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Negotiations about Gradations of Power

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Negotiating about Gradations of Power

By John H. Wade

Legal Decision-Making Power

Power can be described as the actual or perceived ability to influence or change the emotions, beliefs or behavior of other people. There are many forms of power (Mayer 1987; Wade 1999). This chapter focuses on one type of power, which is often the subject of negotiations. This is *future decision-making power over people or resources, which power is supported by a legal system*. A person may have such legal power in the capacity of parent, shareholder, CEO, boss, director, prime minister, or tribal chief. Examples include power to draft or spend a budget; buy and sell assets; relocate children; obtain medical treatment for a child; hire judges; hire and fire employees; implement or terminate projects such as medical research, environmental improvement, international marketing, military invasions or building developments. The list of examples is long.¹

This chapter will set out a “gradation” of legal decision-making power ranging from total to zero. Such a gradation arguably provides a useful template and a form of “expert power” for any negotiator.

Legal power can stifle or promote change; encourage nepotism and tribalism, or not; and facilitate persecution of any opposition, or not. However, legal decision-making power is often weakened or trumped by other forms of power—disobedience, self-help, violence, weak legal systems, charismatic dissenters, or wealthy investors. (“Do what I want or else”) Skillful dictators and labor unions may not be particularly concerned about the negotiation and eventual division of legal decision-making power on paper. They may be accustomed to manipulating the paper rules with violence, intimidation, nepotism and corrupt cronies. Conversely, deans of modern university faculties repetitively state with a smile or a scowl that although they are legally supposed to be “in charge”, they have little or no power over independent academic staff (“herding cats”).

Nevertheless, legal decision-making power usually enables a range of long term and perhaps entrenched decisions to be made in any family, organization or nation, particularly about the allocation of resources. Founding fathers and mothers of clubs, churches, organizations and nations are particularly adept at negotiating balances of power in the form of “constitutions”. The founders usually negotiate with passion and persistence as they have experienced absolute power corrupting absolutely.

Negotiating about Numbers

However, negotiating about future decision-making power is clumsy, at least because the neatness, and predictable leverage and dance of numerical concessions is usually absent.

The majority of negotiations involve discussions of “numbers”---of dollars, acres, tanks, rockets, hours of work, interest rates, timing of performance, percentage of profits, yards from borders, cost of repairs etc. Aubert has suggested helpfully and controversially that negotiations about values (What books should the children read? How to foster respect in the workplace?) always convert to numbers; and negotiating about numbers (“How much compensation--?”) always moves back and forth to values (“It was your fault”; “I worked harder”; “We arrived here first”; “that was contributory negligence” etc) (Aubert 1963).

One key skill of any competent negotiator is the ability to create neutral, mutually acceptable and precisely worded agenda questions which represent “topics”, “lines” or “issues” along which a range of numbers or solutions can be moved. For example, when estranged partners negotiate for the sale of their business:

- What is the value of the business?
- What percentage of that value should each partner receive?
- On what timing?
- With what security for each deferred payment?

It is worth noting that these four “sale” topics involving numbers, will usually require additional “power” topics relating to the interim management of the business during the sale process.²

These agenda questions traditionally begin with the words “how” or “what” in order to avoid premature closure of options. When massaged into mutually acceptable language, well drafted questions can have the effect of reducing hostility, clearing the fog of war and negotiation noise, creating visual charts, and demonstrating a template of “normalcy” for the negotiating parties and their supporters. The questions or lines usually deal with three topics namely:

- **FACTS** (what is the value of the business? What were the written terms of the contract? What happened just before the accident? How much will the repairs cost?)
- **PROCESS** (How can the business be valued? How to discover what was said on that day? How to measure the extent of the injuries?)
- **REMEDIES** (What can be done about the missing money? How to assist the children to adjust to two homes? What remedies are available for the injured back?)

The lines or topics for negotiation can helpfully multiply if the parties each become aware of their *own* diverse interests, goals and risks (some negotiators have little self knowledge); and then are willing to disclose, rank and monetise (numbers emerge

again!) these interests, goals and risks either to self and their own team or even across teams (Wade 2001a).

Once the lines or issues are accurately created, negotiating parties can prepare insult, starting, target and reservation numbers along those lines. Then the parties can move back and forth along each line, particularly the “remedy” lines, with numbered offers. When offers on any line remain apart, then progress can be made by the ubiquitous words “what if”; “if”; and “assuming that—.” For example, “assuming that we find a satisfactory solution to the valuation question, what are your current thoughts about percentage division?”

However, what if the remedial lines do not involve “numbers” (of acres, dollars or steak knives)? Numbers are easy to prepare, understand and move. Losses and gains occur by visible and predictable increments. What if the remedial topic has no numerical range? A wilderness of “losses” threatens the standard negotiation dance.

Negotiations about decision-making power raise this challenge. What is the predictable “range” of non-numerical offers, counter offers and solutions from total to zero legal power? Generic negotiation questions about power could be:

- *How* will future decisions be made about the following different topics---- (expenditure, medical care, armament restrictions, holidays etc)?
- Or, *who* will have the power to make future decisions about----?
- *What* conditions, if any, should be followed before or after each type of decision is made?

Gradations of Legal Decision Making Power

What follows is a gradation or scale which gradually moves decision making power from total power for one person, to a solution of total power in the hands of the other negotiating party. As already mentioned, a negotiator or mediator who has ready access to such a gradation or range, adds normalcy, structure, visibility and predictability to the negotiation. As with a “numbers” negotiation (dollars, acres, steak knives), each party can prepare on a confidential chart its preferred starting solutions about power, what moves to make and how quickly to make them, and where resistance will probably occur based on current “facts” and emotions. Moreover, guesses can be made about the same concepts for the other negotiating parties who may be moving from somewhere near to the opposite end of the range.

Of course, a “loss” of decision-making power “down” the gradation scale will often be, and can be reframed as, a potential “gain.” For example, negotiating some degree of power sharing with another may:

- Placate a disruptive dissident and tribal supporters
- Add new expertise for future decisions
- Test abilities of and educate future leaders
- Enable blame shifting for future decisions
- Create an obligation to return favours later
- Distribute exhausting work loads

- Create mutually shared “agreement” language
- Encourage commitment to an organization

In summary, a gradation from *total* “legal” power via thirteen incremental losses to *no* “legal” power is as follows:

- Total power
- Time limited total power
- Rotation of power
- Duty to Report
- Criteria as Guidance to the Exercise of Power
- Division of Topics and Categories of Power
- Mandatory Consultation Processes; Secret or Publicized
- Entrenchment of Restrictions on Future Decision Making
- Deadlock: Agreed mandatory negotiation or mediation process
- Deadlock: Agreed Mechanisms to trigger Resolution:
 - *automatic formulae;
 - *an independent arbitrator or judge;
- Qualified Veto Power by Other
- Veto Power by Other
- Total Power to the Other Party

Each of these gradations will be expanded shortly in what follows:

Total Power

One party has or claims complete power to decide in the future---what repairs to the apartment complex, by whom and at what cost; how much will be spent on marketing; who will be appointed as employee or judge; who decides about children’s medical treatment.

Where one party trusts another, then they may be willing to grant total power to that trusted other in certain areas of decision-making. (Maister, Green and Galford 2000; Lewicki 2006).

Conversely, a claim (and inherent threat) of absolute power may be disguised by veneers of nominal consultation, rigged elections, a history of benign dictatorship, the smile of a crocodile, or reassurances of wisdom and expertise. Some long term bosses, rulers, spouses and chiefs are experts at recycling smiling veneers during negotiations.

Time Limited Total Power

One gradation less than total decision-making power is where that capacity is limited in time. The president/boss/spouse/business partner/parent/tribe agrees to be “in charge” for x years, whereupon power will shift to another named person automatically, or unnamed person via an election process.

Of course, this model of time limited total power has been negotiated into many national constitutions by the founding parents of those nations.

Rotation of Power

A further diminution of decision-making power can be agreed upon whereby that power mandatorily rotates every X years between tribes, factions, or individuals. Today's boss will be tomorrow's servant until his/her turn comes around again. So be kind today, in order to avoid paybacks tomorrow. This solution is adopted in some families where children or separated parents feud over holiday destinations. Therefore the parents agree that child one decides in year one; child two decides in year two; child three decides in year three; and then start again. This solution has also been adopted in some tribal societies, where automatic leadership rotation between tribes provides an attempt to modify nepotism.

Duty to Report

A minor though important qualification on total legal power is a duty to report *after* certain decisions are made. This is not as onerous as certain duties to consult, but the two are often combined.

The duty to report:

- can be to the other interested parties, or to a neutral accountant, engineer or other go-between;
- may arise daily, weekly or yearly;
- and may be paid for by one or all parties. (Note how two *numbered* negotiation lines again emerge with these last two variables).

Thereby a mechanism for some degree of transparency is set up, and also an early warning system for possible misuses of total power. For example, where partners or separating spouses agree to the sale of a business, it is common for one partner:

- to insist on interim control of the business and sale process in order to sustain efficiency
- to insist on minimum "interference" or access to the business by the other party while the sale is being negotiated
- and in return, to authorize provision each week of records of the business income, expenditure and bank accounts to the other partner(s), in order to reduce suspicions that money or assets might "disappear."

Similar regular obligations to account publicly to boards, shareholders and electors for financial decisions are imposed on managers, corporations and government departments. These obligations may arise from agreement or legislation.

Criteria as Guidance to the Exercise of Power

The next gradation in the diminution of absolute power is effected by a list of agreed criteria which allegedly modifies the decision maker's broad discretion. For example, a major tenant in a shopping mall can negotiate with the owner-lessor that future

adjoining stores shall *not include* food or clothing shops; but should if possible *include* only those stores which are selling technology, camping or electrical goods. Or, the power of a parole board or government to release prisoners early could be qualified by the board or national government agreeing *not* to release those convicted of crimes of terrorism or murder; and to *favour* early release of those convicted drug use or seditious speech offences.

Notoriously, long and vague criteria lists provide little restraint on power and discretion as the criteria are not ranked.

Division of Categories of Topics and Power

It is a classic pattern of bargaining for parties to divide or swap resources. “If you take charge of marketing decisions, I am willing to manage research”; “if you will control budgetary allocations, I am willing to manage day-to-day expenses.” Famously, the negotiated constitutions of various federated countries, including USA, Canada and Australia, include a *list* of topics over which the federal government has exclusive power, while the states or provinces pick up the residue—or vice versa. Of course, boundary disputes are frequent, at least because such lists cannot foresee new topics which emerge in complex societies. These boundary disputes are occasionally “resolved” by decisions of “high” courts.

In conflicted organizations, it is common for one of the disputants (aka “troublemakers”) to fall back on the “negotiated” solution of a work transfer to a distant office or minor portfolio, where, pending retirement, the categories of decisions made will be uncontroversial or unnoticed.

Another illustration of a starting division of power by vague “topic” can be found in local statutes, or in agreements between separating parents about their children. The topics can be bunched under four vague colloquial categories of “little,” “emergency,” “big,” and “irreversible decisions.”

- **Little decisions:** The parent who has daily care of the child legally can make little decisions which might be listed such as food, clothing, friends, books, screen time; or left unspecified under the vague label of “day to day” decisions.
- **Emergency decisions:** The parent who has daily care at the moment of the emergency (eg car accident, swallowing poison, breathing difficulties etc), can decide immediately what response is appropriate.
- **Big decisions:** Obviously this topic has murky borders with the preceding two categories, but commonly includes decisions about church attendance; which kind of school; relocation to another residence; travel out of the country; contraception; name change. This category of decisions often requires as a starting point, the written consent of both parents, or a court order allowing one parent to make such unilateral decisions.
- **Irreversible decisions:** Again this category has overlap with “big” decisions, but classically includes a therapeutic decision to sterilize a child; or allow a child to donate organs to a sibling or parent; or permit gender reassignment of a teenage child. Such decisions, due to dark histories of exploitation of

children, may be taken away from parents by statute or agreement and given to courts.³

In elusive fashion, the above decision making powers of parents over children's lives fade gradually as children reach teenage years, and power shifts to the child, practically, culturally and legally. On occasions, where patterns of "neglectful" or "abusive" parental decision making come to the attention of a state child welfare department, a child may be made a ward of the state, and all decision-making power about the child shifts to that department.

Mandatory "Consultation" Processes

A further diminution of centralized decision-making power is often effected by an agreement to "consult" with other interested or expert people before a decision is made. This process has a number of benefits:

- The pause, wisdom and diverse opinions involved in the consultation process may (or may not) modify a hasty, foolish or self-interested proposal.
- Importantly, consultation also reduces ambush and marginalization for the consultee.
- Shallow or deep consultation also provides someone else to blame if the ultimate decision turns out to be foolish or illegal.
- Moreover, where the volume of decisions is huge (eg employment, funding, immigration and social security applications), routine delegation and rubber stamping of the decisions of consultees becomes normal practice.

Although the *process* of consultation is usually mandatory in such agreements, the ultimate decision-maker rarely agrees to be legally bound by any *substantive* recommendations of the consultees. Such loss of control would be a large leap in the gradation of possible concessions during a negotiation. In some situations, such an agreed delegation of complete decision-making power ("passing the buck"; or "routine rubber stamping") is itself illegal, as statutory or contractual rules require that the consultor make the final decision on criteria other than others' opinions, or majority vote of a committee.

The process has the following basic and important distinction between *secret* and *publicized* consultation as the former only marginally modifies "total legal power".

Secret Consultation

Many powerful individuals, organizations and nations do not want a publicized obligation to consult anyone outside their own tribe about placement of retail stores, prisoners, armaments, crops, land boundaries, investments or staff appointments. Any such publicized obligation to one person inevitably leads to requests or demands from others. A consultation floodgate is opened. Accordingly, a common practice is to placate another negotiator with a confidential verbal agreement to consult secretly, perhaps over coffee in Vienna. These are sometimes referred to as "sidebar" or collateral agreements. The side agreements are occasionally embodied in a letter so that the negotiator can show this document

confidentially to disgruntled hawks and constituents. An added ubiquitous term is that if the duty to consult secretly is ever publicized, then the process and letter will be denied, and the promise to consult will instantly terminate.

Publicized Consultation

As a matter of degree, consultation obligations erode total decision making power the more detailed and publicized are those obligations.

However, the power of the consultees can be readily weakened if the dominant decision-maker uses standard devices such as:

- Only consulting a small committee or a few friends
- Appointing a majority of sycophants and allies to the consultancy committee
- Requiring consultants to sign lengthy and onerous confidentiality agreements
- Denying the consultees any permission to consult others, or to report to constituents
- Demanding secrecy around all consultations
- Prohibiting any written or published report by those consulted
- Prohibiting ranking of proposals by the consultees
- Blandly stating that the majority of those consulted “agreed” with the eventual decision-maker

In order to hamper such standard power shifting strategies, negotiators can push for documented *details* in advance about: which individuals or organizations must be consulted; for what kinds of decisions; in what time frame; what proportions each individual or faction will make up on any committee; with limited or no restraints on publicity; permission for consultees to report to constituents; a requirement for a public written report (including any dissenters) on process, opinions and rankings by those who are or should have been consulted.

Each of the above details in the consultation process represents another possible shift of power, which may be sufficient concession to enable an initial agreement.

Entrenchment of Restrictions on Future Decision Making

Some negotiators push for an extra layer of restrictions upon the use of certain power by a faction or future leader. They attempt to “entrench” or “solidify” various gains, assets or “rights”. Accordingly, certain types of decisions are prohibited unless visible and perhaps onerous procedures are followed. These restrictions are sometimes embedded in the language of “rights”.

For example:

- A sporting club, school, university or aboriginal band may agree to prohibit the sale of land unless such proposals are supported by 70% vote of alumni or “members”.
- A new government may be elected, after “negotiations” with voters, and after assurances to enact entrenched “human rights” legislation. For example, that government could legislate that no law can modify freedom of

the press, speech, religion or of association without a specified form of notice to the public; a specified period of delay; and parliamentary approval by at least two thirds majority; or perhaps even by approval in a referendum of two thirds of voters.

Deadlock: Agreed Mandatory Negotiation or Mediation Process

Once absolute legal power is qualified, modified or divided in any way by law or by agreement such as the gradations above, there arises the probability of boundary disagreements about the modifications. For example: Is it time to “rotate leadership”? Have the requirements for an adjoining “clothing” shop been adequately considered? Is this a “marketing” or “research” decision? Is this a “defence”, “emergency” or “immigration” decision? Who can decide whether to start a child on karate classes, vegetarian meals or alternative medicine? Were the opinions of all the consultants properly gathered and considered?

Much has been written on “dispute system design”(Ury, Brett and Goldberg, 1988). How to create an agreed series of publicized and accessible bus-stops where disputes can find resolution? The steps tend to increase in formality, expense and delay, though parties are free at any time to return by agreement to simpler procedures in the chain.

The first few steps involve a *minimal* surrender of power by any of the parties to the dispute—namely the use of negotiation or some kind of mediation. In order to be legally binding, agreements to negotiate or mediate if future boundary about division of powers occur, require detailed machinery clauses. For example, how to trigger the process? What time limits to prepare? How to appoint a mediator? What time limits for the meetings to begin? What minimum length of meetings? Such machinery clauses now have many accessible precedents.

Deadlock: Agreed Mechanisms to Ensure Resolution

Negotiation or mediation may not resolve the boundary disputes which inevitably arise under the power division solutions listed above. Accordingly, disputants can agree in advance or on the occasion of a dispute to more drastic measures. These mechanisms all involve giving up power and control over a particular boundary decision. This is not a choice which control freaks, experienced leaders or zealous reformers readily embrace. Such humans have an array of well-practiced strategies to undermine the agreed resolution mechanism so that power and control reverts to them.

Two examples of agreed deadlock breaking mechanisms are as follows:

- Automatic formulae
- Independent arbitrator or judge

Automatic Formulae

Some predictable borderland conflicts can be resolved by an agreement in advance to apply a mathematical formula if and when the conflict occurs (numbers emerge

again!). A frequent example arises again where partners or separating spouses agree to sell a business or real estate, but no buyers emerge at the hoped-for price. How to decide on price reductions and sale process without months of further damaging negotiations between the sellers? A common solution is a “self performing” agreement which states to the effect:

- The parties agree to sign all documents necessary to advertise and sell the business at a list price of \$X
- If the contract of sale is not signed for that price or at another price within 3 months
- Then unless the parties agree otherwise in writing, the business will be auctioned under the control of auctioneer Y with a reserve price of \$X minus 15 percent, such an auction to take place with a further 6 weeks
- [If no sale, progressive percentage reserve price reductions at subsequent auctions, until sale etc]

Independent Arbitrator or Judge

Failing a negotiated solution, a disputed interpretation of an agreement which divides decision-making power can of course be referred in advance or in the moment to one of the many forms of independent arbitration (Wade, 1999). Obviously, this involves a substantial loss of control to a third party. Especially where competing decision-makers have a history of trickery and distrust, surrendering power over decision-making boundaries to an arbitrator may be considered dangerous, due to use of “litigation strategies”, and the possible creation of an unfavourable precedent.

Predictably, the disputants may use a range of standard strategies to regain control such as appointment of a friendly arbitrator, hiding information, organizing procedural skirmishes and delay, multiplying expenses and paper, or seeking disqualification of successive arbitrators.

In 1215, King John and his barons entered into a famous power sharing agreement known as Magna Carta. However, less well known is that this “peace agreement” contained a one-sided arbitration clause, which immediately discredited the whole agreement, and civil war followed three months later. The 25 arbitrators chosen to adjudicate future disputes were *all* barons, and the king had not a *single* representative on the panel (Danzinger and Gillingham, 2003).⁴ Even arbitrators who are hired and paid repetitively by one wealthy client, such as a corporate employer, have lost the appearance of neutrality and independence. Why would a wealthy client repetitively rehire an arbitrator unless that arbitrator had a record of rendering favourable, or at least tolerable decisions? (Cole, 2001)

In some jurisdictions, where the judiciary has a reputation for independence, the parties may agree to use, or in the moment actually use, the state courts as a process to resolve borderland disputes. However, the slippery slope of loss of power increases as state courts become involved. In some areas of dispute, a court does not only *interpret* the agreed division of powers. More dramatically, the court can *create* an entirely new division of powers. In such cases, each decision-maker’s

status quo of existing power becomes fragile if (s)he chooses, or is pushed, to buy into the lottery of litigation.⁵

Examples of this “increase” in judicial power from “interpreter” to “legislator” include:

- A parental agreement about who makes which future decisions in relation to a child can be entirely overruled and be replaced by a new division of powers between parents and relatives, which a judge considers to be “in the best interests of the child” from the limited options available.
- A public body such as a court, law society, licensing board or environmental protection agency may have divided or delegated some powers to certain employees, to a committee or tribunal, or to a referendum of members, for the sake of efficiency, or in an attempt to avoid blame for unpopular decisions. A court may decide that parts of this division or delegation are beyond statutory authorization or are even “unconstitutional.”⁶

Qualified Veto Power by the Other Party

The transfer of decision-making power becomes more effective where one person, faction or nation is given the legal power to veto the other’s proposal on a limited number of occasions. For example:

- A staff association may have negotiated a right to veto a maximum of two recommendations on a short list for management positions.
- A defence lawyer may have a right to reject up to eight jurors proposed by the prosecution without giving reasons for such rejection.
- An upper house in parliament may have the constitutional right to reject a financial bill up to three times before parliament is dissolved for new elections.

Veto Power by the Other Party

The penultimate loss of decision-making power occurs where one party confers an unqualified right of veto on another. That is, one party can legally block *any* proposal by another. This unlimited power to say “no” may be the only method to entice a powerful person into membership of a young organization. For example:

- A member of the Security Council of the United Nations can veto any decision proposed by other members.
- An eminent researcher can veto any proposal by a research department of which he is a member to spend funds of more than one million dollars.
- The current elected head of a church denomination or sporting club can veto any number of proposals to change that organization’s constitution or code of fundamental beliefs.

Obviously, an unlimited right of veto gives power to the holder to conduct endless negotiations and lead an organization into passivity, new directions or closure. Moreover, the power to block another person’s proposals and decisions, leads

indirectly to the veto-holder having power to *make* alternative proposals. Sometimes, negotiated or legislated power sharing is couched in optimistic phrases which are intentionally or accidentally vague—for example, “equal partners”; “joint custody and guardianship”; “equal responsibility”; and “co-operative management”. When conflicts later arise, there will be a debate about whether the vague terminology means “unlimited rights of veto”, “limited right of veto”, or some gradation of “duty to consult.”

Total Power to the “Other”

Be careful, or you may get what you wish (negotiate) for.

The final transition in the gradation of shared power reaches the opposite end of the starting point of “total power”. The tables are turned. This occurs where one party “wins” by attrition or other means and “negotiates” a total power transfer. The winner may achieve his/her goals of a relatively efficient or dysfunctional dictatorship; a resources grab; tribal revenge; status as boss; “removal” of dissenters who tried to achieve a more power-sharing venture or nation; control during a “short term” emergency or transition.

Conversely, it is arguable that most families, organizations and nations require a mixture of co-operation, tolerance, power sharing, independence, non-conformist ingenuity, resources, skills, motivation and morale to function “well”. It may be a Pyrrhic victory where one faction achieves total power, unless that transition is replaced subsequently with a model lower or higher on the power-sharing gradation.

Caveat: Paper Agreements and Their Non-Performance

These gradations of legal power may well assist parties to reach a *paper* “agreement” on future division of powers. However, if a power struggle has escalated prior to “settlement”, then the paper agreement may give only shallow and temporary peace. The residual dynamics of conflict may be entrenched.⁷

Nevertheless, even a paper division of power has potential benefits such as:

- A moment of peace
- Reduced intensity of emotions for some of the disputants
- “Back to business” activities for some of the disputants
- A new mutual narrative of “satisfactory settlement”
- Expenditure of money elsewhere than on the dispute
- Placation of tribal supporters, perhaps even some hawks (Wade, 2006).
- Sometimes, time and experience which demonstrate that in the long run, the agreed division of “legal” powers does not matter, or does not work, and will be replaced by another “practical” and perhaps more advantageous reality.

Illustrative of all these benefits are the many thousands of intensely negotiated formal and informal agreements between family tribes each year about the division of parental power over (and “time-with”) children. The vast majority of these

agreements are soon ignored, technically “breached”, or altered due to weariness, lack of funds, new parental employment, relocation, and relationships; and independent teenagers voting with their feet.⁸ Life goes on. However, the gradation of powers discussed in this chapter can still assist the renegotiation (or rationalization) of an emerging and normal statistical reality.

Conclusion

Negotiators and mediators who know about, and can recite, the gradations of solutions which lie between offers and counter-offers can assist disputing parties to consider the range and find a mutually “satisfactory” choice. They can plan, predict and manage the sense of loss which all parties experience as their initially preferred solutions fade. An elusive gradation of shared (or not shared) decision-making powers has been set out in this chapter. This knowledge is a worthwhile addition to the repertoire of a skilful negotiator, mediator, politician, parent, manager, or other decision-making human being.

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- ¹ Trends towards centralization of power in allegedly democratic governments and universities in first world nations (“corporatization” or “managerialism”), have led to frequent disputes about where decision making power does and should fall. Bosquet 2008; Tuchman 2009; Savoie 2015.
 - ² Examples of three standard power questions used in negotiations about the interim management of a business which is proposed to be sold are set out later in the chapter under “Duty to Report.”
 - ³ Eg *Secretary, Department of health and Community Services v JWB and SMB (Marion’s case)* (1992) *Family Law Cases* 92-293 (power to authorize non-medical sterilization of a mentally handicapped child in Australia lies with the courts, not with her parents).
 - ⁴ D. Danzinger and J. Gillingham, *1215: The Year of Magna Carta*, (2003) at 262-262. Clause 52 of the Charter stated boldly “If without lawful judgement of his peers, we [the king] have deprived anyone of lands, castles, liberties or rights, we will restore them to him at once. And if any disagreement arises on this let it be settled by the judgement of the twenty five barons.” Clause 61 goes on to confer unlimited remedial powers on the 25 barons.
 - ⁵ J.H. Wade, 2001b. “Don’t Waste My Time on Negotiation or Mediation: This Case Needs a Judge: When is Litigation the Right Solution?” 18 *Mediation Quarterly* 259-280. Developing the work of Robert Mnookin, this article categorises the diagnostic situations which suggest that a judge is necessary to “resolve” different types of disputes. G. Blum and R.H. Mnookin, “When Not to Negotiate” in *The Negotiator’s Fieldbook: The Desk Reference for the Experienced Negotiator*, edited by A.K. Schneider and C. Honeyman. Washington, DC 2006.
 - ⁶ For example in Australia, *Boilermaker’s case* (1956) 94 *Commonwealth Law Reports* 254 (the popular political practice of granting vote-catching “judicial” powers to a friendly tribunal was limited by the Australian constitution); *Harris v*

Caladine (1991) *Family Law Cases* 92-217 (the practice of delegating certain “minor” judicial powers to court registrars was narrowly held to be constitutionally permissible, so long as limiting conditions were attached to the delegation of powers).

- ⁷ In D.G. Pruitt and S.H. Kim, *Social Conflict: Escalation, Stalemate, and Settlement* (2004) chapters 5-8 set out the emotional and structural changes which occur as conflict “escalates”. When these changes have occurred, the toothpaste is out of the tube, and cannot be easily restored to a previous state by an agreement.
- ⁸ See Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009). This is a remarkable Australian study of 28,000 people involved in separating families with children, and what happened to their formal and informal “child arrangements” about time and power over children over a 3 year period.

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