

James Lee interview with Lord Mackay

[00:00:00]

James Lee: So, my name is James Lee, I am an Academic Fellow of the Inner Temple and a lecturer in law at the University of Birmingham, I'm here today on Tuesday the 23rd July 2013, to interview Lord Mackay of Clashfern.

Lord Mackay: In the Royal Gallery...

James: In the Royal Gallery, at the House of Lords, in the Houses of Parliament. Lord Mackay, could you first of all please state your date of birth?

Lord Mackay: 2nd July 1927.

James: 1927. So today we're going to talk about your career in the law, and your eminent judicial career, but you didn't start off on the path to law, did you?

Lord Mackay: No I didn't. I started off in Mathematics and I got a very great interest in Mathematics at school, and then when I went to university it was greatly increased. I had superb teachers in the University; Sir Edmund Whittaker, a fellow of Trinity College, Cambridge, and a man who had been the professor of Mathematics in Edinburgh University from 1912, and I went there in 1944, and he retired in 1946. And he was an extraordinarily good teacher, developer...he knew, by the time I got to know him, he knew most of the mathematicians in all the different situations in the world because many of them he had taught.

James: And what made him a good teacher?

Lord Mackay: Well he just had a way of introducing the subject which made it stick with you. He always had some interesting story to illustrate his point, and the story helped to fix the subject matter in your mind.

James: So you've studied at Edinburgh University and then Cambridge?

Lord Mackay: Yes. Well the situation was rather special because at the time I finished in 1948 [00:02:00] I graduated from Edinburgh University with an MA in Mathematics and what they called at that time Natural Philosophy, which is often referred to as Physics. The national service arrangements were still on and I had been in the Sea Cadets, so I was expecting to go to the Royal Navy probably. But I was called for an interview by the joint recruiting board, and they told me and the other mathematician who was with me from Edinburgh University, who was a chap called George Mackie, M-A-C-K-I-E, slightly different... that there was a scarcity of Mathematics teachers in the universities in Scotland, and the students were coming back from the war... and it was very important that they should have people to teach them, and therefore if a university in Scotland would accept me as a lecturer then that would serve as my National Service, but I had to serve for two years; I think it was 18 months at that time I'm not sure. But anyway the other of course consequence was that the scholarship when I got to Trinity had to be postponed until I'd finished the spell as a lecturer, so instead of going straight to Trinity as one would normally do, I had the two years lecturing first and then went to Trinity.

James: Were you disappointed not to go to the Navy?

Lord Mackay: I was in a way at the time maybe now I'm seeing it differently, but I mean I was glad of the opportunity to teach. I love Mathematics and I love teaching it, at that time and so that was a very enjoyable experience, and St Andrews where I went, is of course as you know a wonderful place and I really enjoyed these two years very much. But I think they taught me that perhaps academic teaching of Mathematics wasn't likely to be my life's work.

James: Why was that do you think? [00:04:00]

Lord Mackay: I don't know, I just felt somehow that I didn't have the sort of creative mathematical capacity that a really good distinguished academic would have.

James: When you approached teaching did you try and apply what you'd learnt about teaching from being taught so well?

Lord Mackay: Yes yes and I think I that, it's not for me to say but I think on the whole the students were quite interested. When I was Lord Chancellor I was interviewed by Donald Macintyre of The Independent I think it was. And he published a description of me and my life, and shortly after that I got a letter from a gentleman in Oxfordshire who had been one of my pupils. And he told me that he didn't realise until he'd seen this interview with Donald Macintyre published, that I was the person who'd taught him Mathematics in St Andrews University. And he wanted to tell me that he'd been a Mathematics teacher for most of his life. He had by that time retired, and he still had the notes I have to him in 1940-9. So I thought that was..

James: Did he still make use of them?

Lord Mackay: Yes he'd made use of them apparently all his teaching life he said, so...

James: Remarkable.

Lord Mackay: So I thought that was some indication..

James: So after the academic teaching you went to Cambridge..

Lord Mackay: Trinity, yes I did. And there I met Michael Atiyah, who was one of the most distinguished Mathematicians in the world after that, and I think that that helped me to realise that I wasn't quite in the category of those who would make the top flights of academic Mathematics.

James: Yes, Professor Atiyah's brother is a famously good academic...

Lord Mackay: Yes..

James: P.S Atiyah.

Lord Mackay: Indeed, [00:06:00] after the Tripos examinations, Michael Atiyah took me on the back of his motorbike and we had no helmets in these days, to Oxford, and we stayed with his brother Patrick Atiyah in Magdalen, at that time, it was most interesting, and of course I came to know Patrick's work much better, later!

James: So was that your first brush with the law, meeting Patrick Atiyah in Magdalen?

Lord Mackay: No no no. I never had any personal brush with the law I'm glad to say, but Michael Atiyah and John Pocker and myself went up to what was then the courts in Cambridge and we heard some trials and sentencing and what-not, and it made me a bit interested in the law, and then when I went up home from a vacation I went into a Court in session to listen to a case and just you know, as a matter of interest, and I thought perhaps this would do for me, and it really did set my mind on thinking perhaps this advocacy would be quite a good line for me to pursue. And eventually, I did exactly that.

James: And you went to Edinburgh University for law?

Lord Mackay: Yes, I had the idea that I could teach Mathematics and run a school or something or something part-time, and do the advocacy course at the same time. But I was told by the Faculty of Advocates you can't do that, you have to become immediately full-time. And so I went into a solicitor's office for two years doing the office work during the day, lectures in the morning and the evening, and then the last year I did a pupillage to a member of the Faculty of Advocates, and so I did my university course in Law, in the three years that I was doing the practice as well, and then I qualified in 1955.

James: And did you think that was a value, mixing practice and study?

Lord Mackay: Oh yes, I think the law is really a practical subject, and I think [00:08:00] if you want to understand what it's about, it's very important to have the practicalities alongside the theory. I think as a purely academic theoretical subject, and you may have views about this, I wouldn't have thought that it was so good as to be at least with considerable sense of what it means to ordinary people, and the impact it has on the lives and transactions of ordinary people.

James: Presumably you were working on areas of law when you were in the solicitor's office, that you hadn't yet studied.

Lord Mackay: Oh yes, that's right, with conveyancing for example. Conveyancing courses were in the last year at Edinburgh University, and I was doing house transactions, flats, selling flats and whatnot, before that when I was in the solicitor's office. But of course it helped me to understand when the lectures came, I could understand exactly what was an issue and why various things that I was taught were important.

James: And do you think it was an advantage or a different experience to have come having done five, six years of studies in another subject already?

Lord Mackay: I think possibly I found that most valuable once I went to the Bar, in a way, I'll tell you in a moment, but certainly I had studied and I knew a little bit about how to study I suppose.

James: Because there is a debate currently over whether it's best to study Law at university or to do a different subject if you want to go into practice. Lord Sumption of the Supreme Court has argued that it is better not to do Law, and lots of legal academics have argued the other way.

Lord Mackay: Well I must say that I think the combination of practice in the law while you're studying Law is a good idea. Of course Lord Sumption's a hugely talented historian as well as a lawyer. And I think there's another historian on the bench of the Supreme Court now in the form of Lord Hodge from Scotland. So [00:10:00] they've got two historians, we shall look with interest to see what effect that has on the judgements of the Supreme Court.

James: So when it came to qualifying you did your Scotts Pupillage, and at that time was work easy to come by or?

Lord Mackay: Not particularly, there were far fewer people there than there are now, far fewer. And of course my connection was with this solicitor's office that I had worked in, that was the only real connection I had with the law, and I had devilled for W.R. Greave who became Lord Greave later on, and he had a pretty good practice, so as a pupil I had got a very good range of different cases to look at and work on, then he had some good friends who were at the same level as he, and when they took silk these people, I got quite a large tranche of the practice that they'd had, so from that time on I had more work than I could manage, really.

James: So can you remember your first case?

Lord Mackay: No well certainly one of my first cases was a case about delivery of cartons by a person, whatever they'd like to call themselves, I suppose a printer really, a printer of these cartons. And they had delivered too many and the question was what happened in that case, could they ask for damages or could they force the people to take the lot and so on, and there was a debate in front of Lord Hill Watson. And he, I don't know quite how he managed it, he got me going to argue, with as much, and I felt as freely arguing as if I was at home, and he was [00:12:00] very kindly disposed to what I'd said, and it gave me a certain amount of confidence, because I think when I was younger I was fairly shy, I was an only child and I think I was fairly shy but somehow in the court he helped me to overcome that, and I think that was the first case of note I had. I may have had some undefended divorces or something before that but that was the case of real argument that I had first.

James: Do you think your teaching experience helped with your shyness and speaking in public?

Lord Mackay: A bit, yes, I suppose it did. Yes it did. But somehow when you're a teacher, at least in my time, it may happen now, you weren't challenged in quite the way you were in court with a judge saying no, what's wrong with that.

James: I think we're all waiting for one of our students to tell us that we don't know what we're talking about.

Lord Mackay: Fortunately that wasn't a feature of St Andrews in my day as a lecturer!

James: And with your career at the Bar you progressed rapidly in the ranks, didn't you?

Lord Mackay: Yes, that, the Mathematics had something to do with that. When I came to the Bar in Scotland, there was a new statute about evaluation of rating of properties which was passed I think in 1956, and of course it began to be applied. And evaluation for rating is a very mathematical kind of subject and people got to know that I had been a

mathematicians, therefore they tended to come with a lot of work in that area. And it gave me a very good start, it was work that.. the work I did in that area was always subject to appeal, to the Lands Evaluation Appeal Court, now the three judges who were there, I got to know as judges, not personally but as judges, [00:14:01] extremely well, and I knew what they really took as their guides in deciding a case, and the result was that I could tell... once the case was, if it was a statement of fact, a stated case, so by the time I got it from the committee in a local tribunal, it was a stated case so you knew all the facts, and I could tell almost to a certainty what the outcome of the appeal would be. And so that gave solicitors a certain confidence and that was really a combination of understanding the law and understanding the principles of what these three judges worked in deciding cases.

James: I suppose that's a bit of a pattern from the previous case you mentioned as well, the relationship between advocate and the judge.

Lord Mackay: Yes it is in a way, that's right.

James: When you're.. we'll come to your judicial career more fully, but when you were on the other side of the bench did you realise when advocates were doing that to you, presenting the case in a helpful way?

Lord Mackay: I think so, yes, I think I did, and well, as you know I've had experience of different types of advocacy over the years, and I think the persuasive power of the advocate is quite important. On the other hand it's a persuasion to see the light in the case and therefore I don't regard it as one that influences you unduly, it influences you to get it right, but I don't think that the ordinary persuasion that you get from good advocates, and the way they set the case out, does more to help you to really fully understand what the case is about.

James: And so, you took silk how many years into your career?

Lord Mackay: Just under ten, about nine years or something.

James: Which is remarkable..

Lord Mackay: Well it was quite a big step.. yes..[00:16:00] well already I was a bit older than normal when I went to the Bar, it was 1955 when I went to the Bar so I was 27 actually, my birthday was after I was called.

James: Which is maybe five years later than some people would go to the Bar if law was their first degree.

Lord Mackay: That's right. But on the other hand that was an advantage in fact. I think it was quite an advantage. Because when I went to the Bar in Scotland, not many had been in a scientific area, most had been in Oxford PPE or something like that or..

James: Classics, Greats.

Lord Mackay: Or Classics, yes, Greats.

James: Was it before or after you took silk that you first appeared in the House of Lords as an advocate?

Lord Mackay: Before I took silk.

James: Right. What was that experience like?

Lord Mackay: It wasn't particularly good. I was thrown out.. I lost the appeal. And my first appeal as a silk when I was a Lord was for the Inland Revenue. I had been junior to the Inland Revenue towards the end of my career as a junior and when I took silk they kindly instructed me in one of their cases the first appeal I had. And it was in the chamber, and in these days in October the House sat in the chamber, so it was in the chamber of the House of Lords and you can imagine what a rather austere setting that is for a top tribunal. And it was an interesting case. It would have implications for aggressive tax avoidance in present day circumstances. And there were two points I was making, and the first point I told them and the second point I told them and when we told them the second point, Lord Reid who was in the chair said to me 'are you really going to argue that?' So it wasn't a great start. And we lost that case, I must say, and [00:18:00] when I look back on it I'm not sure why. I think the judges of that day really strongly believed that you weren't bound to arrange your affairs so as to maximise tax, and therefore if you arranged your affairs to minimise tax that was alright, but there was a statute that controlled that in relation to dividends, it's a case called *Brebner*, and I still find it a little difficult. But anyway it went against me, but it didn't ultimately do me much harm.

James: Because Lord Reid was a totemic figure in the House of Lords at the time, a great Scots judge.

Lord Mackay: He was and he was a very interesting man, and he was very... you'd really need to know what you were talking about when you went to speak to him.

James: And so your first appearance in the House of Lords would have been before the practice statements, the judicial precedent...

Lord Mackay: Oh yes. Yes I think it was probably, it's a case called *Brimmer* (?) I think it was a '66 appeal case but I think it might have been, I think it was in...

James: Sixty-four or five.

Lord Mackay: Yes, something like that.

James: Of course the patent statement was sixty-six, so shortly after that did you feel free to tackle precedents with gay abandon as an advocate?

Lord Mackay: No, no, no, not at all. They were... I mean the people who made the statement were very reluctant to apply it very often.

James: And that has continued nearly fifty years since.

Lord Mackay: Yes, it's possibly a bit easier now than it was, as I know from one case in which I dissented.

James: Which case would that be?

Lord Mackay: That's the case about referring to statements made by ministers in parliament. [00:20:00]

James: Pepper v Hart, your famous dissent. We'll maybe come to that shortly. So how long was it after you took silk before you thought about judging, going to the bench?

Lord Mackay: I didn't really think about going to the bench myself.

James: Was it thrust upon you?

Lord Mackay: What happened was I was appointed.. you can get part-time judicial appointments. And I was offered.. because it was a question of offering appointments in these days. I was offered the appointment of sharing a principle of rotatory on our gown, so I had that for some time, and then I became the Dean of the Faculty after election, and so I had to give up that and then I was Dean I was approached to become lord advocate in 1979 by Margaret Thatcher, so I found my career anticipations wafted very considerably. And I served as Lord Advocate for five years.

James: And that's the chief legal office of Scotland.

Lord Mackay: That's right but at that time he was an officer of the United Kingdom government and nowadays he's an officer of the Scottish executive government, and officer who's in the United Kingdom government is called the Advocate General for Scotland, but the Lord Advocate was the senior officer and he was a member of the UK government. And so I found myself in that situation for five years.

James: Were you surprised to be approached?

Lord Mackay: Absolutely astonished, but it happened. Because I wasn't really a politician, I'm not an express politician in any sense of the word, the Dean of Faculty was really fairly independent, I mean I..

James: So what is that for our listeners... that role?

Lord Mackay: The Dean of Faculty is the elected head of the Bar in Scotland, he's a bit like the Chairman of the Bar, and at that time anyway once you were elected [00:22:00] you tended to stay on until you went on the bench or passed away or something. So once you became Dean you could reasonably expect to become a judge if you wanted to become one. It's changed now.

James: Did you? You were obviously approached for... did that require thought, consideration?

Lord Mackay: Well the Lord Advocate's job, you don't have that much time for consideration.. you either take it or you don't take it, so I felt I had better take it, because it sounded interesting. And then at the end of the five years, I thought five years just about enough, so there was a judicial vacancy so I thought that might be quite interesting to do, so I did, I became a judge in Scotland, in May 1984.

James: Was that the Court of Session?

Lord Mackay: The Court of Session and the High Court, the Criminal Court as well. They call the full title Senator of the College of Justice, he's a judge of both the Criminal and the Civil Court.

James: And was that a different experience from judging as a sheriff?

Lord Mackay: Yes yes it was, in a sense it was just a different class of cases really, and different styles of advocacy as well. And I must say for a while because I'd been a Lord Advocate I couldn't sit in criminal cases because the indictments ran in the name of the Lord Advocate, so until that went out and finished I couldn't sit in criminal cases. But I must say I find criminal cases quite heavy, and sentencing people I found really difficult I must say, but anyway that's the way it happened.

James: And you sat with juries?

Lord Mackay: Yes, yes, there's criminal cases there's always juries in the High Court.

James: How did you find managing a jury court of fifteen as opposed to twelve in England?

Lord Mackay: Yes well, I did my best to make it clear to them, it's quite difficult to know how you succeed in that,[00:24:00] but anyway I did my best and I don't think any of them were successfully appealed.

James: Do you remember the first time you were successfully appealed?

Lord Mackay: Well I think so, yes the first time I was successfully appealed, there was an appeal from a judgement I did the day our first grandchild was born in the Court of Session.

James: Your grandchild was born in the Court of Session?

Lord Mackay: No the day the grandchild was born the judgement was in the Court of Session, and it was appealed to the Inner House who supported my judgement, it was appealed to the House of Lords, who.. and by that time I had become a member of the House of Lords, they decided that I wasn't correct. but that's the way these things turn out.

James: So shortly after joining the College of Justice, the opportunity to go to the House of Lords...

Lord Mackay: Yes well I was asked if I would do that so I felt.. I wondered about it, moving to London at that time of life is quite a thought, and we had a nice home in Edinburgh and everything, but anyway I decided to do it and the rest as they say is history.

James: And so there.. if we just pause, there you've mentioned your grandchildren, so your family is based in Edinburgh?

Lord Mackay: No, no, none of them are in Edinburgh. The daughter that had my first grandchild is in Inverness. And she's had five children, one that day and four since, including twins, our eldest is a boy who was in Cambridge and he has two daughters, and the third is a daughter who is a vet who is wedded to her career, she is not married, she has no children. And she's in Preston, so they're scattered round.

James: Yes, far afield. So, as you mentioned the appointments to what's now the Supreme Court now are very different but it was still being approached [00:26:02] to become a member of the Appellate Committee and Lord of Appeal in Ordinary?

Lord Mackay: That's right, yes.

James: So do you remember the phone call, or the letter?

Lord Mackay: The then Lord Advocate came and asked me if I would be willing to consider it. And I said yes after a bit and then I got a letter, and it was quite funny actually, the letter I got said 'we wrote you a month ago and we haven't heard your answer.' And of course the answer was that I'd never got the letter and I thought whatever happened to it. So anyway I got the second one and I answered it...

James: So had you been checking your pigeon hole for this letter for Lord Advocate?

Lord Mackay: It was sent to the..it was in my home, because I was that time a judge at the Court of Sessions. I was expecting the letter to come to my home... and the second one did come in.

James: And so was it to replace another Scottish Law Lord?

Lord Mackay: Yes. Lord Keith I suppose it was. No, no, Lord Keith was still there when I.. it would be Lord Guest. No it was Lord Fraser. Lord Fraser of Tullybelton. He came to the age...

James: Because he was Senior Law Lord.

Lord Mackay: Yes he was.. for a time. He retired on the ground of age.

James: Because the convention has always been for there to be two, at least two Scots.

Lord Mackay: Yes, it's certainly been for a while, whether it's a convention or not it's certainly happened. I've been conscious of various attempts to change it, but so far they haven't been successful.

James: And how did you find the step up to the Appellate Committee?

Lord Mackay: I found it most interesting and very stimulating, and I had appealed a lot in the Lords, including English cases, a very unusual thing [00:28:00] for a Scottish advocate to be appearing as an advocate in English cases, but I'd done two when I was Dean of Faculty, when I was in the Scottish system, before I was Lord Advocate, but once I became Lord Advocate, Michael Havers was the attorney and he nominated the people who took cases for the government. And he nominated me to do quite a few of these cases in the Lords and also in Luxembourg. So I got quite a lot of experience of that kind, through that means, while I was Lord Advocate. So I was very much at home in the House of Lords in that sense.

James: Would that have been the first time sitting in the House of Lords that you'd sat collegially as a judge then, or had you done it in Scotland?

Lord Mackay: Yes, I think that would have been the first time I sat in a team.

James: And how did you find that dynamic?

Lord Mackay: I liked that, I liked that, I think it's very useful to have colleagues to discuss it with and of course, it's rather frightening that the junior is asked to give his opinion first at the end of the case, so the first term I was a junior and so I had to give my views on the cases as they came along and then at the end of the first term Lord Ackner, Lord Gough and Chancellor Judge... I've forgotten his name just for the moment, well, they were appointed, so there were three below me so I never had to be the junior again.

James: That's quite a trio.

Lord Mackay: They certainly were.

James: And the thinking behind the convention that the Junior Lord speaks first is..?

Lord Mackay: Somebody has to start and in a way it's right that the presiding judge should finish it off.

James: Did you [00:30:00] often intervene as a judge when being argued before?

Lord Mackay: A bit, a bit.

James: As much as other Law Lords, or...?

Lord Mackay: Probably, just about equally maybe. Yes, I remember, it's interesting now that you've asked that because I remember sitting one time in an English Chancery appeal with Sydney Templeman... and there was a question about what was meant by an 'overriding interest'.. you'll be familiar with these phrases.. and of course the full definition of what's meant is quite important in the effect of it... it's no good to say 'oh it's an overriding interest', well what does that mean? So I ventured to ask the council who was telling us this overriding interest has this effect, could you just define for me please, what was meant by an overriding interest? And at lunch-time Sydney said to me, 'well James I'm very glad you asked that question, because I was itching to ask it but if I had asked it, they'd think I was daft because I've spent my whole life in the Chancellor division. See when I as coming from Scotland, you could do that and of course very often, very often as you'll know, the terms of the definitions are what really determines the issue, if you really understand what you're talking about, you usually know what the answer should be. So a good lot of the time is taken up with fencing round the real issue.

James: So you were able to be the little boy with the Emperor's new clothes in that case!

Lord Mackay: That's right, I love it like that. Anyway they were very very nice to me, they were very kind, very. The spirit of the collegiate arrangements were very very good.

James: And did you find being a Scots judge you mentioned that you can ask [00:32:00] what might otherwise seem naive questions about English law, but the other way it's interesting that in Scots appeals, the deference that is often shown to the Scottish judges.

Lord Mackay: It is in a way but not, but it's not without reasoning, the Scottish judge needs to be sure that he can explain what it's about and what the issues are. I mean I've sat in a.. as you can understand in quite a number of Scottish appeals and the majority of English,

but not all of them, we've had some cases where we've had the majority of Scots and times when I was Lord Chancellor, but usually it's majority English, but their relationship has always been very equal, just the same as the other way round.

James: And so again, continuing the theme of meteoric rise it wasn't long before the Lord Chancellorship opportunity arose, after your elevation to the Appellate committee, and to the House of Lords more generally, so how did the Lord Chancellorship come about?

Lord Mackay: Well I was sitting in the Judicial Committee and I went down and there was a debate going on about extradition, and I went down to listen to that, and I was sitting on one of these cross-benches as a judge, and the secretary to the leader of the House came and sat with me and asked me to phone urgently to No. 10, the private secretary. This was about quarter past four, so I went off and went to telephone, phoned the number he gave me, and the private secretary said, the prime minister would like to see you very urgently. So I said, 'oh I'm free to come when she wants', so he said '4.30'. So I went straight over. And I was to go to a meeting with Robert Gough [00:34:02] to set up the Pegasus Trust, I was a trustee of the Pegasus Trust for the colleges you know, for the Inns. And I so I told Robert Gough I'd been asked to go to Downing Street and I didn't know what it was about, I assumed it was an enquiry or something she wanted, because I wasn't told anything more than just to come, so I went. And I was taken out, there were some cabinet ministers in the cabinet room and I was taken up the back stairs to where Margaret Thatcher was sitting in her study upstairs. And when I went in she waved me to sit down and then she said, 'Michael Havers had just been along to retire on the ground of ill health. And we want you to be the Lord Chancellor', she said. Mmm! I thought, 'well'.

So I said to her, 'oh thank you very much that's a very high honour.' I said, 'you know as well as I, prime minister, that when you take a job of this kind it will affect your family, so I would like to ask my wife before I finally give you an answer.' 'Certainly', she said, 'by all means. Take the telephone.' So I got the telephone and gave the flat number in Edinburgh to the telephonist... no answer. I said 'my wife's not in.' Well she said, 'when will she be in?' I said, 'sorry prime minister I have no idea, but I'll let you know as soon as I know myself.' And of course I got back here and was ringing almost perpetually. Eventually my wife came back in, this will be about, probably about half past five by this time, quarter to six maybe. So I phoned back to the prime minister, he said 'oh I can't take that message you have to speak to the prime minister', so next thing I was through on the [00:36:01] line to Margaret Thatcher, so I said that my wife had come in and I had asked her and she had said well that's not an offer you can refuse, so I certainly accept your offer. And she said 'that's great because we want to put it on the seven o'clock news'. And that's what it was, seven o'clock news.

James: Were you interviewed? On the news?

Lord Mackay: No no no no. It was just intimated from Downing Street. I think it was on the panels actually.

James: Did they put an easel up outside?

Lord Mackay: No I don't think so, they obviously had to get the approval of the Queen, because the Lord Chancellor was fairly near in a sense to the royalty, or at that time he was, and anyway it was intimated on the news. And an interesting side effect on the Inn: that evening after the news bulletin, the sub-treasurer, it's the sub-treasurer isn't it? The under-treasurer is in the middle, the sub-treasurer phoned me up and he said he'd just

heard the news, and he said, 'we've got a difficulty', and I said 'what's that?' And he said 'we've got a dinner on Wednesday in honour of the Lord Chancellor'. And I had the need to go I was a guest, I had taken up the offer of a go, so I knew it was on, but anyway the sudden sort of effect on that proposal of my appointment was actually quite difficult. So he said to me, 'what are we going to do?'

So I said... I thought a minute or two about it and I said to him, 'I think what you should do is ring up Michael Havers, and see what he says, but what I would suggest is that we go ahead with it, and the [00:38:00] same people come as were asked already, except that my wife was not asked before, and Lady Havers is going to be there and the treasurer's wife is going to be there, so I think it would be appropriate probably that my wife would be there as well, so I said 'go and ask Michael Haver' and so he went and did that and rang me up to say Michael Havers was delighted with that proposal and it went ahead, and it was a unique.. I think, anybody who was there would say it was a very unique occasion. Michael Havers was an extremely generous person and the speech he made, having had the... he'd been a member of the English Bar all his life and he'd been a politician and I think to have been the Lord Chancellor was the very apex of his ambition, and to hand it over to a comparative nonentity from Scotland, and the way that he did was generous in the extreme, he really was, very very generous. And the thing that was really quite remarkable was that the menu had been printed before the Monday, and when we got the menu at the table, it said 'Dinner given by the benches of the Inner Temple in honour of the Lord Chancellor'... so it fitted that event! Really extraordinary.

James: Yes, Lord Havers had not been Lord Chancellor for very long at all.

Lord Mackay: No, he was appointed in June after the general election and he hadn't been at all well.

James: So on the Inn, then, when was it that you were invited to join?

Lord Mackay: In 1979.

James: When you became Lord Advocate.

Lord Mackay: That's right and the explanation for that is quite interesting too. The then treasurer was Mr Justice Thesiger, now Mr Justice Thesiger's grandfather was the [00:40:01] MP for the pocket borough of Stamford, and when he became Lord Chancellor of course he had to give up that, so it became vacant. And when he was made the Lord Chancellor, the then Dean of Faculty John Ingles, was made their Lord Advocate. And that had never happened from the time John Ingles came until I, as Dean of Faculty with me the Lord Advocate, so Thesiger thought there was a great connection and I was invited by him to become an honorary bencher of the Inner Temple and I have been ever since and they looked after me very well I have to say. Very well.

James: How so?

Lord Mackay: We've been living in the Temple all the time, except when I lived here, I kept the flat on fortunately.

James: Splendid facilities. Have you served on committees for the Inn?

Lord Mackay: The only one I really served on was the Pegasus one. Honorary benchers don't I think, I haven't, I wasn't conscious of them, I had plenty that were able to do it, Pegasus I was on and remained on until I think they gradually appointed some new trustees, Robert Gough went ..

James: So notwithstanding the cancellation or postponement of that meeting on the day of the Lord Chancellorship, the trust was still set up?

Lord Mackay: Oh yes it had really been constituted and it was just one of these meetings to approve of the thing, and of course, one of the results of that was, that apart from my own wife, Robert Gough and his wife were the first to know that I had been appointed the Lord Chancellor, because I had to phone him up and tell him what had happened, because he knew I had gone to Downing Street so I spent the evening with them.

James: With a close circle.

Lord Mackay: He was very nice do you remember [indistinguishable]... they were a very very distinguished judge and a very very [00:42:00] shrewd person. Sadly, he hasn't been well for a couple of years.

James: No. And so the Pegasus Trust, perhaps we could talk a little about the work that that does?

Lord Mackay: Yeah well it was really in discussion with Robert Gough and others. It was thought that it would be very good for the Inn, our Inn, and I think it was really promoted by the then treasurer, he was keen on it too. To bring people from overseas, particularly the Commonwealth, to London, and to Scotland, in order to become familiar with the English and Scottish systems, and then as a reciprocation to send selected pupils or possibly those who have just been called, to Commonwealth countries from the Inn, and to get funds for that. And we managed then and Robert Gough was good at raising money, and we managed to raise quite a lot of money for that, and then of course, ultimately I think all the Inns have joined in now, so the Pegasus trust is one for all four Inn and I still get an invitation to their party, but I'm not always able to go.

James: Was the inclusion of Scotland within the trust ambit down to your involvement?

Lord Mackay: I don't think.. Robert Gough would have been keen on that anyway, but I've no doubt that wasn't a hindrance.

James: So if we return to your appointment as Lord Chancellor and your dealings with the late Baroness Thatcher, during your period as Lord Advocate had you had much involvement in matters of government or?..

Lord Mackay: Yes yes quite a lot. For some reason, I'm not sure exactly what, the Attorney General was the adviser on foreign [00:44:01] law, foreign affairs so far as they affected law to the government, but on European law, which is part of the law of the United Kingdom, the Lord Advocate was also an advisor, so the Attorney and I were invited really jointly to advise on these matters, and you may remember that at that time there was a great activity in connection with the contribution of the United Kingdom to Europe because people felt that we were contributing too much. And there were various suggestions about what should be done about that, some people suggesting that we should withhold our contribution and so on, and so there was a lot of legal advice required about precisely

what we should do, so Michael Havers and I were quite often invited to the cabinet to give advice on these matters, and he always made sure that if he was invited I was invited too. And so we contributed a fair amount in that area, and I think that's probably the time when... these contributions were the time when Margaret Thatcher really got to know who I was or what I was, I don't know.

James: And you served in two separate administrations of hers, from the '79 government and then the '80..

Lord Mackay: Yes I served as Lord Advocate in her first administration and part of the second. And then I served in her last administration as Lord Chancellor and of course I served for John Major after that.

James: Yes. So if we talk about being Lord Chancellor, you were the last fully judicial Lord Chancellor in terms of having substantive judicial experience in.. and then obviously we've now seen some changes to the role of Lord Chancellor.

Lord Mackay: Certainly seen huge changes, yes.

James: [00:46:00] But when you were appointed as Lord Chancellor in 1987.. we can come to the changes later, what did that role involve?

Lord Mackay: Well it involved first of all that you were speaker of the House of Lords. You were reckoned to be the head of the Judiciary, you were certainly the senior judge in the sense that you presided when you sat in the Judicial Committee of the House of Lords and the Privy Council. And you were a member of the cabinet, and usually regarded as a fairly senior member of the cabinet. When I went there I would be about number four or something like that, I mean I was very junior, I had just arrived as it were, in the cabinet, and by the time that Margaret Thatcher resigned I was number two, because I had the honour or responsibility, however you like to call it, of reading the cabinet tribute to her on the last day she served as prime minister.

James: But you never ran for prime minister...

Lord Mackay: Not at all, I never ran for anything when it came to it. That's one of the reasons the Lord Chancellor was fairly senior, he could be trusted without any aspiration to succeed.

James: And did you join the Conservative party?

Lord Mackay: Well I was a Conservative, certainly, from the time I became Lord Advocate, I had been a Conservative voter, but I had never been very active in politics all... my pupil master was a Conservative candidate, and I'd helped him, and I'd also helped...

James: Was that Greaves?

Lord Mackay: Greaves yes. He was a candidate in West [indistinguishable] of all places, so it wasn't a fruitful Conservative constituency but I learnt a bit about electioneering in that. So I had been a Conservative but not very openly.

James: Were you asked about your political persuasions when approached to be Lord Advocate?

Lord Mackay: No. No. She just asked me would I become Lord Advocate? And actually a previous Lord Advocate [00:48:00] had been non-party, independently non-party, but I didn't intend to be that way, I wanted to be supportive.

James: Although you mentioned you sat on the cross-benches in debates whilst a lot of appeals.

Lord Mackay: During a lot of appeals, yes, that was a proper... in fact, something had to be said for the Lord Chancellor sitting on the cross-benches but it's always been a tradition that the Lord Chancellor was of a party. I think there's a phrase that John Major used which I cherish, when he said that he didn't want the Lord Chancellor to be involved in 'the nitty-gritty of party politics', and I think that's the stance I took because it.. I tried.. after all the speaker here should be reasonably independent and I tried to be that, of course I had to put forward government policy, and advocate government policy but in a way you can.. there are different ways in which you can do it, I wasn't... if I may use a phrase from the chancellor about taxation, I wasn't aggressively political about things.

James: Do you think that's partly the nature of the role sitting in the Lords, which may be less partisan?

Lord Mackay: Yes that's right. And on the woolsack it was quite an office in these days really.

James: So when we come to the activities of the Lord Chancellor, you continued to sit on the Appellate committee when it allowed or did you choose your cases?

Lord Mackay: I usually I.. choose was possibly not quite...I looked to see what cases were on and what would be thought to be appropriate for the Lord Chancellor [00:50:01] and very occasionally I was asked by somebody in the Junior Law Court to consider sitting.

James: In the Court of Appeal?

Lord Mackay: From the Court of Appeal yes, people who were in the Court of Appeal. And when the cases come into the Lords they were quite interested that maybe I should sit. Because if they thought it was an important case they would think about which way I might decide it. But if they thought it was important they thought I might actually sit.

James: And how did the dynamics with the other senior with a little 's' judges work, so the Lord Chancellor was senior in one sense but there was also a senior Law Lord presiding over appeals and so forth.

Lord Mackay: When the Lord Chancellor wasn't sitting?

James: Well, and when you were.

Lord Mackay: That if he was sitting with me he wasn't the senior Law Lord at that time. The letters patent of the senior.. this was a novelty introduced by Quintin Hailsham to have a letters patent for the senior who occupied the woolsack. And the reason he introduced it was, that the Scots were normally appointed to the House of Lords much younger than the English. And the result of that was that Fraser and Keith would have been the two senior Law Lords and Lesley Scarman was on the top of the English list.

And Hailsham felt that he would like to see that change. So he devised the idea of having letters patent, appointing the... the Queen appointing the senior Law Lord to sit on the woolsack in the absence of the Lord Chancellor, that was the important thing, in the absence of the Lord Chancellor, and of course he had to remember that there was a judicial committee for the Privy Council as well, now the Chancellor wasn't responsible for the Privy Council, the Privy Council was the responsibility of the Lord prisoner of the Council... I fear that's our, that's a division.

James: If we just pause for one moment...

Lord Mackay: Yes I'll have to go and vote I'll just come back when it's finished. [00:52:39]

[00:00:00]

[00:00:00]

James: So we're resuming the interview after the occupational hazard of interviewing in the House of Lords... a division bell. So we were talking about the dynamic between the senior Law Lord or other members of the Lords and the Lord Chancellor, and you were explaining Lord Hailsham's rationale for... appointing a senior Law Lord in the first place, formally.

Lord Mackay: I think so.. he devised a system in which there were two Law Lords, senior. One the senior and the second senior, that's what he did, and he did it by the letters patent. And then other Lords of Appeal in Ordinary presided in order of their appointment as Lords of Appeal in Ordinary. And that continued, but after I was Lord Chancellor for a bit I saw the dangers of that arrangement, because people went to X senior Law Lord for a dusty answer without letting on that they went to the second one, and he might give the opposite, and then there might be trouble and there was something of that kind happened.

James: So would this be who sat on which appeals, or just that they would go to the senior Law Lords and...

Lord Mackay: Some procedural arrangement probably. Something like that, maybe trying to hasten it or something I don't know. But I didn't think it was very good to have the possibility of difference of opinion between them so I reverted to the system of having a single Law Lord and of course by the time that I did that the reason for it had gone, the reason for having two had gone, so I think that's the better way, [00:02:00] now it's a senior Law Lord and...

James: And you have the President of the Supreme Court and the Deputy President.

Lord Mackay: No. Yeah that's the arrangement that's right.

James: So I think I'm right in saying it was Lord Keith of Kinkel who was senior Law Lord for most of your tenure and then Lord Gough for your [unsure]?

Lord Mackay: That's right. And Lord Browne-Wilkinson would have been after that...

James: Yes he succeeded Lord Gough. I suppose that relates to then, the other senior judicial figures, the Lord Chief Justice and the Master of the Rolls? Of course as Lord Chancellor you had a role in appointing all of these judges, so how did you find that? Having only so recently been approached yourself and seen the process from the other side?

Lord Mackay: Well I knew a good number of these people for one reason or the other and of course the Inn, being involved with the Inn a bit had helped me with that and I always, on very senior appointments, I always consulted the heads of Division and the Lords of Appeal, and as you can imagine, they weren't always unanimous, but on the whole it was possible to get a consensus which I used and I must say... you know it was quite a good system so far as results were concerned, it produced pretty good results. I think my impression is that most people feel that the judicial appointment, certainly the senior judicial appointments, that were made during my time were pretty successful.

James: Because as Lord Chief Justice you were able to appoint Lord Taylor and Lord Bingham...

Lord Mackay: That's right.

James: And you'd also appointed Lord Bingham as Master of the Rolls.

Lord Mackay: That's right.

James: And then Lord Woolf is his successor and I'm sure anyone listening to these interviews will recall the impact that Lords Bingham and Woolf particularly have had on the development of [00:04:00] our legal system.

Lord Mackay: Yes that's right. I mean I think these were... I mean they didn't have to write any kind of material ... I selected them on the basis of what I knew about their judicial qualities.

James: And then when it came to the legislative role of Lord Chancellor because I suppose a neglected aspect of the Lord Chancellor's role can be that...

Lord Mackay: I took quite an active part in quite a lot of fairly important legislation, probably the most important and the most lasting is the Children Act, 1989.

James: Again for our listeners what transformations did the 1989 Children Act, which as you say is a great monument of legislation, introduce?

Lord Mackay: Well it, one of the central questions, it was reorganized of the whole thing, of very antiquated terms and so on, but one of the things that was being set up was the local authorities childcare responsibilities and I remember the difficulty of trying to formulate what they now called the 'threshold conditions' for children being taken away from their own natural family, whatever nature of family it was, and put into the care of the local authority. And that particular provision has stood the test of quite severe analysis over the years. There are many other provisions as well, I mean the best interest of the child as the predominant feature and then the list of matters to be considered, all of that I think has turned out to be pretty valuable and pretty good and pretty acceptable and accepted.

[00:06:00]

James: And how did you find the process of being involved in drafting?

Lord Mackay: I found it very interesting indeed. And of course Lady Hale was in the Law Commission, she'd been in the Law Commission in preparing the report in which the Children Act was based, so I had a lot of discussion with her and got to know her well and I thought she had judicial potential which turned out to be correct.

James: Were you involved in her appointment?

Lord Mackay: Yes. First appointment, yes, as a judge, yes. I don't think she got to the Court of Appeal when I retired as far as I remember just now.

James: And as we sit here on Tuesday the 23rd July it's the day after Lady Hale has been sworn in as Deputy President of the Supreme Court, so another decision you made that has stood the test of time. Another important piece of reform that you introduced in the early years of your Lord Chancellorship was the Courts and Legal Services Act, 1990. And that obviously had profound consequences for a variety of aspects of the legal profession, the Inns, the barristers, would you like to speak a little about that?

Lord Mackay: Yes well, I preceded as you will remember my consultation papers, the so-called 'green papers' which were issued on Burns Night in 1989 I suppose it was, and you may remember that they weren't all greeted with absolutely unanimous applause, so I had quite an interesting time defending them. Desmond Fennell was the spokesman for the Bar, now I just want to remind you that the Bar under the Law Society had set up a joint committee, with [00:08:00] I think five barristers, five solicitors and five independents. And they were deliberating on whether or not the Bar should be open to solicitors. And the five solicitors and the five independents said yes, the five barristers said no. So it was a deadlock. Now I had been approached to consider all these matters for the government earlier and my view was that on that central issue... there were many other issues but on that central issue, there was no reason why a qualified solicitor shouldn't have a right to an audience, because it didn't matter what your name was, it depended on what the basic qualification was to reach that place. And the mere fact that you were called a barrister wasn't of itself sufficient, it was the fact that a barrister was trained to exercise rights of audience in a higher court. And if a solicitor was trained in the same way and the certificate earned to that effect, I could see no reason why you shouldn't be also. So that was my attitude, and when it went to the committee I told them that, but I also said and this is quite important because this is a thing that Lord Ackner picked up and suggested I was telling lies. I said that I didn't think that we should do anything until this committee had decided because the committee was still sitting, and if it decided it would be much easier than [00:10:00] us taking the responsibility of making this decision. So of course when the committee didn't reach an agreement, we came forward with our proposals, and I think Ackner thought I had misled the House when I said it was because of a breach in the agreement system, the disagreement that I had come forward with this when I was... in fact it was a decision coming from a cabinet sub-committee of which Nigel Lawson was the Chair, and which he narrated in his autobiography. But I've never challenged Ackner or any of these things, I've always thought if he wanted to say something, let him say it, truth will out.

James: And your.. also in the reform of Legal Services, contingent or conditional fee agreements were introduced and I think they were introduced by the Act but later by statutory instrument.

Lord Mackay: The Act was only a paradigm, because I knew it was a controversial subject and we did it by regulation and I had some job in getting that through, the Labour party opposed it strongly in the Lords but their front bench didn't vote against it so it went through. And of course when they came to power they approved it in spades, you know...

James: Yes, because the Access to Justice Act..

Lord Mackay: The other thing they've done was to forget about my qualification of solicitors and they gave it to all solicitors. And my own impression is that that's not a particularly good idea, but anyway I don't think many solicitors have taken it up actually. So that was quite a time, it generated [00:12:01] out of public interest, the Times set up a big conference in the theatre, the National Theatre, where they wanted me to come and answer questions. And I was sat in this National Theatre, a great big auditorium and I was sat in a great big chair, like a throne, in the middle of the platform, the middle of the stage. And the chairman of the whole thing was a chap with a bow tie, a great interviewer... what was his name now, I should know...

James: Robin Day?

Lord Mackay: Robin Day, it was, he sat behind me, up behind me for some reason, anyway that was the arrangement. It wasn't intended to maximise my comfort I don't think. Anyway we had a very good debate, I mean I was really and fairly on fighting form for these people, one of the things I said which I happen to remember which I'm sure says a lot more about one thing really, they said, 'you haven't given us long for a consultation.' Well I said, 'considering the way most people seem to have already made up their minds it's the consultation period is probably too long.' But it was interesting, the Times published on one of their central pages a fairly full report of the whole thing, which showed how interesting they thought the whole thing was.

James: So you said the Labour Party opposed some aspects of the reforms, how partisan, so it was obviously controversial.. particularly from the barristers' side of the lobby, but was it politically partisan or..

Lord Mackay: No it wasn't really very.. I mean [00:14:01] they thought to oppose the conditional fees. You see what they said about it but anyway, it went through.

James: Another area which I think was touched on in the 1990 Act and also in your Hamlyn lectures of the Administration of Justice in 1993 I think, is legal aid, and of course twenty years later that's a very hot topic. In the early nineties it was as valid a question as it is today, the cost of legal aid and how that system works, what was your approach in the government to do that?

Lord Mackay: Well I had to try and get as much legal aid as I could, I mean that was part of the problem, I had to defend the legal aid system, and try to improve it, for example, I introduced the standard fee for.. I think they called it the Standard Fee for Magistrates Court, anyway it was a fixed fee for a case, but what defined a case was a matter for some controversy exactly. But that was introduced and I think that proved to be very... I think it's still in place, it proved to be quite controversial, but I think the best people saw it as an advantage and I had a great meeting - the Law Society asked that Kenneth Baker as a Home Secretary should come and defend it. And I said, 'what's he got to do with it? He's got nothing to do it whatsoever, I'll come and defend it myself, I know exactly what I'll be doing.' So of course they had to be content with that, because Kenneth Baker needless to

say didn't wish to be involved. And so we had a huge meeting of solicitors in the central hall in the Methodist Church place,[00:16:02] huge meeting, and I had to answer questions from people. But it really was beyond argument that it was a good thing to do, so there are lots of details about legal aid but I had quite a lot of pretty heavy challenge to the amount that was being spent on legal aid from nearly, for most of the time I was there.

James: So you saw your role as standing up for legal aid?

Lord Mackay: Yes, you know up to a point. You had to see whether you could improve it. One of the things that I did which helped was to get legal aid for these advice centres, because I thought on the whole it was good value for money. And the people who worked in these advice centres, normally young people, didn't want huge salaries, they were very idealistic, wanted to help the poor and so on, and so it was a good way of getting quite a lot of value for money. I think the government have kept that on a bit but they've reduced it somewhat like most other things.

James: Yes, I think perhaps the view is not any longer something that should be cherished in quite the same way...

Lord Mackay: No of course, no it's a different.. the set up is different. I mean the Lord Chancellor is a different kind of officer, to what it was in my time. And of course also the Lord Chancellor was a fairly senior member of the government, so he had a fair amount of clout when it came to arguments and committee and so on. I mean I've had heavy arguments from people like Michael Heseltine and so on about the lawyers actively ripping them off and so on. And when you see the figures they were actually going up, but anyway I did my best [00:18:00] and it was a good lot better than what's available now.

James: So picking up that theme of how the Lord Chancellor's role has changed, I mentioned earlier that you were the last sort of serving judge to then be appointed Lord Chancellor, and also I think you sat, I think you were the last judge to sit very regularly as Lord Chancellor.

Lord Mackay: Yes, that much more than my successor. And probably at least as much as Hailsham, I'm not sure, maybe in his latter years but I sat a lot, I mean I felt on the whole that's what I was there for.. because I was a judge really.

James: So there were cases you wouldn't sit on because of the role, cases of the government, the party or...?

Lord Mackay: I took the view that the Lord Chancellor was... as long as it wasn't a government...as you may or may not know do you know that book called 'The House Of Lords: The Judicial Authority' or something? There's a chapter in that in which my decision in the famous dissent that you referred to...

James: Pepper and Hart.

Lord Mackay: Yes. Was quoted.

James: So this is the book, 'The Judicial House of Lords 1870 to 2009 by, edited by Brice Dickson, Louis Blom-Cooper and Gavin Drewry?

Lord Mackay: Yes. And there's a passage in it in its original form that suggested that I decided in favour of the Inland Revenue, but of course as you know that's not correct. So needless to say I challenged them, so they said on new editions, on new reprints they would put it right and they were to send a paper round to people who had got the original edition correcting it.

James: Ah. Well I have a copy of the book but I have not yet received [00:20:00] the letter so I'll await that.

Lord Mackay: Well in that case it's a bit delayed because it's a long time since they said it, but...

James: Maybe it's in the same place as your invitation to be a Lord of Appeal in...

Lord Mackay: That's possible, yeah.

James: And just to explain...

Lord Mackay: It doesn't matter now... it's just a mistake.

James: But just to explain for our listeners that the reason that that is not correct is because although in *Pepper v Hart* you disagreed with your brethren on the point of the admissibility of statutory materials on the outcome of the appeal, you weren't dissenting.

Lord Mackay: I wasn't dissenting on the outcome of the appeal because I thought on the terms of the statute the tax payer should succeed.

James: Because this was a case where it was about the assessment of certain benefits in kind for teachers.

Lord Mackay: That's right. That's right. And I have to say that you know, it's not for me to criticise the judgement of my colleagues who were in the majority by quite a large margin. But the truth is if the statute was ambiguous the law up 'til then was that the tax payer should win. It was our fundamental part of the admissibility of these other statements that the thing that you were construing was ambiguous. And therefore, on the laws it stood there was no need to get into this, but of course they wanted to get into it, in order to make these statements and ministers admissible so they could look up *Hansard* and so on. I think the experience has been as I rather predicted, in that the expense involved in most cases is not the worth the result, but you'll be able to judge better than me because I don't look at them all, but people like Steyn and whatnot rather felt that it wasn't really worth it...

James: So after *Pepper v Hart* as minister promoting a bill so there are several conditions [00:22:01] in the decision in *Pepper v Hart* itself that the statement relied upon by *Hansard* must be clear and unambiguous, must be by the promoter of the bill, and it must essentially answer the question. When you were subsequently promoting legislation were you conscious that what you were saying might be used as a... because one of the objections was the concern that it allows the promoter of the bill to govern the meaning of the statute.

Lord Mackay: I wasn't much promoting bills after that. That's towards the end of my term as Lord Chancellor. But the thing I object to slightly is that of course like all judgements it's retrospective, so they're using statements made by ministers way back before that was the

rule. When the rule was that they weren't to be looked at, from time to time, including statements of my own in the British Telecom Privatisation Bill...

James: One point that I thought was interesting was you had published on the admissibility of extra statutory materials as they used statutory reconstruction in an article in the Statute Law Review, previous to *Pepper v Hart*, so the possibility of extra judicial statements then becoming, coming up in subsequent cases is an interesting one, you have the opportunity having expressed the view to then judge on the point.

Lord Mackay: I've always been careful to be pretty cautious about expressing a view that you might have to think about, and after all, I don't regard it... I think the Law Lords have every right to... it's part of what they do to comment on the development of the law, and almost any matter of development of the law may come to be a subject of decision, so I don't regard [00:24:01] it as in anyway defining their attitude. I said, this is a... I don't like quoting myself, but this is to encapsulate what I think about this. Years ago, I was invited by the advocates of Ontario to a seminar they had in Toronto, to which they had the Chief Justice of Canada, and the then Chief Justice of the United States and myself, and we had a discussion about the appointment of judges in these three places, and I was asked about the situation in the United Kingdom. And I said in the United Kingdom, we appoint judges for their ability to reach conclusions after they hear the full argument, and not for the opinions that they have already formed, and Rehnquist who was the the then Chief Justice of the United States thought that that was different from what they had and he thought on the whole I think... I don't want to quote him particularly because this is private, he said, but I think he thought that was superior.. I think the question of what did you think about abortion when you were 24? I mean, what relevance has that to how good a judge you're going to be? So that's the kind of situation that I feel is quite strongly about that you're quite free to express opinion, but you understand that these opinions don't bind you if you come to a case where the thing is argued and you come to an opposite conclusion. And I think if you look at that debate in Hansard... there's a debate in Hansard, sometime before *Pepper v Hart* about these questions, and I expressed a view and so did quite a number of others, and if I'm not mistaken some of these others sat in *Pepper v Hart* and expressed a different view in *Pepper v Hart* than what they [00:26:00] expressed when they were speaking in the House of Lords, so I think it's perfectly alright to change your view in the light of the evidence.

James: So I suppose around the time of your appointment as Lord Chancellor, on the other side of the Atlantic the Robert Bork confirmation hearings for his nominations to the Supreme Court that wasn't successful and was very partisan in the United States was ongoing, and that question of judicial appointments and the role of public scrutiny is an interesting one.

Lord Mackay: It is it is. I'm not persuaded that it has much... one's wedded to one's own methods I suppose.

James: So with the changes since the Constitutional Reform Act 2005 the Lord Chancellor is no longer the head of the judiciary. Insofar as you feel comfortable talking about it, what's your view in how the role has changed and how the judiciary have changed in response?

Lord Mackay: Well I think the judiciary have been moved a little in the hierarchy of society by that. The Lord Chancellor as the head of the judiciary was a member of the government, the top level of the government, and they have no such person now. Now

many people say that that was inevitable so perhaps it was. The way that the human rights convention developed made that sort of thing difficult. My own impression is that what's objectionable is that the legislative body and the judicial body are the same, but the fact that they have common members, as long as there's a sufficient difference, the number of the members [00:28:00] of the legislator that were in the judiciary was insignificant really. And so long as they're different in that way I don't see any objection to it. I don't think that the separation of powers requires that nobody in the judiciary should be a member of the executive of the government over the legislator, but anyway that's just my analysis of it, it wasn't the general and prevailing analysis at the time.

James: I suppose it may mean as well, that the Secretary of State for Justice slash Lord Chancellor, it is now more political as a role than it was in your time...

Lord Mackay: Oh undoubtedly much more, much more, and the question as well, whether that's an improvement...

James: But it's certainly different.

Lord Mackay: Absolutely different.

James: And then what about the other major judicial change of the 2005 Act, was the creation of the Supreme Court, what was your view in 2005 when it was rather hurriedly announced?

Lord Mackay: I wasn't really keen on it. And the main reason I wasn't keen on it was that it was functioning perfectly as it was, and I also think that there's something about a brand. I mean, companies in the ordinary run of affairs will give a lot for their brand and if their brand is interfered with, they tend to take it pretty heartily to heart and try to defend it. Now the House of Lords as a judicial brand was unique in the world and very highly thought of as I think that book we referred to shows. But supreme courts are all over the world and not only in the top, [00:30:00] I mean the Supreme Court exists in the United States in every state, and so there are any number of supreme courts around, so we've just got one among a multitude. Now that may not matter, but on the other hand I think it is significant myself. And if you look at it from the cost point of view, the cost of the Supreme Court is very very much larger than the cost of the Law Lords.

James: I think Lord Hope has said extrajudicially that sometimes the brand was sometimes an issue in explaining to people in civilian jurisdictions who our leading judiciary were, when they came to conferences because they weren't from the Supreme Court.

Lord Mackay: Oh yes that's right and you know, everything needs an explanation. The mere fact that it's a name doesn't necessarily convey all its characteristics but I must say I never found that very difficult to do.

James: And have you been to the supreme courts?

Lord Mackay: Yes oh yes. Oh yes I've been to supreme court. Needless to say I never sat in it because I wasn't qualified by the time it was set up.

James: I think the question of how much of a change other than moving across Parliament Square has been is an interesting one.

Lord Mackay: Yes you'll have views about that, I don't think I have any real sense that it has changed.

James: Well I think it has largely been continuity. I think there are more single judgements now...

Lord Mackay: There were quite a few before...

James: Well in terms of the formula so they... the supreme court doesn't necessarily have each judge say, even formally, I agree with my noble and learned friends, they sometimes just have a judgement.

Lord Mackay: They started that bit in the Lords [00:32:00] before the Supreme Court was set up.

James: Yes under Lord Bingham particularly.

Lord Mackay: Yes he was rather keen on that but..

James: And of course Lord Diplock was very keen on giving a single judgement, many by himself.

Lord Mackay: Yes that's right, well that's...

James: Did you have a view on that when you presided?

Lord Mackay: I never asked them to have just the one judgement, never, and I don't think there's any that I gave which were only myself.. as far as I remember. You can correct me if I'm wrong but I don't think so.

James: Well thinking more broadly then, as we look back, do you have any favourite cases, do you think? I think the last time you sat was in 2002 as a member of...

Lord Mackay: Yes that was a Scottish case. No my favourite really experiences of the Lords is when I appeared in English cases as a Scottish council. Miller against Whitworth Street Estates in 1970, which was an interesting case. The other was.. what was his name now.. Max somebody against Ockwell Glass, which was about whether a case needed to be taken in England or Scotland, I appeared as Dean of Faculty in that one, and in both of these we won, which of course was an attraction. But they were both very interesting cases, very.

James: I think your last appeal as Lord Chancellor was a case called Fellowes v Clyde Helicopters which was at least partly about legal aid eligibility, which I suppose is an appropriate case for you.. involving a soldier I think.

Lord Mackay: It was Fellowes against Clyde ...

James: It was Fellowes against Clyde Helicopters from 1997, at least from my researches that was what I found.[00:34:00]

Lord Mackay: That must have been the beginning, that can't have been the end.

James: 1997.

Lord Mackay: Oh sorry, ah yes. Yes yes yes.

James: Well I suppose as we perhaps draw to a conclusion, given that this is the Inner Temple oral history project, thinking about your legal education, and also the 1990 Courts and Legal Services Act established a council on legal education and conduct, what do you think matters in what is good about a legal education?

Lord Mackay: I think it's very important that people should have a good grounding in what the law is, and should be able to apply it, and I also think that the ethics that are incumbent on barristers and those with rights of audience in the higher courts, indeed in all the courts is very important to the conduct of affairs in our country. And on the whole, on the whole, I'm pretty satisfied that these standards have been upheld, and for example, I've never heard of any even semblance of a case of corruption in connection with judicial work against any judge in the United Kingdom. And that's not true in every jurisdiction. And I think that's something that we devalue at our peril. I mean I'm not suggesting it's in danger, I'm just suggesting that it's extremely valuable, and I think the Inns have had an important role in the faculty [00:36:00] in Scotland, the Inns in Ireland for example, and the faculty... the courts, what they call it, in Ireland, they have the same in Northern Ireland, see it as a comparable institution. And I think all of these have helped to maintain high standards of professional ethics in our country.

James: As Dean of the Faculty did you, presumably you had contact with new members of the Bar and...

Lord Mackay: Yes I had the role in connection with the formulation of rules and I took a lead in getting rid of rules that restricted the faculty people from commenting to the press. Because I thought that these rules were a) very very difficult to enforce and b) I didn't feel why they should... and same of course with the judges.. one of my first press conferences I said I didn't believe in the Kilmuir rules, which was quite a shock to a lot of people but..

James: Just to clarify for our listeners the Kilmuir rules..

Lord Mackay: The Kilmuir rules were judges, and I think it was supposed to apply to all judges, but certainly the majority of judges were not supposed to speak to the media unless they had the consent of the Lord Chancellor. Well I thought that I wasn't prepared to go along with that, so we got rid of that at one of the first press conferences I ever had, as Lord Chancellor. And I'm sure that's right, and I had the same view at the Advocate, at the Faculty of Advocates and we got rid of these rules but of course there are plenty of ethics about what you should talk about and confidentiality and all that sort of thing. But the mere outlawing speaking to the press I thought wasn't very good, very sound.

James: And do you think the Kilmuir rules would have had you speaking to the Times and the National Theatre? [00:38:02] That kind of set piece .. it sounds like you found a valuable opportunity really which maybe Lord Kilmuir wouldn't have gone for.

Lord Mackay: Well I was Lord Chancellor of course, so it wouldn't apply because it didn't require his own consent. No, they set that up in order to discuss the whole consultation if you like, a discussion on the green papers I had put out. Actually it's quite interesting for me to see the extent to which the green papers forewarned if you like, or forecast the possibility of these ABS structures that we have now.

James: The alternative business structures being introduced by the Legal Services Act 2007.

Lord Mackay: Yeah.

James: And has the fact that we had to pause the interview for you to go and vote.. you're still very active as a member of the Lords.

Lord Mackay: Quite yes, for my age I'm probably more active than I should be. But anyway I still taking a bit of a part in it.

James: And do you enjoy doing that whilst not a member of the executive?

Lord Mackay: Yes in a sense it's easier. You have no restraint from that source, restraint from other sources of course.

James: Do you feel that it's valuable to have ex Law Lords commenting on legislation, so obviously since the creation of the Supreme Court we no longer have serving equivalents of Law Lords in the House.

Lord Mackay: That wasn't a consequence of the creation of the Supreme Court..

James: No but we no longer have them there.. Bingham in 2000 said...

Lord Mackay: Yeah but he wasn't keen to speak in the Lords as a serving judge, but that was part of his human rights formulation. But the real reason they were excluded I think, was to preserve the government against the kind of observations that they sometimes got from very senior judges, particularly in the House of Lords.

James: Do you think that's... to the detriment [00:40:02] of legislation, the quality of legislation, not to have the scrutiny?

Lord Mackay: Well I do think that the judges in the past, the Law Lords in the past made valuable contributions to the scrutiny of legislation, it may be that their contributions have been replaced now but that's all I would say in the past, they certainly were very valuable and of course as you know they're coming back, those have retired are coming back. Lord Hope I was speaking to this afternoon.

James: Although of course the new appointees to the Supreme Court who didn't previously serve in the House of Lords or have the peerage by other means will not necessarily be elevated after their tenure, so maybe in twenty years time we will..

Lord Mackay: That's possible I don't know what the government will do about that.

James: It's difficult.

Lord Mackay: It's something for me when my youngest pupil is retiring on age grounds anyway.

James: Well I just suppose as a final question, you've mentioned that the Inn was of great value to you, I suppose just a few thoughts on what the Honourable Society of the Inner Temple means to you?

Lord Mackay: Well it means a great deal, it's provided me, apart from anything else with accommodation ever since I became Lord Advocate. And I value that very much and they've always been very very kind to me, I've never been able to go very often to the lunches for reasons beyond my own control, but we try to go to other functions like guest nights and that sort of thing, but now it's more difficult for us, because we're not in London quite the same as we were. And when I was Lord Chancellor we used to go to the Temple Church regularly, I feel freer to go now when I went, you know we sometimes go. But I felt it was, it was a lawyers church and it was quite a good thing for the Lord Chancellor to be seen in it as often as he could. The Inn has been terrific for me all along and good friends in it and living there you feel very much at home, and people greet you and some people I know and some I don't, because the guards we've got our flats in Paper Buildings down at the end of the garden. And the gardens are beautiful, we've got a very very good gardener, excellent, and the music's always nice and the master of the Temple is a very interesting and he's a very wise man. So. Thank you very much.

James: Splendid. Thank you very much, Lord Mackay of Clashfern. [00:42:43]