Shall Must Go

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Why?

For several years I have advocated that lawyers abandon *shall*. My reasons are:

(1) The word is hardly ever used outside the legal community, and consequently:

- Using *shall* puts lawyers out of step with the language of the general community;
- Nonlawyers don't understand the special way lawyers use *shall* in documents and laws; and

(2) Lawyers misuse it. They confuse the imperative *shall* with the future tense and fail to distinguish between the various senses of *shall* in their documents. The distinctions drawn between these senses by commentators such as Reed Dickerson and Elmer Driedger are difficult to understand and apply, and have been ignored by most lawyers, who continue to misuse *shall*.

In Place of *Shall* . . .

My suggestion is to abandon *shall* altogether and, in its place, use:

- *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), as in:

> "The agreement *is* governed by the laws in force in New South Wales."
>
> "The borrower *indemnifies* the lender against loss . . . ."

and for a statement of condition, as in:

> "If the buyer *fails* to pay the final installment . . . ."
>
> "An event of default *occurs* if the borrower *sells* the shares."
>
> "Unless the box is checked, the vote *is* invalid."

How Important Is *Shall*?

Joseph Kimble, in *The Many Misuses of* Shall, doesn't want to go that far. He can see the advantages of abandoning *shall*, but he is reluctant to make a clean break. Even though he recognizes the appalling misuses of *shall* by lawyers over the years, he says that *shall* is the most important word in the world of legal drafting. That's where he and I part company.

I don't believe that any one word in legal drafting is more important than any other. It is the way we put words together that counts. There are no "magic" words in legal drafting that produce a guaranteed result every time. We all know that. If there were, drafting would be dead easy. But it isn't. Just look at all the cases that say *shall* means *may*. How can that be? Any nonlawyer would say it was impossible. But it is possible in a court of law, and do you know why? Because the drafter got it wrong. And the court had to do its best to correct the mistake. So the court said that black meant white, but the court really meant that the drafter erred and wrote *shall* when *may* was intended. Maybe our courts have been too polite — by describing the error so politely they've led us to think that one ordinary word can mean the opposite of what it means to everyone else.

Should We Define *Shall*?

For some documents, Kimble suggests defining the words *shall* and *must*. I have three problems with that approach:

(1) If we decide to do that, then hadn't we better define *may, will, should, ought, does, is, has,* etc.? There would be no end to it. None of these plain-language words has a meaning that is set in stone — in law, or anywhere else. The meaning will always be governed to a great extent by the context.

(2) By restricting the meaning in that way, we risk imposing an unfamiliar meaning on a common word. For example, Kimble's suggested definition for *shall* or *will* in contracts is "promises to." Now we cannot use *will* to mean anything else. What about the future tense?

(3) I'm against any solution that requires defining everyday words that in other contexts would be self-explanatory.

The Subtleties of *Shall*

Kimble is concerned about the various shades of meanings of the imperative/directory/mandatory *shall* in its modal operation, and he does not think that using *must* for imperatives gets us much further.

I agree. Using one little word — *shall* — doesn't tell us the degree of compulsion in any obligation or duty. *Must* won't do this any better than *shall*. But nothing will. The only thing that will tell us for certain are the consequences of failing in the obligation or duty. If these are left unsaid, then we can only guess what was intended, using the context and other extrinsic aids that might be allowed from jurisdiction to jurisdiction. That's what judges do. They've been doing it for years.

The Real Problem

The reason why it is difficult to replace *shall* with a word that has all these subtle meanings is that *shall* never did it in the first place. Not on its own. It did in context. So lawyers who want precision should state the consequences of breaching a duty or failing an obligation.

The real problem usually is that in the drafter's mind the issue isn't clear. Getting rid of *shall* and choosing between one of the three alternatives listed above (*must, will,* or the present tense) forces you to decide what you really mean: an obligation, the future tense, or the present tense to signify a statement of fact, a legal result or agreement, or a condition. Strangely enough, in my experience it's usually very easy to choose the word you need, and you don't have to go through a legal analysis of modalities. The right word just looks right. The issues are clearer. The drafting comes more easily.

But just hitting on the right word is not enough to make your intention clear. You must state the consequences. Kimble makes this point on page 67 of his article, with his example of the tobacco stalks. Only by adding clarifying words can the drafter make it clear that the provision is a condition precedent. Neither *shall* nor *must* can do that by itself.

Goodbye, *Shall*

I think lawyers have used *shall* as a crutch for too long. It has led them into bad drafting habits, such as writing in the passive voice and in the future tense. And despite its modal functions, it has not allowed any greater precision or clarity in drafting than using modern words, like *must* or *will*, or using the present tense.

I'm happy to say that the move to use *must* instead of *shall* for imperatives in legislative drafting began in Australia as early as 1985 in the State of Victoria, when the Attorney-General of Victoria instructed all Victoria parliamentary counsel to use *must* instead of *shall* to impose an obligation. Other Australian jurisdictions, including mine — New South Wales — as well as the

Australian Parliamentary Counsel's Office, use *must* (and occasionally *is required to* or *is to*) rather than *shall* when a duty or obligation is involved.

Most nonlawyers abandoned *shall* long ago. Its time has long passed. Let's let it go.