

Presidency and the Supreme Court: Lord Neuberger's Legacy
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Professor Alan Paterson OBE, Strathclyde University
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David Edmund Neuberger was appointed as President of the UK Supreme Court on the 1st October 2012 and stepped down on the 4th September 2017. What happened between these dates is the topic for this lecture. David studied at Oxford where he met and became friends with Jonathan Sumption. He was called to the bar in 1974 and thereafter had a niche practice in Landlord and Tenant which kept him from the attention of the senior judiciary. He jokingly remarks that this meant that he made no enemies on the way up. By 1987 he was a QC and, after some resistance on his part, a High court judge in 1996, a member of the Court of Appeal in 2004 and the youngest sitting Law Lord at 59, in 2007. Barely two and a half years later he was Master of the Rolls, and three years later still he was President of the Supreme Court. How are we to understand such a meteoric rise in the eight years from 2004? Was Lord Neuberger ambitious and astute enough to see that his best way to the Presidency was not to join the Supreme Court in 2009, but to spend a stint as head of the Court of Appeal to cement his power base from whence to leapfrog any rivals in 2012? Conspiracy theorists will be dismayed to hear that it was not like that. Like Lord Denning before him, Neuberger had mixed feelings about his time in the

Lords. Like Tom¹ his first case in the Lords was not a success. In *Stack v Dowden*² Lord Neuberger thought he had a majority for his position since Lord Walker (armed with a draft judgment) and Lord Hoffmann who was presiding, agreed with him at the delayed post hearing conference. Within a month that majority had crumbled. Lady Hale had persuaded Lord Walker and Lord Hoffmann to back her position and Lord Walker, uniquely for him, withdrew his written judgment. Neuberger spent the Easter vacation writing a lengthy dissent but it was too late – the caravan had moved on and the battle had been lost.

Lord Neuberger is widely known to be a workaholic and he missed the camaraderie of the court he had just left, for he took every opportunity that the less pressurised schedule in the House afforded him, to spend a few days sitting in the Court of Appeal. He had a slightly greater ambivalence about the Supreme Court than some of his colleagues,³ and this combined with the attractions of taking on the challenge of a position with managerial responsibility for the first time – particularly one that Tom Denning had given some allure to – persuaded him to put his hat in the ring for the Master of the Rolls post that Lord Clarke had just vacated.⁴ Lord Neuberger did sit in the Supreme Court on four occasions while he was Master of the Rolls, most famously in *Pinnock*,⁵ the determining case on eviction and Article 8

¹ See A Paterson, *The Law Lords* (Macmillan Press, 1982) at p.38, discussing Lord Denning's first case in the Lords, *Rahimtoola v. Nizam of Hyderabad* [1958] AC 379 and the rebukes he received from Viscount Simonds and his colleagues for relying on arguments not raised by counsel.

² [2007] 2 AC 432.

³ See UKSC Tenth Anniversary event The Three Presidents <https://www.supremecourt.uk/ten-year-anniversary/three-presidents.html>

⁴ David Hope in his diaries suggests that Lord Phillips as senior Law Lord and President elect of the Supreme Court had actively encouraged Lord Neuberger to apply to replace Lord Clarke. (See D Hope, *House of Lords 1996-2009: Lord Hope's Diaries* (Avizandum Publishing, 2018) pp. 360,364.

⁵ *Manchester City Council v Pinnock* [2019] UKSC 45

of the Human Rights convention, (and quite unusually in the case of a visitor, gave the lead judgment in three of them). However, it was not a ploy to lay the ground for a future career move, for he was genuinely in two minds about applying to replace Lord Phillips as President, when the time came. His application probably owed as much to his perception of duty as ambition. Some Justices arrive at the Supreme Court with a desire to change one or two aspects of the law which they consider has gone wrong in apex court in days gone by. This makes assessing their legacy a little easier for academic chroniclers. Regrettably, from this perspective, Lord Neuberger had no such agenda, at least when he started, and to make matters worse his innate modesty meant that he was not very comfortable with the notion of legacies anyway.⁶ Fortunately, I was unaware of this when I embarked on this project which has entailed interviewing all of David's colleagues – some of them more than once – as well as David himself.⁷ In his presidential years Lord Neuberger sat in 228 cases in the Supreme Court, more than anyone else in that period, presided in all of them, and delivered 55 lead or single majority judgments (25%) in the cases he sat in, 29 concurrences (13%) and 7 dissents (3%) less than anyone else on the Court at the time. Such are the bald statistics but what do they tell us about Lord Neuberger as President?

⁶ Lord Neuberger had some objectives in mind on arriving in the Court but they did not relate to the substantive law. See UKSC Tenth Anniversary event The Three Presidents <https://www.supremecourt.uk/ten-year-anniversary/three-presidents.html>

⁷ The project began as a study of the Neuberger Presidency in 2016 – and has now morphed into a larger project on Presidents and Senior Law Lords over the years. It has entailed around 20 interviews with Justices to date.

The Role of the President: What the Constitutional Reform Act 2005 says

Here I should digress with a short excursus on role of President of the Supreme Court as set out in the legislation. Since the role is only ten years old its early incumbents have inevitably shaped the role while they interpreted it. Indeed, as Lord Neuberger observed in interview,⁸ in many respects the Presidency of the UK Supreme Court is what the President at any given time makes of it, since the leadership role of the President has surprising degrees of freedom. One reason for this is that the offices of the President and the Deputy President were created by the Constitutional Reform Act 2005 (CRA),⁹ and this enactment, as is well known, was not the product of an in depth white paper but of blue sky thinking by New Labour.¹⁰ Section 24 of the Act provides that:

“On the commencement of section 23 – ,.....

(b) the person who immediately before that commencement is the senior Lord of Appeal in Ordinary becomes the President of the Court, and

(c) the person who immediately before that commencement is the second senior Lord of Appeal in Ordinary becomes the Deputy President of the Court.

However, other than this, the Act provides little content for either office except on some peripheral matters¹¹ and contains few additional requirements for holders of these two offices than the statutory qualifications required to become a Justice on the

⁸ Interview with author.

⁹ Ss.23 and 24 Constitutional Reform Act 2005

¹⁰ Lord Bingham worked tirelessly to influence the Government’s thinking on the new Supreme Court but there is little evidence that he focused much attention on the issue as to how, if at all, the offices of President and Deputy President would differ from that of the Senior and Second Senior Law Lord.

¹¹ The Statute confers on the President or the President and the Deputy President the power to allow senior UK judges to be “acting judge” (s.38), to appoint retired judges to the “supplementary panel” (s.39), to provide directions on the size of panels (s.42), to promulgate Rules and Practice Directions governing the practice and procedure to be followed in the Court with a view to securing that the Court is accessible, fair and efficient.

Court. The Act does set out the new roles for the Lord Chief Justice (as head of the Judiciary) and the Lord Chancellor (as Secretary of State for Justice with no judicial role) – which by inference help determine what the role of the President is not – but that gets us little further forward. The reference to the senior Law Lord positions in section 24 is a partial pointer, but the statute carefully does not state that the new offices can be exactly equated to those of the senior Law Lords. In any event since the roles of the Senior Law Lord and Second Senior Law Lord were not statutorily defined either,¹² this avenue also has its limitations, the more so since in the twenty years before the Supreme Court was established the role of the senior Law Lord had changed considerably.

A second approach to the Presidency is to define it through its relationship with other key actors associated with the Supreme Court – the Lord Chief Justice (LCJ), the CEO of the Court, the Deputy President and finally with the fellow Justices. The CRA 2005 makes the LCJ the titular head of the judiciary in England and Wales. The President however, is the head of the apex UK Court. There is obviously potential for friction there – especially if the President chooses to speak

¹² The roles of Senior and Second Senior Law Lord were created by Lord Hailsham (at the request of Lord Diplock, then the most senior Lord of Appeal) in 1984. He announced to the House of Lords that year that “ I have advised Her Majesty that it would be appropriate for her in future to appoint the senior and second senior Law Lords who, between them , normally preside over sittings of the House of Lords and the Judicial Committee of the Privy Council.” Lord Diplock added to the House: “the task of presiding over a plurality of judges in such a way as to promote an efficient and expeditious way of dealing with appeals is not the same as producing judgments which clarify and develop the law. The tasks call for different qualities. They may be combined in the same judge, but also they may not. To preside is a more taxing task.” 453 HL Deb Col 915-18, 27 June 1984. An example of where the senior law lord was appointed other than by seniority and was not well received was the appointment to succeed Lord Fraser of Tullybelton. The next senior Law should have been Lord Keith of Kinkel (by seniority). Instead the English desire to avoid two scots in a row prompted the LC to appoint Lord Scarman to succeed Lord Fraser. However, Scarman retired after less than 2 years and Lord Keith was duly appointed. Little had been achieved than to cause ill feeling North of the Border and amongst most of the Law Lords. See A. Paterson, “Scottish Lords of Appeal 1876-1988 (1988) J.R. 235 at 251.

out on topics central to the legal system such as legal aid or the independence of the judiciary. Much therefore may depend on the personalities of the two officeholders. That said there are many commonalities of interest and scope for constructive engagement between them and Neuberger had an excellent working relationship with Lord Thomas. Thus Lord Neuberger gave several lectures on the decline of legal aid in England and Wales, which might equally well have come from the LCJ. Similarly, in the Brexit case, the failure of the Lord Chancellor to defend the members of the Divisional Court who had been branded as “Enemies of the People” by the Daily Mail, was publicly criticised both by the LCJ and the President.¹³

The relationship between the President and the CEO is referred to in the statute but the President is given wide powers of delegation so again in practice much will depend on the personalities of each, and on circumstances. Most, if not all, Presidents will wish to establish strategic priorities for the Court but fewer will be so keen to manage its operations on a day to day basis. The latter is the role of the CEO. The need for delegation is obvious - the President has a raft of responsibilities which even as powerful a senior Law Lord as Lord Bingham had not had. Establishing a new Court in a “new”¹⁴ building entailed many tasks, appointing a swathe of staff with roles that had not existed in the House e.g. the Director of Communications, the CEO, the IT Director, and a security team; managing the public face of the Court through encouraging visitors, introducing live streaming of the hearings and

¹³ One Justice told me “The Supreme Court has acquired an image, a public image, which I think entitles its presidents to speak generally about the operation of the legal system. He really shouldn't tread on the toes of the Lord Chief Justice. I don't think he was for a moment on the media attack on the Divisional Court”.

¹⁴ Of course, the Middlesex Guildhall was an existing building. However, £60 million had been spent on transforming its interior into an environment that was far better fitted for the apex court of the UK than the House had been.

judgments, having to fight for the independence of the staff from the Ministry¹⁵ whilst depending on a budget from that Ministry. The first CEO Jenny Rowe was heavily involved in the financial wrangles with the Ministry in the early years, as was Lord Phillips.¹⁶ However, Mark Ormerod in Lord Neuberger's time had comparatively little to do by way of budgetary negotiations and Lord Neuberger even less. On the other hand in the Brexit case, Miller (No.1)¹⁷ Mark and David worked closely with a wide range of staff to ensure that the logistic, public relations and administrative arrangements in the case worked to the best possible advantage of the Court. Sixty five counsel had to be accommodated, the printed cases were (unusually) made available on the website,¹⁸ facilities given to the world's media, an overspill courtroom provided for the public and a queuing system implemented with the help of the catering staff.¹⁹ Indeed Neuberger's personality led him to interact with all levels of staff to a greater extent than his predecessors and on matters that with other Presidents in other courts might have been left to the CEO.

The Constitutional Reform Act does set out some of the responsibilities of the President and Deputy President but largely omits their two most significant duties, namely, approving the make up of the panels for each hearing of the Court and to preside in hearings in the Supreme Court and the Privy Council. The relationship

¹⁵ G Ghee, R Hazell, K Maleson and P O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015) ch. 8.

¹⁶ *Ibid.* ch 8.

¹⁷ *Miller v S of S for Exiting the European Union* [2017] UKSC 5

¹⁸ Lord Briggs is working hard to resolve the legal and technical problems involved in making the parties printed cases available to the public in every case coming to the UKSC. [see UKSC Blog 10th anniversary event]

¹⁹ Lord Neuberger was so impressed by the "can do" approach of the staff to the demands of Brexit case that, after discussion with Mark Ormerod, he and his colleagues clubbed together to buy the staff a ping pong table as a thank you. See UKSC website The Three Presidents event <https://www.supremecourt.uk/ten-year-anniversary/three-presidents.html>

between the two officeholders, including delegation of tasks from the President to the Depute, has varied with the personalities and interests of each.²⁰ Nick Phillips may have pipped David Hope to the Presidency²¹ but the latter had far more experience of sitting in the Lords than Phillips. At any rate during Lord Phillip's presidency Lord Hope sat in 106 cases in the Court and Lord Phillips in only 74. On the other hand David Neuberger's "action man" tendencies meant that he sat and presided in many more cases than Lord Phillips. Consequently when Lady Hale became Deputy President there were considerably fewer cases in which she had the chance to preside. In more recent times the administrative aspects of the Deputy President role appear to have grown. Thus, both Lord Mance and Lord Reed contributed to the development of management statistics on the work of the Justices.

The CRA may have left considerable ambiguities as to the role of the President, however, over time, the day to day requirements of the role have become clearer as is evidenced by the job description for the post of President when it was advertised in 2018. It included:²²

- Effective presiding in the highest appeal court in the United Kingdom;
- Providing outstanding leadership, which inspires confidence of stakeholders in the UK and abroad, and which supports the rule of law and the judicial process;
- Leadership of the judicial administration of the Court so that the Court functions internally as a collegiate institution;

²⁰ Thus where the President is a "big picture" person it helps if the Deputy President has an eye for detail.

²¹ See D Hope, *House of Lords 1996-2009: Lord Hope's Diaries* (Avizandum Publishing, 2018)

²² This is a precis of the role description for the President contained in the information pack made available to all candidates for the post in 2018.

- Participating fully and collegiately in discussions and decisions on cases heard before the Court and applications for permission to appeal;
- Liaison with the most senior judges in the UK and internationally;
- An ambassadorial and representational role for the UKSC, justice and the rule of law within the UK and internationally, and effective engagement with Parliament, Government and the media;
- Writing, with appropriate dispatch, judgments of the highest quality, commanding the respect of colleagues and commensurate with the role of President; and ensuring the timely delivery of judgments by the Court generally.

Unsurprisingly, the descriptions of the office of President provided by the Justices whom I interviewed for this project²³ highlighted similar aspects of the role:

“[L]eading the judicial work of the Court and, therefore, doing a certain amount of organisation about things like panels and PTAs, obviously presiding in Court, allocating judgments, regular meetings with the administration to make sure that side is operating smoothly. ” [Lady Hale]

“[L]eadership on the legal side because you are presiding in one of the panels and *the* panel if it is a larger one...Also it is really up to you to keep an eye on who is doing what and how they are getting on with it and making sure that you don't allow someone to hog all the interesting judgment writing and making sure that people don't get over-burdened or under-burdened. Making sure that the judgments are being issued in a reasonable time and so forth. So, you have got a combination I think of a sort of HR role, an administrative role and a judicial role” [Lord Reed]

“Leadership, establishing and fostering collegiality, reviewing the direction of travel of the Court. Also, the responsibility for staff morale and generally establishing a healthy esprit de corps among the entire institution, not simply among the justices, and obviously doing the heavy lifting when it comes to writing judgments...” [Lord Kerr]

²³ I began the research interviews with the Justices of the Supreme Court by asking them what they considered to be the role of the President and whether this picture was one that Lord Neuberger shared.

Leadership and power

It is no coincidence that both the Justices and the job description highlighted *leadership* as a key attribute of the office of President. Although a multifaceted concept, definitions of leadership frequently focus on (a) holding a leadership position in an institution and (b) acting to motivate a group or body to achieve a common goal. All Presidents of the UK Supreme Court meet criterion (a) but some Presidents have been more active and some more successful than others as leaders in sense (b). Interestingly, in the last few years there has been a flurry of writing on leadership in a legal or judicial context.²⁴ Deborah Rhode, a highly respected law professor at Stanford University has argued²⁵ that effective leadership by lawyers is context specific but that certain qualities are rated in the literature as significant across a wide array of leadership situations. These are values (e.g. integrity, honesty, trust and a service ethic); personal skills (e.g. self-control and self-awareness); interpersonal skills (e.g. empathy, social awareness, persuasion and conflict management); and vision and technical competence. Rhode dismisses “charisma” as an overworked concept with little explanatory content but she distinguishes a range of leadership styles e.g. coercive, authoritative, affiliative, aloof, democratic and role model. As we will see later it is not difficult to identify Presidents and Justices with these values²⁶ and Presidents epitomising the range of

²⁴ See e.g. Deborah Rhode, *Lawyers as Leaders* (OUP, NY, 2013); R.M. Cormac, *The Supreme Court* (Penguin Ireland, 2016); Katherine .Lindsay and David Tomkins, “ Hail to the Chief?” 40(2017) *The University of New South Wales Law Journal* 712; Rosemary Hunter and Erica Rackley, “Judicial Leadership on the UK Supreme Court” 38 (2018) *Legal Studies* 191 ; Sir Ernest Ryder and Stephen Hardy, *Judicial Leadership* (OUP, Oxford, 2019).

²⁵ Deborah L Rhode, *Lawyers as Leaders* (OUP, NY, 2013)

²⁶ For a detailed account of the importance of Justices’ values see Rachel Cahill-O’Callaghan, *Values in the Supreme Court* (Hart Publishing,2020)

leadership styles. Rhode also points to the paradox of power, namely that the qualities which are required to get someone to the top are not necessarily the attributes required to keep one at the top. For example, staying at the top may include the ability to let others succeed. As Laotse observed: 'A leader is best when people barely know he exists. When his work is done, they will say: "we did it ourselves"'. ' This, too, has its resonances in the Supreme Court.

Rosemary Hunter and Erika Rackley in their stimulating and insightful article on "Judicial Leadership on the UK Supreme Court"²⁷ derive four broad categories of judicial leadership from the literature:

- 1) Administrative leadership (running a court and managing relationships with other branches of government);
- 2) Jurisprudential leadership (intellectual leadership in one or several areas of law, or "effective leadership concerning decisional outcomes" – dubbed "task leadership" by various scholars;²⁸
- 3) Social leadership²⁹ – fostering collegiality and social cohesion in the Court when tensions can run high;
- 4) Community leadership – reaching out to stakeholder communities through talks, lectures and interactive engagement.

²⁷ 38 (2018) *Legal Studies* 191

²⁸ D. Danelski, 'The influence of the Chief Justice in the decisional process of the Supreme Court' in Goldman, S and Sarat, A (eds) *American Court Systems: Readings in Judicial Process and Behaviour* (New York: WH Freeman & Co Ltd, 1978) p 486; A. Paterson, *The Law Lords* (Macmillan, 1982) and A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013).

²⁹ D Danelski, A Paterson (1982) and A Paterson (2013)

It will be seen that these categories also feature strongly in the job description and the Justices' accounts of the role of the President set out earlier.³⁰ Hunter and Rackley show how other Justices have frequently provided leadership on the Court as well as the office bearers, nevertheless by the very fact of being office bearers, the President and Deputy President have greater opportunities to demonstrate leadership characteristics and to seek to persuade others to follow their line of thinking, than other Justices. Moreover, being an office bearer and particularly, the President, places the holder in a stronger position to exercise power with leadership – in all three of the dimensions of power identified by Steven Lukes in his seminal treatise on the topic:³¹

- 1) Directing others to do as you say;
- 2) Restricting the 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.³²

When the apex court was largely a number of individuals who remained individuals even when sitting as a panel to decide a case, the power of the senior Law Lord in Lukes' senses was somewhat limited – although nobody seems to have tried to tell Lords Diplock and Bingham that. However, as *Final Judgment*³³ showed, in the Supreme Court teamwork and group orientation have developed exponentially, particularly after Lord Neuberger took over the Presidency.³⁴ This has brought with it greater opportunities for the exercise of leadership powers by the President

³⁰ Certainly, Hunter and Rackley convincingly illustrate the extent to which the office bearers in the Supreme Court have evidenced all four of these leadership characteristics in the Supreme Court, not least because there are inevitable overlaps between the characteristics.

³¹ S. Lukes, *Power: A Radical View*, London: Palgrave Macmillan, 2nd edn, 2005.

³² Note the resemblance to Loatse's observation above. For reasons of brevity this account of the dimensions of power is necessarily a gross over-simplification of the richness of Lukes' thesis.

³³ A. Paterson, *Final Judgment*.

³⁴ *Final Judgment* p.143ff

especially, but also by other presiders. Interestingly, though it is power in Lukes' second and third senses, which stem from the President being more *primus inter pares*³⁵ 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.”³⁶

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

External and Internal dimensions of the Presidency

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

“I see the role of the President as having two dimensions, an internal and external one. 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]

³⁵ Brian Dickson – one of the most powerful and celebrated Chief Justices of the Canadian Supreme Court regarded himself as no more than the first amongst equals and was said to be a great listener who did not seek to impose his views on his colleagues. See Robert Sharpe and Kent Roach, *Brian Dickson* (The Osgoode Society, 2003) at p.301.

³⁶ Interview with the author. As Richard Cornes has observed, command style leadership is an uneasy bedfellow with judicial independence. “A Point of Stability in the Life of the Nation” [2013] *New Zealand Law Review* 549.

For Lord Neuberger the two dimensions were linked. This was because he felt that as President he had a paramount duty – to preserve and enhance the reputation of the Court both in the UK and abroad. This is an external facing obligation but to attain it he believed that he had to succeed at two linked internal tasks – first to foster a collegial atmosphere in the Court (by which is meant an ability and inclination to work together as a team) and second to achieve as much agreement between his colleagues as he could around the best available outcome to the cases in which he presided.³⁷

External aspects – the Ambassador role

The external aspect of the Presidency includes public communication, in speeches – of which David delivered a very great number (rivalled only by Lady Hale) or in the hearings³⁸ and in President’s judgments in significant cases.

I think he is very instinctive. He has very sensitive antennae to what is going on inside this building and outside the building... He is very conscious about how the Court is thought of and appears.

[Lord Reed]

“I think David has been very good at being himself both in Court and when speaking to wider audiences. He doesn't appear distant. He communicates and I think has received a good deal of public acceptance... He has got a very broad range of interests and an extremely acute mind and memory. He is able to speak on subjects which maybe don't come in front of us on a day to day

³⁷Chief Justice Edwards, “The Effects of Collegiality on Judicial Decision-Making” (2003) 151 *University of Pennsylvania Law Review* 1639 extends collegiality to mean also striving to persuade ones colleagues to share a commitment to the pursuit of the best answer available. In this sense Edwards and Neuberger were pursuing similar objectives. See also, Lord Neuberger, “Twenty Years a Judge: Reflections and Refractions” Neill Lecture Oxford University 2017 para 31.

³⁸ See the opening and closing statements by the Presidents during the hearings in the two *Miller* cases. In the first *Miller* case Lord Neuberger stressed that the case was not about politics but about law. Similarly, in *Miller* (No.2) Lady Hale states that the case is about a serious and difficult point of law and had nothing to do with the wider political issues including the matter of Brexit, which form the context of the legal questions in the case.

basis but which are legally important and, I think, as President of the Supreme Court there is a role for that provided you are able to do it.”³⁹

[Lord Mance]

Internal aspects

As we have seen 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” projects a positive image of the Court for the outside world.

Well, principally, it's enabling the Court and the other judges to function and much of it is unseen, or mostly unseen, to the rest of us, but it is absolutely essential...You keep an eye on how the business is being done. You have got to liaise with the support business staff, registry, chief executive, finance but all that is ancillary to keeping the sitting of the Court turning over effectively. That is what you are there to do, I think. [Lord Hughes]

[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 tell 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]

³⁹ As Lord Mance's final remark points to the fact, which we discussed earlier, that Neuberger's view of his role has encompassed speaking out on topics broader than the Supreme Court such as legal aid or the relationship between the Executive and the Courts. Few senior Law Lords³⁹ had played such role in past because of the role of the Lord Chancellor as the bridge between the courts and the executive. Lord Neuberger's willingness to speak out on wider Justice matters was related to his paramount objective as President, which was to maintain and enhance the status and reputation of the Court, nationally and internationally.

Another aspect is the maintenance of collegiality. The keeping of the court together. The pursuit of a common goal in improving and explicating the law and I think our current President is a very successful justice in that respect. I think he has created a very coherent and very happy institution [Lord Hodge]

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]

Fostering collegiality came naturally to David who was a very people-oriented President. First, he encouraged his colleagues to lunch together in their Dining Room, sometimes guests would be invited, and generally speaking the discussions were not focused on the cases that were part heard during the day.⁴⁰ Second, David may not have kept his office door open,⁴¹ but 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.

Any President has an HR function although complaints are fortunately very few and far between. The Justices are regularly asked to deliver lectures, preside over moots, become trustees of charities or Chancellors of Universities, to travel abroad to give prestigious addresses, exchange visits with comparable courts abroad, or to sit for a period in a foreign court. Someone has to decide whether all such offers should be taken up either because they might pose a reputational risk to

⁴⁰ See 10th Anniversary event at the Supreme Court entitled " The Three Presidents" <https://www.supremecourt.uk/ten-year-anniversary/three-presidents.html>

⁴¹ Generally speaking those Justices who keep their doors open are indicating a willingness to be disturbed by colleagues. See A. Paterson, *Final Judgment*.

the Court or because it would unfairly increase the burden on the others, and that person had to be the President. Lord Neuberger had a characteristically light touch, but he was not *a* soft touch. In the five years of his Presidency he had to say “No” on only a handful of occasions a year, an outcome that was never challenged, which is a testament to the friendly relations on the Court, and to the respect afforded to David by his colleagues.

David Neuberger as leader

Different leaders of our apex court have evidenced different aptitudes for, and degrees of interest in, exercising the four categories of judicial leadership discussed by Hunter and Rackley. In part this stems from their varied styles of leadership. In Rhode’s classification 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 mesmerised⁴² his fellow judges, 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 nudge⁴³ 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*

⁴² See A. Paterson, *Lawyers and the Public Good* (CUP, 2012) at p.178.

⁴³ See R. Thaler & C. Sunstein, *Nudge* (Penguin Books, 2009)

(No1).⁴⁴ 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. Of course, an elliptical approach to leadership is not without its dangers. What if his hints went unheeded? In at least one appointment round for the Supreme Court, Lord Neuberger knew who he favoured for appointment but did not get this across to the rest of the panel and another candidate was appointed.

Neuberger's preference for a "nudge" rather than a dictat, 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]

Robert 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."

⁴⁴Lord Neuberger, "Twenty Years a Judge: Reflections and Refractions" Neill Lecture Oxford University 2017 para 30.

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 rates than the norm for all Justices.⁴⁵ 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.

Leadership Power and Tension

In this next section we will examine how Lord Neuberger exercised his powers of leadership. Theoretically, Presidents could play quite a wide role in the allocation of resources to their colleagues, e.g. by deciding which Justice gets which office, or judicial assistant⁴⁶ or personal assistant. In practice all the Presidents of the Supreme Court have delegated these decisions to others or as with the matter of offices, it is settled by seniority. However, successive Presidents (and Neuberger was not an exception) have played a greater role in relation to the allocation of opportunities e.g. to sit or to write the lead, to colleagues or to themselves

Leave to appeal

⁴⁵ The average dissent rate for Justices in the ten years of the Supreme Court is 6.9%. Lord Phillips’s dissent rate was 5.5% and Lord Neuberger’s 3%. Lady Hale had a higher than average dissent rate before becoming Deputy President (13%) e. however, following her appointment as Depute President it dropped to 8.5% and then to 5.5% when she was President..

⁴⁶ Evidence that tensions can arise over the distribution of judicial assistants can be found in *Lord Hope’s Diaries :The UK Supreme Court* (Avizandum Publishing, Edinburgh, 2019) at p.45.

As we saw earlier, some of Neuberger's colleagues⁴⁷ had a desire to rectify areas of law where they felt that the lower courts (and occasionally the House of Lords) had gone astray in the past. Neuberger did not – he had come to the Court without an agenda for reform. So he did not nudge his PTA team⁴⁸ towards admitting particular kinds of case and probably felt that the Court admitted too many cases that could not really be described as of “public importance”.

Selecting who will be a Justice

Lord Neuberger, as noted above, allowed his preference for elliptical leadership to get in the way of selecting his preferred candidate to vacancies on the Court. Lord Phillips saw “merit” as an individual characteristic whilst Lord Bingham and Lady Hale saw “merit” as including diversity and the overall needs of the Court.⁴⁹ Neuberger, however, whilst recognising the importance of diversity on the Court, found himself torn between the Phillips and the Hale strands of thinking.

Determining the size of the panel

Once a case has been admitted a decision has to be made as to the timetable for the case – when to slot it into the Court's calendar and how much time to allocate to the hearing. The latter can be influenced by the comments of the PTA Committee, as can the size of the panel, which in turn impacts on the Court's calendar. The Registrar consults with the President and Deputy President over proposals to have an

⁴⁷ E.g. Lord Hughes, Lord Briggs.

⁴⁸ Each senior Justice presides over panels of three to determine the outcome of PTAs.

⁴⁹ See A. Paterson,, “Power and Judicial Appointment” Ch 3 in G. Gee & E. Rackley (eds) *Debating Judicial Appointments in an Age of Diversity* (Routledge, London, 2018)

enlarged panel and whether it should be 7,9 or 11. In the House of Lords there were 13 hearings with an enlarged panel in its last decade.⁵⁰ In part this was because the normal committee rooms in the Lords could not accommodate an enlarged panel. In the Supreme Court, Court No.1 had been specifically configured to accommodate up to nine Justices on a panel.⁵¹ Because of this and because Lord Phillips believed that it made a difference to the outcome of cases which Justices got to sit in contentious cases,⁵² he encouraged hearings with enlarged panels. Strikingly, in his Presidency (2009-2012) 48 out of 189 cases heard in the Supreme Court during that time (25%) had an enlarged panel.⁵³ Yet in Lord Neuberger's Presidency (2012-2017) only 43 out of 369 cases heard by the Court had an enlarged panel (12%). The proportion of enlarged panels has fallen even further in Lady Hale's Presidency (2017-2019). This is somewhat curious since all three Presidents have denied rationing enlarged panels in any way.⁵⁴ Moreover, the criteria⁵⁵ for having an enlarged panel have not changed materially during the first decade of the Court so it is difficult to see why

⁵⁰ See *Final Judgment* p.72 at fn35.

⁵¹ The Courtroom has twice held hearings with 11 Justices and can, at a squeeze, take all 12 for formal ceremonies e.g. valedictories.

⁵² See Lord Phillips, 'The Highest Court in the Land' (BBC4, 27th January 2011) and *Final Judgment*.

⁵³ For a critique of this development see A Burrows, "Numbers Sitting in the Supreme Court" (2013) 129 *Law Quarterly Review* 305.

⁵⁴ See 10th Anniversary event at the Supreme Court entitled " The Three Presidents" <https://www.supremecourt.uk/ten-year-anniversary/three-presidents.html> 2/7/2019 Supreme Court.

⁵⁵ See J. Lee, "Against All Odds" in P. Daly (ed) *Apex Courts and the Common Law* (Univ of Toronto Press,2019)

Proportion of cases with an enlarged panel by year



the number of such cases should have dropped so significantly. Jamie Lee argues that there is too much discretion in the interpretation of the criteria⁵⁶ and considers that they should be done away with altogether and replaced by an explanation in each case as to why a larger panel has been chosen.. Part of the explanation may lie in the Court's caseload since the number of cases heard during the first decade has increased as the number of enlarged panels has decreased, so it may be that subconsciously the PTA panels and the President and Deputy President may be influenced by a desire not to build up a backlog in the Court or to put litigants off from coming to the Court. However, 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 proportion of cases where the

⁵⁶See J. Lee, "Against All Odds" in P. Daly (ed) *Apex Courts and the Common Law* (Univ of Toronto Press, 2019) at p.94.

composition of the panel made a difference to the outcome, and considered them to be unwieldy and difficult to manage⁵⁷ (a view shared by Lady Hale). Only towards the end of his Presidency did Lord Neuberger begin to see the value of enlarged panels – as the figures reflect.⁵⁸ He would also consider an enlarged panel, as Lord Phillips had done, to accommodate the desire to sit on contentious cases of some of the excluded Justices.⁵⁹ 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.

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,⁶⁰ giving rise to speculation as to whether the inclusion of the missing Justices might have made a difference. Even Presidents who largely left the selection of the panels to the Registrar ⁶¹took an interest in who sat in the larger panels. In the House of Lords Tom Bingham’s preference in enlarged panel cases was to include the most senior judges⁶² to avoid being accused of packing the Court. However, Lord Phillips paid heed to the pleas

⁵⁷ Interview with the author. See also D. Neuberger, “Twenty Years a Judge” Neill Lecture 2017, Oxford Law Faculty 10th February 2017.

⁵⁸ Lords Neuberger and Sumption in their interviews expressed support for the Court sitting *en banc*, whilst accepting that the logistics and the cost of such a change made it unlikely.

⁵⁹ See *Final Judgment* at p.73.

⁶⁰ In *Miller No1* , unusually because Lord Toulson had not yet been replaced, the full Court sat on the case. In *Miller (no2)* the exclusion of Lord Briggs (not the most junior member of the Court) provoked some speculation. It would appear that since it was decided during the vacation, Lord Briggs’ vacation arrangements were deemed to be the most difficult to change. In fact, it seems that the original panel for *Miller (No.2)* was 9 and Lady Arden and Lord Kitchin were then added to the panel.

⁶¹ See *Final Judgment* at p.72.

⁶² Lord Millett *As in Memory Long* (Wildy, Simmonds and Hill Publishing, 2015) p.189 circa and Paterson, *Final Judgment* p.71

of the junior Justices and abandoned the seniority rule⁶³ and Lord Neuberger followed suit. Moreover, both could be persuaded to expand an already enlarged panel for reasons of balance or collegiality.

Lord Neuberger was a workaholic and wanted to sit on as many of the significant cases as he could, indeed in his period as President he sat (and presided) as we have seen, 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 (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 “ 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. Lord Kerr was not alone in wishing to see greater rotation between panels. Neuberger did, however, seek to balance the two or three “ A team” specialists with two or three generalists and in practice at least one and sometimes all three members of the PTA panel that had admitted the case, would sit.

⁶³ Inevitable once enlarged panels reached 25% of all cases.

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.⁶⁴ Again, in *Prest* the issue was whether the Family court in a millionaire's divorce could lift the veil of incorporation of the "one-man" companies registered in the millionaire's name in the Isle of Man, in order to assess the husband's assets. Perceiving a possible tension between Family lawyers (who would wish to lift the veil) and Chancery lawyers (who would not), Lord Neuberger selected two family lawyers, two chancery lawyers, one Justice who favoured lifting the veil and another who did not, and one neutral. Finally, 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*⁶⁵ (malicious prosecution) and *Patel v Mirza*⁶⁶ (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, David commented:

⁶⁴ Interview with author.

⁶⁵ *Willers v Joyce*[2016] UKSC 44

⁶⁶ *Patel v Mirza* [2016] UKSC 42

“[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 four Neuberger took account of what he thought his colleagues would consider to be balanced. 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”.

The illegality cases were an example of a phenomenon which occasionally arose in Neuberger’s time, namely, several cases on similar issues which had come through different PTAs or sometimes the Privy Council as well as the Supreme Court and the interconnection had not been noticed. Ideally such cases should be conjoined with the same panel or at least balanced panels. Thus in 2017 the Court discovered that it was dealing with two unjustified enrichment cases⁶⁷ some months apart. Although they couldn’t harmonise the panels they did hold back the judgment in the first case to allow the judgments in the two cases to be coordinated. Lord Neuberger himself felt that he wasn’t so successful in the most spectacular example of overlapping cases, *Rahmatullah, Al Waheed and Belhaj*⁶⁸ about torture and rendition, where some judges present at the initial hearing were not included at the re-hearing. As he said :

⁶⁷ *HMRC v Investment Tr Cos* [2017] UKSC 29 and *Lowick Rose v Swynson Ltd* [2017] UKSC 32

⁶⁸ *Rahmatullah v MOD* 2017 UKSC 1; *Al-Waheed v MOD (Serdar Mohammad)* 2017 UKSC 2 and *Belhaj v Straw; Rahmatullah(No.1)* 2017 UKSC 3

“We didn't handle those three cases very well and that is one of my regrets. ...There were a number of cock-ups in relation to those cases. I think what we should have done was have all the arguments in all of them together over three or three and a half weeks in the same panel. I think I took my eye off the ball in relation to the panels and we took forever over it because there was a lot of changing of views. We felt we had to have all the judgments out together. I expect one could find other cases but that was the thing that I handled worst in terms of everything. All aspects were badly handled. How we divided up the hearings, how I allocated the judges and the delays that resulted.”⁶⁹

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

The pre-hearing conference

Lord Bingham did not have pre-hearing conferences – because he shared the view of his immediate predecessors as senior Law Lord that such conferences under Lord Diplock had become a way of encouraging the Law Lords to make up their minds too early.⁷⁰ Nick Phillips re-introduced them as part of the Case Management work of the Court. David Neuberger kept them on, but for him their value was not so much identifying which of counsel's arguments they wanted to see developed, as giving the five individuals on the panel the chance to feel they were part of a team.

Besides, as he added:

“Occasionally, particularly when I am (a) not sure I have quite understood the case (b) I am slightly confused about something, or (c) I really have a completely open mind, I am quite interested to see what colleagues think provisionally.”⁷¹

Conducting the Hearing/ The President during hearings

⁶⁹ Interview with the author, 2017.

⁷⁰ Interview with the author. See also A.Paterson, *Lawyers and the Public Good* at p.167.

⁷¹ Interview with the author, 2013.

David would often describe himself as an Impressionist (rather than a Pre-Raphaelite)⁷² when it came to doing his homework with the printed materials prior to a hearing. Unlike most of his colleagues he would only read the minimum for fear of making up his mind too early.

As Lady Hale graphically reminded us in her valedictory salute to Lord Neuberger, patience in the chair was not his forte. As his agile mind grew bored he would slump lower and lower down his chair, except in the Miller case where he was very conscious that the Court had the eyes of the world on it. In the Chair his temper could be tried to the point of grumpiness, if sufficiently provoked. Certainly, he was one of the minority of Justices who felt that the time allotted to oral hearings in the Supreme Court – which far exceeds that which occurs in the US and Canadian Supreme Courts and the High Court in Australia – should be gradually curtailed. As President, David was in a strong position to bring this about. As Lord Sumption observed:

“I wouldn't say that the function of the President in general was to shorten the period of the time allowed for oral argument. That happens to be something that David Neuberger has done and it is certainly the function of the President to preside over hearings and influence policy [in our collective meetings once or twice a term] but that happens to be the direction in which he has chosen to exercise his right.”⁷³

Certainly Neuberger was successful in achieving his goal in this area. The average length of the hearings fell from 2.2 days per case in 2009 to 1.5 days in 2017. Whether

⁷² See Lord Neuberger, “Sausages and the Judicial Process” Lecture in NSW 1st August 2014.

⁷³ Interview with the author. The second half of Lord Sumption’s response contrasts the difference between the President’s role on the one hand and how different incumbents of the office may interpret the role.

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 seek to achieve an appropriate balance in the eyes of his colleagues:⁷⁴

“I am very conscious that I am presiding, which means that if I think my colleagues are asking too many questions or one colleague is hogging it too much, I have to politely try and shut them down, because we are trespassing too much on counsel's time. I am also very conscious that I am inclined to talk a lot and have to button up. Thirdly, if ever a colleague and I ask a question at the same time I always make sure I defer to the colleague. Then either he or she may ask the same question so it goes away or she may ask a different question, and then I will ask mine after. However, I think it is very important that you ensure that people and colleagues feel that they have had their say, because I am sure I think I am terribly fair and democratic and let everybody have their say, but I am sure equally that they feel I am presiding and, therefore, you don't want them to feel that you are shutting them down.” [Lord Neuberger]

Running the Post Hearing Conference

As is well known 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. In *Final Judgment*⁷⁵ we saw that there were unsuccessful attempts under Lord Phillips to curtail the length of the monologues, in order to encourage more sustained debate as occurs in the ECHR or the German Federal Constitutional Court or the Australian High Court. Under Lord Neuberger, the first

⁷⁴ Interview with author.

⁷⁵ *Final Judgment* at p.159

conference seems to have reverted largely to the predominantly monologue mode of Lord Bingham. It was overwhelmingly held immediately after the end of the hearing.⁷⁶ Each Justice, starting with the most junior, presented their views seriatim. It was unusual for the speaker to be interrupted and normally there was relatively little dialogue after the series of monologues.⁷⁷ 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”.⁷⁸

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

⁷⁶ That imposed some subconscious limits on the length of the conference, because people had to get away at the end of the day. The typical conference under Neuberger lasted an hour at most.

⁷⁷ In *How Judges Think*, (Harvard University Press, 2008) the celebrated US Federal judge Richard Posner observed that the real secret of appellate judicial deliberation is that in the common law world they do not deliberate *collectively* very much.

⁷⁸ Interview with the author, 2019

Sumption went along with that, unless he wanted to write the lead. 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”.⁷⁹ 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”.⁸⁰ 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*,⁸¹ 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

⁷⁹ Interview with the author.

⁸⁰ Interview with the author.

⁸¹ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38

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) with an even larger panel, he decided on a novel expedient. He asked all the Justices to write a 600 word essay⁸² 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

⁸² 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).

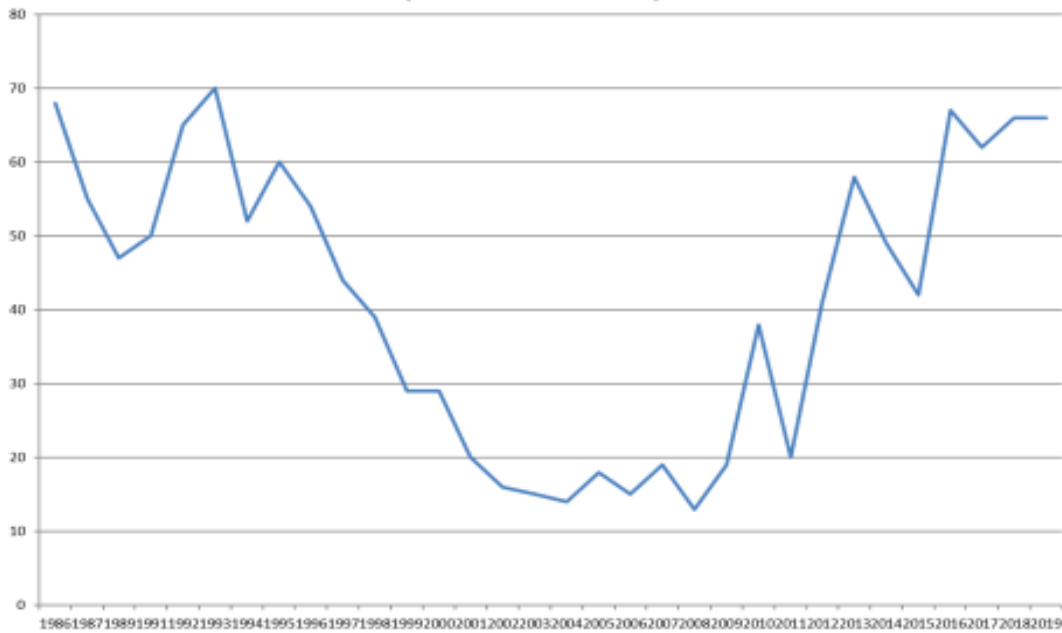
seek to allocate which Law Lord would have the task of setting out the facts even if he was not writing himself - whether he was in the majority or not. Lord Neuberger however, generally only allocated the lead if he was in the majority or if he could represent that he was. One partial exception was *Willers* the private prosecution case. The Court split 5:4 at the conference, so who should write - one of the three Justices who had stated their position in the earlier case or one of the two swing voters, Clarke or Toulson? Lord Neuberger thought it would do more for the Court's reputation and for collegiality on the Court if it was a swing voter and he plumped for Toulson. Except Lord Neuberger wasn't clearly in the majority. Nonetheless, by dint of elliptical collegiality his suggestion was adopted.

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*,⁸³ *Stone Rolls Ltd v Moore Stephens*⁸⁴ and *Nicklinson* whilst boosting collegiality and safeguarding the Court's reputation. Under his Presidency the number of sole judgment cases soared as the next two tables show. So how did Neuberger double the percentage of single judgments as

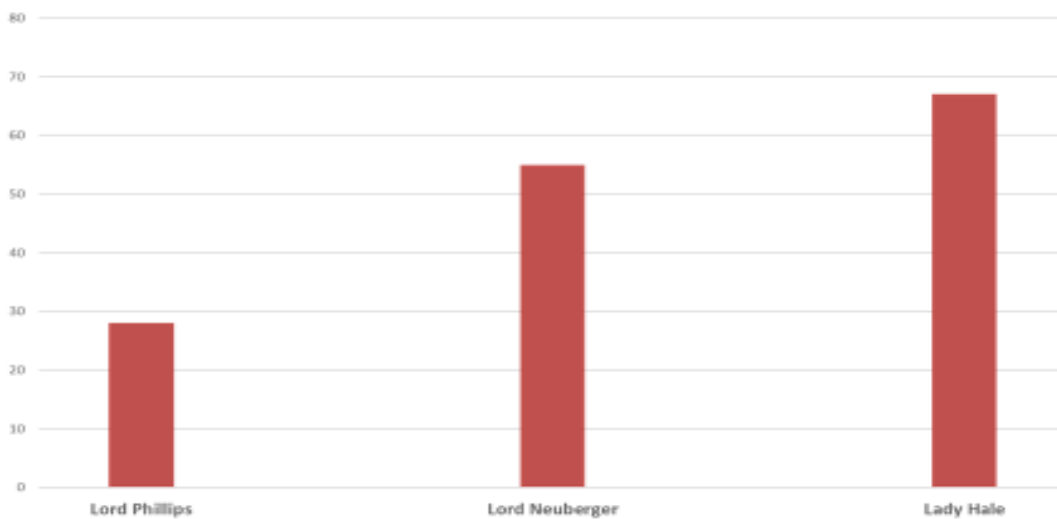
⁸³ [1971] AC 356

⁸⁴ [2009] UKHL 39

**Percentage of Single Judgments in the House of Lords and UK Supreme Court
(1981-2019 June 19th)**



Percentage single judgments according to Presidency 2009-2019
Chart Title



occurred under Nick Phillip’s presidency? Partly, those who favoured the Bingham position e.g. Lords Brown, Rodger and Hope retired, to be replaced by those 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]⁸⁵

“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] ⁸⁶

However, as the second quote indicates Lord Neuberger wasn't completely against concurrences – indeed he wrote a concurrence in 13% of the cases in which he presided in the Court. Again, in *Benedetti*⁸⁷ one of a series of unjustified enrichment cases, he was aware that two of his colleagues wanted to write but he didn't think a joint judgment would work, so he started his contribution to the post-hearing conference by saying :

“[W]ell somebody better write the lead but let me say at once that this is the first judgment in this important new area that we have done for a long time. I think it is a suitable case for anybody else who feels like writing, to have more than one judgment.”

That was an example of David anticipating problems and also being collegial to the Justice who wasn't likely to get the lead. But as he added: ⁸⁸

“I strongly feel that there are cases where concurring judgments are valuable, when you are developing the law. You are not quite sure where you are going. You want discussions with academics. You don't want it to be too adamant and then there are other areas where I am equally confident that you don't want more than one judgment, the obvious one being *Pinnock*.”

⁸⁵ First BAILII Lecture “No Judgment, no justice 20th November 2012 . As a testament to his success in reducing concurring judgments we need only note that in Lord Phillips' Presidency 60% of cases had at least one concurring judgment. In David's Presidency the figure had dropped to 32%.

⁸⁶ “Sausages and the Judicial Process”, Lecture by Lord Neuberger, 1st August 2014
<https://www.supremecourt.uk/docs/speech-140801.pdf>

⁸⁷ *Benedetti v Sawiris* [2013] UKSC 50

⁸⁸ Interview with the author.

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 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?

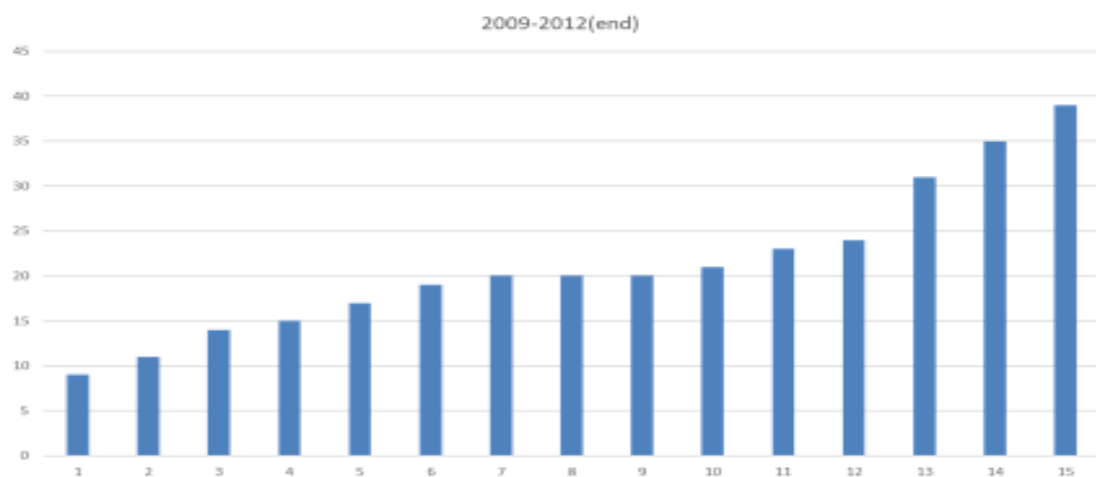
1. Do it himself/herself as presider or President;
2. Ask for volunteers,
3. Rely on the specialists,
4. Reward those without a backlog, or
5. Look for a safe pair of hands.

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 the following Table:

Lead or Single Judgments in UK SC as a percentage of cases sat in 2009-12 (end)



Lord Neuberger didn't 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 the next Table:

wheelchair or a pram. At the conference it split 3:3 and David was undecided as the swing voter, so the others said he should write.

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 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 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:⁹⁸

⁹⁸ Interview with the author.

“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.

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 Danelski⁹⁹ 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 presidors had

⁹⁹ D. Danelski, 'The influence of the Chief Justice in the decisional process of the Supreme Court' in Goldman, S and Sarat, A (eds) *American Court Systems: Readings in Judicial Process and Behaviour* (New York: WH Freeman & Co Ltd, 1978) p 486.

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. However, there were certainly occasions in his presidency when Lord Sumption or another of the fast writers would go for a pre-emptive strike. If he could, Lord Neuberger would try to persuade them to hold off, or at least only to circulate the judgment to the lead writer.¹⁰⁰

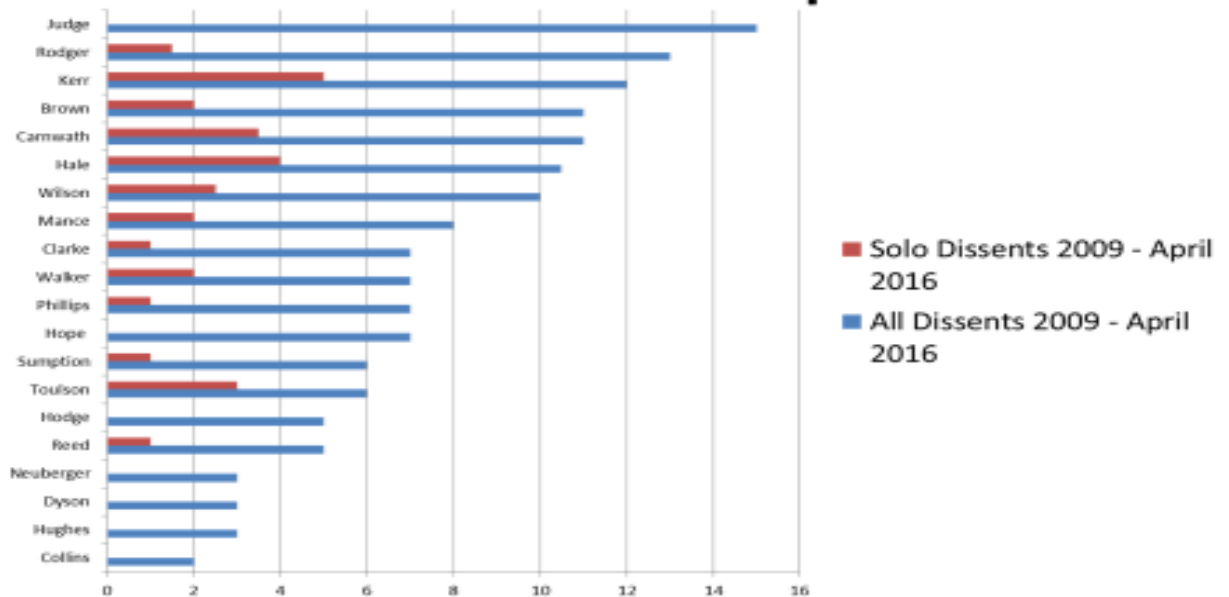
Achieving consensus

As indicated at the outset, one of David's *strategic objectives was to achieve as much agreement as he could around the best available outcome to the cases in which he presided.*

His success in this regard can be 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.

¹⁰⁰ This may have occurred in *Reyes v Al-Malki* [2017] UKSC 61 where the Lord Sumption's intervention became the lead judgment in the case.

Dissents and Solo dissents as a % of cases sat in UKSC 2009 – 13 April 2016



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

- 1) *Being an active social leader* (see earlier) thus fostering collegiality and information flows;
- 2) *Declining to lobby overtly*

Tom Bingham would not lobby for his preferred result and neither would

Neuberger in the accepted sense of the term,¹⁰¹ although he would often talk

¹⁰¹ Even Lord Hoffmann, who tried hard to win a majority of his colleagues to his position in most cases, did not lobby once the judgments were circulating (taking the view - like Lords Reid and Radcliffe before him that if his written judgment did not do the trick, then going into his colleagues rooms to win them round was unlikely to do any better). However, Lords Atkin, Scott and Millett would lobby even at the circulation stage. At least two Justices in the Supreme Court under David would lobby at this stage in the hope of bringing others over to their side.

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.

3) *Being willing to back other's solutions*

Lord Neuberger did not read as much as his colleagues before the case and 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*¹⁰² 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,¹⁰³ 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

¹⁰² *Patel v Mirza* [2016] UKSC 42

¹⁰³ For an earlier example of such behaviour see Lord Millett's autobiography, *As in Memory Long* (Wildy, Simmonds & Hill, 2015) at p.189.

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]¹⁰⁴

4) *Holding multiple conferences*

In moving to a situation where cases with a single majority judgment are now the norm, Lord Neuberger, with the help of his colleagues has shifted the Supreme Court half way to the European style constitutional court or ECHR model. Lord Neuberger borrowed another continental characteristic, in encouraging multiple conferences in difficult cases.¹⁰⁵ 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. The case that probably influenced his thinking in that regard was the *Zurich*¹⁰⁶ case which of all the cases in his time produced the most by far in terms of exchanges both in meetings and in notes following the hearing.

Following an initial hearing which split 3:2 there was a further hearing before seven

¹⁰⁴ Quotations taken from interviews with the author in 2017.

¹⁰⁵ This is a practice which has begun to appear quite regularly in relation to the Australian High Court under Chief Justice Kiefel. See also B. Hacker and W. Ernst. (eds.), *Collective judging in comparative perspective: Counting votes and weighing opinions* (Intersentia Publishing, 2020 forthcoming).

¹⁰⁶ *Zurich Insurance PLC UK Branch (Appellant) v International Energy Group Limited (Respondent)* [2015] UKSC 33

justices who promptly split 4:3. There were four post hearing conferences in that case and feelings were beginning to run high. David had to rely on all his skills as a social leader and peacemaker to get the Court to an end point after 309 days. He remarked of second conferences:¹⁰⁷

“I had them more often to begin with, I think, than I had them later on. I think there is a slight feeling which has force that once people have written judgments, having meetings tends merely to involve them banging the table as it were and emphasising what they have already said but, sometimes, even allowing for that I feel that the others who haven't written judgments may benefit from the discussion.” [Lord Neuberger]

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.

5) 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.¹⁰⁸ 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

¹⁰⁷ Interview with the author, 2017.

¹⁰⁸ Usually the email is with the other Justices, or (sometimes) a sub-set of them. Unlike the federal courts of the USA the emails are not predominantly with the law clerks. See R. Posner *Reflections on Judging* (Harvard University Press, 2013) at ch 8.

not at all.¹⁰⁹ 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 as the following figure reveals :¹¹⁰

Adjusting a Majority Judgment

34. XXXXXX XXXXXXXXXXXX XXXXXXX XXXXXXXX , XX XXXXXXXXXXX X XXXX XXXX
 XXXXXXXXXXXX, XXXXXXXXXXX XXX XXXXX XXXXXXXXXXX X XXXXXXXXXXX XXX XXXXX
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36. Cccc ccccc ccccccccccc, cc ccccc ccccccccccc cccc, ccccc zzzzz
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 ccccccccccc. Ccccccccc ccc c ccccccccc cc ccccc c ccccccccc ccc
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Try as he might Lord Neuberger could not retain the tautness and power of a single authored piece – such as Lord Reed’s dissent.¹¹¹ 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.

¹⁰⁹ *Miller (No.1)* was written during the Christmas vacation whilst the justices were in several countries, *Miller (No.2)* was written over a weekend, when not all of the justices were in London.

¹¹⁰ Each different colour denotes a different contributor. This is not an actual page from the judgment, merely a construct reflecting the processes used in the actual drafting.

¹¹¹ This is one of the weaknesses of today’s penchant for single judgments. The majority text tends towards tubbiness and a loss of transparency in authorship.

6) *Email, diplomacy and the minority*

Lord Neuberger's pursuit of consensus 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*¹¹² Lord Atkin's famous and celebrated dissent where he compared his colleagues' reasoning to Humpty Dumpty and counsel's arguments as being ones which could have come straight from the Star Chamber, was the subject of a delicate approach by Viscount Simon, the Lord Chancellor. Simon suggested to Atkin that he might tone down these references 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.

David 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

¹¹² [1942] AC 206

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:¹¹³

“ 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,¹¹⁴ instead of languishing in a cupboard in the wings – as he put it.

Yet, ironically, 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.

¹¹³ Interview with the author.

¹¹⁴ See M. Elliot and K. Hughes (eds) *Common Law Constitutional Rights* (Hart Publishing, forthcoming,2020).

What history will record, moreover, is how Lord Neuberger safeguarded and enhanced the reputation of the Court through an inimical 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 thoroughgoing, 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 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:¹¹⁵

“ 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 .”¹¹⁶

¹¹⁵ His achievement has been underlined by the fact that the High Court of Australia has embraced his form of group decision-making with team working and multiple conferences aimed at a single majority judgment, in a move that clearly imitated developments in the Neuberger Court. See M. Pelly, “Chief Justice Susan Kiefel says more talk is key to High Court's work” *Financial Review* 16/8/18

¹¹⁶ Interview with the author, 2017.