

Forensic-linguistic Analysis of Grammatical Modality Features in Kenya Supreme Court judgements

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Abstract:-Many studies on grammatical modality have focused on media and political discourse. Studies on modality features as used in legal discourse are limited. This study undertook a Forensic-linguistic analysis of Kenya Supreme Court judgements with a view to explore the grammatical modality features used. Guided by Systemic Functional Linguistics, different aspects of modality were investigated. These include deontic modality, dynamic modality and epistemic modality. The study established that the deontic modal categories are used in the Supreme Court judgements to articulate the prescriptive nature of legal discourse. Modal verbs such as 'shall', 'must', 'should', 'ought to', 'need to', 'have to' and 'had better' are used in the judgements to articulate obligation, permission, and authority related to various legal expectations. Secondly, dynamic modal features (can, could, would, shall, will) are used in the Supreme Court judgements to signify ability, volition, intention and willingness. On the other hand, the epistemic modal categories (must, could, may, might) are used to articulate the speakers' confidence or lack of confidence concerning different propositions related to the legal process. Evidently, the judges and lawyers use high modality features to assert legal authority while median and low modality features are used to describe different legal aspects. From the study, it is clear that legal discourse is both prescriptive and descriptive. The participants in the legal process should therefore use appropriate modality features to express the intended meanings and legal functions.

Key words: Forensic linguistics, Legal discourse, Grammatical modality, Supreme Court judgements, obligation, volition, authority, modality value

I. INTRODUCTION

Forensic Linguistics entails analysis of the language of the law either as evidence or as legal discourse. Language as evidence includes authorship attribution and interpretation of meaning, while language as legal discourse focuses on legal documents, legal judgements and other legal events (Olsson & Luchenbroers, 2014). Researchers in Forensic Linguistics also examine the written language of the law with an aim to highlight relevant structural, lexical and semantic features. Modality is a key aspect in legal discourse in terms of meaning and function.

Modality according to Halliday (2014) is the speaker's judgement or request of the hearer's judgement on the status of what is being said. In Halliday's Functional linguistics, modality is situated in the interpersonal component of grammar. Martins and David (2003) affirm that modality introduces an attitudinal voice to discourse as it helps in grading polarity and setting up positivity and negativity. Grammatical modality is expressed by use of modal verbs which include *can, could, may, might, will, shall, should* and *must*. Semi-modals such as *dare, need, ought to*, among others can also be used. Literature reveals that modality can also be expressed in the clause through the use of adjectives, adverbs and certain nominalizations (Fowler, 1985).

Palmer (1990) explores three types of grammatical modality with regard to nature of meaning added to a proposition. The key types of modalities according to Palmer are deontic modality, epistemic modality and dynamic modality. In each of these categories of modality are found different aspects of meaning including permission, command, possibility and necessity. According to Collins (2009), modality embraces a range of semantic notions including possibility, necessity, obligation, permission and hypotheticality.

II. LITERATURE REVIEW

Early studies on modality recognize several categories such as alethic modality, epistemic modality, deontic modality and existential modality (Jingua, 2019). Recent modality typologies explore form and meaning aspects in discourse and give more insight on role of modality in representation of meaning. Modality is regarded as a semantico-grammatical category. According to Griffiths (2006), modality is the term for a cluster of meanings centered on the notions of necessity and possibility. There are different categories of modality which include deontic, epistemic and dynamic modality (Palmer, 1990).

According to Palmer, Deontic modality is performative in nature. By use of different modal auxiliaries, a speaker or writer may give permission, lay an obligation, make a promise or give a threat. The quality of deontic modality can be extended to include those modal forms that are used to ask for permission. Modal auxiliaries such as ‘*can*’ and ‘*may*’ are useful in this category. On the other hand, when a speaker uses ‘*should*’ and ‘*ought to*’, the speaker takes responsibility for the judgement given without involving himself/ herself in the performance of an action. Moreover, modal auxiliaries in the deontic category are also used when spelling out rules and regulations.

In the deontic category, ‘*can*’ is often used to convey a command often of a brusque or somewhat impolite kind. In other cases, ‘*can*’ is frequently used to give permission though its use is regarded less formal as compared to ‘*may*’. Vanparys (1987) states that the modal ‘*can*’ is also used to state that someone has permission. According to Leech (2003), deontic ‘*may*’ is usually used subjectively with the speaker as the deontic source. Vanparys (1987) observes that ‘*may*’ is used to perform acts of granting permission. For instance, when one asks ‘May I sit here?’ the act of sitting is solely dependent on being granted permission by the addressee (Groesfema, 1985).

The modal auxiliary ‘*shall*’ is used to show deontic necessity and prediction in statutes and legal documents. It also expresses obligation and it is widely adopted into legal English. The modal serves its function well because of its double use in reference to obligation and futurity aspects which are inherent in regulative texts (Facchinetti, Krug & Palmer, 2003). Huddleton and Pullum (2002) affirm the constitutive function for the modal ‘*shall*’. This is the regulative function where the modal is used with the third person subject as seen in legal documents.

The auxiliary ‘*must*’ falls in the category of the high value deontic modals which are used to express necessity and obligation. This auxiliary mainly expresses deontic necessity or obligation and has a default interpretation in which the speaker is identified as the deontic source. Lyons (1977) observes that deontic ‘*must*’ can be used performatively by a speaker to impose a directive. Subjective deontic ‘*must*’ is used when the speaker is not in a position to oversee the actualization of an obligation given. On the other hand, objective deontic ‘*must*’ is typically found in legal texts

and documents to articulate a strong obligation concerning a specific action (Collins,2009). Despite the strong compulsion expressed by ‘*must*’, it is less forceful and indirect when compared to the imperative form such as ‘*Stop doing that.*’

The second type of modality is epistemic modality. The function of epistemic modals is to make judgement about the possibility that something is or is not the case. Palmer (1990) affirms that this type of modality is used with propositions rather than actions, states or events. Ideally this aspect of modality is used to articulate the qualities of possibility, inference and necessity in propositions (Facchinetti et.al 2003).

The Epistemic ‘*must*’ is used to show the speaker’s confidence in a proposition and the objective epistemic ‘*must*’ expresses logical certainty with reference to facts. With epistemic ‘*must*’, there are no restrictions on the temporal relationship between the modal meaning and the situation (Collins, 2009). This is illustrated in the example below:

- a) That must be the messenger.
- b) He must be here tomorrow.

The modal form ‘*must*’ in the above sentences fits well with respect to the present and future time

The other modal auxiliary with epistemic meaning is ‘*should*’. The modal is typically subjective with the speaker indicating a tentative assumption or assessment of the likelihood of a proposition. With this modal, there are no temporal restrictions on the proposition stated. The modal can be used with past, present or future propositions. Other modal auxiliaries used to express epistemic modality include *can*, *may*, *could*, *might*, and *will*.

Huddleston and Pullum (2002) observe that ‘*can*’ may serve as a marker of epistemic modality but with restrictions to non-affirmative contexts (*There can’t be a student who is ignorant on the value of education*). Epistemic ‘*may*’ has a concessive use which serves to soften the speaker’s assertion (Coates,1983). In the use of ‘*may*’, the speaker concedes the truth of a proposition rather than expressing lack of confidence in it. Others modals with epistemic meaning are *could* and *might*. ‘*Could*’ occurs readily in the past time use while epistemic ‘*might*’ is used with general time situations including the past. ‘*Might*’ is close to the indeterminate borderline between epistemic and dynamic modality (Collins, 2009).

The modal ‘*will*’ can also be used in the epistemic sense. There are two main uses of epistemic ‘*will*’. In the first use, the modal appears in present and past situations. The other use is labelled as futurity by Huddleston and Pullum (2002). Epistemic ‘*will*’ conveys the speaker’s confidence in the truth of a proposition based on evidence and knowledge. The modal conveys some sort of an assumption or expectation with a suggestion of future confirmation (Collins, 2009).

Thirdly, dynamic modality is used to highlight ability, possibility, prediction, necessity and habit (Facchinetti, 2003). The modal ‘*shall*’ for instance can be used to express futurity and is used in place of ‘*will*’ with first person subjects. When used with non-first person, the modal guarantees that the action expressed will occur, a usage which is frequent in religious texts (Facchinetti,2003).

Dynamic modality is a minor category with the modal '*must*'. The modal is used to express an internal need in the subject referent. For instance, 'The lions are predators and they *must* come out to hunt'. The same type of modality is seen in the use of '*need to*', which expresses objective logical necessity. This usage derives where the speaker makes a deduction from available evidence. '*Need to*' expresses necessity located in external circumstances (Collins, 2009).

Dynamic '*may*' is used to express theoretical possibility whereby the potentiality for action resides in an external situation. When used so, '*may*' is associated with a greater degree of formality. '*Can*' is equally used to express theoretical possibility and dynamic implication. In addition, '*can*' is useful in expressing ability which is potentiality domiciled in the subject referent (Collins, 2009). '*Can*' is mostly used in a sense of neutral possibility, simply to indicate that an event is possible and there is no obstruction to the action of the lexical verb (Palmer, 1990). '*Could*' and '*might*' are closely related to '*can*' and *may*. '*Could*' is used to express past ability whereas '*might*' appears in archaic contexts for the same purpose (Collins, 2009).

Several studies on legal discourse have been carried out. Dong (2013) carried out a modality analysis on the verbal exchange between lawyers and witnesses in the courtroom. The study evaluates the relationship between the different types, orientations and values of modality used in court by lawyers and witnesses. The study reveals that lawyers speak objectively, employing more high and median modalities. This accords them more authority and credibility during the legal process. On the other hand, the witnesses incline towards low value modality and are quite liberal in the use of subjective metaphorical modalities. The use of low value modality and subjective language choices presents the witnesses as subordinate during the litigation process.

Modal verbs are used extensively in the legal process. Krapvkina (2017) examines the use of the modal '*shall*' in legal English. According to the study, it is established that '*shall*' performs a number of semantic functions in legal texts that violate the principles of legal drafting. The study explores the approaches adopted in legal writing concerning the use of '*shall*'. They include restricting '*shall*' to one sense, avoiding using '*shall*' and keeping '*shall*' with all its existing meanings. The study concludes that the modal '*shall*' may be replaced with other modal verbs such as '*may*', '*must*' and '*should*' for less ambiguous meanings.

Gozdz-roszkowski (2021) conducted a study on application of Corpus linguistics in the legal context. The research reviews application of corpus linguistics in the area of legal discourse with a focus on phraseology, legal translation, genre perspectives and evaluative language in judicial settings. Hoffman (2011) conducted a study on the use of discourse analysis methodology to teach legal English. The study proposes a curriculum focussed on raising students' linguistic awareness through elaborate discourse analysis in the legal context. Through careful analysis of the language used in the legal process, students gain expertise in analysing and appraising legal texts. Students learn to use legal language to achieve the desired linguistic and legal effects.

Berukstiene (2016) carried out a research on the features and criteria used in the classification of the legal texts into genres. It is imperative to investigate genres of legal texts to shed light on general features of legal discourse and on the nature of the law. In the study, it is observed that various legal texts reflect the diversity of law. Legal texts have different functional, structural and linguistic features. They are thus classified into genres on the basis of the different criteria

including functions and linguistic structures. Analysing the different genres of legal texts helps in the construction and understanding of legal discourse.

Breeze (2011) uses the notion of disciplinary values to examine the way legal writers communicate meaning in different genres. Different adjectival and adverbial sets which have prominent place in legal discourse are identified. The collocates and semantic preferences for the adjectival and adverbial sets are studied in word corpora under different themes. The data is studied under themes such as commercial law, academic journal articles, case law, legislation and legal documents. From the study, it is clear that the adjectival and adverbial sets appear to convey values that define the legal and social expectations.

Cecconi (2008) carried out a study on address and reference strategies as used to produce effects of discourse incongruity during cross examination. The analysis reveals the author's ability to utilise social-pragmatic features of the 'speaker-addressee' and 'speaker-referent-addressee' relationship to foreground lawyers' manipulative discourse behaviour towards their addressees and referents. The manipulation of address strategies is accomplished by contravention of the sociolinguistic rules expected in the legal set up or by creating a disconnect between conventional meaning of honorifics and the lawyers' pragmatic intention. This results to the honorifics acquiring a sarcastic function that contrasts with the expected standards of courtroom communication.

Chin and Chiang (2011) examine 'fight' metaphors employed in Taiwan legal statutes and judgements. The study also identifies the influence of the justice system on language use. It is evident that 'fight' metaphors are used to reflect litigant ideologies and shape the legal reality. The proliferation of 'fight' metaphors in the judicial process suggests that the concept of 'legal fight' to individuals engaged in litigation is mapped unconsciously in their minds and may affect subsequent discursive behaviours in the courtroom.

The studies conducted have focused on various aspects of legal discourse. However, there is limited research on modality as used in written legal documents. To bridge the gap, this study examined the grammatical items that are used to introduce modality in Supreme Court judgements. The focus was on political and civil judgements where different aspects of modality including deontic, dynamic and epistemic modality were examined.

III. RESEARCH METHODOLOGY

A. Research Questions

This study aimed to investigate the different types of modality in Kenya Supreme Court judgements and the linguistic functions realized. According to Halliday (2014), modality is the speaker's evaluation or request of hearer's opinion on the status of what is being said. This study explored the following questions on grammatical modality:

1. How are grammatical modality features used in Kenya Supreme Judgements?
2. What functions do the grammatical modal categories have?

B. Theoretical Framework

This study was guided by Systemic Functional Linguistic theory. SFL theory by Halliday (1994) describes the lexical grammatical choices available to writers for the formation of different meanings. In Halliday's view, a discourse analysis that is not based on grammar is not an analysis at all but simply a running commentary on a text. This theory is centered around the notion of

language functions and serves as a model of language production and use (Kay, 1979). The framework was appropriate in the exploration of different modal forms and their functions in the Kenya Supreme Court judgements.

C. Research Design

This study employed qualitative research design. Purposeful sampling was used to identify three Supreme Court judgements on election petitions and three on civil cases. The judgements were then downloaded from Electronic law reports (eKLR) digital repository. The researcher read the sampled judgements and using a lexical-grammatical checklist identified and highlighted the different modality features used in the judgements. Afterwards, the data was rewritten in the form of research notes. The other step entailed creation of data codes according to functional aspects of the modality features identified. The codes were then collated with supporting data and grouped into grammatical themes. This was followed by a thematic discussion of the data under deontic, dynamic and epistemic modality.

D. Research Population

The population for this study included judgements delivered by the Kenya Supreme Court since the promulgation of the repealed constitution in 2010. By the time of this study, there were 466 judgements by the Kenya apex court which were available at Electronic Law reports (eKLR) repository. A sample of six judgements was purposively selected for an in-depth study of the modality features used to index different legal functions.

E. Research instruments

A grammatical checklist was used for identification of relevant grammatical- modality features appearing in the sampled Supreme Court judgements. The features were highlighted and then rewritten into research notes.

F. Ethical consideration

The research concept was submitted to Chuka university Ethics Committee for appraisal and consent (vide letter dated 21/6/2021). A research permit was also granted by NACOSTI prior to embarking on this research. Ultimately, the research complied with all research ethics requirements in relation to acquisition, management and utilization of data.

IV. RESULTS AND DISCUSSION

The results on the features of modality used in Kenya Supreme Court judgements are presented below. The features are placed in their appropriate categories namely deontic, dynamic and epistemic modality features.

A. Deontic Modality

Deontic modality markers of obligation

Conventionally, the modal '*shall*' is used in the expression of the deontic sense which entails imposing an obligation or reporting the existence of an obligation (Abdul, 2011). In the data collected, the modal auxiliary '*shall*' is used in the judgement to signify a sense of formal

obligation. The propositions preceded by this modal have a status of immutability and the subjects so ordered have to act according to the ruling of the court. This is seen in excerpt *T1* which is sourced from a case filed by one Martin Wanderi and 106 others against the Engineers Registration Board (ERB). Graduate engineers from Egerton University and Masinde Muliro University had lodged a complaint at the Supreme Court when the ERB failed to register them as practicing engineers even after they graduated with degrees in Engineering. After the Court listened to the submissions by all parties, the following ruling was made:

T1

The Engineer's registration Board shall pay general damages assessed at Ksh 200,000 to each of the petitioners and second interested parties. The sum shall carry interest at a rate of 12% per annum from the date of High Court Judgement. The Engineer's Registration Board shall bear the costs of the petitioners and second interested party in petition no.19 of 2015 in the High Court, Court of Appeal and in The Supreme Court. The said costs shall carry interest at a rate of 12 % per annum respectively from the date of judgement. All other parties shall bear their own costs.

The absolute and binding nature of the directives given by the judge is illustrated by use of the modal 'shall' which has a high modality value. The use of this auxiliary leaves no options for the subjects concerned. The ERB as seen in the text is authorised to pay damages at Ksh 200,000 per petitioner. The board is also directed to bear the cost incurred by the petitioners in filing the suit. This ruling is authoritatively given and the deontic modality realised by using 'shall' which signifies the weight and finality of Supreme Court ruling. The ERB is required to meet the legal obligation in totality. What is stipulated by the text is obligatory and this aspect is derived from the immutability of law.

The other marker of deontic modality is 'must'. Ruppenhofer and Rehbein (2012) observe that the deontic sense is about obligations that are imposed by some source on an agent. In the Supreme Court judgements, the auxiliary 'must' is used in different ways in the judgements to show various aspects of obligation. The text *T2* from the Supreme Court judgement on the petition filed against the Engineers' Registration Board is an apt illustration. The petition had been filed to challenge the decision by the ERB not to register the graduate engineers from Egerton University and Masinde Muliro University of Science and Technology (MMUST)

T2

The essence of the right to fair administrative action is to ensure administrative processes meet constitutional standards. The element that administrative action must be lawful encapsulates the principle of legality and the fact that administrative action must be located in the law and must not be arbitrary".

The modal 'must' in the excerpt has a sense of objective obligation and high certainty value. The source of authority in this case is the law and those in administrative positions are obligated to act within the confines of the law. The writer articulates the absoluteness of the assertion made by using an impersonal entity (administrative action) in place of the subject. This combined with the deontic 'must' indicates the obligation to act as per the law. In this case the ERB has an obligation

to follow the principles of law and act within its legal mandate. The modal auxiliary ‘*must*’ in *T2* illustrates the restrictive nature of the law. Though mandated to register graduate engineers, the ERB had to carry out its responsibility within the principles of law. Failing to comply with this law renders the action by the board unconstitutional. By failing to register the graduate engineers, the board overstepped its mandate a fact which made the Supreme Court make a ruling that the ERB registers the students who had filed the petition and pay damages for the delayed registration.

Specific obligation involves combining the deontic ‘*must*’ with third person subjects to express a sense of specific rather than general obligation. This is seen in the text *T3*. The excerpt is drawn from a judgement on a petition filed by Mitu-Bell Welfare Society and two others against the Kenya Airports Authority, the Attorney General and Commissioner for Lands. The petitioners were challenging the demolition of their houses and eviction from the suit property in Mitumba village adjacent Wilson Airport.

T3

As an introduction to their submissions, they urge that Superior Courts have an inherent jurisdiction to issue remedies in rights-based cases and in the discharge of this power, Courts must ensure that their orders are just and equitable. In issuing such orders, Courts must always be alive to the doctrine of separation of powers.

The excerpt *T3* derives from a submission by Initiative for Strategic Litigation in Africa who were enjoined in the case as *Amicus Curiae*. The residents of Mituba village which is adjacent Wilson Airport had lodged a complaint in the Supreme Court after their houses were demolished and a directive issued for their eviction from the land. This was done regardless of court order that had been issued earlier. The *Amicus Curiae* start their submission with an assertion to show the responsibility of the court in giving just and equitable orders. The court is obligated to issue fair and just orders and ensure that offenders are punished. The Specific obligation is used when a speaker/ writer wants to assign the role of carrying out a particular action to a specific agent. The sense of obligation in *T3* is specific rather than general. The message in the text shows that the courts of law are required to adhere to the tenets of justice. In addition, the courts are also required to exercise their powers without being overshadowed by the other arms of the government

The other modal auxiliary that is used in the Supreme Court to show obligation is ‘*should*’. Using this modal in the deontic sense entails imposing an obligation or reporting the existence of an obligation (Ruppenhofer & Rehbein, 2012). The modal ‘*should*’ in the deontic sense of obligation is weaker than *must* and can be interpreted as- *it is a good idea to do something*. ‘*Should*’ carries a median certainty value. In the Supreme Court Judgements, this modal is mostly used to express the meaning of a moral obligation in the objective or subjective sense. Objective obligation is realized through passive structures used with the auxiliary ‘*should*’ as seen in *T4*, which is an excerpt from the dissenting judgement on 2017 presidential petition.

T4

A new election should be conducted only when voters have been completely prevented from accurately registering their intended preference in numbers sufficient to affect the outcome. A determination to hold a fresh election in terms of Article 140(3) should only be made if the following questions are considered, analysed and determined.

In T4, the writer uses the passive form together with the modal auxiliary ‘*should*’ to highlight the circumstances that could necessitate a fresh election. The sense of obligation with ‘*should*’ is mild with median certainty value and it is hinged on morality rather than a command. The writer states the obligation mildly and also articulates the circumstances under which an election can be voided and a new one conducted. The obligation is founded on a well pleaded case based on voters being denied an avenue to register their preference in an election. The other circumstance that may warrant a new election entails a fraudulent election, which does not reflect the will of the people. The electoral systems and processes are therefore expected to uphold the requisite constitutional principles in conducting an election. The objective modality as seen in T4 underscores the importance of the established legal principles and systems in guiding a country’s electoral system.

The auxiliary ‘*should*’ is also be used to show specific obligation. In this case, the modal is used together with a specific subjective form in a sentence as illustrated in T5. The engineering graduates from MMUST had been denied registration by the ERB because they had taken their degrees from a university that was not recognised, accredited and approved by the board. Those from Egerton University were denied registration by ERB because they had not met the minimum requirements as stipulated in the ERB act. The petitioners sought an intervention by the Supreme Court on the issue. According to the constitution, courts only address issues arising from decisions by academic bodies only when it is imperative to do so. Excerpt T5 illustrates the aspect of and criteria for the specific obligation being vested upon the courts of law.

T5

The court should be slow to interfere and should only seldom interfere in academic decisions of academic bodies.

According to T5, the court rarely interferes with academic decisions by academic bodies. The text is cited from the judgement on the case between the graduate engineers and ERB. By use of the modal ‘*should*’, the writer expresses the limitations on the involvement of the court in issues touching on academic bodies. The court can only handle cases related to academic bodies only when there is no other way to resolve the issues at hand. In the final ruling, the judges direct that the students be registered within twenty-one days and the ERB pays damages to the petitioners as per rates specified by the court.

Another modal form in the Supreme Court judgements that is used to express obligation is ‘*need to*’. The form is regarded as a marginal modal because it can be used either as a full verb or as an operator in a verb phrase. The modal ‘*need*’ expresses deontic modality when used in the operator or non-operator form. In the Supreme Court judgements, this modal auxiliary is used to show a sense of obligation which is out of the speaker’s control. Consider the data given in T6. In this case, the petitioners were the residents of Korogocho informal settlement, which is a slum in the outskirts of Nairobi, Kenya. The petitioners sought intervention by the Supreme Court on issues of ownership of the suit property. The main respondents in the case were the attorney General and commissioner for lands. The petitioners claimed that there was a threat to evict them from the suit property.

T6

The said letter requested the aforementioned parties to remove structures in the chief's compound to give room for construction of the APS houses. Surely the administration police need to be housed so as to provide security in the area.

The semi-modal 'need' to in T6 is used expresses a form of obligation that is out of the speaker's control. The modality value in this case is median. The text is derived from the Supreme Court Judgement whereby residents of Korogocho informal settlement had sought legal directive to be given title deeds to the pieces of land on which their semi-permanent houses stood. The petitioners also requested that the government desists from any attempt to evict them from their settlement. However, at the Supreme Court, the judges observe that no evidence was tabled on the threat of eviction. There was only a letter sent to a church group to move from the area chief's compound to give room for construction of administration police houses. This according to the cited text is not eviction. The judges show the obligation of the project mentioned (Administration police housing) by using the modal 'need to'. So as to appear impartial, the writer of the judgement uses the median modal combined with a passive form (*The administration police need to be housed*). This is meant to communicate the necessity of the project and invalidate the said letter as evidence of eviction.

Deontic Modality Markers of Authority

In the deontic sense, the modal 'can' shows evidence of some condition that determines whether an agent is or is not permitted to do something (Bieber, Johanson, Leech, Conrad & Finnegan; 1999). In the Supreme Court judgements, the modal auxiliary 'can' is used abundantly to refer to legal authority given to the courts of law concerning various issues. On the other hand, the negated form 'cannot' is used to indicate absence of legal authority. The deontic use of 'can' is well seen in the text T7.

T7

They cite the High Court decision of John Mukora vs Minister of Lands & 6 others, petition no. 82 of 2010 (2013) EKLR to urge that the right to property can only be enjoyed by registered proprietors of the land in question.

The text T7 above derives from a lawsuit filed by residents of Mitumba Village, which is situated near Wilson Airport in Nairobi. The modal 'can' is used in the text to indicate legal authority and right to property. In the petition, the residents of Mitumba village sought a declaration for compensation or alternative land for loss of their property including land. The Kenya Airports Authority had evicted them from the land regardless of a court order that had been issued earlier. The modal auxiliary 'can' is used to clarify where the right to benefit from property lies. Only the registered proprietors have the authority over a piece of land. This underscores the fact that the petitioners in the given case do not have the right to the piece of land from which they were evicted. They do not have any authority to enjoy the right to property because they are not the registered proprietors.

In other cases, the modal auxiliary 'can' is used in the negative form to signify denial of authority to perform a given action. When used in the negative sense, the modal carries high certainty value as illustrated in T8.

T8

On the contrary, it requires the state to take immediate steps to the maximum of its available resources. They therefore urge that the state cannot sanction an eviction in the absence of a concomitant duty to ensure alternative housing of the evictees.

The negated modal ‘cannot’ in T8 shows limitation in authority where even the state does not have absolute power. In this specific case, the Attorney General had published a notice in the dailies requiring the residents of Mitumba village to vacate their land within seven days. The appellants then filed an application seeking conservatory orders against the Attorney General. An order restraining the demolition was issued pending the hearing and determination of the case. Notwithstanding the conservatory orders, the Attorney General proceeded to authorise the demolition of the appellants’ houses in Mitumba village. The use of modal auxiliary ‘cannot’ indicates that the authority of the state is limited to ensuring that the rights of the citizens are not overstepped. The authority of state organs should not be used in such a way as to undermine the rights of the citizens. However, some state organs fail to abide by this principle.

The auxiliary ‘may’ is also used to denote permission and authority. However, unlike other modal forms, ‘may’ has low modality value. The deontic source of ‘may’ is seen to come from laws, morality, the external circumstance or the speaker himself/herself (Tran, 2014). This modal is used in the text T9 which is an excerpt from the constitution and it expounds on the jurisdiction and authority of a court of law. The modality in the clause illustrates that the court has inherent authority bestowed upon it by the constitution.

T9

Article 23(3) of the constitution provided that in any proceeding brought under article 22, a court may grant appropriate relief including: a declaration of rights, an injunction, a conservatory order; a declaration of invalidity of any law not justified under article 24, an order for compensation or an order for judicial review.

According to T9, the court is mandated to make a declaration on abuse or denial of rights, give an injunction concerning specific issues placed before it, or declare invalid any law which contravenes constitutional principles. The court has the mandate to order for compensation or even judicial review.

The negative form ‘may not’ is used to show prohibition or lack of authority to carry out a given action. This is seen in T10 below.

T 10

That further in making orders and directions in relation to article 43(1) of the constitution, the provisions of article 20 (5) (c) of the constitution stipulates that the court may not interfere with a decision by a state organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.

The text T10 shows the limitation of authority on the state and the court of law. The court’s authority is limited as far as allocation of resources is concerned, more so if the responsibility is

in the domain of another state organ. The negation on the modal 'may' is used to express deontic modality in the sense of denial of authority to engage in a specific activity. The modal form in *T10* in its negated form is used to stipulate that the court has no authority to interfere with a decision made by a legitimate state organ. Should the court proceed to give a directive that is in conflict with the interest of the state organ, it would be regarded as an illegality.

B. Dynamic Modality

Dynamic modality markers are expressions conveying ability, volition, intention and willingness (Tran, 2014). Dynamic modality varies from deontic modality in that the latter is discourse oriented while the former is subject oriented (Palmer, 1990). The key modals that express this type of modality are *can*, *could*, *will* and *shall*. The modal 'will' is used to make predictions that are not completely definite and in the dynamic sense to express immediate decisions or intentions (Bieber, etal.1999). This modal has a median modality value. There is significant usage of the modal *will* in the Supreme Court judgements as seen in *T11*.

T 11

In summary, I respectfully disagree with decision of the majority and in accordance with section 26(2) of the Supreme Court act 2011, will issue my full dissenting judgement within 21 days.

The text *T11* is sourced from the dissenting judgement by Justice Njoki Ndung'u on the 2017 presidential petition. The majority made a ruling to the effect that the presidential election of 8th August, 2017 was not conducted in accordance with the constitution and the law rendering the results invalid, null and void. However, Justice Njoki Ndungu was of a contrary opinion. The dynamic modality in *T11* signifies a volitional commitment to a divergent view. The cause of action by the subject is informed by own decision and is not compelled. The modal 'will' signify the decision made by the judge, Justice Njoki Ndung'u, and the resolve to issue a dissenting judgement within the time indicated.

Similar volitional involvement is illustrated in text *T12* derived from the same dissenting judgement.

T12

On the issue of the pending constitutional matters, it is imperative to note that this court will respect the hierarchy of courts and will not usurp the jurisdiction reposed in another court. This court will allow other courts below it to exercise their jurisdiction in accordance with the law and will allow a matter to come before it in the ordinary course of appeal.

The text alludes to the constitutional expectation concerning the Supreme Court. The modal auxiliary 'will' express a sense of willingness as it conveys the subject's volitional involvement in the performance of the act presented. The Supreme Court is expected to allow other courts resolve cases pending before them prior to the cases being taken up by the apex Court. The dynamic modality feature 'will' signify that the Supreme Court is not compelled on this issue. However, this expectation according to Justice Njoki Ndung'u is not met. The Supreme Court in its wisdom made a ruling on the presidential petition which according to the judge was pending in a lower

Court. This is one of the premises informing her dissent. The Supreme Court reneged on the expectation to give other courts space to handle issues before taking them up.

In the Supreme Court judgements, the modal ‘*can*’ is used to express the ability of the subject to perform the action presented in an utterance. This dynamic use of the modal helps to realize subject oriented possibility (Palmer, 1990). Consider the text *T13* drawn from the Supreme Court judgement on the 2017 presidential election petition.

T13

The illegalities and irregularities committed by the first respondent were of such a substantial nature that no court, properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can in good conscience declare that they do not matter and that the will of the people was expressed nonetheless... The results of an election in terms of numbers can be overturned if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the constitution and applicable law.

In *T13*, the dynamic modal ‘*can*’ signify passive and subjective ability respectfully. The passive form ‘the results can be overturned’ has put the agent in the background and fronted the object. This construction helps to give prominence to the effect of the modal ‘*can*’ on the object of the clause. In the election process, it is resulting that matter though they can be nullified in case of an illegality.

The modal auxiliary ‘*can*’ in *T13* brings out subjective ability. In the legal process, a petitioner is empowered by law to initiate the nullification of an election if there is proof that the election was not conducted in compliance with the principles laid down in the constitution. The oversight role is also vested upon any interested party. Election candidates, voters or the members of the civil society are entitled by the law to raise issues of concern in relation to the quality of an election. They have the ability to seek cancellation of results if the election is not conducted in compliance with the laid down constitutional principles.

The modal ‘*shall*’ is also used in the dynamic sense. In such instances, it signifies volitionality where the subject expresses their intention concerning a particular action. The volitional ‘*shall*’ always takes first person subject (Collins 2009) as illustrated in *T14*

T14

We would now like to turn to the facts of this case, starting with the first limb of Section 83 and in this we shall be analysing the violations of the principles in the Constitution and the electoral law that the petitioners are complaining of...We shall address other illegalities and irregularities later but for now we shall limit ourselves to the question of transmission of results and transmission of unverified results.

The excerpt refers to the constitutional principles for the conduct of elections. The whole election process should be free from violence, fair, transparent, impartial, efficient, accurate and accountable. Section 83 of the Kenyan constitution gives guidelines on the registration of voters and stipulates that a person qualifies as a voter if he/she is an adult, not declared to be of unsound

mind and not convicted of an election offense. The petitioners in the cited case alleged that that the IEBC flouted the constitution and the election law and thus compromised the will of the electorate.

In *T14*, use of the dynamic ‘*shall*’ expresses the intention of the judges to examine any instances where the constitutional principles guiding the elections were flouted. The plural subject ‘*we*’ in the *participant* slot illustrates the concerted nature of the proposition which involves a team of judges carrying out the legal task with the aim to deliver electoral justice. By using the dynamic modal ‘*shall*’, the commitment of the judges to justice is clearly spelt out. In the second instance, the use of the dynamic modal with the object ‘*irregularities and illegalities*’ reveals the extent of compromise in the conduct of the 2017 election and the determination of the judges to address these challenges.

C. Epistemic Modality

This type of linguistic modality is used to express the possibility and necessity of a proposition. According to Coates (1983), epistemic modality is not only concerned with the speaker’s assumptions or assessment of possibilities but also indicates the speaker’s confidence or lack of confidence in the truth of the proposition presented. Different modal auxiliaries are used to give epistemic value to propositions in the Supreme Court judgements.

‘*Could*’ is one of the auxiliaries used to convey the speaker’s level of confidence or commitment to an utterance made. The modal has a low certainty value and is used to show the speaker’s weak commitment to the content of the utterance (Tran, 2014). This is seen in *T15* which is an excerpt from the Supreme Court judgement on the 2017 presidential election petition.

T15

What is this court to make of the fact that of the 290 forms 34 B, that were used to declare the final results, 56 of them had no security features? Where had the security features touted by the first respondent disappeared to? Could these critical documents be still considered genuine? If not then, could they have been forgeries introduced into the vote tabulation process.

The excerpt *T15* captures a reflection concerning the quality of election materials used during the presidential election. The court had ordered a scrutiny of the forms used in the declaration of the presidential election results. It was discovered that some of the forms did not have the requisite security features which points to the possibility of a forgery in some of them. The court’s level of confidence in the genuineness of these documents seems low. From the text, there is a possibility that some of the said forms had been forged with the intention of compromising the election results.

The modal auxiliary ‘*must*’ on the other hand has a high modality value and is used in the Supreme Court Judgements to convey the speaker’s confidence in the truth of the proposition presented (Coates, 1983). This is seen in the text *T16* from one of the Supreme Court petitions filed by one *Paul Mungai Kimani & 20 others against the Attorney General & 2 others*. This law suit had been filed concerning land ownership in Korogocho informal settlement within Nairobi municipality. In the excerpt *T16*, the issue in question relates to whether it is legally appropriate for a group of people to institute court proceedings on behalf of themselves and others.

T16

This must be the reason the matter has not been raised in the appeal before us. In any event, the appellate court must have been cognizant of the fact that the question of locus standi in representative suit for enforcement of rights under the bill of rights is now settled under article 12 of the constitution.

Epistemic use of ‘*must*’ conveys an inference from the discourse context and the speaker’s belief that the occurrence of the event presented is certain. In T15, the writer is certain why the matter of representative lawsuit was not determined in the court of appeal or raised in the Supreme Court. The Supreme Court acknowledges the legal concept of *locus standi* where an individual can file a case on behalf of others. The certainty in the cited text is realized by use of the auxiliary ‘*must*’ and it derives from the legal context of the discourse.

The modal ‘*will*’ used in the epistemic sense marks the speaker’s prediction about the occurrence of the event presented. This epistemic modal has a median value and simply indicates the speaker’s confident prediction concerning the assertion made (Tran, 2014) as highlighted in T17. The text derives from the Supreme Court judgement on a petition filed by one Paul Mwangi Kimani and two others against the Attorney General and two others concerning the ownership of land in Korogochi informal settlement.

T17

The Supreme Court will only sit on appeal on matters which the other courts have already determined so that as an apex court, it benefits from the reasoning of these other courts...only cardinal issues of law or jurisprudential moment will deserve the further input of the Supreme Court.

The use of the epistemic modal verb ‘*will*’ reveals the level of certainty concerning the issues that can be addressed by the Supreme Court. From the text, the Supreme Court can only handle matters which have been determined at the other courts and where there are unresolved issues on interpretation or application of the constitution. The use of the epistemic ‘*will*’ shows the certainty and longevity of the proposition. This is based on the fact that the mandate of the Kenya Supreme Court is defined in the Kenya constitution. The apex court can only handle select cases on appellate grounds. In T17, the lower courts had exhausted their legal input and the Supreme Court had the mandate take up the case for final arbitration.

Another auxiliary used to express epistemic modality in the judgements is ‘*should*’. The modal has median modality value used to convey a sense of a tentative assumption. It is used to express the speaker’s assessment of probability (Tran, 2014). With the usage of this modal, the speaker shows a relatively weak assumption about the certainty of a proposition as exemplified in T18.

T18

If there is evidence of such substantial departure from constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. “It is clear to us that an election should be conducted substantially in

accordance with the principles of the Constitution, as set out in Article 81(e). If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.

The modal auxiliary ‘*should*’ in *T18* hints to a hypothetical situation which is not realized. For instance, when the election process departs from the constitutional imperatives, the ideal expectation on the election is not realized. The remedy for such would be the court annulling the election but the use of the modal ‘*should*’ with the verb ‘annul’ signifies that this expectation has a low degree of probability. An important parameter in an election petition is provision of evidence. If there is evidence that an election is constitutional, procedural irregularities do not warrant invalidating the election.

The assertion in *T18* also appears hypothetical with the use of modal ‘*should*’ where the level of certainty is low. In the Supreme Court judgements, ‘*should*’ is used to illustrate a much less confident assumption on the proposition made. Where ‘*should*’ is used, the speaker is not very confident that the assertion made is tenable.

The other epistemic modal auxiliary identified in the Supreme Court judgements is ‘*would*’. This modal is key among the secondary modals and it is used when the context of an utterance indicates an unreal condition. *Would* has a median certainty value in the sampled excerpt. This modal is used in the judgements when the speaker wants to communicate a sense of hypothesis and tentativeness (Tran, 2014). The text *T19* from the Supreme Court judgement on the 2017 presidential petition clearly illustrates this. The petitioners, Hon. Raila Amolo Odinga and Hon. Kalonzo Musyoka had moved to court to challenge the validity of the election in view of several irregularities identified.

T19

All that remained was for the POs to move to vantage points where 3G or 4G network would be picked and the details could automatically be transmitted in seconds...It is common knowledge that most parts of those Counties have fairly good road network infrastructure. Even if we were to accept that all of them are off the 3G and/or 4G network range, it would take, at most, a few hours for the POs to travel to vantage points from where they would electronically transmit the results.

It is clear from *T19* that all the assertions preceded by the auxiliary ‘*would*’ were not realized. The petitioners in the 2017 presidential petition took the failures as a contravention of the election’s act. In their submission, the petitioners used epistemic ‘*would*’ to highlight what they expected done but was not done. In addition to the tentativeness and minimal degrees of possibility, ‘*would*’ gives the expressions above a sense of indirectness. The speaker is giving a statement about his/her expectation but in an indirect and reserved manner.

V. CONCLUSION

Different aspects of modality were identified in the Supreme Court Judgements. These include deontic, dynamic and epistemic modality. These forms of modality are used to illustrate the attitude of the legal practitioners and other participants towards different issues related to the legal process.

The different components of modality are used to highlight the prescriptive, formal and immutable nature of justice. The lawyers and judges who are custodians of justice use high value modality to articulate legal authority. On the other hand, the median and low value modality features are used to describe the different legal expectations and processes. Ultimately, it is imperative for the participants in the legal process including the lawyers, judges and the litigants to use appropriate modal forms in line with the intended meanings and discursive functions.

VI. DECLARATIONS

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B) Ethical Consideration

The research concept was submitted to Chuka university Ethics Committee for appraisal and consent (vide letter dated 21/6/2021). A research permit was also sought from NACOSTI prior to engaging on this project.

C) Conflict of Interest

No conflict of interest was expressed or identified in this research work.

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