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Creating a group oriented Supreme Court – Lord Neuberger's legacy*

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ABSTRACT

Presidents of the UK Supreme Court have a degree of flexibility in how they approach their role, and how they exercise the power that they undoubtedly have to shape key aspects of collective judicial decision-making in the Court. This article, based on interviews with the Justices, focuses on the way that Lord Neuberger interpreted the role and how his colleagues thought that he carried out the role. Taking Steven Lukes' account of "power" as its starting point the piece seeks to show how Lord Neuberger harnessed the power of the president to enhance the reputation of the Court and to develop a form of group decision making based on team work which was far removed from the operation of the House of Lords even under the leadership of Lord Bingham. The *Miller No. 1* case (2017) is used as a case study of presidential power in operation.

1. Introduction

I owe a great deal to Philip Lewis. He was my DPhil supervisor at Oxford in the early 1970s and with his active participation we set about the novel task of seeking to interview the Law Lords of the time. That we succeeded as much as we did was undoubtedly down to his contacts and quiet diplomacy. I was his first supervisee and I could not have asked more of him in terms of support then or in the years that followed. The DPhil morphed into *The Law Lords* (Paterson 1982) and I returned once again to interviewing the Law Lords and the Justices of the UK Supreme Court in the first decade of the twenty-first century, leading to the follow up volume *Final Judgment* (Paterson 2013). This article draws on 24 further interviews with Presidents, Deputy Presidents and Justices and is derived from a more substantial lecture on Lord Neuberger's legacy (Paterson 2019, 2021). What ties these projects together is a focus on small group decision-making in final appellate courts which Philip fostered all those years ago.

In the last fifteen years research interest in the senior UK judiciary and the Supreme Court in particular, has blossomed. The House of Lords Appellate

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*This article is derived from a more substantial lecture on Lord Neuberger's legacy held on the UCL website (Paterson 2019) which will appear in a revised form in Volume 10 of the UK Supreme Court Yearbook (Paterson 2021).

Committee had attracted anthologies about the Court (Andenas and Fairgrieve 2009, Blom-Cooper et al. 2009, Lee 2011) and a range of diaries, biographies or autobiographies (Wilberforce 2003, Millett 2015, Hope 2018, 2019, Torrance 2019, Brown 2020) but relatively few research monographs (Blom-Cooper and Drewry 1972, Stevens 1979, Paterson 1982, Robertson 1998). The advent of the Supreme Court acted as a stimulus to some of these[1] and as a backdrop for other research e.g Penny Darbyshire's impressive participant observation study of the English and Welsh judiciary (2011). This study dovetails well with contemporary books by heavy-weight appellate judges from around the world on judicial decision making from the inside (Thomas 2005, Posner 2008, Hacker and Ernst 2020). Overwhelmingly, the habitus of these publications has been what judges make of judging, an activity that has been principally bounded by the parameters of the legal world. Some judges (mainly from the United States) of a more realist bent had reflected (in the twentieth century) on the influence of their attitudes and values on their decisions, which in turn had prompted American political scientists to study these in a more scientific way. However, such studies, despite having a provenance of over 50 years have, until the last few years, had less traction in the UK because our final appellate court (unlike the US Supreme Court) (a) does not sit *en banc* and (b) is not a purely constitutional court. Arvind and Stirton (2012) and Chris Hanretty (2013, 2020) have wrestled impressively with the genre without, as yet, producing on a sustained basis correlations between judicial attitudes and judicial decision-making on a par with those for the US Supreme Court. That said Rachel Cahill O'Callaghan's highly innovative work using psychology to study the values of UK Supreme Court Justices in hotly contested cases (2013, 2020) has begun to show how Kahneman's fast and slow thinking (2011) can be wedded to judicial values to cast real insights into aspects of appellate judicial decision making in the UK.

Nevertheless attitudinal and value based studies, whether derived from political science or psychology have tend to focus on the individualistic or even idiosyncratic aspects of decision-making in appellate courts. Within US political science there have been two counters to this. First, Danelski's fascinating article on small group decision-making (1978) and secondly an emerging focus on strategic decision-making. The latter shows how US Supreme Court Justices will temper their value preferences strategically in order to get the court to move in the direction favoured by a Justice, through tactical or ad hoc alliances with those of different views. Equally some within the US federal appellate judiciary have argued that collegiality or team-working can work as an antidote to individual values of the judges (Edwards 2003).

These limited forays aside, on both sides of the Atlantic, the literature on appellate courts as collective decision-making institutions is rather threadbare. Accordingly, this article, like my two earlier research monographs, seeks to demonstrate that judicial decision-making in the UK's final Appeal Court is

a social activity and that the study of judicial values has to be seen in the context of collective decision-making. In the House of Lords, the Law Lords tended to emphasis their role as individual decision makers. However, in the UK Supreme Court teamwork and group orientation have developed exponentially, particularly after Lord Neuberger took over the Presidency (Paterson 2013, p. 143ff). This has brought with it greater opportunities for the exercise of leadership powers by the President especially, but also by other presiders. Steven Lukes in his seminal treatise on power (Lukes 2005) identifies three senses of power:

(1) Directing others to do as you say;
(2) Restricting others' options – mobilisation of bias – keeping things off the table without it being apparent;
(3) Persuading others to want what you want without it necessarily being transparent.

In the UK Supreme Court the President's powers are almost entirely confined to Lukes' second and third senses, because the President is more *primus inter pares* than a President (politician) in a Republic. As Lord Neuberger observed:

> [O]ne can suggest and encourage but not, save in very rare circumstances, positively require … leading by example, has a great deal to be said for it.[2]

In what follows it will be argued that Lord Neuberger was the first leader of our apex court to harness effectively these leadership powers in a small group decision-making context.

2. Dimensions of the Presidency

Stakeholders and incumbents of the post agree that leadership in the Court has two dimensions – internal and external.

> Internally, I see it as being, in general terms, vis a vis my colleagues to try and ensure that they are working well together personally, both in Court and out of Court … That if you see problems coming, even though it may involve confrontation, to head them off rather than to wait for them to occur. Externally, I see the role as being to explain and relate to the public … I try and make sure that when I speak in public that everything I say will at least not undermine any aspect of the Court and hopefully will project it in terms of explaining what we do, why we do it, how we do it and I hope implicitly but not explicitly, that we do it well. [Lord Neuberger]

For Lord Neuberger a key part of maintaining and enhancing the reputation of the Court derived from working to foster collegiality amongst his Justices and staff. His social leadership (which also had the benefit of supporting the growth of team working amongst the Justices) derived not simply from his personality but also from his belief that a "happy ship" projected a positive image of the Court for the outside world.

> [I]t is obviously a leadership role in a variety of ways. You have to be a leader in the sense of motivating people. Going round and talking to people. Finding out what their concerns are and trying to address them and telling them they are doing a good job, if they are doing a good job … [David] is very aware about morale on the Court and which individuals' morale might be low and tries to do things to encourage them and keep their spirits up. [Lord Reed]

> [T]he abiding impression one has of David is that he likes to build consensus and I think that he would give a premium to that aspect of his work … [reaching a] conclusion that was comfortable for all of the judges involved That is a very important thing … I think that he is a man who has achieved a great deal in promoting the sense of collegiality and general happiness of the justices and indeed of the Court generally. [Lord Kerr]

> He was certainly trying to make everybody feel happy, loved and wanted and properly respected and insofar as he could, gave them what they wanted. If anything cropped up which was a slight problem he just went and dealt with it. [Lady Hale]

Being a people-oriented President, fostering collegiality came naturally to David, indeed, he mixed more freely and more frequently with his colleagues during the working day, than any other judge on the Court. This was more than simple friendliness, it was Lord Neuberger's way of "managing" the Court.

3. Lord Neuberger as leader

Different leaders of our apex court have evidenced different aptitudes for, and degrees of interest in, exercising judicial leadership. In Rhode's classification of leadership (Rhode 2013) Lord Diplock was *coercive*; Lords Reid and Bingham were *authoritative*, Lord Phillips was *detached*, and Lady Hale offered a *role model*. Lord Neuberger on the other hand was *collegial*. Where Diplock mesmerised his fellow judges (Paterson 2012, p. 178), leaving them in no doubt as to his opinion and preferences, Neuberger adopted a more elliptical style. Lukes would probably describe his behaviour as the third dimension of power, since Lord Neuberger would try to "nudge" (Thaler and Sunstein 2008) his colleagues indirectly towards his preferred conclusion. For example, in the first Brexit case, *Miller (No. 1)* Lord Neuberger felt that he as President should write the single majority judgment. However where others might simply have stated that this was their view, David preferred to raise the topic, sow the seed in his articulation of the options, let the others conclude that he should write it and then if he was fortunate, they would then persuade him to agree. Similarly, Lord Neuberger, aware that there were only eleven members of the Court following Lord Toulson's retirement, concluded that they should sit *en banc* in Miller *(No. 1)* (Neuberger 2017, para 30). As President he could have announced this but his preference was to insert the idea elliptically into the conversation in the hope that others would run with the idea – which they did. Less elliptically, but just as indirectly, Neuberger wanted the Court to move to more single

majority judgments and fewer unnecessary concurrences. He did not achieve this by stipulation but by making speeches criticising unnecessary concurrences and hoping that his colleagues would get the hint.

Neuberger's preference for a "nudge" rather than an edict, was noticed by his colleagues.

> You are not there to manage other judges. You are there to facilitate them. You are bound to spend a certain amount of time nudging, setting in place, allocating individual tasks to those who might be persuadable to do it. [Lord Hughes]

Lord Reed commented that the use of the nudge rather than an overt suggestion was:

> [t]o some extent, true of everybody who has been President. You are leading a dozen people who are obviously very senior professional men and women. You are not the headmaster with a bunch of schoolboys and so it is very much *primus inter pares*. The biggest difference with David in terms of how he related to the other Justices, is he spoke to people a great deal and so he was well aware of what people were thinking. If he was thinking about some issue to do with the operation of the Court he would bounce it off people in their rooms and he was always dropping in for chats.

Most senior Law Lords and all Presidents have been seen as "first amongst equals". As such Presidents tend to be given greater weight in the policy debates at termly meetings, or in case conferences or when presiding in the hearings. Moreover, most Presidents have had a lower dissent rate than the norm for all Justices. Having the respect of your colleagues is essential for the President, since judges who have reached the pinnacle of their career can have a degree of independence or self-esteem that is difficult to manage. If nudge theory is right, Presidents will get more by persuasion and example than by rather too obviously indicating what they would like to happen.

4. Leadership, power and tension

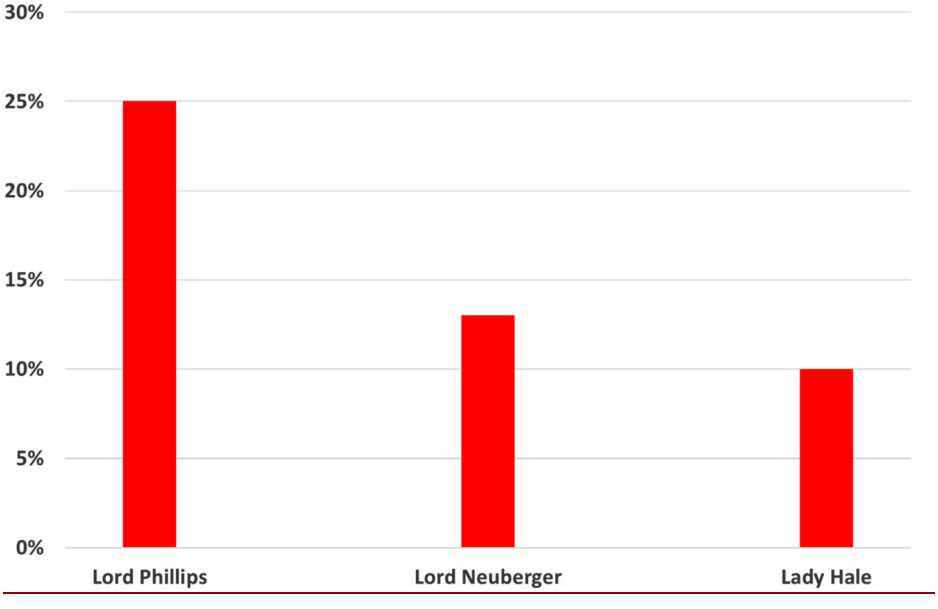
Part of the role (and power) of the President relates to the allocation of opportunities on the Court e.g. to sit or to write the lead judgment.

4.1. Determining the size of the panel

Leaving aside the President's role in selecting who will be appointed to the Court, and his/her role in chairing one of the Permission To Appeal Committees, the first real opportunity to exercise the power of leadership in a case comes with the decision as to the size of the panel which will hear the case. Will it be 5,7,9 or 11? The PTA Committees have a role in this, as does the Registrar and the Deputy President, but the final say lies with the President. Thus Lord Phillips believed that it made a difference to the outcome of cases

which Justices got to sit in contentious cases (Paterson 2013, p. 72), so he encouraged hearings with enlarged panels (for a critique of this see Burrows, 2013). As a result, in his Presidency (2009–2012) 48 out of 189 (25%) cases heard in the Supreme Court during that time had an enlarged panel. Yet in Lord Neuberger's Presidency (2012–2017) only 43 out of 369 (12%) cases heard by the Court had an enlarged panel. The proportion of enlarged panels fell even further in Lady Hale's Presidency (2017–2019) to 10% (see Table 1). This is somewhat curious since all three Presidents have denied rationing enlarged panels in any way (The Three Presidents 2019). Moreover, the criteria (Lee 2019) for having an enlarged panel have not changed materially during the first decade of the Court so it is difficult to see why the proportion of such cases should have dropped so significantly. The main explanation is likely to be the leadership characteristics of Lord Neuberger and Lady Hale. Neuberger, at the outset, did not share Lord Phillips' view as to the frequency of cases where the composition of the panel made a difference to the outcome, and considered them to be unwieldy and difficult to manage (a view shared by Lady Hale). Only towards the end of his Presidency did Lord Neuberger begin to see the value of enlarged panels. He would also consider an enlarged panel, as Lord Phillips had done, to accommodate the desire of Justices who would otherwise be excluded, to sit on contentious cases (Paterson 2013, p. 73). Lord Neuberger did not issue a direction to his colleagues on the matter but his elliptical leadership style is likely to have influenced the PTA committees, the Registrar and his discussions with his Deputy Presidents.

Table 1. Proportion of cases with an enlarged panel according to Presidency 2009–2020.



4.2. Selecting who will sit on cases.

The selection of the panel to hear a case is closely interlinked to the size of the panel. Even with panels of 9 or 11 someone has to be left out, giving rise to speculation as to whether the inclusion of the missing Justices might have made a difference. Moreover, even Presidents who largely left the selection of the panels to the Registrar (Paterson 2013, p. 72) took an interest in who sat in the larger panels. In the House of Lords Tom Bingham's preference in enlarged panel cases was to select the most senior judges to avoid being accused of packing the Court. However, Lord Phillips paid heed to the pleas of the junior Justices and abandoned the seniority rule and Lord Neuberger followed suit. Moreover, both could be persuaded to expand an already enlarged panel for reasons of balance or collegiality.

The next issue is, who should preside. Lord Neuberger was a workaholic and wanted to sit on as many of the significant and contentious cases as he could, indeed in his period as President he sat (and presided), in more cases in the Court than any other Justice – 228 out of 380 (60%). This had the result that Lady Hale had fewer opportunities to preside as Deputy President (p. 72) than her predecessor, Lord Hope. Thus Neuberger, (like his predecessor) presided in all 9 judge panels to arise in his Presidency and (unlike his predecessor) in almost all of the 7 judge panels also.

Under Bingham the Registrar evolved the concept of "A Teams" or "horses for courses" for each specialist field of cases, just as there was for Scots appeals, which entailed that certain Law Lords sat in the lion's share of Public law cases or family cases or immigration cases. Lords Phillips and Neuberger retained the concept of "A teams" (see now Hanretty 2020) even although some Justices were beginning to feel that (a) signs of bloc voting were emerging, and (b) they were being pigeon holed and not getting to sit with Justices in another specialism. In fact, Lord Neuberger's leadership preference in relation to panel selection was to pursue balance wherever he could in order to safeguard the reputation of the Court. In several cases he created an enlarged panel because he felt the balance of the original panel in terms of known preferences might lead external observers to feel that the outcome was predictable. Again, wherever there were a series of cases on the same theme (e.g the Illegality cases, the Malicious Prosecution cases, or the Benefit cap cases) Lord Neuberger would seek to avoid selecting the same panel that split in the previous case(s), but instead take two or three from the competing sides with some neutrals in order to balance the panel. The problem was compounded because in both *Willers* (2016) (malicious prosecution) and *Patel v. Mirza* (2016) (illegality) Neuberger had been involved in the earlier cases and necessarily taken a side in each. He knew that in such a situation those Justices who were on the opposite side to him in the earlier cases would be watching carefully to see that he didn't "pack" the Court. Of the *Willers* case, Lord Neuberger commented:

> [W]e had two options. One was to have a panel probably of seven not including any of the five who had been in the previous case or having a panel of … nine with the five in the previous case and four new ones and I decided in the end that I would go for the latter course and have nine in the expectation that the five would probably not change their mind.

In choosing the additional four Neuberger took account of what he thought his colleagues would consider to be a balanced panel. As he said "I knew that the eyes of everybody, particularly the three in the majority on the earlier case, would be very much on who I had picked." Lord Neuberger expected his panel selection in *Patel v. Mirza* to be equally anxiously scrutinised for the same reason, so he was scrupulously careful to make sure that he had 4:4 plus one who was clearly open-minded and "would probably decide the case unless any of the groups of four changed their minds".

Here again we see that for Neuberger the principal concern in selecting panels was to safeguard the reputation of the Court.

4.3. Conducting the hearing/ the President during hearings

Lord Neuberger did not read in advance so assiduously as some of his colleagues, for fear of making his mind up too early. He also believed that most hearings took longer than necessary and sought to reduce their length while he was President. In this he was successful. The average length of the hearings fell from 2.2 days per case in 2009 to 1.5 days in 2017. Whether he did this in his usual elliptical style or more directly is unclear. Curiously, although he was a strict time keeper Lord Neuberger was very willing to ask for additional submissions in writing when a Justice – often Lord Sumption, thought of a point after the hearing that was considered to be important for the decision. Yet, whilst a stickler for time limits, Neuberger did not forget his larger goal of pursuing collegiality. Characteristically, he relied on his finely honed antennae to pursue a balance between his and his colleagues interventions in counsel's arguments that his colleagues (and counsel) would consider to be appropriate.

4.4. Running the post hearing conference

The first substantial judicial conference in a Supreme Court case comes at the end of the hearing, and consists largely of a series of monologues followed by general debate. Like Tom Bingham, David Neuberger encouraged the junior member of the panel (usually Lord Hodge for most of Neuberger's presidency) to see the chance to speak first at the conference as his best opportunity to persuade his colleagues, and to prepare his mini judgment in advance accordingly. In fact, other Justices e.g. Lord Sumption saw their contribution to the conference as a major opportunity to advocate for their favoured outcome without the risk of interruption:

> When we have our case conferences immediately after the hearing, I think quite carefully not only about what I am going to say but how I am going to say it and the exercise is pretty similar to what I would do when I was a counsel. [Lord Sumption]

Scarcely surprising therefore that in the final session of most hearings some of the Justices can be seen taking copious notes. It is not, as counsel fondly hopes a sign of an effective response, it is the Justices preparing their extempore contributions to the conference.

Once the juniors have had their say, the later contributors can generally be more succinct as the opportunity to add something new decreases. Even Lord Sumption went along with that, unless he wanted to write the lead judgment. The presiders, speaking last, were expected not to repeat earlier contributions, as Lord Neuberger observed, such self-effacement meant that "when there is a point you really want to make as presider, you can highlight it on its own and it doesn't get diluted with all the other points". In any event, he was not one of the active advocates in conference, indeed, he could at times come across as a bit hesitant there, not from indecision as Lord Phillips occasionally was, but because, as Lord Toulson observed, overt or overemphasised hesitancy is a good attribute in a presider since it comes over as even handed and open minded. Toulson concluded pithily, "One of the desirable strengths of presiders is to be temporarily less sure of the law than some of their colleagues". Moreover, Lord Neuberger's elliptical leadership style led him sometimes to put both sides of the arguments or to present as more or less neutral but perhaps just over the border of the view that he actually espoused pretty firmly, because partly for diplomatic reasons he did not wish to denigrate the views of others and partly from a hope that it might add authority to what he was saying.

This account of the typical post-hearing conference under Lord Neuberger begs the question as to what happened in the atypical ones. Take *Nicklinson* (2014) the assisted dying case. This was a hotly contested nine Justice case. They delayed the post hearing conference and set aside a whole day to deal with the discussion. In the end it took so long that some of the later, more senior Justices felt a bit short changed since their opportunity to contribute to the discussion had been squeezed by time constraints and despite the extent of the deliberations, the Court was still split three ways. Lord Neuberger felt he had mishandled the conference so when it came to *Miller (No. 1)* (2017) with an even larger panel, he decided on a novel expedient. He asked all the Justices to write a 600 word essay[3] at the end of the hearing and to circulate it by email to all the panel during the weekend. Come the following week when the conference was held, everyone knew what everyone else's position was (8:3 for Parliament) and whether it was likely it was to change (it wasn't and didn't). There being relatively little to discuss, the conference was over in an hour. Neuberger wasn't sure if he'd offended the minority by the truncated discussion but my researches suggest that he did not:

> I thought the way David handled *Miller* was really excellent. There were a lot of issues, and they were hard, and by getting us all to go away and produce our homework he compelled everybody on the Court to think carefully about the case. It produced a reasoned analysis which was very useful in itself, in having to put it down on paper. It meant that when we got together to have a discussion, it was very focussed. It was quite apparent what we thought about each other's points and that we weren't persuaded by the other side, and there was really no point in debating it. We just wanted to get on and write it, but there were issues about how many judgments, timing of course, as we were under a lot of pressure to get the judgments done quickly, and how we were going to exchange drafts. This was all to be done over the Christmas period. [Lord Reed]

As Lord Reed's quote reveals, at the end of the post hearing conference the President has to lead the discussion on the judgment production process – how many there will be and who will write the lead. Under Lord Bingham the Court preferred multiple judgments on most occasions and Tom would very often write – choosing to do so over the long weekend after a Thursday hearing. Lord Bingham would still seek to allocate which Law Lord would have the task of setting out the facts even if he was not writing himself – whether he was in the majority or not. Lord Neuberger however, generally only allocated the lead if he was in the majority or if he could represent that he was.

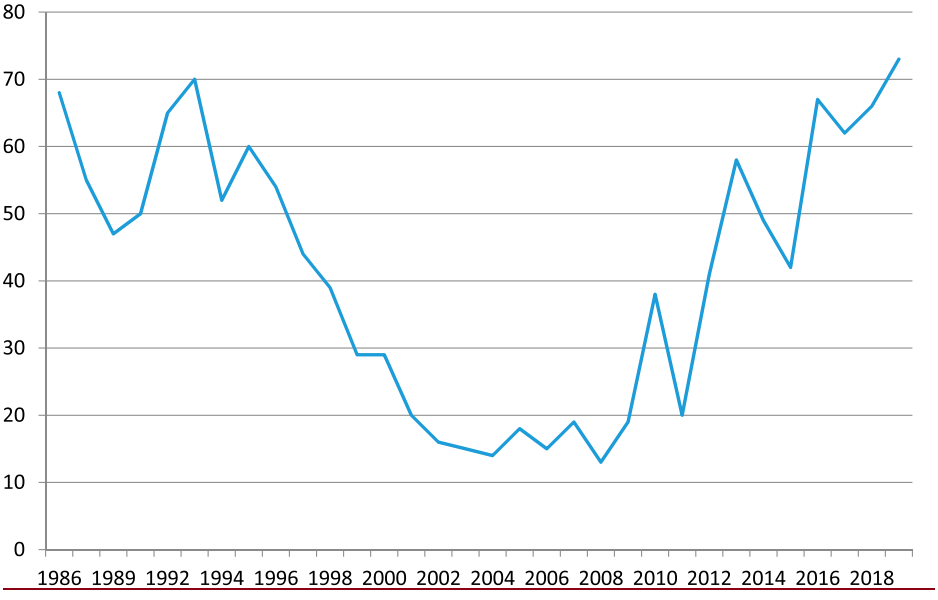
Lord Neuberger had very different opinions from Lords Bingham and Phillips as to the ideal number of judgments that should be written in the typical case. He had long been a fan of fewer judgments – it avoided the notorious *ratio* treasure hunts of cases like *Boys v. Chaplin* (1971), *Stone Rolls Ltd v. Moore Stephens* (2009) and *Nicklinson* whilst boosting collegiality and safeguarding the Court's reputation. Under his Presidency the number of sole judgment cases soared as Tables 2 and 3 show. So how did Neuberger nearly double the percentage of single judgments from that under Nick Phillip's presidency? Partly, those who favoured the Bingham position e.g. Lords Brown, Rodger and Hope retired, to be replaced by recruits from the Court of Appeal who, like Lord Carnwath, were staunch converts to the single judgment view, and partly because through speeches and policy meetings he gently nudged the Court towards this outcome.

> [C]oncurring Judgments … should only be written where they really add (or, I suppose, subtract) something to (or from) the leading judgment. On the whole, there is much to be said for giving a concurring judgment only where the topic really would benefit from judicial dialogue. [Lord Neuberger]

> I am on record as having discouraged multiple judgments, and that remains my view in many cases, but it is an over simplification. [Lord Neuberger]

However, as the second quote indicates Lord Neuberger wasn't completely against concurrences – indeed he wrote a concurrence in 13% of the cases in

Table 2. Percentage of single judgment in the House of Lords and UK Supreme Court (1981–2020 (May)).

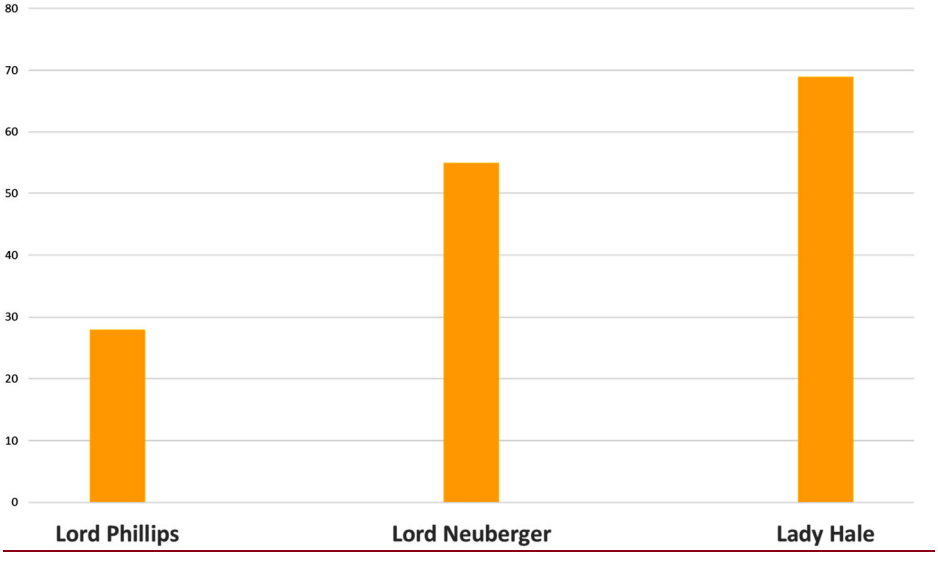


which he presided in the Court – twice the number that Lady Hale wrote while President.

4.5. Allocating the lead judgment

The combination of the unparalleled prevalence of single judgments in the Supreme Court with a greater commitment to collective decision-making

Table 3. Proportion of cases with single majority judgments by President 2009–2020.



than ever before, entailed that the power of the presiding justices, and the President in particular, to allocate the lead judgment in Lord Neuberger's time was more significant than at any time in the last thirty years. So what options did Lord Neuberger, or indeed any presider of the time, have in deciding who was going to write the lead or single majority judgment?

(a) Do it himself/herself as presider or President;
(b) Ask for volunteers,
(c) Rely on the specialists,
(d) Reward those without a backlog, or
(e) Look for a safe pair of hands.

Lord Neuberger tried all these options and more, but what influenced his choice between them? It seems that there were two principal considerations which weighed with him. First, his view of the role of the President and second, how he saw the particular case.

(i) The role of the President

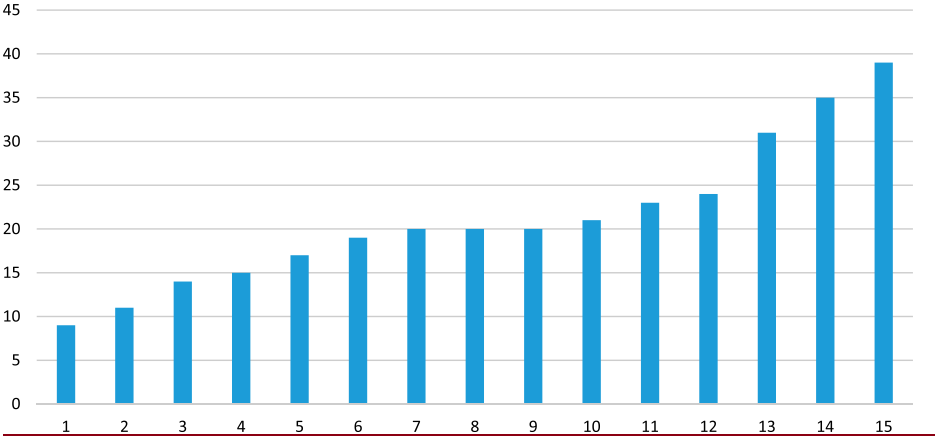
Lords Phillips and Hope saw the role of presider as being the person who carried the heavy load when it came to lead judgments and they are Justices 14 and 15 in Table 4.

Lord Neuberger did not feel that the presider should expect to get the lion's share of lead judgments to write in the key cases, the more so when he saw how successful the campaign for single judgments had become. He immediately sensed the dangers in allocating those judgments predominantly to the presider – it would be unfair to the others and potentially foster discontent amongst his colleagues. So he set out to equalise the allocation of lead judgments, as they do in the US Supreme Court – with a considerable degree of success as we can see in Table 5. That said, there are some cases of such significance e.g. the *Miller* cases, that it is felt by the Justices that the judgment should be written by the President (if in the majority), yet Lord Neuberger's elliptical leadership style meant that sometimes his colleagues had to persuade him that this was a case in which he should write the judgment.

(ii) Type of case

Where the case was more specialist Lord Neuberger relied on specialists, particularly specialist volunteers – and that included himself in property cases or landlord and tenant or village green cases. Where the case was more general or even run of the mill Neuberger would opt for the workhorses – the fast

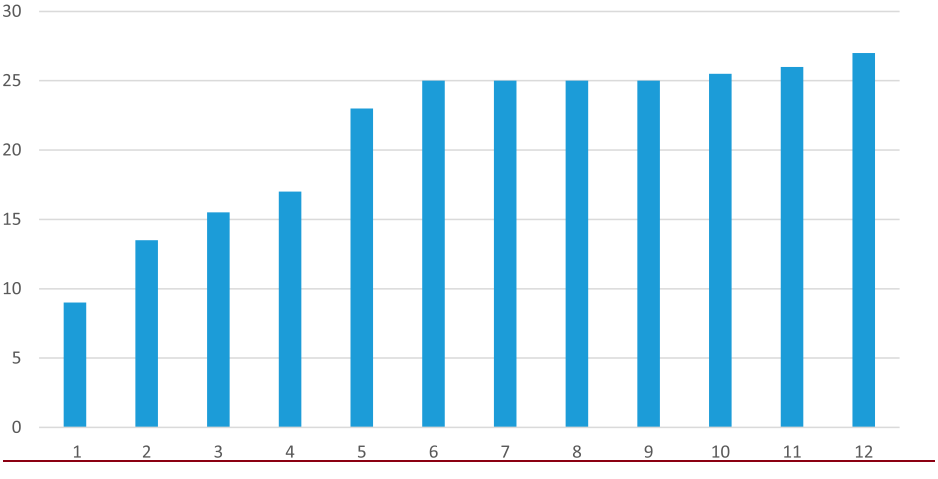
Table 4. Lead or single judgment as a % of cases sat in 2009–2012 (end).



writers with no backlog. As we saw in *Willers*, when a case was one of a series of cases which had divided the Court on several occasions he had a tendency to go for those who had not written or sat in the earlier cases. Finally, in the cases that he felt really mattered and which he himself was not doing the lead, he appears to have been tempted to opt for those who he considered to have the safest pairs of hands to deliver the core of what had been articulated by the majority at conference.

As ever with Lord Neuberger he was influenced by his strategic objectives of pursuing the Court's reputation and collegiality. He allowed himself to be persuaded to take the lead in *Miller (No. 1)* but he took parts of the judgment from the 600 word essays, so that all of the Court could feel they had contributed (which might also have reduced the likelihood of their writing a

Table 5. Lead or single judgment in the UKSC as a % of cases sat in 2013–2017.



concurrence) and he asked for help with the Devolution sections from the relevant specialists.

David Neuberger's collegiality meant that he was troubled if his allocation of the lead judgment caused upset. He observed:

> If I know that *x* wanted to write the judgment but I have decided *y* should, I will try and remember to go to *x* and say "Look I know you wanted to write it but *y* hasn't had many judgments, and you have had quite a few recently" or "I really don't think you actually represented the majority view". [Lord Neuberger]

On other occasions he would bear in mind that he had disappointed X in one case and so would allocate a lead to him or her in the future, possibly even one that he had hoped to write himself.

5. Constructing the judgment: an exercise in teamwork and small group decision-making

For the most part once the lead was assigned, that was it. Approximately 80% of cases under Lord Neuberger were unanimous and even in some of the split cases the split began early and remained throughout. However, there was still a range of contentious cases where he had to work to achieve a solid majority or where vote switches occurred. This is what Danelski (1978) called "task leadership" on the Court – where one of the Justices works to achieve a solid majority judgment for the Court even if it is not necessarily the most favoured outcome of the task leader.

Early on in Lord Neuberger's Presidency he was confronted with the issue of what to do if (where there was a split in the panel or if all the Justices were agreed as to the outcome but for different reasons) the Justice allocated the lead judgment was not as quick at writing as the dissenter(s) or the concurrer. Other presiders had allowed the judgments to be circulated when the author was ready, but Neuberger's commitment to collegial working made him uncomfortable with this:

> There is something slightly competitive, slightly one-upmanship, slightly uncomfortable about people circulating with the view to persuading, getting their blow in first. It is not a competition in that sense. They should always circulate at the same time … but trying to get your blow in first, I just think, it risks creating bad feeling with the majority writer. [Lord Neuberger]

Generally, thereafter, Lord Neuberger's nudge towards collegial working in this sense, prevailed.

6. Achieving consensus

One of Lord Neuberger's strategic objectives was to *achieve as much agreement as he could around the best available outcome to the cases in which he presided.* This was not a dogmatic pursuit of conformity in the belief that it enhanced the

public perception of the Court. Nor was he trying to eliminate strongly held dissents, which he valued. What he was seeking to do was to maximise the clarity of the Court's ruling to its audiences. His success in this regard can be partly evidenced by the fact that where the Court was split Lord Neuberger was three times as likely to be on the majority side as on the minority and by his low rate of dissent, especially on his own.

So what were the tactics and techniques that Lord Neuberger deployed to achieve consensus?

(a) *Being an active social leader* (see earlier) thus fostering collegiality and information flows;

(b) *Declining to lobby overtly*

Tom Bingham would not lobby for his preferred result and neither would Neuberger in the accepted sense of the term, although he would often talk to other members of the panel, even when judgment was circulating, in order to promote consensus and collegiality. However, when Lord Neuberger found one or two of his colleagues were lobbying their other colleagues in cases he didn't seek to stop it, but he would on occasion warn the lead writer that they were being lobbied against, to give them a chance to use the same tactic.

(c) Being willing to back other's solutions

Lord Neuberger had a striking ability to keep an open mind longer than most on the Court. It was not that he was actually indecisive at the first conference, although he might appear hesitant for diplomatic reasons as we have seen, but he would say to his colleagues that this was his provisional opinion on a particular point but that he was open to persuasion. Thus famously in *Patel and Mirza* (2016) the illegality case, Lord Toulson responded to such an invitation and persuaded David to switch his vote to make the majority 6:3. Indeed, it seems that there were occasions when David voted with the majority to make it more solid, because he thought that 5:4 decisions reduced the authority of the precedent and to that extent undermined the reputation of the Court.

> Well, even when I think deep down I have made up my mind I will tend to remain open-minded on the face of it. Partly because even when I think I have made up my mind I sometimes do change it and, partly, because it is my style of leadership. I very much don't like telling people what to do unless I have to. I feel particularly when there is a minority or difference of view it encourages others to think a bit more if you say you haven't made up your mind or you think this is a difficulty and you can see arguments both ways but I have to say, temperamentally, I am conscious that I am very much more, I would say, open-minded and prepared to not to jump and that it slightly suits my style of leadership as well, I think. [Lord Neuberger]

> I don't dissent very much. I probably don't dissent because I don't really disagree, but I think it is also partly probably because I can see much to be said on both sides. That said, there are a very few cases where I will consciously decide that I will go with the majority, because I think that is the right thing to do … I don't think it is good for the President of the Court to be dissenting very much. [Lord Neuberger]

(d) Holding multiple conferences

In moving to a situation where cases with a single majority judgment were now the norm, Lord Neuberger, with the help of his colleagues shifted the Supreme Court half way to the European style constitutional court, CJEU or ECtHR model. Lord Neuberger borrowed another continental characteristic, in encouraging multiple conferences in difficult cases. In the earlier days of his Presidency Neuberger saw this as a way of narrowing areas of difference and identifying possible compromises with the possibility of heading off impasses like *Nicklinson*. In his later years he worried that multiple conference sometimes only served to make the main protagonists more entrenched.

Lord Neuberger's eventual ambivalence about multiple conferences does not explain why there was only one conference in *Miller (No. 1)*. That was down to the judgments having to be written over the Christmas holidays – which brings us to Lord Neuberger's next technique for building consensus, namely, active use of email.

(e) Email, Diplomacy and Interacting with the majority

Lord Neuberger's first four techniques depended on face to face interaction. The fifth reflects the growing importance of email for decision-making on the Court. It is not unusual to have 50 emails exchanged at the circulation stage of a case or seven or eight drafts of the lead judgment. Without email neither of the two *Miller* cases could have been determined with anything like the speed that they were, or perhaps not at all. Neuberger, in the interests of keeping decision-making manageable and to avoid the majority in *Miller (No. 1)* splintering at any stage, relied heavily on email to keep up the momentum of the decision-making. With each draft and exchange Lord Neuberger would adjust the text of the majority judgment until it began to resemble a draft produced by a committee.

Try as he might Lord Neuberger could not retain the tautness and power of a single authored piece – such as Lord Reed's dissent. At one stage Lord Sumption even suggested that he should produce a separate concurrence to take on Lord Reed's dissent, but this was quickly scotched and David used the goodwill derived from his work on collegiality to restore harmony to the proceedings.

(f) Email, diplomacy and the minority

Lord Neuberger's pursuit of a majority *ratio* did not lead him to try to persuade his dissenting colleagues to narrow the scope of their dissents – far less not to dissent at all. But he did not leave dissenters to their own devices. For them there was a different set of emails, since he believed that the tone and content of dissents could also impact on the reputation of the Court. Thus there were a few occasions, especially at the start of his presidency when he entered into diplomatic negotiations with dissenters to see if they might consider toning down one or two words which might wound another member of the Court or suggest to the wider world that there was a degree of animus in the Court over the case. There is an irony here. In *Liversidge v. Anderson* (1942) Lord Atkin's famous and celebrated dissent where he compared his colleagues' reasoning to Humpty Dumpty was the subject of a delicate approach by Viscount Simon, the Lord Chancellor (Heuston 1970). Simon suggested to Atkin that he might tone down this reference out of collegiality. Lord Atkin would have none of it and posterity is the richer for it. Maybe David's more effective diplomacy has denied us of another Humpty Dumpty moment.

7. Conclusion: Lord Neuberger's legacy

What then can we say has been Lord Neuberger's legacy? In terms of substantive law he made significant contributions in some of the major cases in which he presided and/or wrote in: *Pinnock, Miller (No. 1), Nicklinson* and *Evans* to mention a few. Lord Neuberger was rightly proud of the last (notwithstanding Lord Sumption's critique of it in his Reith lectures) and not just for upholding the rule of law and the separation of powers – which were key to his judicial philosophy, but as he reflected later:

> I counted it a major triumph. The two people I had to support me were Robert Reed and Brian Kerr. Some might think the opposite ends of the spectrum, and possibly for different reasons.

Characteristically, the other area of substantive law development he was most proud of during his Presidency, was not his – although he encouraged his colleagues Lords Reed and Toulson particularly in this regard – namely, the re-discovery of the common law as a source of fundamental rights (Elliot and Hughes 2020), instead of languishing in a cupboard in the wings – as he put it.

Yet, ironically for a judge with a brilliant mind, it may be that posterity will not recall his Presidency for his contribution to the development of the law, since perhaps on account of his famed ability to see both sides of an argument as well as his elliptical leadership style, his judgments were frequently drawn out and lacking the direct impact and succinct turn of phrase of a Bingham or an Atkin. Yet unlike Atkin, his commitment to consensus building as a task leader

more frequently resembled a pursuit of the best available answer in the circumstances, rather than a partisan push for his own preferred outcome.

What history will record, moreover, is how Lord Neuberger safeguarded and enhanced the reputation of the Court through an admirable leadership style – seen quintessentially in *Miller (No. 1)* – which combined collegiality in a broad sense with a determination to uphold the rule of law and the independence of the judiciary. What he created (with the help of his colleagues) was a new way of decision-making in the Apex Court of the UK. Eschewing the individualism of the Law Lords on the one hand and the European style judgments of the Court, on the other, he produced a via media, unique in the common law world. He took the part-formed versions of team-working and group decision-making which had evolved between 2009 and 2012 and transformed them through an elliptical style of leadership by "nudge" or example, into a thorough going, collegial form of team-working. To achieve this Lord Neuberger was prepared to innovate e.g. pursuing balance in panel selection, boosting single judgments, using 600 word essays, encouraging joint judgments, holding multiple conferences, facilitating remote decision making through email and multiple drafts, and taking the Court to the rest of the UK. He was equally happy to abandon or curtail practices that he found inimical to effective appellate judicial decision-making e.g. the use of enlarged panels, allocating the lion's share of lead judgments to the President and Deputy President, and (laterally) the use of multiple conferences. His peripatetic engagement with everyone in the Court allowed him to draw on, and encourage the development of the strengths of each member of the team whether they were on the Court or members of staff. David understood the importance goodwill, and collegiality for effective decision-making:

> I think I have run a happy Court and if that sounds a bit sort of weedy, I do think you get the best out of people if they are happy. I don't think creative aggression and creative tension is a good thing in this Court.

Notes

1. For an autobiography by a Justice of the Supreme Court see Dyson (2019).
2. Unless otherwise indicated, quotations or viewpoints attributed to Justices are derived from interviews with the author.
3. This clever innovation by-passed the seriatim monologues which had failed in *Nicklinson* whilst boosting a collegial approach to the resolution of the case. It was used once again by Lady Hale in *Miller (No. 2)*.

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