

การแปลเชิงกฎหมาย กรณีศึกษาวิเคราะห์การใช้คำว่า Shall ในฉบับแปลภาษาอังกฤษ
ของรัฐธรรมนูญแห่งราชอาณาจักรไทย พ.ศ. 2550**

Legal Translation: An Analytical Study on the Use of Shall in English
Translated Versions of the Thai Constitution B.E. 2550**

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บทคัดย่อ

โดยทั่วไปแล้วการแปลเป็นกระบวนการทางภาษาที่มีความซับซ้อน โดยมีความยากอยู่ที่การแปลงบทความในภาษาต้นไปเป็นภาษาปลายทาง เป้าหมายสูงสุดของการแปล คือ การสื่อความหมายของบทความในภาษาปลายทางให้เหมือนกับภาษาต้น ทั้งนี้การแปลเชิงกฎหมายมีความซับซ้อนยิ่งกว่า กล่าวคือ ธรรมชาติของกฎหมายนั้นมีความสัมพันธ์โดยตรงกับวัฒนธรรมและภาษาของสังคมใดสังคมหนึ่ง งานวิจัยนี้ศึกษาการใช้กริยาช่วย 'shall' ในฉบับแปลภาษาอังกฤษของรัฐธรรมนูญแห่งราชอาณาจักรไทย พ.ศ. 2550 โดยใช้กรอบแนวความคิดการแปลเทียบเคียงต่างรูปของยูจีน ไนดา โดยผลการวิจัยพบว่า มีปัญหาในการใช้กริยาช่วย 'shall' และช่วยให้นักแปลเข้าใจการแปลเชิงกฎหมายมากขึ้น

คำสำคัญ: การแปลเชิงกฎหมาย ภาษากฎหมาย ภาษาอังกฤษแบบเรียบง่าย การแปลศึกษา

Abstract

General translation is a complicated language process. It poses the difficulty of changing a text of the source language into the target language. The ultimate goal of it is to create the same effect of the source text on the target text. Legal translation imposes even more complexities of translating due to the nature of the law and its contingency upon a specific culture and language. This research explored the use of the English modal auxiliary verb 'shall' in the translated versions of the Thai Constitution B.E. 2550. It was based on the dynamic equivalence concept of Eugene Nida. The research findings demonstrated the problematic use of 'shall' and how inappropriate use of it provided attributes to assist translators in better understanding of legal translation.

Keywords: Legal Translation, Legalese, Plain English, Translation Studies

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Introduction

The year 2015 marked an important phenomenon in Thailand when the ASEAN Economic Community (AEC) was formed. According to the ASEAN Economic Blueprint, AEC was to be officially established by 2015 (ASEAN Secretariat, 2008: pp. 2-4). With the AEC in place, the English language will play an even more vital role of being the official language of ASEAN. This means that the main medium of communication in ASEAN will be English. As a result, there will be a need for Thailand to produce its legal documents in English so that non-Thai nationals may have access to them and be able to understand them. To the researcher's knowledge, there has never been official translation of Thai legal instruments at the legislative level as well as ministerial regulations in Thailand. Nevertheless, the Office of the State Council, a government agency that is responsible for drafting, editing, and proving Thai legal instruments has initiated a project on translating Thai laws into English in preparation for the AEC. This project started in 2013 and it is now in the final process of its first phase.

Statement of problems

Legal translation has been known as a complex process (Cao, 2007: p. 3; D'Avanzo, 2009: p. 36) and it requires a translator of legal texts to possess special skills, experience, and knowledge of both law and language to produce a decent piece of translation work. To consider this statement, it means that translating legal texts is a difficult task. As previously mentioned, there are no official translations of Thai laws in Thailand. Furthermore, to the researcher's knowledge, there are no official legal translation guidelines issued by any government agency in the country.

The word 'shall' has been criticised by scholars that it is a troublesome and ubiquitous legal word (D'Avanzo, 2009; Frost, 2012; Garner, 2012). However, the researcher believed that this issue has not been acknowledged by translators in Thailand. The word 'shall' has been used in a sense of requirement or prohibition. These words include 'ต้อง' (pronounced /t^hoŋ/), which literally translates to 'must' or 'need'; 'ให้' (pronounced /haɪ/), which literally means 'provide' or 'allow'; and, 'มิได้' (pronounced /mɪ.dai/, which literally translates to 'not' or 'fail'. For example, in the unofficial translation of the Thai Constitution B.E. 2550 translated into English by the Office of the Council of State, the word 'shall' is used 951 times out of 48,555 words. This accounts to 1.9 percent of the unofficially translated version of the Thai Constitution. Since the use of 'shall' has frequently been incorrect on the part of legal draftsmen, the researcher questioned the appropriate use of 'shall' in this unofficially translated work of the Thai Constitution. Thus, it is important to examine the appropriate use of the term 'shall' in Thai legal texts. This research intends to examine translated sections containing the term 'shall' of two versions of the Thai Constitution B.E. 2550 by the Office of

the Council of State and the Administrative Court.

Plain English

The notion of plain English, started in the United States during the 1940s, has been acknowledged in all English speaking countries (Duarte & Martinez, 1995). The ultimate goal of plain English is to write in a style that is friendly towards all readers. Plain English is more meaningful because it says what it means and it speaks to the audience. English plays an important role in law. It is also a topic that is taught at law schools to train law students to write legal documents using plain English. This is relevant in this research, as it intends to minimise the use of problematic English legal words such as the term 'shall' in order to avoid misunderstanding and misinterpretation of the term in translated English legal texts.

Legal translation and Issues of legal translation

Legal translation was historically and dominantly used in diplomatic missions (El-Farahaty, 2008). Kunnecke (2013) enunciated that legal translation is an area of study related to comparative law and the translation process. There are different types of laws and legal documents that are translated on a regular basis. For example, in the European Union, legal documents are translated on a daily basis (Ibid). Stolze (2013) categorised legal translation into eight types as follows:

1. Personal administrative documents such as birth certificates and education certificates;
2. Penal proceedings such as summons and court sentences;
3. Foreign court decisions;
4. Trade contracts;
5. New law texts from the European Commission such as Directives;
6. The same law that is written in several languages such as in Switzerland and Canada;
7. Documents resultant from political changes; and,
8. International treaties.

Cao (2007) divided legal translation into three types in accordance with the purposes of the target language text. These include legal translation for normative purpose, legal translation for informative purpose and legal translation for purposes other than the scope of the first two types. The first type refers to legal translation for countries with more than one official language such as Canada and the European Union. This means a legal document of the original language and its translated version hold the same weight in terms of their legal force. On the contrary to the first type of legal translation, the information legal translation does not pass on any legal authority to the translated text. This type of legal translation is the case in Thailand, in which only the original text in the Thai language is

vested with legal powers. Finally, the third type of legal translation covers the translation of laws and legal documents that may be easily understood by people whose legal knowledge is limited.

A number of scholars agree that for a translator to be able to translate laws or legal documents, such translator has to understand the nature and the differences between different legal systems (Balazs, 2013; Cao, 2007; Sarcevic, 2000; Stolze, 2013). This is the area in which issues related to legal translation arise. The major legal systems of the world are the English Common Law system and the Civil Law system. Garzone (1999) explained that different legal systems made legal translation complicated due to the culturally mediated nature of legal discourse. Therefore, legal translation is a system-bound language that is specific to a legal system (Balazs, 2013). As a consequence, certain concepts in one legal system may not always be translatable in another legal system.

The other aspect of legal translation issue is enunciated by Balazs (2013: 358) who imparted that legal concepts are “incongruous and unique to each legal system – a major obstacle to equivalence”. As a result of this, it can be construed that equivalence in legal translation may not always be achievable. In this research, the modal auxiliary verb ‘shall’ is the primary parameter in relation to how it is transferred from English to Thai and vice versa. The research examines whether the legal abstraction vested in the term ‘shall’ is translatable in the Thai language and whether equivalence is possible for this term.

Uses of ‘Shall’

This section of the literature review examines the uses of ‘shall’ in general English and in legal English. It also explains the problematic status of the term.

‘Shall’ in general English

Eastwood (2002), in *Oxford Guide to English Grammar*, classified ‘shall’ as a modal auxiliary verb. It is used to state about the future only when the subject is the first person – ‘I’ or ‘we’; however, this is not common in American English. ‘Shall’ is also used to ask for suggestions or promises. Sometimes, it is used for formal rules.

Despite its existence in the English language, the use of ‘shall’ has been under debate for over 300 years (Crystal, 1986). In this first place, the use of ‘shall’ was uncommon in American English; however, “it is becoming less and less common to hear shall used by English people of blood and breeding” (Ibid: 43). Crystal elaborated on the use of ‘shall’ that the rules of using it were strict and that usage errors were significant. In support of Crystal’s statement, Cooper (2011) added that the modal auxiliary ‘shall’ was withdrawing among non-native speakers of English. This could be because of the strict rules of using ‘shall’ and that it tends to be used only for particular fixed phrases (Ibid). Therefore, it can be claimed the use of this term is not popular in modern English.

‘Shall’ in legal English

In legal English, the term ‘shall’ is extensively used (Cooper, 2011). Kimble (1992) claimed that ‘shall’ is the most important word in legal English in terms of creating legal duty. However, it is also the most misused word in legal vocabulary (Ibid). Garner (2012) stated that in the ninth edition of Black’s Law Dictionary, five meanings for ‘shall’ were listed – 1. Has a duty to or is required to, 2. Should, 3. May, 4. Should and 5. Is entitled to. This indicates that the term ‘shall’ in legal English is prone to causing confusion as there are several meanings for this one word. This leads to the argument that ‘shall’ ought to be abandoned completely in order to make legal English simpler. Kenneth (2007) reported that the leading positions were an American legal scholar, Bryan Garner, editor in chief of Black’s Law Dictionary as well as the Australian perspective, Michele M. Asprey, author of ‘Plain Language for Lawyers’.

The problem of using the term ‘shall’ has been experienced in a law case. For example, Mr. Justice Crabbe stated that the use of the terms ‘shall’ and ‘may’ have been misused by Parliamentary Council (Crabbe, 1989). Tessuto (2008: 24) inserted that:

an abundance of *shall* in the 1988 Acts (selected Acts the subject of his study) with fewer instances of the modal in the 2006 Act, where the flexibility of *shall* in imposing a duty, giving direction, creating conditions, expressing future and intention, might create a source of confusion particularly for ordinary readers in native or non-native contexts, when identifying which function of the modal lies behind the provision

It is clear from the above statement that the use of the term ‘shall’ is problematic for both native and non-native speakers of English. Further, it is difficult for readers to understand. Therefore, the new concept of plain English is further supported.

The successful use of plain English can be seen in Australia. There have been manuals on plain English created to use both at state and federal levels (Cooper, 2011). There are specific sections in the Australian plain English manuals that deal with the use of the term ‘shall’. As a result of this, the term ‘shall’ is not generally, if at all, used in Australian legal writing style. As for the purpose of this research, it is important that the use of the term ‘shall’ is investigated in order to avoid lack of the equivalent effect in the English translated legal texts as compared to the original Thai legal texts.

Research questions

1. How is the term ‘shall’ used as a translated word in the Thai Constitution B.E. 2550?
2. To what extent is the use of ‘shall’ problematic in the translation of the Thai Constitution B.E. 2550?

Objectives

The objectives of this research are as follows:

1. To study the use of the word 'shall' in the translation of the Thai Constitution B.E. 2550;
2. To analyse the problematic use of the word 'shall' in the translation of the Thai Constitution B.E. 2550; and,
3. To create a guideline for the use of the word 'shall' for legal translators of Thai legal instruments.

Conceptual framework

This research was qualitative in nature and based on the translation theory of dynamic equivalence proposed by Eugene A. Nida (1964), which is based on the principle of equivalent effect. This means that the source text may not be as close as possible to the target text; however, both texts create the equivalent effect on their readers.

Methodology

Content analysis

According to Garner (2012), the first meaning of 'shall' in legal English is 'required to'. In general terms, 'shall' in legal English provides the sense of the modal auxiliary verb 'must' in plain English. This part of the research conducted a content analysis of 30 Sections/Articles (3, 5, 8, 13, 27, 30, 32, 33, 35, 39, 40, 43, 50, 53, 56, 60, 68, 73, 76, 77, 80, 83, 103, 112, 132, 163, 181, 201, 219 and 227) of the translated versions of the Thai Constitution B.E. 2550. These sections presented all of the patterns the researcher found with the problematic use of 'shall'.

The aim was to diagnose whether the term 'shall' was problematic in how it was used in each Section/Article. The diagnosis was done on two separate occasions by replacing the term 'shall' with 'must' and 'required to'. Explanation of the diagnosis was provided for each Section/Article. Note that the two translated versions were almost identical; therefore, only the translation by the Office of the Council of State was used in the analysis.

Results

After close examining of the two translated versions of the Thai Constitution B.E. 2550, the combinations shown in Table 1, Table 2, Table 3, Table 4 and Table 5 are how the word shall was used in the two translated versions of the Thai Constitution B.E. 2550:

Table 1: Shall + Infinitive

Shall + Infinitive			
shall exercise	shall determine	shall enjoy	shall expose
shall countersign	shall make	shall submit	shall act
shall perform	shall select	shall draft	shall present
shall notify	shall come (into force)	shall convoke	shall invite
shall continue	shall apply	shall disclose	shall have
shall impose	shall affect	shall specify	shall terminate
shall prevent	shall organise	shall constitute	shall lapse
shall prepare	shall promote	shall refer	shall state
shall patronize	shall conduct	shall consist	shall arrange
shall comply	shall encourage	shall hold	shall cast
shall revoke	shall vest	shall inspect	shall give
shall remain	shall possess	shall vacate	shall appoint
shall cause	shall select	shall serve	shall carry out
shall uphold	shall elect	shall last	shall obtain
shall extend	shall get	shall suspend	shall proceed
shall review	shall mean	shall facilitate	shall itemize
shall place	shall pass	shall commence	shall attend
shall amend	shall finish	shall convene	shall inform
shall replace	shall vacate	shall tender	shall transfer
shall send	shall base	shall rely on	shall control
shall meet			

Table 2: Shall + Be 6 Past Participle

Shall + Be + Past Participle			
shall be deemed	shall be deported	shall be suspended	shall be supported
shall be protected	shall be made	shall be imposed	shall be inflicted
shall be presumed	shall be treated	shall be provided	shall be paid
shall be published	shall be assessed	shall be permitted	shall be entitled
shall be returned	shall be done	shall be varied	shall be conducted
shall be completed	shall be reported	shall be regarded	shall be announced
shall be divided	shall be reflected	shall be decided	shall be held
shall be considered	shall be taken	shall be summoned	shall be lodged
shall be fixed	shall be brought	shall be counted	shall be arrested
shall be based	shall be introduced	shall be endorsed	shall be annexed
shall be deferred	shall be allocated	shall be prescribed	shall be enacted
shall be withheld	shall be deprived		

Table 3: Shall Not + Infinitive

Shall Not + Infinitive			
shall not try	shall not hinder	shall not affect	shall not have
shall not hold	shall not participate	shall not include	shall not apply

Table 4: Shall Not + Be + Past Participle

Shall Not + Be + Past Participle			
shall not be submitted	shall not be permitted	shall not be established	shall not be applied
shall not be made	shall not be bound		

Table 5: Shall + Be + Gerund

Shall + Be + Gerund
shall be adjoining

The following section of this research provides detailed analysis of how the term ‘shall’ was used in the translated versions of the Thai Constitution B.E. 2550. It also explains the problematic areas of the use of ‘shall’.

Section 3/Article 3

“The sovereign power belongs to the Thai people. The King as Head of State shall exercise such power ...”.

MUST: The sovereign power belongs to the Thai people. The King as Head of State **MUST** exercise such power ...

REQUIRED TO: The sovereign power belongs to the Thai people. The King as Head of State **IS REQUIRED TO** exercise such power ...

EXPLANATION: In Section 3/Article 3, ‘shall’ was replaced with ‘must’ and ‘required to’ with no grammatical implications nor interpretation issues. ‘Shall’ in this Section/Article simply imposed an obligation on the King as Head of State to exercise his power.

Section 5/Article 5

“The Thai people ... shall enjoy equal protection under this constitution”.

MUST: The Thai people ... **MUST** enjoy equal protection under this constitution.

REQUIRED TO: The Thai people ... **ARE REQUIRED TO** enjoy equal protection under this constitution.

EXPLANATION: In Section 5/Article 5, ‘shall’ was replaced with ‘must’ and ‘required to’ with no grammatical implications. However, an issue arose in relation to the interpretation of ‘shall’ in this Section/Article after the replacements. When ‘shall’ replaced by either ‘must’ or ‘required’ to, it seemed that the Section/Article could be interpreted in a way that Thai people are actually forced to enjoy equal protection under the constitution rather than something that they should have with free will. Therefore, ‘shall’ became problematic in this Section/Article. The modal auxiliary verb ‘may’ would be more appropriate for this Section/Article.

Section 8/Article 8

“The King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action”.

MUST: The King MUST be enthroned in a position of revered worship and MUST not be violated.

No person MUST expose the King to any sort of accusation or action.

REQUIRED TO: The King IS REQUIRED TO be enthroned in a position of revered worship and IS REQUIRED TO not be violated.

No person IS REQUIRED TO expose the King to any sort of accusation or action.

EXPLANATION: In this Section/Article, ‘shall’ was replaced with ‘must’ and ‘required to’ with no grammatical implications. However, its function became questionable when replaced by ‘must’ and ‘required to’. In the first sentence of the first paragraph, both ‘must’ and ‘required to’ seemed out of place. They both implied a sense of unnecessary force in which it reads as if the King is made to reign. It would be simpler for readers as well as legal interpreters to omit ‘shall’ in this part of the sentence – The King is enthroned in a position of revered worship.

‘Shall’ in the second sentence of the paragraph constituted no interpretive obstacles when replaced with ‘must’. However, when replaced with ‘required to’, it became problematic. ‘The King is required to not be violated’. This sentence seems unnecessary complicated.

In the second paragraph, when ‘shall’ was replaced with ‘must’ and ‘required to’, problematic interpretation occurred. If the sentence was changed to ‘No person must expose the King’, despite possible syntactic allowance, the interpreters would have difficulty understanding the sentence as ‘No’ did not fit well with ‘must’ and it did not provide the same meaning as ‘A person MUST NOT’. The problem became even more obvious with the ‘required to’ replacement. If the sentence went with ‘No person is required

to expose the King’, it would be interpreted as it would be possible to expose the King. The modal auxiliary ‘may’ or ‘can’ would be more appropriate in this Section/Article – ‘No person may expose the King to any sort of accusation or action’.

Section 13/Article 13

“The selection, appointment or removal of Privy Councilors shall be at the King’s pleasure.”

MUST: The selection, appointment or removal of Privy Councilors **MUST** be at the King’s pleasure.

REQUIRED TO: The selection, appointment or removal of Privy Councilors **IS REQUIRED TO** be at the King’s pleasure.

EXPLANATION: In this Section/Article, when ‘shall’ was replaced with ‘must’ and ‘required to’, syntactically it was possible. The modal auxiliary ‘must’ imposed neither syntactical nor interpretive obstacles. Nevertheless, when ‘shall’ was replaced with ‘required to’, it became superfluous – ‘The selection, appointment or removal of Privy Councilors are required to be at the King’s pleasure’. A simpler version should be – ‘The selection, appointment or removal of Privy Councilors are at the King’s pleasure’. This eliminated the confusion that might have prevented an interpreter to understand the Section/Article correctly.

Section 27/Article 27

“Rights and liberties by this Constitution explicitly, by implication or by decisions of the Court shall be protected ...”

MUST: Rights and liberties by this Constitution explicitly, by implication or by decisions of the Court **MUST** be protected ...

REQUIRED TO: Rights and liberties by this Constitution explicitly, by implication or by decisions of the Court **ARE REQUIRED TO** be protected ...

EXPLANATION: In this Section/Article, when ‘shall’ was replaced with ‘must’ and ‘required to’, there seemed to be no grammatical issues. The first diagnosis with the use of ‘must’ also rendered no issues related to interpretation. Nonetheless, when ‘shall’ was replaced with ‘required to’, the sentence appeared unnatural. Rights and liberties are legal constructs and it seemed against standardisation of English to use them with ‘be required to’ although no rules of English grammar would prohibit this way of syntactical structure. It would be more appropriate to write – “Rights and liberties by this Constitution explicitly, by implication or by decisions of the Court **ARE TO** be protected ...”.

Section 30/Article 30

“All persons are equal before the law and shall enjoy equal protection under the law. Men and women shall enjoy equal rights.”

MUST: All persons are equal before the law and MUST enjoy equal protection under the law.

Men and women MUST enjoy equal rights.

REQUIRED TO: All persons are equal before the law and REQUIRED TO enjoy equal protection under the law.

Men and women ARE REQUIRED TO enjoy equal rights.

EXPLANATION: In this Section/Article, the two replacement words imposed no grammatical implications. However, both of the replacement words seemed to go incompatible with the infinitive verb ‘enjoy’. Neither ‘must’ nor ‘required to’ enjoy equal protection under the law read semantically reasonable. If a person were to enjoy a legal construct (protection under the law), the person ought to be able to do it though free will not force. Therefore, an alternative word (may) would be appropriate – ‘All persons are equal before the law and may enjoy equal protection under the law’.

Section 32/Article 32

“A person shall enjoy the right and liberty in his life and person.”

MUST: A person MUST enjoy the right and liberty in his life and person.

REQUIRED TO: A person IS REQUIRED TO enjoy the right and liberty in his life and person.

EXPLANATION: In this Section/Article, the same analysis applied to the problematic use of ‘shall’ as in Section/Article 30.

Section 33/Article 33

“A person shall enjoy the liberty of dwelling.”

MUST: person MUST enjoy the liberty of dwelling.

REQUIRED TO: A person IS REQUIRED TO enjoy the liberty of dwelling.

EXPLANATION: In this Section/Article, the same analysis applied to the problematic use of ‘shall’ as in Section/Article 30 and Section/Article 32.

Section 35/Article 35

A person’s family rights, dignity, reputation and the right of privacy shall be protected.

MUST: A person’s family rights, dignity, reputation and the right of privacy MUST be protected.

REQUIRED TO: A person's family rights, dignity, reputation and the right of privacy ARE REQUIRED TO be protected.

EXPLANATION: In this Section/Article, the same analysis applied to the problematic use of 'shall' as in Section/Article 27.

Section 39/Article 39

"No person shall be inflicted with a criminal punishment ..."

MUST: No person MUST be inflicted with a criminal punishment ...

REQUIRED TO: No person IS REQUIRED TO be inflicted with a criminal punishment ...

EXPLANATION: In this Section/Article, the same analysis applied to the problematic use of 'shall' as in Section/Article 8, second paragraph.

Section 40/Article 40

"A person shall have the rights in judicial process ..."

MUST: A person MUST have the rights in judicial process ...

REQUIRED TO: A person IS REQUIRED TO have the rights in judicial process ...

EXPLANATION: In this Section/Article, when 'shall' was replaced with 'must' and 'required to', no grammatical implications were found. However, 'must' and particularly 'required to' did not go in parallel with 'have the rights', which indicates a construct that the law either allows or disallows. If the law allows something, it ought not to be in an obligatory sense. Rather, it exists or it does not such as the case of a person's rights in judicial process. Therefore, 'shall' in this Section/Article would be superfluous. Otherwise, a more appropriate term for this Section/Article would be the modal auxiliary 'may' – 'A person may have the rights in judicial process ...'.

Section 43/Article 43

"A person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and free competition."

MUST: A person MUST enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and free competition.

REQUIRED TO: A person IS REQUIRED TO enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and free competition.

EXPLANATION: In this Section/Article, the same analysis applied to the problematic use of 'shall' as in Section/Article 30, Section/Article 32 and Section/Article 33.

Section 50/Article 50

“A person shall enjoy an academic freedom.”

MUST: A person MUST enjoy an academic freedom.

REQUIRED TO: A person IS REQUIRED TO enjoy an academic freedom.

EXPLANANTION: In this Section/Article, the same analysis applied to the problematic use of ‘shall’ as in Section/Article 30, Section/Article 32, Section/Article 33 and Section/Article 43.

Section 53/Article 53

“A person who is over sixty years of age and has insufficient income for living shall have the right to welfare...”

MUST: A person who is over sixty years of age and has insufficient income for living MUST have the right to welfare...

REQUIRED TO: A person who is over sixty years of age and has insufficient income for living IS REQUIRED TO have the right to welfare...

EXPLANANTION: In this Section/Article, the same analysis applied to the problematic use of ‘shall’ as in Section/Article 40.

Section 56/Article 56

“A person shall have the right to receive and get access to public information ...”

MUST: A person MUST have the right to receive and get access to public information ...

REQUIRED TO: A person IS REQUIRED TO have the right to receive and get access to public information ...

EXPLANANTION: In this Section/Article, the same analysis applied to the problematic use of ‘shall’ as in Section/Article 40 and Section/Article 53.

Section 60/Article 60

“A person shall have the right to sue a government agency ...”

MUST: A person MUST have the right to sue a government agency ...

REQUIRED TO: A person IS REQUIRED TO have the right to sue a government agency ...

EXPLANANTION: In this Section/Article, the same analysis applied to the problematic use of ‘shall’ as in Section/Article 40, Section/Article 53 and Section/Article 56.

Section 68/Article 68

“No person shall exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime ...”

- MUST:** No person **MUST** exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime ...
- REQUIRED TO:** No person **IS REQUIRED TO** exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime ...
- EXPLANATION:** In this Section/Article, the same analysis applied to the problematic use of ‘shall’ as in Section/Article 8, second paragraph and Section/Article 39.

Section 76/Article 76

“The Council of Ministers shall prepare a plan for the administration of State affairs ...”

- MUST:** The Council of Ministers **MUST** prepare a plan for the administration of State affairs ...
- REQUIRED TO:** The Council of Ministers **IS REQUIRED TO** prepare a plan for the administration of State affairs ...
- EXPLANATION:** In this Section/Article, when ‘shall’ was replaced with ‘must’ and ‘required to’, this created no issues neither on grammatical rules nor interpretation. This was the case because the subject of the sentence being the Council of Ministers (a real person in the form of juristic person who possesses a duty to perform by law) that is with a duty to prepare a plan for the administration of State affairs and so on. Therefore, the obligatory term such as ‘shall’ and its corresponding terms – ‘must’ and ‘required to’ rendered non-existent issues.

Section 77/Article 77

“The State shall protect and uphold the institution of kingship ...”

- MUST:** The State **MUST** protect and uphold the institution of kingship ...
- REQUIRED TO:** The State **IS REQUIRED TO** protect and uphold the institution of kingship ...
- EXPLANATION:** In this Section/Article, the use of ‘shall’ created non-existent issues as in the analysis found in Section/Article 76. This is because the State being the subject of the sentence is in a form of the thing capable of performing an act.

Section 80/Article 80

“The State shall act in compliance with the social, public health, education and culture policies ...”

- MUST:** The State **MUST** act in compliance with the social, public health, education and culture policies ...
- REQUIRED TO:** The State **IS REQUIRED TO** act in compliance with the social, public health, education and culture policies ...
- EXPLANATION:** In this Section/Article, the same analysis under Section/Article 77 applied.

Section 83/Article 83

“The State shall encourage and support an implementation of the sufficient economy philosophy.”

MUST: The State **MUST** encourage and support an implementation of the sufficient economy philosophy.

REQUIRED TO: The State **IS REQUIRED TO** encourage and support an implementation of the sufficient economy philosophy.

EXPLANATION: In this Section/Article, the same analysis under Section/Article 77 and Section/Article 80 applied.

Section 103/Article 103

“A political party presenting its members as candidates in the election in any constituency shall present its members as candidates in an equal amount ...”

MUST: A political party presenting its members as candidates in the election in any constituency **MUST** present its members as candidates in an equal amount ...

REQUIRED TO: A political party presenting its members as candidates in the election in any constituency **IS REQUIRED TO** present its members as candidates in an equal amount ...

EXPLANATION: In this Section/Article, the same analysis under Section/Article 77, Section/Article 80 and Section/Article 83 applied.

Section 112/Article 112

“In an election of senators, the area of Changwat shall be regarded as one constituency ...”

MUST: In an election of senators, the area of Changwat **MUST** be regarded as one constituency ...

REQUIRED TO: In an election of senators, the area of Changwat **IS REQUIRED TO** be regarded as one constituency ...

EXPLANATION: In this Section/Article, the replacement words ‘must’ and ‘required to’ seemed to create no grammatical problems to the sentence. This was also true at the interpretive level.

Section 132/Article 132

“During the expiration of the term or the dissolution of the House of Representatives, the Senate shall not hold its sitting ...”

- MUST: During the expiration of the term or the dissolution of the House of Representatives, the Senate MUST not hold its sitting ...
- REQUIRED TO: During the expiration of the term or the dissolution of the House of Representatives, the Senate IS NOT REQUIRED TO not hold its sitting ...
- EXPLANANTION: In this Section/Article, the same analysis under Section/Article 77, Section/Article 80, Section/Article 83 and Section/Article 103 applied.

Section 163/Article 163

“The persons having the right to vote of not less than ten thousand in number shall have the right to submit a petition ...”

- MUST: The persons having the right to vote of not less than ten thousand in number MUST have the right to submit a petition ...
- REQUIRED TO: The persons having the right to vote of not less than ten thousand in number IS REQUIRED TO have the right to submit a petition ...
- EXPLANANTION: In this Section/Article, the same analysis applied to the problematic use of ‘shall’ as in Section/Article 40, Section/Article 53, Section/Article 56 and Section/Article 60.

Section 181/Article 181

“The outgoing Council of Ministers shall remain in office for carrying out duty ...”

- MUST: The outgoing Council of Ministers MUST remain in office for carrying out duty ...
- REQUIRED TO: The outgoing Council of Ministers IS REQUIRED TO remain in office for carrying out duty ...
- EXPLANANTION: In this Section/Article, the same analysis under Section/Article 77, Section/Article 80, Section/Article 83, Section/Article 103 and Section/Article 132 applied.

Section 201/Article 201

“Before taking office, a judge shall make a solemn declaration before the King ...”

- MUST: Before taking office, a judge MUST make a solemn declaration before the King ...
- REQUIRED TO: Before taking office, a judge IS REQUIRED TO make a solemn declaration before the King ...
- EXPLANANTION: In this Section/Article, the same analysis under Section/Article 77, Section/Article 80, Section/Article 83, Section/Article 103, Section/Article 132 and Section/Article 163 applied.

Section 219/Article 219

“There shall be three levels of Courts of Justice ...”

MUST: There MUST be three levels of Courts of Justice ...

REQUIRED TO: There ARE REQUIRED TO be three levels of Courts of Justice ...

EXPLANATION: In this Section/Article, when ‘shall’ was replaced with ‘must’ and ‘required to’, there appeared to be no problems regarding grammatical rules. When ‘must’ replaced ‘shall’, it functioned as prediction that there would definitely be three levels of Courts of Justice. However, when replaced with ‘required to’, the sentence was although grammatically correct, it became unnecessary lengthy and complicated. Therefore, a problematic use was found for this Section/Article because the only one replacement word was possible.

Section 227/Article 227

“The Administrative Courts shall have an autonomous secretariat ...”

MUST: The Administrative Courts MUST have an autonomous secretariat ...

REQUIRED TO: The Administrative Courts IS REQUIRED TO have an autonomous secretariat ...

EXPLANATION: In this Section/Article, the same analysis under Section/Article 77, Section/Article 80, Section/Article 83, Section/Article 103, Section/Article 132, Section/Article 163 and Section/Article 201 applied.

Discussion

It can be seen from the analysis in the above section that the use of ‘shall’ can be problematic. In one sense the use of ‘shall’ imposed neither grammatical implication nor interpretive issues, but it can also be problematic in another sense. Based on the content analysis found in the two translated versions of the Thai Constitution B.E. 2550, it appeared that the function of ‘shall’ complemented the syntactical structure when the subject of the sentence was capable of performing an actual task. It could be said that the subject of the sentence should be a person or a juristic person in order to allow undisputed use of ‘shall’. An obvious example was found in Section/Article 76 in which the subject of the sentence was ‘The Council of Ministers’. Since the Council consists of members who can actually perform the act, in this case prepare a plan, the function of ‘shall’ imposes an obligation on the Council to perform an act. Regardless of the replacements, ‘must’ or ‘required to’, it was grammatically possible and interpretively unambiguous. On the other side of the coin, the use of ‘shall’ created ambiguity in relation to how the term ought to be interpreted – ‘may’, ‘must’, or even ‘should’.

The first ambiguity the researcher found was when ‘shall’ was used with an emotive verb (enjoy) or a static verb indicating possession (have). An example may be found in the words under Section 5/Article 5, which states that Thai people shall enjoy equal protection. In this Section/Article, it is clear that any scholars of English would agree that the sentence is grammatically correct. However, when interpreting the Section, the legal texts simply give a right to all Thai people to enjoy equal protection. Nevertheless, the use of ‘shall’ here when replaced with ‘must’ or ‘required to’, it can awkwardly be read in a sense that it is a requirement for Thai people to enjoy equal protection. This way of interpretation contradicts the intention of the original legal texts that provide a basic condition of life (protection) for Thai people. A corollary of this should give doubt to a translator in terms of their use of ‘shall’ and whether to search for a less complicated term when translating legal texts into English or not. One possibility for Section/Article 5 would be to replace ‘shall’ with ‘may’.

Another obvious ambiguity was found when ‘shall’ was used in a sentence beginning with the determiner ‘no’ such as in Section/Article 39 (No person shall be inflicted with a criminal punishment ...). Despite no apparent grammatical implication, when ‘shall’ was replaced with ‘must’ and ‘required to’, it created a serious issue in terms of interpretation. This means Section/Article 39 could be rewritten that it was not a requirement under Section/Article 39 for a person to be inflicted with a criminal punishment. After interpreting this Section/Article, it could be that although it was not a requirement, it would be possible for a person to be inflicted with a criminal punishment. Therefore, an alternative modal auxiliary verb ‘may’ or even ‘can’ would be more appropriate than ‘shall’.

In summary, the term ‘shall’ has been proven to be a highly tricky word to use in the act of translating legal texts. According to the content analysis under this research, it was found that the use of ‘shall’ did not violate grammatical rules of English. It was also possible to use ‘shall’ under a limited set of possibilities. However, under some specific usages of the term, ‘shall’ did cause confusion at the interpretive level. As a result of this a translator should take a careful step when translating a source text (in Thai or other languages) into the target text (English) using ‘shall’. An example can be traced back through the history of translation studies when Etienne Dolet was prosecuted for incorrect translation of the Bible into French (Bassnett, 2002). This demonstrates that incorrect translation can be serious and that it requires highly skilled translators to translate legal texts.

Recommendation

This research was done with the particular focus on the supreme law of the country – the Thai Constitution. If the results of this research were adopted, it would be

beneficial for future researchers to further examine the translated versions of other laws in Thailand. This is because other laws may not contradict the Constitution even in its writing style.

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