review*, 4(2), 417-466.
Palmer, F.R. (2013). *Modality and the English modals*. London: Routledge.
Popelier, P. (2000). Legal certainty and principles of proper law making. *European Journal of Law Reform*, 2(3), 321-342.
Press Corner. (n.d.). European Commission - European Commission. https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_825
Quirk, R. et al. (1985*). A Comprehensive Grammar of the English Language*. London: Longman.
Sastri, M. M. (1988). Legalese revisited. Law Library Journal, 80(2), 193-216.
Short Definition of Plain Language. (n.d.). https://www.plainlanguage.gov/about/definitions/short-definition/
Schane, S. (2002). Ambiguity and misunderstanding in the law. *Thomas Jefferson Law Review*, 25(1), 167-194.
Stark, S. (1985). Why lawyers can't write. *Bar Leader*, 10(6), 15-17.
Tiersma, P. (2008) The nature of legal language. In J. Gibbons, M. T. Turell, Eds., *Dimensions of Forensic Linguistics* (pp. 7-25). Amsterdam, Philadelphia: John Benjamins Publishing Company.
Tiersma, P. M. (1999). *Legal Language*. Chicago and London: the University of Chicago Press.
Tiersma, P. M. (2006). Some myths about legal language. *Law, Culture and the Humanities*, 2(1), 29-50.
Viswanathan, T. K. (2007) *Legislative Drafting: Shaping the Law for the New Millennium.* Indian Law Institute.
Williams, C. (2007). *Tradition and Change in Legal English: Verbal Constructions in Prescriptive Texts.*
Williams, G. (1945). Language and the law I. *Law Quarterly Review*, 61(1), 71-86.
Wydick, R. C. (2005). *Plain English for Lawyers.* (5th ed.). Durham: North Carolina: Carolina Academic Press.

Résumé

Teoretická část bakalářské práce se z počátku zabývá popisem modality a modálních sloves z obecného hlediska, s cílem představit problematiku modality a představit pozici slovesa *shall* v rámci anglického jazyka.

Dále se teoretická část práce zabývá popisem, definicí a charakterizací právního jazyka, kde se nejvíce zaměřuje na otázky přesnosti a otázku intepretace. Přesnost je jednou z typicky popisovaných charakteristik právního jazyka, nicméně diskuse, která toto téma obklopuje, nedochází k identickému závěru vzhledem k tomu, že ve světě existují různé pohledy na to, jak přesnosti docílit. Zatímco tradicionalistický pohled na právní jazyk má za cíl uchovat tradiční maximy právního jazyka bez větších revolucí a změn, v 50.-60. letech 20. století se ve Spojených státech amerických se v kruzích lingvistů a pak i právních expertů začíná probouzet hnutí, které si klade za cíl tyto tradicionalistické přístupy zbourat a modernizovat tak, aby se právní jazyk přizpůsobil době, ve které se nalézá.

Právníci a právní jazyk jsou obklopeni obecně mnohými stereotypy, které se snaží vysvětlit, proč je právní jazyk natolik rigidní, a proč někteří právníci způsob svého vyjadřování nehodlají měnit. Jsou tu tací, kteří tuto nepružnost přičítají tomu, že právní jazyk je neprůhledný naschvál – pokud by právní jazyk byl příliš jednoduchý, všichni by ho chápali a nebyla by potřeba ho interpretovat, právní profese by tím ztratila velkou část své klientely. Výklad je totiž důležitou součástí, která je základem pro formování toho, jakým způsobem je zákon aplikován. I v případě, že by byl jazyk naprosto zjednodušen tak, že by bylo možné zákony číst stejně snadno jako noviny, výklad by byl vždy potřebný. Právní jazyk totiž nemůže být vždy napsán tak, aby ho bylo možné jednoznačně vyložit restriktivně. Zákony často totiž potřebují být vágní a flexibilní, jinak se lidé začnou odvolávat na to, že po subjektivním výkladu docílili toho, že se musí chovat pouze tím způsobem, který je vytyčen v daném ustanovení. Ve své podstatě ale nic nebrání tomu, aby bylo alespoň ve sférách smluv zjednodušeno tak, aby minimalizovalo náklady a nebylo tak náročné na výklad pro laiky.

Teoretická část se dále zabývá popisem a kategorizací právnické angličtiny, jakožto univerzálního jazyka práva. Nejprve mapuje vývoj právnické angličtiny ve své prapůvodní zemi, a to Velké Británii, ve které právnická angličtina nepřekvapivě na území Normany dobyté Anglie, bojovala o svou pozici s tehdejší francouzštinou a latinou. Anglický jazyk byl obecně ovlivněn oběma jazyky, ale ve sféře práva byl tento vliv v jisté míře značnější.

Díky expanzi Britského impéria mimo své hranice do prostředí Ameriky, Austrálie, a dalších území, se angličtina stala oficiálním jazykem a začala se transformovat na základě potřeb daného území. Po získání nezávislosti se Spojené státy americké distancovaly od britských zákonů, ale ne od jazyka ani

právního systému jako celku. To samé se stalo jak v Austrálii, tak v Kanadě, Novém Zélandu, a dalších státech. Takzvaný common-law systém utváří celek několika států, kde základem jejich právní kultury je tzv. precedent neboli soudní rozhodnutí.

Vzhledem k tomu, že historicky vznikala potřeba mezinárodní spolupráce, přirozeně s tím vznikala i potřeba užívat nějaký společný jazyk. V dobách, kdy latina nebyla mrtvým jazykem, byla latina jedna z nejběžnějších možností. Nicméně 20. století a latina už šly jiným směrem, a po světových válkách, které motivovaly státy k mnohem silnější spolupráci, vznikla potřeba utvářet organizace, které budou mnohajazyčné a přístupné velké části populace. Protože angličtina se stala globálním jazykem mezinárodní komunikace obecně, bylo vcelku očekávatelné, že se tak stane i ve sféře mezinárodního trhu a spolupráce. A tak tedy se vznikem Spojených národů a Evropské Unie, se angličtina stala jedním z oficiálních jazyků mezinárodního práva, a tím usnadnila komunikaci mezi stovkami států.

Nicméně protože bakalářská práce se nezabývá právnickou angličtinou jako takovou, ale jedním elementem, a to tedy slovesem *shall*, je v další kapitole teoretické části věnováno několik stránek tomu, proč je *shall* natolik problematické. Příčinou debaty nad tématem tohoto slovesa je hlavně to, že v rámci běžného anglického jazyka se sloveso užívá k vyjádření budoucnosti, zatímco v jazyce právním sloveso slouží k vyjádření povinnosti (či spíše stanovení povinnosti někomu). Jenomže jak mnoho odborníků na právní jazyk naznačilo a naznačuje, sloveso *shall* nese mnoho významů, které překročují tyto dva zmíněné významy. Právníci nevědí, jak sloveso správně používat, protože se překrývá jejich znalost z právnické fakulty s jejich znalostí z běžného jazyka. Navíc již mnohá léta ani předešlí právníci nevěděli, jak sloveso správně používat.

Tento problém s výkladem slovesa *shall* je následně analyzován v praktické části z hlediska historického, a to v rámci 240letého období, začínajícího rokem 1780 a končícího rokem 2020. Tato analýza je provedena na základě korpusů právního jazyka, původem z Ameriky, Británie, Austrálie, dále Evropské Unie a orgánů Spojených národů. Sloveso je analyzováno napříč několika kulturami právě kvůli svému dnešnímu statusu univerzality. V každém 20letém období je analyzována frekvence výskytů slova *shall* napříč vybrané právní texty (tedy soudní rozhodnutí) a dále je na malém vzorku, který je použit pro sémantický výklad slovesa, poukázáno na nepřesnost slovesa *shall,* a to, jak nejednoduché je správný výklad daného slovesa.

Sémantická analýza musí být brána s určitými rezervami, jelikož to není zdaleka exaktní výklad a interpretace může být mnohdy několikerá.