1. A lot is said about supporting marriage. By s1 of the Family Law Act 1996 it is stated that "the institution of marriage is to be supported". In the Tory manifesto it was described as " a good institution" which should be supported by tax breaks. It is already supported by concessions in the field of Capital gains Tax and Inheritance tax. But what is it, exactly? And what should it be?

2. The very final words of Lady hale in the now notorious case of Granatino in the Supreme Court were

> Marriage still counts for something in the law of this country and long may it continue to do so.

3. I had thought of entitling this talk "something" and singing the famous Beatles song of the same name. What is this something that Brenda Hale is referring to?

4. So I thought I would briefly try to set out what in two respects I think the law now defines marriage as and to ask whether you agree that that is how it should be.

5. It is an extraordinary truth that when two people get married they likely have little idea what they are signing up for particularly in terms of economic obligations. And even if they were very well informed had they married before 2000 they would have thought they were signing up for very different economic arrangements to those now imposed.

6. There is nothing printed on the back of the marriage certificate explaining what are the terms of the agreement they have just entered into. Sometimes there is pinned to the Registry office wall the words of Lord Penzance in *Hyde v Hyde* in 1866

> Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite lights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in

> different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

7. Quite apart from the fact that almost every element identified by Lord P is questionable in the modern world, this definition tells us nothing at all about the economic obligations assumed on and the economic consequences of marriage. Nor does it tell us anything about the nature of the union. I am not going to speak on the interesting question of whether there is implicit a sexual obligation, or whether nowadays there is a realistically enforceable duty of fidelity. But I will speak a little later on the very interesting question of trust and confidence

8. So my questions to you are

   8.1. is a marriage an economic union? Should it be?

   8.2. is marriage a union of trust and confidence? Should it be?

9. these are questions that lie at the heart of two important recent decisions: Granatino, recently decided by the Sup Ct, and Imerman recently decided by the CA heard by Lord Neuberger MR

10. When I learned the law and got married it was a cardinal feature of English law that since 1882 the marriage ceremony has no effect on the parties' entitlements to property, other than a right to invoke the court's discretionary jurisdiction to make an award on termination of marriage.

11. Prior to 1882 the marriage ceremony in England had profound economic consequences in that the wife under the doctrine of consortium lost her capacity to acquire or retain property in her own name. Her legal identity was subsumed with that of the husband and her status was one of servitude. This was as unequal a partnership as can be imagined. As Blackstone put it:

> The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing protection and cover she performs everything (Commentaries on the Law of England 23rd Edition 1854 Vol 1 p554).

12. Thus until the late 19th century marriage had a fundamental effect on property entitlement at common law: the husband and wife became legally one – although as Lord Denning MR put it in *Williams and Glyn's Bank Ltd v Boland* [1979] Ch 312 at 332, the husband was that one. To the same effect Lord Upjohn observed in *J v C* [1970] AC 668 at 720-721:

> The wife was a mere chattel and for all practical relevant purposes her identity and, of course, her property merged in that of her husband.

Lord Denning in another case described the wife's position as "barbarous servitude"

13. The position was very different on the continent of Europe, where (Normandy aside) community of property has been the norm since the Dark Ages. The Napoleonic code did not introduce any innovation but merely codified customary law as applied in France and elsewhere from the time of the replacement of the Romans by the Gothic and Visigothic tribes. For them a woman was a free independent person who in a marriage shared equally in the marital acquest. There are interesting speculations as to how this came about. Some say it was as a result of strong Visigothic wives giving support by their presence on the battle-field and insisting on an equal division of the booty brought home by their pillaging husbands.

14. Thus the tradition of community of property has been formalised on the Continent and it comes in three varieties

    14.1. **Traditional community:** on marriage a community is created, and is divisible into equal halves on termination. In Belgium, France, Italy, Portugal and Spain the "divisible mass" is confined to the marital acquest. In the Netherlands it applies to everything. An agreement can be made on marriage excluding or modifying the community.

14.2. **Deferred Community:** This is the Scandinavian system. No community is created on marriage, but one comes into being on termination. In Norway the divisible mass is the marital acquest. In Sweden and Denmark it applies to everything. Again, a marital agreement may be made excluding or modifying the community

14.3. **Participation systems:** These apply in Germany and Austria. In Germany there is full separate property during marriage, but on divorce a community of accrued gains arises whereby net accrued gains are equally divided by means of a monetary balancing payment

15. The customary law in Normandy was different. As the name of that area indicates, it was inhabited by Vikings who applied an entirely different ideology of relationships. For them a wife was a subservient chattel; she had no independent legal personality. She had no right to own property. Her rights on breakdown of the relationship were limited to maintenance.

16. Norman customary law was exported to England following the conquest in 1066, where Anglo-Saxon Teutonic law was superseded.

17. The Married Women's Property Act 1882 enacted the regime of separate property, as a result of which marriage no longer had any immediate effect on the entitlement of the spouses to property. One view is that the 1882 reform was intended to benefit married women, which self-evidently it did by removing the legal incapacities to which they had been subject at common law. The Act introduced a system of formal equality as between husband and wife. Another view is that the Act was a male initiative: husbands were discontented at the practice of estranged or even current wives pledging their credit

18. So since 1882 separate property supported by the right to apply for a discretionary adjustment. How was that discretion to be exercised? From the very dawn of secular divorce, indeed from the times when these things were dealt with

by the Ecclesiastical courts the discretion was exercised to meet needs generated by the marriage. As Lady Hale said in Granatino at para 132

> Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state. Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children.

And at para 187

> However, "needs" is a convenient shorthand for a rather more complicated concept, which is the (now) mutual commitment which each spouse makes to support the other. Under the former "tailpiece" or statutory objective, this was a life-long commitment, surviving divorce although ending on the receiving party's remarriage. Under the present law, it is no longer life-long. Each party has a responsibility to try to adjust to living without such support. But they may still be entitled to support for requirements which arose as a result of or during the marriage. Usually, of course, this is because of the demands of child-rearing and the (often life-long) financial disadvantage which results. But among the statutory factors is disability. If this arises during the marriage, it may be entirely proper to expect the normal support commitment to continue after the marriage ends.

19. I think we would all probably agree that marriage does give rise to a mutual obligation of support and that this could extend beyond divorce for the reasons explained. That was the foundation of the sole economic rule of marriage in this country from 1857 to 2000

20. But in 2000 in White the HL changed all that. I have called this year zero. In that case the needs approach was condemned as discriminatory. Instead the dominant criterion became sharing of the marital acquest; and this should be divided equally unless there were good reasons not to. While separate property would exist up to divorce there would be a monetary equalisation of the fruits of the marriage by the divorce court. This ideology was reinforced by the decision of the HL in Miller. This is, as can be readily appreciated, almost indistinguishable from

the German deferred community of accrued gains. As Lord Phillips for the majority in Granatino said in para 107

> But although the economic effect of Miller/Macfarlane may have much in common with community of property, it is clear that the exercise under the 1973 Act does not relate to a matrimonial property regime

21. Now a number of points arise

    21.1. No law was democratically passed that changed so fundamentally the nature of marriage

    21.2. Rather it was passed by 5 judges in the HL without any public debate, research or consultation

    21.3. The new law was retrospective and backdated to cover marriages entered into in an entirely different world.

22. So the question I pose is : do we want marriage to be a full economic union of this nature or not?

23. The recent case of Granatino has legitimised the use of pre-nups. Of course in the old needs based world pre-nups were an irrelevance because meeting need was an irreducible minimum whatever the parties may agree. But with the brave new world of deferred community of accrued gains pre-nups come very much to the fore. After all every community of property country allows nuptial agreements to modify what is in effect the default position.

24. So it must be the case now that whenever parties are considering marriage they should take advice as to whether the default position should by agreement be modified. Do we actually want this? I have a rosy romantic view that marriages should be attended by bridesmaids and not Mr Tooth and Mrs Shackleton.

25. And do these agreements ever do anything than promote the suppression of the weaker economic party usually but not invariably the woman. As Hale said at para 137

> unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled

and went on, somewhat acidly

> In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.

26. Again I pose the question is this what we want?

27. I do suggest that given the continuing popularity of marriage there needs to be some hard thinking about what it means economically and at the very least public education.

28. I now briefly turn to my second question. Is a marriage a union of trust and confidence? Should it be?

29. In Imerman this very question was considered by the CA in the contest of the W's brothers, the Tchenguiz brothers have broken into H's password protected computer and having copied hundreds of thousand of his documents. That was an egregious case where the wrong doing by the brothers was plain. It is a good example of the old saw that hard cases make bad law.

30. at para 85:

> …, why, we ask, should one spouse have no right of confidentiality enforceable against the other in relation to their separate lives and personalities? More specifically, why should one spouse in relation to his or her separate financial affairs and private documents not be able to have recourse as against the other to the kind of equitable relief which we are here considering? We can think of no satisfactory reason for any such rule and every reason why such relief should in principle be available as between spouses. Is it to be said, for example, that a husband is to be free to borrow and read what he knows his wife would consider her private diary? Is a wife to be free to borrow and read what she knows her husband would consider his confidential papers (whether relating to his work or to the affairs of his parents or siblings)? Surely not. Subject of course to the court being satisfied that the normal equitable principles would otherwise be in play, a claimant is not to be denied equitable relief merely because the defendant is, or has obtained the material or information in question from, his or her spouse.

31. and at para 88

> The question must, inevitably, depend on the facts of the particular case. Thus, if a husband leaves his bank statement lying around open in the matrimonial home, in the kitchen, living room or marital bedroom, it may well lose its confidential character as against his wife. The court may have to consider the nature of the relationship and the way the parties lived, and conducted their personal and business affairs. Thus, if the parties each had their own study, it would be less likely that the wife could copy the statement without infringing the husband's confidence if it had been left by him in his study rather than in the marital bedroom, and the wife's case would be weaker if the statement was kept in a drawer in his desk and weaker still if kept locked in his desk. But, as we have already said, confidentiality is not dependent upon locks and keys. Thus the wife might well be able to maintain, as against her husband, the confidentiality of her personal diary or journal, even though it was kept visible and unlocked on her dressing table.

32. So we seems to have arrived at a very strange state of affairs

32.1. marriage is an economic partnership

32.2. but the paperwork of the partnership is confidential and not available to both partners. If one spouse seeks to get hold of the documents to see what assets are in fact existing in the economic partnership then she risk being sued for the tort of breach of confidence and or being prosecuted for theft, burglary, data protection offences or for offences under the Computer Misuse Act 1980.

33. At present the law concerning marital agreements is being considered by the law Commission. It is a pity that they have drawn their remit so marrow. Rather the law commission should be considering all of the issues I have mentioned to you.