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## Modal verbs as instruments for signaling liberty and coercion in legal and quasi legal documents

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### Abstract

The modal auxiliary verbs-‘may’, ‘shall’, ‘will’, ‘can’, ‘would’ and ‘should’ are linguistic elements which demarcate the boundary of actions that individuals can take in the form of permission, obligation, necessity etc in the course of interaction. In everyday language use, the modals have been considered intractable in their meanings such that it is usually not certain when one or the other meaning is intended. In legal and quasi-legal documents, the modal verbs are equally used quite extensively to grant permission and enforce obligation on individual citizens or the state or even the constitution itself. Like in everyday language, their meaning in this context too is rather elusive. In this paper, we have attempted to examine the meaning of the modals in order to determine, in a more or less systematic way, when they are intended as elements for signalling liberty and as instruments of coercion in constitutional and quasi-constitutional contexts. In doing this, we have relied heavily on the *1979 Constitution of the Federal Republic of Nigeria* and *Gender Review of the 1999 Constitution of the Federal Republic of Nigeria*- a document prepared by the National Centre for Women Development Abuja Nigeria. Our interpretive tool is a reliance on the ‘epistemic/deontic’ components of Palmer’s (1990) insights into the nature of modal verbs. These we have combined with the relevant aspects of the Speech Acts Theory of Austin (1962) as modified by Searle (1969).

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### Résumé

Les verbes auxiliaires modaux ‘may’, ‘shall’, ‘will’, ‘can’, ‘would’ et ‘should’ sont des éléments linguistiques qui délimitent la frontière des actions que les individus peuvent entreprendre sous forme de permission, d'obligation, de nécessité etc. au cours de l'interaction. Dans l'usage courant, les modaux ont été considérés insurmontables dans leurs significations de telle sorte qu'on n'est pas, en général, certain quand à la signification à donner. Dans les documents légaux et quasi-légaux, les modaux sont également employés pour accorder la permission et pour imposer l'obligation sur les différents citoyens, sur l'état, ou même sur la constitution elle-même. Tout comme le langage courant, leur signification dans ce contexte est aussi plutôt évasive.

Dans cet article, nous avons essayé d'analyser la signification des modaux afin de déterminer, de façon plus ou moins systématique, quand est-ce qu'ils sont utilisés pour exprimer la liberté, et quand est-ce qu'ils interviennent en tant instruments de coercition dans des contextes constitutionnels et quasi-constitutionnels. Pour ce faire, nous nous sommes basés sur la constitution de 1979 de la République fédérale du Nigéria et *Gender Review of the 1999 Constitution of the Federal Republic of Nigeria* - un document a préparé par le centre national pour le développement des femmes, Abuja, Nigéria. Nous avons basés nos interprétations sur les composants ‘épistémiques/déontiques’ de Palmer (1990) sur la nature des verbes modaux. Nous avons combinés ceci avec les aspects pertinents de la *Speech Acts Theory* d'Austin (1962) reformulée par Searle (1969).

### Introduction

Every organized society or system has certain rules, regulations or norms that make it operate efficiently. The absence of such rules or their improper codification may make it difficult or even impossible for the components of the organization to harmonize their functions in order to make the system work. The need for efficient and effective operation in the theory and practice of government has given rise to the concept of the constitution.

According to Black (1990:31) the constitution is the organic and fundamental law of a nation or state which may be written or unwritten, establishing the character and conception of

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its government. The constitution also lays the basic principles to which the internal life of a government is to be conformed, organizing the government, and regulating, distributing and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers. The constitution in other words, stipulates the rights and obligations of individuals in the organization or government or state that subscribes to it. The interpretation of the constitution can, therefore, be said to determine substantially, the action of the judiciary, the legislative and executive arms of government. The constitution could, in fact, be said to be central to the operation of all modern democracies.

Constitutional documents in view of the above must, therefore, be carefully drafted to give precision to interpretation. This is because according to Crystal and Davy (1968:172) “human nature makes it imperative for individuals to attempt to become morbidly curious about his obligations, even scrutinize them closely to see if they may possibly be wriggled out of.”

One of the most important linguistic items by which precision is achieved and limits of power imposed in the constitution are the linguistic elements called modal auxiliary verbs- ‘shall’, ‘may’, ‘will’, ‘would’, ‘can’, ‘should’ etc- which are used quite frequently in constitutional and quasi-constitutional documents.

Curiously, however, these modal auxiliary verbs as deployed in the constitution as in other legal documents do not seem to have stable or fixed meaning as they are understood and used in linguistics and in ordinary non-legal communication. This propensity for variegated meanings and interpretation has given rise to legal disputes and confusion.

Even legal authorities are seemingly helpless in the face of the intractable nature of the meaning and function of the modal auxiliary verbs in constitutional or similar documents.

An example of the helplessness of legal authorities in the interpretation of the meaning of modal auxiliary verbs could be found in the *Black’s Law Dictionary* (6<sup>th</sup> ed)’s definition of ‘may’:

‘may’ an auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency. Black (1990:979).

It is this indefiniteness in the meaning intended that forms the basis of this paper. It is our intention to examine the modal

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auxiliary verbs, 'shall', 'may', 'can', 'will' and 'would' and predict in a fairly systematic manner when they are intended as elements for signaling liberty and as instruments of coercion in constitutional and quasi-constitutional contexts. In doing this, we have relied heavily on the 1979 constitution of the Federal Republic of Nigeria and "Gender Review of the 1999 Constitution of the Federal Republic of Nigeria"- a document prepared by the National Centre for Women Development, Abuja, Nigeria.

### **1.1 Literature Review**

Greenbaum and Quirk (1990), consider the functions of auxiliary verbs which Palmer (1990), defines as those words which play a significant part in the verbal system expressing such concepts as possibility, necessity, permission, obligation, ability and willingness.

Admittedly, according to Lyons (1968) some of them, for example, 'will' and 'shall', could be used with the future in mind but it is not always that they refer to the future. Lyons sees modality as a category of scale. According to him, the modal auxiliary verbs:

May be categorized into a large or small number of sub-distinctions, (e.g., 'certainty', probability', 'possibility', or 'stronger' and 'weaker' or different kinds of 'obligation' and 'necessity' and so on).

This position by Lyons (1968) is of much instruction for this paper because the constitution and legal documents generally demarcate the limit of the exercise of power and privileges.

We interpret Lyons, in this paper to mean that modal auxiliary verbs which express wish and necessity, are necessarily commands. This is of much instruction as well for this paper for, as Goodrich (1987) has observed, legal language is coercive. Lyons' view, therefore, tallies with our goal to examine how constitutional documents use modal auxiliary verbs as compelling or permissive linguistic signals for rights and obligations.

The coercive or permissive functions of modal verbs are also given force to when Lyons (1968) points out that when 'shall' and 'will' are used, the speaker puts himself forward as guarantor of the truth or occurrence of the event he refers to, in which case, the speaker:

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- a) can put himself forward as the guarantor of an event in which he is involved, or
- b) can put himself forward as the guarantor or enforcer of an event in which another person is involved.

As a result of their ‘obligatoriness’, ‘shall’ and ‘will’ are opposed to such other modals as ‘may’ and ‘can’ as a result of the latter’s permissiveness. It is in fact possible to say that apart from ‘can’ which signals ‘ability’ and ‘permission’ and which is scarcely used in legal documents, all others convey, in varying degrees, compulsion, obligation, and willingness which are authoritatively enforced through the instrumentality of state powers.

In a similar vein, Halliday and Hasan (1976) and Palmer (1981) believe that modality is the speaker’s assessment of the probabilities inherent in the situation or of the rights and duties of the addressee. Palmer (1981) further identifies two kinds of modal: epistemic and deontic. Epistemic modals indicate the speaker’s attitude towards the probability of what is expressed in his utterance, while deontic modals indicate the speaker’s attitude to the addressee or to himself in terms of what is permitted or what is ordered. This tallies roughly with Halliday (1985) who believes that certain modal auxiliary verbs will typically be categorized as being indicative of ‘modalization’, in which case they are indicative of ‘probability’ and ‘usuality’ and ‘modulation’ which indicates ‘obligation’ – that which the speaker wants to do or which he wants done. In this case, what the speaker wants done is compulsive on the addressee while that which the speaker wants to do is mandatory on his part.

Halliday’s insight fits quite well into the constitutional framework. The constitution, through the use of these modal auxiliary verbs, compels addressee to perform some actions. It also holds itself bound to discharge certain responsibilities to the addressee. Coercion in constitutional documents can, therefore, be said to be two-fold-on the speaker (sometimes the constitution or an oath taker) and the addressee, who could be an individual citizen or the state.

Hornby (1975) says the use of ‘may’ and ‘might’ is an idiomatic way of expressing the idea of permission. ‘May’ is used for asking and giving permission while ‘may not’ is used to deny permission:

May I borrow your toothbrush?  
No. you may not.

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‘May’ is also used, in formal style, in statement that gives authoritative permission.

‘May not’ is similarly used in statements (not necessarily in answer to a request):

Borrowers may not take out more than three works of fiction.

For a prohibition (stronger than a denial of permission), ‘must not’ is used.

The uses of ‘may’ and ‘must’ to give authoritative permission and for prohibition as outlined by Hornby (1975) are germane to our concern in this paper. The constitution as an authoritative document would be expected to give authority to proxies and prohibit, in clear terms, acts that are considered inimical to the interest of the state or of the people who subscribe to it.

In statutes (constitutional documents inclusive), the use of the modal auxiliary verbs differs from the ordinary usage. Accordingly, ‘will’ is ordinarily used in the first person to imply a wish or intention. In the second and third persons, ‘will’ implies futurity. ‘Shall’ on the other hand, in the first person implies futurity. In the second person and third person, it implies compulsion, obligation or command and it is imperative:

Upon compliance with the provision of the Act,  
the Board shall issue a certificate of compliance.

In this provision, because of the use of ‘shall’ the Board is bound to issue a ‘certificate of compliance’.

The use of ‘may’ gives the legal subject authority to do the specified thing or act. However, the legal subject may or may not do so in his discretion. In the provision:

The trustees may pay life assurance premiums payable by employees,

the trustees are permitted but not compelled to act. ‘May’ is commonly used to vest public officers discretionary power to exercise for the benefit of persons. Thus if ‘the trustees’ in our extract above prefer to exercise their discretion, employees have no cause of action for their failing to pay premium.

Fairclough (1989), says the concept of modality is an important one for both relational and expressive values in grammar. Modality according to him, has to do with speaker or writer’s authority and there are two dimensions to modality depending on what direction authority is oriented to.



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Firstly, if it is a matter of the authority of one participant in relation to others, we have ‘relational modality’. Secondly, if it is a matter of the speaker or writer’s authority with respect to the truth or probability of a representation of reality, we have ‘expressive modality’ – the modality of the speaker/writer’s evaluation of truth:

Your library books are overdue and your library cards may not be used until they are returned. If the books are not returned within a fortnight, you must pay the cost of replacing them before you borrow more books.

In this extract, two modals ‘may not’ and ‘must’ have been used. ‘May’ as a relational modal can signal permission (you may go). But with ‘not’ the meaning becomes ‘not’ permitted’. ‘Must’ signals obligation – ‘you are required to pay the cost of replacement’.

According to Goodrich (1987), the use of the modal auxiliaries is a key feature of the legal text in which prevalent forms are imperative and axiomatic.

### **1.2 Analysis of Data**

In this section, we have attempted to analyse sentences in constitutional documents i.e the 1979 constitution of the Federal Republic of Nigeria and in a quasi-Constitutional document, the “Gender Review of the 1979 Constitution of the Federal Republic of Nigeria” as our subjects of analysis. In the analysis, attempt has been made to determine what kinds of act are performed when one or the other of the modal verbs is used. Particularly, we have sought to explicate the modals along the dimension of the Deontic/Epistemic modality of Palmer (1986 and 1990). According to Palmer, Deontic modals are those which signal notions such as obligation, permission and necessity while Epistemic modals, while being necessarily future elements, also signal the speaker or writer’s assessment or attitude towards the probability of what is expressed in his utterance. In addition to these features of modal verbs, we have also attempted to explicate the direction in which power or attitude is oriented as well as the pragmatic effects of such acts.

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S/NO	Text	Modal	Source	Act	Person	Impact
1.	Nigeria shall be a Federation consisting of states and Federal Capital Territory	Shall	Section 2 (2) p.1	i) Deontic Obligation ii) Epistemic future iii) Directive	Speaker insistence	Promulgation which brings into existence the act named
2.	The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a senate and House of Representatives.	Shall	Section 4 (1) p.2	i) Deontic Obligation ii) Epistemic future iii) Directive	Speaker insistence on hearer	Mandates National Assembly to legislate laws
3.	The Government of the Federation or of a state shall not adopt any religion as state religion.	Shall	Section 10 p.1	i) Deontic prohibition ii) Epistemic future	Speaker prohibition of hearer	Hearer compliance .
4.	The state shall foster a feeling of belonging and of involvement among the various people of the Federation, to the end that loyalty to the nation shall override sectional	Shall	Section 15 (4) p.8	i) Deontic Obligation ii) Epistemic future iii) Directive  Do-	Speaker insistence on 3 <sup>rd</sup> person	Compulsion on state to foster conditions stated

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	loyalties.					
5.	The House of Assembly of a state shall have power to make laws for the peace, order and good government of the state or any part thereof with respect to the following matters ...	Shall	Section 4 (7) p. 1	i) Deontic Obligation ii) Epistemic future iii) Directive	Speaker insistence on 3 <sup>rd</sup> person 'Hearer'	Confers power on state Assembly to make law
6.	Exploitation of Human or natural resources in any form whatsoever for reasons other than the good of the community shall be prevented.	Shall	Section 18(1) p.10	i) Deontic prohibition ii) Epistemic future iii) Directive	Speaker insistence	Prohibits acts named
7.	Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.	Shall	Section 35 (4) p.17	i) Deontic prohibition ii) Epistemic future iii) Directive	Speaker's insistence on 3 <sup>rd</sup> person	Assures every person of life
8.	In the absence of the Speaker and	May	Section 89 (2)	i) Deontic possibility or	Speaker permits 3 <sup>rd</sup>	3 <sup>rd</sup> person so

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	the Deputy Speaker of the House such member as the House may elect for the purpose shall preside.		p.33	permission ii) Epistemic future iii) Directive	person to elect a person as speaker in the stated circumstance	permitted.
9.	That the House may by resolution decide whether or not such member may vote, or participate in its deliberations, on such matter.	May  May	Section 52 (3)c p.23	i) Deontic Obligation ii) Epistemic future iii) Directive	Speaker's of permission of 3 <sup>rd</sup> person i.e the House	House so permitted
10.	Subject to the provision of the constitution, the National Assembly may by an act make provision for ...	May	Section 4 part ii (a) p.100	i) Deontic permission ii) Epistemic future iii) Directive	Speaker permission of 3 <sup>rd</sup> person	3 <sup>rd</sup> person permitted
11.	Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of these persons except in accordance with the law.	May	Gender Review p.44	i) Deontic Obligation/prohibition ii) Epistemic future iii) Directive	Speaker insistence	Prevents/prohibited acts.

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### **1.3 Discussion**

It is fairly obvious that in legal documents, certain aims are achieved by using particular modal verbs. It is also fairly obvious that both in legal and quasi-legal documents, different modal auxiliary verbs are employed. Of all the modal verbs which are used in this domain, 'shall' and 'may' are the most frequently used. 'Can', 'will', 'should' and 'would' are less frequently used.

In general terms, the functions of modal auxiliary verbs can be divided into two broad types: modal auxiliary verbs could be said to perform obligatory and permissive functions.

When modal auxiliary verbs are used to perform obligatory functions, such functions fall within what Goodrich (1987) calls the coercive nature of legal discourse (intra and inter) and the general framework of law, which serves as the enforcement of 'violence' by the state.

Of all the modal verbs, 'shall' is particularly used for coercive purposes. It serves to represent the desire of the state to enforce constitutional or legal provisions. When such provisions are made, those concerned- the state inclusive –are left with no option than to comply. This is the aspect of legalese, which tallies with the coercive tendencies of the law. In this regards, 'shall' performs three concurrent acts in legal draftings. These are:

- (a) Deontic obligation/ prohibition/ promulgation
- (b) Epistemic
- (c) Directive

In using 'shall', the constitution is making an obligation, which either rests on itself as the codified representation of the state or on a third person, the reader, as a citizen or an officer of state. For instance, in this provision in the 1979 constitution:

The state shall foster a feeling of belonging and of involvement among the various peoples of the federation to the end that loyalty to the nation shall override sectional loyalties (section 15 p.8)

The state is placed with an obligation to 'foster a feeling of belonging'. The use of 'shall' is therefore performative in that it performs the act that it names- that of "fostering". In the other part of the same extract, 'shall' also performs a deontic function by way of the constitution compelling that loyalty to the nation override sectional loyalties.

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It can also be further stated that the constitution derives its power from the state just as the state derives its functions and existence from the constitution. Thus when the constitution makes a promulgation, it compels itself to enforce and compels either the state or individual citizens to adhere to such promulgations.

The same applies to prohibitions. The constitution through these tripartite channels of the enforcement of power enumerated above also makes the performance of certain actions unacceptable and prevents or forbids the constitution, the state or individuals from acting in such stated ways. In the extract below for instance;

Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

The constitution forbids the state or any individuals from depriving any one of his life apart from in exceptions granted.

It should also be pointed out that when promulgations or prohibitions are made in the constitution, they constitute directives, which cannot be wriggled out of. In other words, no party-not even the constitution itself or the state-can (legally that is) fail to comply with such directives without dire consequences which are enforced through the instrumentality of state powers.

‘Will’ is used for insistence on the part of the speaker (because ‘will’ appears characteristically in oaths in the constitution and oaths are spoken) to perform the stated act in his utterance. The speaker insists because pragmatically, there is a non-linguistic authority (the constitution which enjoys or derives its authority from the state), which compels or insists on the speaker performing that act which is named in his utterance. Prohibitions are similarly expected not to be performed either by the state or by individual citizens. Prohibitions are encoded in the negative element ‘not’ which shows the willingness of the speaker not to perform the act that is named in his utterance.

‘May’ apart from being used to express epistemic possibility, is also used principally to express or grant permission either to the state or to individuals to perform certain acts. In what we have preferred to call ‘willing permission’ the constitution grants individuals or bodies permission to enjoy certain rights and privileges, if it is their desire to enjoy them:

Subject to the provision of the constitution, the National Assembly may by an act make provisions for ....

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In this provision, the National Assembly is permitted (if it desires) to make the provisions stated in this section. Similarly, individual citizens or officials of the state could be granted permission to enjoy other rights and privileges stated in the constitution.

It is possible to conclude, based on our analysis, that ‘shall’ ‘may’ and ‘will’ perform similar functions in quasi-legal documents as they perform in the constitution. When these modal verbs are used in quasi-legal documents, they perform either obligatory or permissive functions. For instance, ‘shall’ and ‘may’ as used in the “Gender Review of the 1999 Constitution of the Federal Republic of Nigeria” conform to these functions apart from in one instance of the use of ‘may’:

Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons except in accordance with the law.

In this instance of the use of ‘may’, an obligatory function is intended. The provision is a prohibition of the separation of children from their families. In the constitution, this provision is expressed by ‘shall’, which is a stronger element for conveying obligation. We may add that in spite of the use of ‘may’ in this way, the intention of the constitution to make a prohibition is quite clear and unambiguous.

### **1.4 Conclusion**

It is possible, based on the focus of this paper and the research of which it forms a part to make the following conclusions.

The research of which this paper is a part has proceeded on the assumption that modal auxiliary verbs are crucial in the interpretation of constitutional provision. It has, therefore, been the central belief of the work that a proper understanding of the modals is sine qua non for the proper interpretation of any constitutional document. The focus of the research has been determined essentially because of the distance that obviously exists between the normal every day interpretation and meaning of modal auxiliary verbs and their meaning in constitutional documents. Even in constitutional and quasi-legal documents, modal verbs do not lend themselves to stable interpretation.

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Based on the paper and the research from which it has been derived, it is possible therefore, to divide modals into two:

- 1) Deontic modals: Those modals like ‘shall’ ‘may’ and ‘can’, which convey obligation, and permission, and
- 2) Epistemic modals which express the speaker’s attitude to the probability, or possibility of what is contained in his utterance.

To start with, when ‘shall’ is used either for deontic obligation or for deontic prohibition, it is always the case that the third person is being obliged to do or is prohibited from doing particular things stated by the constitution. An example of this is found in section 15 (4) p. 8 of the constitution:

The state shall foster a feeling of belonging and of involvement among the various peoples of the Federation, to the end that loyalty to the nation shall override sectional loyalties.

In this extract, ‘shall’ is used to make it obligatory for the state to foster a feeling of belonging among the people of the Federation. This directive compels the third person- the state.

In the same manner, the state is compelled to see to it that loyalty to the nation override other forms of loyalty.

Similarly the use of ‘can’, which is rare, conveys deontic ability. In the 1979 constitution for instance ‘can’ is used to convey ability, which makes the third person to be given the permission to perform any act that is mentioned in the constitution:

For the purpose of section (4) of the section, a House of Assembly shall not be deemed to be unable to perform its functions so long as the House of Assembly can hold a meeting and transact business.

It is important to point out that the constitution is the first person which specifies what actions or acts are to be performed by (usually) the third person-individual citizens, or the state or even itself. In most cases, it is possible to say:

The constitution hereby states or declares that the state shall foster a feeling of belonging and of ...

The constitutional power of the state, therefore, specifies and spells out measures for the enforcement of state directives.

On the other hand, epistemic modals predict futurity in the context of the constitution. Mainly the modal ‘would’ falls into this category. ‘Would’ in the constitution has an epistemic



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function indicating essentially probability or possibility. It is important to also note that all modal verbs in the constitution have epistemic components. All such verbs have future application, as it is not, for instance, possible to permit someone in the past.

We cannot, for example say:

He shall come yesterday.

Nor is it feasible for someone to be willing in the past. For instance, an individual cannot say:

I do solemnly swear that I will be faithful and bear true allegiance to the Federal Republic of Nigeria, that I will preserve, protect and defend the constitution of Federal Republic of Nigeria yesterday.

In terms of the impact of constitutional directives, effects are achieved as a result of the appropriate interpretation of the communication given. For example, when an obligation is given, it is compulsory for the citizen or whoever or whatever the directive is meant. Similarly, if willingness is expressed, it is expected that there will be a fulfillment of that willingness. For instance, where an individual makes an oath, it is expected, within the context of the constitution that the individual will abide by the oath taken.

It is of vital importance to say that these conclusions which, are possible for the 1979 constitution of the Federal Republic of Nigeria, could also be applied to other constitutional and quasi-constitutional documents since modal auxiliary verbs are used to achieve broadly the same ends-those of enforcing obligation and of granting permission-in those contexts

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