POLITICAL PHILOSOPHERS AND THE TROUBLE WITH POLYGAMY: PATRIARCHAL REASONING IN MODERN NATURAL LAW

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> . . . there can be little doubt that the main reason why polyandry is not more commonly practised, is the natural desire in most men to be in exclusive possession of their wives.
>
> *Westermarck* [1]

> You ask for my views on that species of polygamy according to which one woman marries several men, and of which you say that it does not violate the law of nature: Such a thesis might perhaps be defended in the academic lecture. But, to be honest, I doubt whether it would meet with the universal approval of judicious men. Apart from other reasons, we also call such matters against the law of nature which are not viable in the affairs of ordinary life and which do not fit the end which this nature commonly has or should have. This, however, is the case with *vielmännerei* [polyandry]. The common end of matrimony is to establish a family. And this can easily be achieved under *vielweiberei* [polygyny] where the man is the *caput familiae* who can form a single family with his many wives and children. But this does not apply when one woman wants to take several husbands.
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> *Samuel Pufendorf to Christian Thomasius* [2]

Some time ago, a daily news programme treated its viewers to a debate about polygamy.[3] What prompted the event was a proposal to incorporate Islamic family law in the British legal system. It was perhaps predictable that the argument should soon turn to those provisions in the Islamic code according to which a man may take up to four wives. As the spokesman of the Anglican Church pointed out correctly, within our legal framework such an arrangement would count as 'bigamy' and thus as an offence under the criminal law. From this and other similarly perturbed responses to the debate one would have gained the impression that the concept of the polygamous marriage has no place in the universe of Western values and modes of thinking.

It is little known that from Augustine to Pufendorf and Montesquieu polygamy was a much and impassionately debated issue in European political thought. In

[1] E. Westermarck, *The History of Human Marriage* (London, 1921), Vol. III, p. 206.

[2] Quoted in M. Erle, *Die Ehe im Naturrecht des 17. Jahrhunderts* (Göttingen, 1952), p. 120. All translations from German, French and Latin texts by the author

[3] *Newsnight*, BBC 2, 8 July 1989.

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Diderot's *Encyclopédie*, for example, we can still discern the contours of a controversy that had occupied theologians, moral philosophers and jurists over many centuries. Here, as in virtually all other texts, the discussion of polygamy — defined as 'the marriage between one man and several women, or between one woman and several men'[4] — followed long-established patterns of reference and rhetoric.[5] Everywhere the same examples were cited: the legendary Lamech of the Old Testament, reputedly the first bigamist, joined by some of the most illustrous names among the patriarchs; the impact of Islam and the standard cases of oriental despotism; the warrior tribe of the Nayars on the coast of Malabar (one of the rare examples of polyandry); and, closer to home, the ancient Britons among whom Caesar had spotted evidence of group marriages. These instances of primitive custom were listed, it seems, from an assured position of historical distance: 'Among us polygamy carries the penalty of banishment or the galleys'.[6] Yet, noting the frequent cross-references to 'Marriage' and the occasional warning to readers to consult the polygamist literature with great caution, we catch a glimpse of the unsettling and subversive implications of this remote practice.

What was at issue was not, in the first instance, the scandal of illicit sexual practices. The 'marriage uneven in numbers'[7] harboured trouble of much wider import. The real provocation derived from the fact that polygamy could lay claim to the credentials of a proper marriage. Church fathers and medieval schoolmen had the unenviable task of steering the commands of Christian ethics and its endorsement of monogamy past the embarrassing example set by the holy figures of the Old Testament. The natural law philosophers of the seventeenth and eighteenth centuries could seize upon the embarrassment of contradictory norms as a convenient guise behind which to assert the purely secular purposes of marriage against the doctrinal and jurisdictional supremacy of the church. But they, too, became enveloped in the troublesome legacy of polygamy. For, considered by its most radical philosophical implications, the debate on polygamy was a debate about the origins and verification of true knowledge.[8] It reflected and affirmed the divide between the claims made on behalf of revealed truth, on the one hand, and the postulates of the *ratio sibi relicta* — autonomous human reason unaided by religious faith — on the other. For the natural jurists polygamy had all the advantages of a favourable hypothesis capable of supporting a decisive step in the emancipation of social philosophy from the normative frameworks of medieval theology. It could be used to lend credence to the

[4] 'Polygamie', *Encyclopédie, ou Dictionnaire Raisonné des Sciences, des Arts et des Métiers, Par une société des gens de lettres* (Paris 1751), Compact Edition, Vol. II, p. 938.

[5] cf. 'Polygamie', *ibid.*, pp. 937–9. 'Polygamie', *Grosses Vollständiges Universal-Lexikon Aller Wissenschaften und Künste*, ed. J.H. Zedler (Leipzig, 1741), Vol. 28, cols. 1300–13. 'Polygamie', *Handwörterbuch zur deutschen Rechtsgeschichte*, Vol. III, cols. 1813–20.

[6] 'Polygamie', *Encyclopédie*, II, p. 939.

[7] Pufendorf, *Herrn Samuels Freiherrn von Pufendorff Acht Bücher Vom Natur- und Völkerrecht* (Frankfurt, 1711), Book VI, Ch. I, 15.

[8] cf. S. Buchholz, 'Erunt tres aut quattuor in carne una: Aspekte der neuzeitlichen Polygamiediskussion', in *Zur Geschichte des Familien- und Erbrechts*, ed. H. Mohnhaupt (Frankfurt, 1987), pp. 71–91.

revolutionary claim of a new epistemology, namely that human practices which clearly violated the commands of the divine law were not necessarily at variance with the principles of pure natural law.

The debate on polygamy might thus be seen as the furthest outpost of an empire for which the *recta ratio* claimed exclusive jurisdiction. At the same time, however, it reveals the precarious nature of this achievement. For there were, of course, two distinct forms of polygamy — male and female (*polygyny* and *polyandry*; *vielweiberei* and *vielmännerei* in the rendering of the German texts).[9] The natural lawyers, as we shall see, might vindicate the former. But they near-unanimously proscribed the latter:

> La pluralité des hommes pour une seule femme est quelque chose de mauvais en soi . . . Il faut raisonner tout autrement de la polygamie simultanée par rapport aux hommes; par elle-même n'est point opposée au droit naturel . . .[10]

If we search for the reasons behind this divided judgment we will be referred to a cluster of problems intimately bound up with the 'modern' identity of modern political philosophy. Secular natural law aimed to construct a self-contained, scientific system of legal and political norms.[11] The rights and obligations of individuals as well as the legitimate authority of their institutions were to be deduced, 'following in the footsteps of Euclid',[12] from no other certainties than those pertaining to the rational and sociable nature of man. However, scientific deductions of this kind seemed by themselves not capable of bridging the gap between abstract principles and the specific rules of conduct required for the affairs of everyday life. In the seventeenth and eighteenth centuries this problem confronted political philosophy in a particular form and still with a particular urgency. Once religious codes of moral behaviour, together with the institutional sanctions supplied by the church, had been divested of their public authority, what would safeguard the good order of civil society against the destructive passions inherent in human nature? Political theorists today tend to discuss this question in a narrower frame of meanings. That is, we no longer focus on certain dimensions of human nature that were once thought crucially relevant to the constitution of the political order.[13] As a consequence, we have lost sight of a whole ensemble of questions that formed the inner layer in conceptions of obligation, property and legitimate authority: How could the secular law, disconnected from the certainties of divine command, secure the preservation of human society against the subversive force of mankind's disorderly sexual appetites and

[9] cf. Westermarck, *Human Marriage*, Vol. III, chs. 27–30.

[10] 'Polygamie', *Encyclopédie*, II, p. 937.

[11] The paper refers mainly to the German tradition of natural law in the seventeenth and eighteenth centuries: see below p. 232f.

[12] Christian Wolff, *Grundsätze des Natur- und Völkerrechts, worinnen alle Verbindlichkeiten und alle Rechte aus der Natur des Menschen in einem beständigen Zuhammenhange hergeleitet werden* (Halle, 1754), Vorrede.

[13] For a critique of contemporary accounts of classical social contract theories, see C. Pateman, *The Sexual Contract* (Oxford, 1988), Ch. 1.

passions? Which institutional guarantees would protect family lineages and the permanence of property against the disorders born from sexual promiscuity, adultery and uncertain paternity? What were the obligations incumbent on men and women in relation to the purpose of procreation? These were distinctly political questions. They were also questions that compelled reflection upon the natural differences between the sexes. This explains why marriage and, at its core, the right order of sexual relations were considered as the proper subject of political philosophy — 'marriage is of all human actions that in which society is most interested'.[14]

Polygamy — the mirror image of marriage and test case of its legitimate forms — drew the philosopher's attention to one particular aspect of the conjugal relation. It reduced a complex and rich account of marriage, which dealt with the duties of mutual assistance and friendship and with the concrete details of domestic life as much as with its formal, legal constitution, to the single dimension of a hypothetical question: whether the purposes of marriage necessarily restricted the number of spouses 'to one male and one female?'.[15] But this esoteric question turned the spotlight on the conflicting demands that a secular legitimation of marriage had to satisfy. Modern natural law claimed to derive conjugal rights and obligations solely from the egalitarian premises of natural liberty. Yet it was equally concerned to retain an institutional framework that presumed the hierarchical ordering of sexual difference. The terrain into which these conflicting demands were cast was the marriage contract. Its formal structure displayed the same principles of legitimation as all of society's institutions. But within this structure there remained an enclave governed by altogether different rules.

The argument of this paper will at many points refer to themes developed in Pateman's *Sexual Contract*. But it will examine them in the discursive terrain of a different tradition — that of German natural law in its development from Samuel Pufendorf (1632–94) to Christian Thomasius (1655–1728) and Christian Wolff (1679–1754). Although the polygamy debate had common European origins and ramifications, its native territory in the seventeenth and eighteenth centuries was Germany. The German school (and, more generally, the legal culture of Continental Europe) differed from the natural law discourses with which English readers will be more familiar in three respects. First, arguments about the nature of law and its role in society were rooted in the 'civil law' tradition of the *ius commune* that derived from the Roman and the Canon law.[16] In both systems the marriage contract occupied a central place and its paradigmatic definitions still influenced the perspectives of the natural jurists. Equally important were the links that connected their arguments

[14] Montesquieu, *The Spirit of the Laws*, ed. F. Neumann (New York, 1949), Vol. II, p. 68.

[15] Christian Thomasius, *Institutiones Jurisprudentiae Divinae* (1688) (Halle, 7th edn., 1730), III, II, 200.

[16] F. Wieacker, *Privatrechtsgeschichte der Neuzeit* (Göttingen, 2nd edn., 1967), Part V; H. Coing, *Europäisches Privatrecht*, Vol. I (Munich, 1985), Part I. For the different traditions of the 'Civil Law' and the English Common Law, see J.H. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford, 2nd edn., 1985). For the marriage doctrine of the Canon Law, see R. Metz, 'Le Statut de la Femme en Droit Canonique Mediévale', *Receuils de la société Jean Bodin*, Vol. 12 (1962), pp. 59–113.

with the natural law doctrines of medieval scholasticism.[17] In the confrontation between secular social philosophy and theology, marriage was the province where the major battle lines were drawn. To claim the purely contractual legitimacy of the marriage bond carried the radical intention of removing all institutions of civil society from the jurisdiction of church doctrine. However, in defining the purposes of marriage in relation to the demands of procreation and legitimacy of offspring, of fidelity and sexual constraint, the natural jurists in many instances still followed conventions inherited from the medieval schoolmen. The point is that we cannot understand the specifically 'modern' thrust of patriarchal political theory unless we reconnect it with its 'pre-modern' history. As we shall see, this is a complex story, bound to confuse any comfortable assumptions about clear dividing lines or patterns of historical progression.

Secondly, German natural law does not easily conform to categories of analysis that are modelled on the constitutive features of seventeenth-century English liberalism. It placed the obligations of individuals, rather than their rights, at the centre of questions about legitimate authority; and the principles of contractual freedom and equality from which those obligations derived were still substantially constrained by the pre-established and non-negotiable purposes of a given institution. Most importantly, political argument did not presuppose a clear distinction between public and private spheres. This means in the German case that the history of women's subordination, i.e. the original formulation of sexual right, need not be retrieved from the margins of the narrative that established the legitimacy of political authority.[18] It is woven into, and visible in, the main threads of this story. The polygamy debate, to use a modern phrase, records an argument about sexual politics. It highlights the political element in the articulation of sexual difference; and it identifies the beliefs and interests that shape the very meaning of the 'political'.

The legal languages which German natural law inherited from the past bear, finally, on a third distinction. In the texts under discussion here the *societas conjugalis* is placed in a terrain of its own. The rights and obligations of marriage are not absorbed into the wider nexus of family and household relations.[19] Natural law distinguished — as modern political theorists often do not — between a husband's power over his wife and the instances of paternal right. The habit of collapsing the two categories of right in the concept of 'patriarchy' is, of course, not unrelated to the ambiguous status of the term itself.[20] It will in the following be used exclusively to refer to gender relations as defined by the normative principles and specific institutional forms of marriage.

[17] cf. 'Ehe', *Die Religion in Geschichte und Gegenwart*, Vol. II (Tübingen, 1958), cols. 318–34. S. Buchholz, *Recht, Religion und Ehe. Orientierungswandel und gelehrte Kontroversen im Übergang vom 17. zum 18. Jahrhundert* (Frankfurt, 1988), Ch. 1.

[18] cf. Pateman, *Sexual Contract*, pp. 4, 18.

[19] cf. C. Pateman, ' "God Hath Ordained to Man a Helper": Hobbes, Patriarchy and Conjugal Right', *British Journal of Political Science*, 19 (1989), pp. 445 ff.

[20] Pateman, *Sexual Contract*, Ch. 2.

The next section of the paper will relate natural law arguments about polygamy to the legacies of Christian modes of thinking about human nature and sexuality. We shall see that the natural lawyers not only inherited the terms of this debate from the medieval theologians, but that in certain important respects — as in the profound ambivalence towards the sexual foundations of the marriage bond — most of them remained firmly within the confines of traditional beliefs. A similar pattern will emerge as we chart the changing meanings of the marriage contract in the transition from sacrament and predetermined status towards an ordinary business transaction. This change, too, reflects both the detachment from older perceptions and their continued impact. The latter is nowhere more strikingly evident than in the attempt to safeguard, in the egalitarian framework of the natural law contract, a legitimate space for the *imperium maritale*, for the traditional right of a husband to rule over his wife. At this decisive point in the argument the asymmetrical standards of moral judgment applied to male and female polygamy will shed light upon the motivations that lay behind this contradictory undertaking. In comparing the reasons that are said to speak for polygyny but against polyandry, we will be able to identify the constitutive features of the *imperium maritale* — as a form of right rooted in the husband's ownership claims to his wife's body. The most difficult task must be to explain why 'modern' natural law reaffirmed a model of proprietory right that still carried vestiges of ancient and medieval marriage laws. There is, I think, no conclusive answer. The reasons most commonly cited claimed political imperatives: they staked the very survival of civil society upon the certainty of biological fatherhood and, by implication, upon absolute guarantees for a wife's sexual fidelity. But, as will be seen by reference to the 'deviant' position of the early Thomasius (who judged and justified both female and male polygamy by the same criteria of formal rationality), any consistent application of natural law principles was bound to expose the tenuous character of the claimed connection.

Contradictions of this kind, however, often contain a subversive dynamic. They may leave some space for alternative answers to a given problem. The conclusion will argue that this is the distinctly 'modern' element in natural law arguments about gender. They did not conceal the fact that when submitted to the test of the *lumen naturale* the hierarchical ordering of sexual difference would stand devoid of legitimation.

Begetting without Sin or Lust

From the very beginnings of Christianity polygamy enveloped the Church in an intractable dilemma.[21] Whether a Muslim converted to the Christian faith should be allowed to keep his several wives; or by which criterion of selection an African

[21] For material used for this section, see the titles cited in no. 5, above. J. Cairncross, *After Polygamy Was Made A Sin. The Social History of Christian Polygamy* (London, 1974). E. Hillman, *Polygamy Reconsidered. African Plural Marriage and the Christian Churches* (New York, 1975). At the 1988 Lambeth Conference of Anglican Bishops a delegate from Africa pleaded for tolerance on the part of the church — on the traditional grounds that, although not desirable, polygamy was not incompatible with the teachings of the Bible: cf. *The Independent*, 28 July, 1988.

tribesman should reduce his domestic retinue to meet the standard of Christian monogamy — such were the staple worries that had confronted missionaries and Church authorities over many centuries. But polygamy also threatened the coherence of religious doctrine from within. For while the teaching of the Gospels enjoined monogamy and the strict observation of mutual fidelity as the only legitimate form of the Christian marriage, it was impossible to erase the plentiful evidence that the God of the Old Testament must, at the very least, have tolerated polygamous practices among the patriarchs. Not only numbers had to be accounted for — from Jacob's four spouses to Solomon's endowment of seven hundred wives (supplemented by a further three hundred concubines). More damaging still was the explicit testimony, quoted by virtually all writers on polygamy, that David had been given numerous and noble wives as a sign of Jehovah's special favour. In order to curb the impact of such examples and to close the door firmly upon the confusing latitude of the divine law, the Church fathers and medieval schoolmen construed an elaborate edifice of justifications. These ranged from simply pleading the case of special divine dispensations granted to particular individuals, to the more general claim that before the advent of Christ's law men of pious heart could with impunity entertain polygamous marriages as merely a natural and innocent device to multiply the numbers of God's chosen people.

The presumption of 'begetting without lust or sin'[22] benefitted not only the Patriarchs. It became the standard formula harnessed in many different circumstances to the defence of polygamy. During the turmoils of the Reformation it was invoked by the millenarian sect of the Anabaptists — in much the same language of a 'divine command to raise up righteous seed to inherit the earth' that would be used three hundred years later by the Mormons in America.[23] The formula entered the arena of high politics in the notorious case of the Count of Hesse who successfully bargained his loyalty to the Protestant cause for Luther's approval of a bigamist marriage. Moreover, at a time when the rulers and administrators of the evolving territorial state measured the well-being of their nations primarily in terms of population growth, the principle of one man's association with several wives recommended itself as an effective arrangement for 'planting citizens'.[24] Thus, when in the last decades of the eighteenth century the first draft for the new Prussian civil code was submitted to the public, more than one respondent suggested official permission of the multiple marriage, both for the common good and for the relief of the married woman![25]

[22] Cairncross, *After Polygamy*, p. 3.

[23] *Ibid.*, p. 166.

[24] F.N. Volkmar, *Philosophie der Ehe* (1794): 'Since marriages are absolutely necessary for planting citizens [*zum Bürgeranbaue*] the number of whom determines the commonweal, the state must take an interest in marriages', quoted in S. Buchholz, *Eherecht zwischen Staat und Kirche. Preussische Reformversuche in den Jahren 1854–1861* (Frankfurt, 1981), p. 11.

[25] cf. Wieacker, *Privatrechtsgeschichte*, p. 330.

Officially, bigamy had been proscribed as a criminal offence in the Holy Roman Empire since 1532 and declared anathema in the Catholic Church since the Council of Trent (1563):

> If anyone says that it is not unlawful for Christians to have several wives at the same time, and that it is not forbidden by any divine law . . . let him be anathema.[26]

But even sanctions of this severe order did little to diminish the popularity of 'polygamy' as a favourite topic of academic dispute and, indeed, a benchmark of enlightened thinking.[27] Towards the end of the seventeenth century the skirmishes between religious orthodoxy (Protestant as well as Catholic) and pro-polygamous free thought escalated into a war of pamphlets accompanied by scandals of book-burning, persecution, excommunication. The repercussions of these events can still be discerned in the argument of Pufendorf who, in order not to be implicated in the charges of heresy, cast his favourable account of polygyny into the form of a fictional dialogue.[28] At the lower end of the doctrinal warfare, the vulgar polygamists and their adversaries expended considerable exegetic ingenuity in order to bend the key testimonials of the Bible in their favour. To recall the most frequently cited example: how many wives could, without offence to God's wisdom and human common sense, be fitted into the command 'And the two shall be one flesh'? Numbers varied but there was, it seemed, no definite upper limit.[29] More subtle distinctions were at stake where the philosophers made use of polygamy to redraw the boundaries between the domains of the divine and the natural law. But on this level, too, the imperative of lustless sex for a good cause supplied the decisive criterion to determine the outer frontiers of the legitimate marriage. Its terrain, according to the prevailing consensus, extended as far as a husband's capacity to beget numerous children within an ordered framework of multiple marriage bonds.

That was the salient point in all these disputes. Church fathers and heretics, millenarians and professors of jurisprudence might have had little else in common, but they shared certain presumptions about the nature of human sexuality and, more specifically, about the moral and political implications of sexual difference. Paradoxically, many of the advocates of polygamy sided firmly with conservative values. They were implacably opposed to divorce and anxious to oppose polygamy to adultery and sexual indulgence.[30] Even the most extreme claims made on behalf of

[26] Quoted in Hillman, *Polygamy Reconsidered*, p. 218.

[27] cf. Buchholz, 'Erunt tres', p. 82.

[28] cf. *Vom Natur- und Völkerrechte*, VI, I, 17–18. Buchholz, 'Erunt tres', pp. 78–91.

[29] The notorious Ochino (1487–1565), a monk turned polygamist, saw no problem with one hundred wives, cf. Cairncross, *After Polygamy*, p. 68. For evidence that popes, bishops and serious scholars devoted their attention to this question, see *ibid.*, pp. 68 f.; Erle, *Ehe im Naturrecht*, p. 171.

[30] For Pufendorf's argument, see p. 242f, below.

'polygamia triumphatrix'[31] were sustained by the commands of an austere sexual morality. Vestiges of Christian asceticism and its profound hostility towards sensual pleasure[32] lingered on even in arguments which, on the level of general principle, contested the very core of the Christian marriage doctrines. According to modern natural law, marriage was a strict obligation incumbent on all human beings.[33] Only impotence, age, invalidity and — a much invoked get-out clause on behalf of the philosopher — the dedication to a life of scholarly pursuits, could absolve men from the duty of contributing their share to the preservation and multiplication of mankind. It is important to understand, however, how closely the imperative of procreation was still aligned with the belief that the good order of civil society was at all times imperiled by unconstrained sexual desire. Like the medieval schoolmen before them, the philosophers of modern natural law engaged in elaborate and truly 'scholastic' exercises of classification in order to separate permissible from illicit sexual acts.[34] The natural law not only ruled out marriage for eunuchs; it weighed no less categorically against a husband's intercourse with his pregnant wife.[35] The *remedium concupiscentiae* of medieval theology which had conceded marriage, albeit on strictly limited conditions, to the weakness of the human flesh, retained its hold over the empire of reason. Whether outside or inside marriage, any surplus of carnal desire over what was strictly necessary for the propagation of offspring counted as a violation of the law of nature and fell under the verdict of fornication.

The rigid asceticism manifest in the debates on polygamy turned with particular severity against the sexual promiscuity of women. Amongst the Anabaptists such cases were punished by death. Most advocates of polygamy did not go to the extremes of religious fanaticism, yet there existed a general consensus that the union between a woman and several husbands was, by the very nature of sexual difference, bound to stray from the narrow path of procreative legitimacy. Women's subordination formed the subplot in the story of polygamy. More pointedly, it supplied the necessary condition upon which its vindication was predicated.

On closer inspection, the whole argument in favour of polygamy turns upon the assertion of men's superior procreative strength when compared with the obvious

[31] A tome of nearly six hundred pages (1682) by another much-maligned and persecuted 'patronus polygamiae', Johann Leyser, erstwhile Lutheran pastor: cf. Buchholz, 'Erunt tres', pp. 77–9.

[32] For a polemical account, see J. Ranke-Heinemann, *Eunuchen für das Himmelreich. Katholische Kirche und Sexualität* (Hamburg, 1988). For a brilliant analysis of early Christian debates on sexuality, equality and the quest for knowledge, see E. Pagels, *Adam, Eve and the Serpent* (London, 1988).

[33] cf. Pufendorf, *Natur- und Völkerrecht*, VI, I, 2–7. Thomasius, *Institutiones*, III, II, 42–6, 138–72. Wolff, *Grundsätze*, III, I, 2, 854–7. For other writers and commentators, see Erle, *Ehe im Naturrecht*, *passim*. A. Dufour, *Le Mariage dans l'École Allemande du Droit Naturel* (Paris, 1971), Part II, *passim*.

[34] Wolff prefaced his secular theory of marriage by nearly twenty lengthy sections intended to trace and proscribe every one of the multifarious forms of *Geilheit* (lust): cf. Wolff, *Vernünftige Gedanken von dem gesellschaftlichen Leben der Menschen und insbesonderheit dem gemeinen Wesen* (Frankfurt and Leipzig, 4th edn., 1736), I, 2, 22–39.

[35] cf. Thomasius, *Institutiones*, III, II,178–99; Wolff, *Vernünftige Gedanken*, I, 2, 22, 27.

limitations of women's reproductive capacities. The natural law, as one critic of Trent put it, stood against the presumption that 'in a woman already pregnant the man-creating seed should be lost which could raise heroes and fill the empty seats of the Eupyrean'.[36] However, what appeared to be an argument about biological difference was shot through with assertions of power. The alleged natural disparity was invariably cast into metaphors of political domination and subordination. Augustine justified the polygamous practices of the Old Testament by reference to the bond that tied a number of slaves to one master.[37] Other writers invoked the relation between a lord and his servants, a sovereign and his subjects. Whatever the image, the implication was the same: a person superior in rank and power might command several inferiors. The reverse was absurd, incompatible with the very nature of sovereign power.[38] What was really at issue then was not a man's merely natural prowess in fathering numerous offspring. It was his 'right' to rule over several wives.

The problem was, however, to establish the legitimacy of such a right. Devout Christians might claim that subordination was a woman's divinely ordained status. Whether they invoked Eve's prime culpability for the Fall or the head-body metaphor of St. Paul's letter to the Ephesians, they could draw on a powerful legacy in Christian thought which committed the married woman to a life-long state of submission.[39] No such justifications were available to those thinkers who had removed any assumption of preordained hierarchy from the premises of legal and political philosophy. Indeed, nowhere was the confrontation between secular natural law and theological doctrine more sharply marked than in the understanding of marriage as a purely 'worldly business',[40] defined by secular purposes and by the formal juridical structure of ordinary contractual undertakings. How then could a husband's personal rule be vindicated in a system that recognized no other justification for authority than contract?

The Marriage Contract: A Property Transaction

That the legitimacy of marriage derived from contract and consent was, of course, not a novel idea. 'Solus consensus facit nuptias' had been the basic assumption in both the Roman and the Canon law. But according to both Catholic and Protestant church doctrine, marriage held the status of a *pactum supra partes*. Endowed with the attributes of a sacrament or divine institution, and unlike commercial transactions, this special kind of contract stood above, and was withdrawn from, the free disposal of the contracting parties. While the decision to enter into marriage was a matter of individual conscience and free will, the terms of of its duration were not.

[36] Giordano Bruno, quoted in Cairncross, *After Polygamy*, p. 73, n.1.

[37] cf. Hillman, *Polygamy Reconsidered*, p. 181.

[38] cf. Cairncross, *After Polygamy*, p. 80; Erle, *Ehe im Naturrecht*, p. 261.

[39] cf. Metz, 'La Femme en Droit Canonique', pp. 72–82.

[40] Thomasius, *Rechtmässige Erörterung der Ehe- und Gewissensfrage* (Halle, 1698), p. 8.

The same strictures of an unalterable status applied to the rights and obligations that defined the positions of husband and wife.[41]

The reformulation of the marriage contract in modern natural law divests the conjugal bond of its sacramental, meta-juridical dimensions. In the eyes of the law, marriage is a contractual exchange of property rights undertaken by two parties of equal standing for the purpose of procreation. It involves a transaction by which each of the parties acquires an entitlement to the use of the other's body:

> Marriage is an association of man and woman... which entails the legal mutual use of their bodies. (Grotius)[42]

> Thus when they enter the state of marriage man and woman promise that they will each grant to the other alone the use of their body. (Wolff)[43]

By placing marriage in the same category as other civil contracts natural law paved the way for the recognition of divorce and the obligatory civil marriage ceremony (both first introduced by the French Revolution).[44] It is but a further implication of the contractual logic that it will remove the constraints of preordained status also from the position of husband and wife. Any arrangements that modify the initial position of equality can derive only from additional contractual commitments:

> There can exist no obligation demanding obedience from a wife before she has by her own consent submitted to the rule of her husband.[45]

Yet, with this proviso in place the great majority of writers from Grotius to Wolff agree on the presumption that the parties will, in fact, choose a regime with the husband 'head and director of all affairs'.[46] Moreover, the concrete incidents of the husband's superior position thus deduced — his rights to the person and property of his wife — are in some important respects indistinguishable from the attributes of the *imperium maritale* as prescribed by the positive laws of this period. Earlier writers tend to emphasize the elements of ownership and physical control inherent in a power that places the woman 'under the eye of the man and under his

[41] cf. D. Schwab, *Grundlagen und Gestalt der staatlichen Ehegesetzgebung in der Neuzeit bis zum Beginn des 19. Jahrhunderts* (Bielefeld, 1967), pp. 17–32.

[42] Quoted in Erle, *Ehe im Naturrecht*, p. 27 (from Grotius's early work).

[43] Wolff, *Grundsätze*, III, I, 2, 858. It should be noted that Kant's much-maligned definition of marriage as a 'union for the life-long, mutual possession of sexual capacities', was in fact a definition common to the whole natural law tradition: cf. Kant, *The Philosophy of Law*, ed. W. Hastie (Edinburgh, 1887), pp. 110 f.

[44] For the influence of natural law doctrines on these developments, see P. Mikat, 'Rechtsgeschichtliche und rechtspolitische Erwägungen zum Zerrüttungsprinzip', *Zeitschrift für das gesamte Familienrecht* (1962), pp. 81–9, 273–81, 497–504; (1963), pp. 65–76. H. Conrad, 'Die Grundlegung der modernen Zivilehe durch die französische Revolution, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (*Germ. Abt.*), 67 (1950), pp. 336–72.

[45] Pufendorf, *Natur- und Völkerrecht*, VI, I, 12.

[46] *Ibid.*, 10.

guardianship'.[47] While Grotius does not go beyond the strictly legal definition of marriage according to which a woman's moral faculty is appropriated by her husband, Pufendorf's account refers in many instances to the informal and mutual obligations owed to friendship and conjugal love. But here, too, we find a prior concern with the tangible conditions of a settled domestic life. In order to safeguard the ends of marriage against shifting residence, 'vagabonding' and disorderly inclinations, a wife has to follow her husband wherever he chooses to take residence; she is not 'to travel across field' or sleep outside the matrimonial home without his permission; above all, she is not to deny him (without good reason) the use of her body.[48] These are, it should be noted, not moral adhortations; they are statements of legal obligation and, on behalf of the husband, of a legal right to control the physical space in which the wife moves.[49] What is most striking in this and many similar accounts is the assumption that women if left to their own devices will take to 'vagabonding', to neglecting their duties and jeopardizing the stability of marriage. The remedy, it seems, must be sought in some equivalent to the Chinese practice — cited by Pufendorf without ostensible signs of disapproval — of binding women's feet so that they cannot walk without pain, 'and thus, instead of shifting about in public, will learn to stay at home'.[50]

In the writings of Wolff and his pupils marriage conforms more closely to the model of an essentially 'equal society' sustained by mutual obligations in most affairs of ordinary life. But the general premise of any contract — that each of the parties may transfer rights to the other — still points towards the presumption that it is the wife who will do so. It never points in the other direction.[51]

What can explain the broad consensus behind the presumption of the wife's voluntary subordination which is claimed not only as a desirable but as the predictable outcome of the contract? What can account for the emphasis that is in many cases placed on the physical confinement of women? It is at this crucial juncture in the argument that the discussion of polygamy can be used to illuminate a set of beliefs and assumptions that form a 'second agenda' in the marriage contract.

The Marriage 'Unequal in Numbers'

The issue of polygamy enters natural law arguments about marriage at a specific point. It follows upon the statement of the general purposes and the juridical nature of the conjugal relation, and it is set up as the test case that will confirm the validity

[47] Grotius, *The Law of War and Peace* (Indianapolis, 1925), Book II, ch. V, VIII, 2.

[48] Pufendorf, *Natur- und Völkerrecht*, VI, I, 10.

[49] Remnants of this obligation remained on the statute books of many European states until after the Second World War.

[50] Pufendorf, *Natur- und Völkerrecht*, VI, I, 10.

[51] Wolff, *Grundsätze*, III, I, 2, 870.

of those general principles.[52] The question is not whether, as a general norm for institutional arrangements, polygamy merits preference over monogamy. That is unequivocally denied by most writers. There is broad agreement that the monogamous marriage conforms more readily to the demands of propriety, decency and domestic tranquillity.[53] What is at issue is a hypothetical question: whether the polygamous union, proscribed by divine and positive law alike, would also violate the conditions of institutional legitimacy issued by the law of nature. The demands of the latter do not go beyond the requirement that such marriages must be conducive to procreation; that they must not disturb the good order of civil society; and that they must meet the formal criteria of a valid contract.

It is not difficult to see why a marriage in which one man is husband to several wives will not incur disfavour in the forum of reason. Since a man is capable of begetting and, in the case of sufficient economic resources, feeding a great number of children, the purpose of procreation will be easily secured. Moreover, as long as there is a chance of 'planting citizens' (i.e. with any one of his wives not yet pregnant) he may with impunity engage in multiple sexual relations without being guilty of mere lust. Without exception, the trump argument in the defence of male polygamy turns on the assured links of paternity. If in the language of the natural lawyers indiscriminate copulation (*gleichgültiger Beischlaf*)[54] is the by-word of social anarchy, order is synonymous with the unquestionable biological nexus between fathers and sons. This nexus, which secures the legitimate passage of property from one generation to the next, forms the most tangible guarantee for the preservation of civil society over time. Male polygamy is not incompatible with these prerequisites of order because — as stated in Pufendorf's letter at the beginning of the paper — a man can be head and ruler of several sub-families. The *imperium maritale* provides him with sufficient power over each of his wives to ensure that he has exclusive access to her body. There can thus be no doubt that he will be the father of all the children born in the polygamous marriage set-up.

In stressing the net gain that will accrue to procreation and guaranteed family lineages the defence of polygyny has so far largely reiterated conventional views. What holds the argument together and secures the polygamous marriage against disorder is the presumption of marital power. Power, however, cannot simply be

[52] For this section, see Grotius, *War and Peace*, II, V, IX. Pufendorf, *Natur- und Völkerrecht*, VI, I, 15–19. Thomasius, *Institutiones*, III, II, 200–13. For extensive reference to major writers and commentators, see Dufour, *Mariage*, Part II, *passim*. Erle, *Ehe im Naturrecht*, *passim* (summary of debates on polygamy, pp. 259–63).

[53] In the Scottish Enlightenment, this becomes the dominant theme in a new perspective on polygamy. Under the influence of Montesquieu, the interest in polygamy focuses on cultural diversity, on the contrast between primitive and civilized society and on the relationship between forms of marriage and types of government. Polygamy — the domestic slavery of women — is associated with despotism and criticized mainly for the 'wretched condition of the female part of the family' (Adam Smith). Cf. Montesquieu, *Spirit of the Laws*, Vol. I, book XVI. Adam Smith, *Lectures on Jurisprudence*, ed. R.L. Meek, D.D. Raphael, P.G. Stein (Indianapolis, 1982), pp. 150–61. David Hume, 'Of Polygamy and Divorces', in *Essays Moral, Political and Literary*, ed. E.F. Miller (Indianapolis, 1985), pp. 181–90.

[54] Wolff, *Grundsätze*, III, I, 2, 854.

inferred from legal convention, it has to be seen to result from mutual agreement. The legitimacy of polygamy will thus crucially depend on whether it can satisfy the imperative of mutual conjugal fidelity stipulated in the marriage contract. This demand sustained the uncompromising stance of the church and the proscription of polygamy as a form of adultery. As we have seen, the mutual promise of the 'conjugal debt' — the obligation of sexual availability — forms also the core of the natural law contract. To vindicate polygyny calls for an argument that will exculpate it from the charge of adultery, by demonstrating that it does not entail a breach of contract. According to the divine law, Pufendorf readily admits, the obligation to abstain from adulterous acts does not fall only on the wife: 'In so far as the situation of both spouses is taken into account, the polygamous husband would be guilty of adultery.'[55] To circumvent this conclusion he attempts to show that the logic of the contract does not rule out the commitment to obligations of different kind and range and, furthermore, that women can be presumed to consent to an uneven trade in fidelity.

The positions taken by defenders and opponents of polygyny in Pufendorf's fictional dialogue are likely to confound familiar preconceptions. We tend to associate modern social contract theories with the ascendancy of egalitarian, universalist principles over 'medieval' ideas of hierarchical order. Yet, in the arena of this dispute about sexual right, it is the party of Christian orthodoxy which repeatedly affirms the basic equality of women and men. Polygamy stands condemned because it violates the strict reciprocity of conjugal obligations; because it denies that the marriage contract gives to each of the parties the same, exclusive right to the other's body. Without overtly rejecting this doctrine, Pufendorf's 'polygamist' invokes the adultery laws of the Old Testament which, like the prescriptions of the Roman law and the customs of many ancient societies, are derived from altogether different premises.[56] According to the principles of ancient law a man can commit adultery — i.e. a punishable offence — only with the wife of another man. Only a husband has the *ius thori*, the right to the inviolability of the matrimonial bed; and only he counts as the injured party in cases of adultery. A wife, by contrast, can never suffer an injustice from her husband's unfaithfulness since her claims on him do not have the status of a right. The implication for the argument is clear: a polygamous husband is, by definition, incapable of violating the obligation of fidelity.

It must be stressed that in harnessing these traditions to his case Pufendorf does not intend to license male adultery or sexual permissiveness. He cites them for the one and only reason of freeing moral judgment from the constraints of theology. To prove the legitimacy of polygamy is to demonstrate that marriage and, by further implication, the nature of all rights and obligations can be explained without recourse to the authority of religion. However, the foray into enemy territory challenges a position which upholds the equal rights of wife and husband; and to refer to the adultery laws of the Old Testament is to invoke principles according to which wives

[55] Pufendorf, *Natur- und Völkerrecht*, VI, I, 18.

[56] cf. 'Ehebruch', *Reallexikon für Antike und Christentum*, Vol. IV (Stuttgart, 1959), cols. 666–76. 'Ehebruch', *Allgemeine Encyklopädie der Wissenschaften und Künste*, ed. J.S. Ersch and J.G. Gruber, Vol. 31 (Leipzig 1818) pp. 394–403.

are not full legal agents. The move beyond the boundaries of theological doctrine characteristically relies on assertions of natural difference. They enable the advocate of polygyny to reformulate the 'conjugal debt' in the following way: both husband and wife have a justified claim on the services of the other. But this does not imply that 'a man is able or *obliged* to render this duty to one wife only'.[57] No similar claim is made on behalf of the wife. If, as seems to be the case here, the extent of a moral obligation is derived from a corresponding natural disposition it is difficult to see why a woman's natural sexual capacities should not equally entitle her to enter into relationships with more than one husband.

The imbalance in the procedure of reasoning becomes still more transparent where the argument addresses the charge that only fear of superior force could bring a woman to 'agree' to the injustice of a polygamous marriage settlement (a charge that might come straight out of a contemporary feminist text but which is here, again, brought by the traditional moralist).[58] On what assumptions, then, can a woman's consent be stipulated? Why should it be reasonable for her to accept an arrangement whereby she would have less than exclusive demands on her husband's fidelity and, yet, be herself under an absolute obligation of faithfulness? The postulate of natural equality, Pufendorf argues, and the validity of contractual procedures do not demand that mutual obligations should always consist in strictly equal or uniform commitments. Otherwise the law of nature would stand against any social order which 'assigns some individuals to positions of rule and others to conditions of obedience' — a patently absurd proposition.[59] He does concede that a wife may exact an explicit commitment that would rule out her husband's simultaneous union with other women. But unless she does so she has no good reasons to complain. In countries where polygyny is the customary practice women's tacit complicity can be presumed:

> It would be as unreasonable to complain about the condition of women in Asia as to lament about the fate of our peasants and artisans because they are less well off than the men of noble birth.[60]

We have charted Pufendorf's defence of polygamy, which was to be reiterated by countless commentators, in some detail in order to isolate the specifically 'patriarchal' assumptions and constraints in natural law reasoning. As the examples quoted above suggest, women are not the only group to fare badly in the procedures of contractual legitimation. Historians have often remarked that German natural law before Kant does not turn the principle of natural rights against the hierarchical institutions of a still semi-feudal society. In relation to prevailing legal custom, the presumption of natural equality may primarily serve the purpose of justifying a

[57] Pufendorf, *Natur- und Völkerrecht*, VI, I, 18 (my emphasis).

[58] *Ibid.*

[59] *Ibid.*

[60] *Ibid.*

subsequent renunciation of rights.[61] In this respect, marriage would not differ from other traditional forms of private *Herrschaft* incorporated into the justificatory frame of natural law deductions, such as serfdom and the power of masters over domestic servants.

There are, however, certain postulates that natural law cannot surrender to the judgment of convention. On the level of abstract argument at least, it cannot renege on the principle of men's and women's equal moral agency and equal contractual capacity. Whether this claim has any purchase beyond its usefulness as a weapon against orthodox theology will depend on the symmetrical casting of the initial question: 'We now have to investigate whether according to the law of nature . . . the marriage unequal in numbers is permitted. There are, however, two forms of marriage of this kind.'[62] *Could*, as a matter of hypothetical speculation, a woman contract a legitimate marriage with several husbands? As we shall see, that question does not even arise.[63]

To begin with a general observation: the very fact that polyandry was discussed at all must count as evidence of how far natural-law thinking had rid itself of traditional taboos, for previously female polygamy had been regarded as too monstrous a fiction to merit attention. In proclaiming its ban on polygamy the Council of Trent had not even mentioned it.[64] Yet, while the vindication of male polygamy collided head-on with the teachings of the church, the latter had little to fear from the philosophers' judgment on polyandry. It was near-unanimously condemned as an outrage to nature, reason and morality alike:

> No legitimate end can possibly be ascribed to this union which is entered into for the sole aim of pleasure, which hinders the propagation of the human race and compromises the certainty of fatherhood. It is abhorrent in every respect to the rational and sociable nature of man and presupposes the worst corruption of morals.[65]

It is not difficult to spot instances of bias in this standard catalogue of charges levelled against polyandry. But the core of discriminatory reasoning must be sought in the basic asymmetry of the standards of judgment that are applied to the two forms of polygamy. Polyandry not only fails the tests of legitimacy that polygyny is said to pass, it also meets with objections for which there is no equivalent on the other side.

[61] cf. D. Klippel, *Politische Freiheit und Freiheitsrechte im deutschen Naturrecht des 18. Jahrhunderts* (Paderborn, 1976), pp. 31–47. E. Hellmuth, *Naturrechtsphilosophie und bürokratischer Werthorizont. Studien zur preussischen Geistes- und Sozialgeschichte des 18. Jahrhunderts* (Göttingen, 1985), pp. 50–88.

[62] Pufendorf, *Natur- und Völkerrecht*, VI, I, 15.

[63] The exception is Thomasius, see below, p.247f.

[64] cf. Buchholz, 'Erunt tres', p. 88.

[65] Titius (commentator of Pufendorf), quoted in Dufour, *Mariage*, p. 264. For the standard list of prevailing arguments against polyandry, see Erle, *Ehe im Naturrecht*, pp. 260 f.

How, for example, would one reverse the claim that the polygamous woman is indistinguishable from a whore?[66] Moreover, the whole tone of the two accounts betrays a remarkable difference between detached analysis, on the one hand, and a high pitch of hysteria, on the other: 'disgraceful fornication'; 'bestial lust'; 'a practice of savage brutes' — these are the recurrent epithets attached to female polygamy.[67]

The reasons offered to sustain such claims typically fuse and confuse allegedly immutable 'facts' of reproductive biology with normative principles of any variety. Scientific statements, folklore, moral beliefs and appeals to the public interest are joined together in a tangled web of reprobation.[68] Objections to polyandry may endorse the 'fact' that 'one man per year' suffices to ensure frequent pregnancy and to satisfy the purpose of procreation, with the clear connotation that any surplus husbands serve only to gratify a woman's animal lust. Or, they may invoke the baneful consequences of *superinfoetatio*, i.e. of warfare and mutual destruction of successive foetuses in the mother's womb. In this respect, natural law arguments merely reiterate prevailing beliefs about the strange anatomy of women's bodies.[69] However, frequent allusions to the 'horror of nature' — the mixture of the semen of different men in the body of the polygamous woman — highlight the apprehensions that really lie behind, and lend moral significance to, such genetic speculations: the identity of each individual husband is 'lost' in the body of the polygamous woman. But we need only remember that, in the reverse case of polygyny, sexual pluralism carries no comparable stigma in order to see that the whole issue has little to do with anatomy and everything to do with threatened rights of property. Upright men, Pufendorf argues, want to keep their wives for themselves and rightly consider it improper that 'a vessel already loaded should take on further and alien freight'.[70] Male polygamy, we must conclude, grants to a man exclusive rights to the body of each of his wives. Under conditions of polyandry, exclusive possession is reduced, as it were, to shared ownership — and, of course, to less than absolute proprietory claims on any offspring.

'Who could in such confusion still know what is his own?'[71] This is the salient point and the distinctly political core in the indictment of polyandry. Virtually all writers are agreed on the catastrophic effects of uncertain paternity upon the moral fabric of civil society, and in this context, too, the account of polygamy contains within it the story of adultery. Both stories converge in a chain of property violations which affect a particular man's rightful claims to his wife's body, at one end of the spectrum, and society's claims to the continuous reproduction of its order, at the

[66] cf. Erle, *Ehe im Naturrecht*, p. 261.

[67] cf. Pufendorf, *Natur- und Völkerrecht*, VI, I, 15; Dufour, *Mariage*, p. 262.

[68] cf. Dufour, *Mariage*, p. 262; Erle, *Ehe im Naturrecht*, p. 196. A list of these and other standard charges can be found in Thomasius's defence of polyandry: cf. *De Crimine Bigamiae* (Halle, 1721), pp. 25–7.

[69] cf. N. Zemon Davis, *Society and Culture in Early Modern France* (Oxford, 1967), pp. 88 f., 124–7.

[70] Pufendorf, *Natur- und Völkerrecht*, VI, I, 21.

[71] *Ibid.*, 15.

other. Like a wife's adultery, female polygamy involves the 'disgraceful substitution of bastards' for a man's legitimate children.[72] In obliterating the traces of biological fatherhood, it destroys the property-chain between fathers and sons and, with it, the natural basis of any enduring nexus of familial and social obligations. Perpetual strife is said to be the inevitable fate of a society where property cannot be attached to legitimate heirs and where, consequently, every citizen could say of everything 'that is mine'.[73] Even apart from its calamitous consequences, a woman's union with several husbands stands by its very nature against the claims of a legitimate power. It fragments the attributes of unity and indivisibility that pertain to the *imperium maritale*. Here, too, the case against polyandry but reflects the prevailing understanding of a wife's adultery — as an act of rebellion against her ruler. Rousseau will speak of 'treason' in this respect, Montesquieu of women's illicit escape from the 'state of their natural dependence'; Pothier, the eminent French jurist of the eighteenth century, defines adultery as a breach of obligation by that person who has no 'dominium' over her body.[74] In the last instance, polyandry wages war with human nature itself. It transgresses the divide that, according to Grotius and Pufendorf, separates marriage amongst humans from mere animal copulation: the vow of fidelity 'by which the woman binds herself to the man'.[75] Later writers may distance themselves from so blunt an assertion of unilateral obligation, but the incommensurate, i.e. uniquely political, significance of women's fidelity remains the dominant motif in the case against polyandry and, similarly, the dominant reason for the double standard of adultery: 'The Romans made regulations amongst themselves to preserve the morals of their women; they were *political* institutions.'[76]

Open Spaces in Patriarchal Reasoning

In the cautious approval of polygyny natural law successfully vindicates the independence of the *recta ratio* from the encumbrances of religious dogma and moral convention. With regard to polyandry, in contrast, the old prohibitions hold out intact. But neither the insistence on the political meanings of sexual difference nor the visions of social breakdown harnessed to the imperative of certain paternity can conceal the fact that the husband's proprietory power over the wife's body is placed in a vacuum of legitimacy. One might perhaps argue that *if* natural law takes such imperatives as given — *if* it sees in the patrilineal descent of property, in the unquestionable legitimacy of offspring and the guaranteed fidelity of women the indispensable conditions of any social order — then the different judgment of male and female polygamy is only consistent. But it is precisely the axiomatic nature of

[72] *Ibid.*, 18.

[73] *Ibid.*, 15.

[74] cf. Rousseau, *Emile: or On Education* (New York, 1969); Montesquieu, *Spirit of the Laws*, II, p. 65; Pothier, *Traité du Contrat du Mariage* (Paris, 1772), Vol. II, pp. 122 f.

[75] Grotius, *War and Peace*, III, V, VIII, 2; Pufendorf, *Natur- und Völkerrecht*, VI, I, 15.

[76] Montesquieu, *Spirit of the Laws*, II, pp. 64 f. (my emphasis).

these assumptions that is problematic. It remains to be shown that their precarious, extra-territorial status in the argument emerges from the texts themselves and that these contain open spaces for telling a different story.

That philosophical judgment does not admit of a different treatment of female and male polygamy is convincingly argued in Thomasius's *De Crimine Bigamiae* (1685): 'Bigamy of either kind does not conflict with natural law nor natural equity nor right reason.'[77] This judgment contains the most radical implications that could be derived from the epistemological core of natural law principles. Thomasius 'talks about polyandry but he means the autonomy of the natural law'.[78] For polyandry differs from polygyny in that its defender can neither call upon the authoritative heritage of sacred texts nor on copius evidence drawn from the customs of societies outside Europe, nor even on the concurring views of his fellow philosophers. Thomasius is able to vindicate female polygamy because he upholds the categorical distinction between the different types of knowledge that pertain to the *ius divinum positivum*, to the laws of the secular sovereign and to the pure law of nature. If the latter deduces its judgments from no other principles than those related to the rational and sociable nature of human beings, polyandry, too, will be seen to conform to its imperatives. All that needs to be proved is that the marriage between a woman and several men does not necessarily frustrate the primary end of procreation or the tranquillity of the social order.[79] On this level of abstraction, the 'facts' of reproductive biology and the disorders associated with women's bodies stand exposed for what they are — mere opinions rooted in to habitual ways of thinking. Nor can, according to Thomasius, the *imperium maritale* claim unfailing authority from the general premises of contractual reasoning. For considered merely by its formal attributes, the contract can accommodate other and equally legitimate options: a husband might not stipulate this power or, indeed, renounce his rights.[80]

The cutting edge of the pure law of nature is turned with similar efficacy against the bedrock of certain paternity. It may be, as Thomasius concedes, a quest affirmed by the universal consensus of common opinion. But it cannot claim validity in the realm of first principles. Again, from a philosophical vantage-point detached from any particular conventions, polyandry as such need not lack structures of order. Decisions about paternity could be left to a judge, or children might be claimed by that husband who had first access to the mother, or the latter herself could designate the father. Finally, a disarmingly simple solution to the nightmare of uncertainty (that continued to haunt political philosophers for a long time to come):

> All husbands could care for, and nourish, all the sons derived from this association as common property — with equal love.[81]

[77] Thomasius, *De Crimine Bigamiae* (Halle, edn. of 1721), p. 23.

[78] Buchholz, 'Erunt tres', p. 89.

[79] Thomasius, *De Crimine Bigamiae*, p. 26.

[80] *Ibid.*, p. 32.

[81] *Ibid.*, p. 29.

Thomasius's later reworking of his system of natural law in the *Fundamenta Juris Naturae et Gentium* (1705) indicates a significant revision of his earlier views.[82] He held on to the claim that judged by the pure principles of natural reason, i.e. solely by the demands of justice, polyandry could not be condemned as illegitimate. To the extent, however, that he now conceded equal weight to the demands of social utility and propriety (to the *honestum* and *decorum*) he followed the judgment of Pufendorf and his school. He not only reiterated their verdict against female polygamy, he also affirmed a wife's unilateral promise of sexual fidelity and, similarly, her special obligations of subordination and obedience under the *imperium maritale*. There has been considerable disagreement as to how we should evaluate this change of perspective. Does it epitomize the failure of philosophical intentions that aimed to purge the dictates of reason of any admixture of conventional morality?[83] Or can, despite the dissonances between his earlier and later works, Thomasius's emphasis on the equality of the sexes under the strict natural law be understood as 'une première rupture dans l'histoire des idées et des moeurs' which had taken the natural pre-eminence of man for granted?[84] The difficulty of locating Thomasius's position between the two poles of radical deviance and recantation only casts into sharper relief what can be observed in most natural law arguments of this time. There is an unresolved tension between, on the one hand, an epistemological radicalism that is played out in the abstract setting of hypothetical questions and, on the other, the need to accommodate conventional beliefs and practices in the account of social morality. While in the first domain natural reason can endorse the abstract equality of women and men, it will, in the second, defer to the prevailing opinions about sexual difference and to their institutional expression in the positive law.

In our context it is important not to overlook the links that connect Thomasius's 'radicalism' with the common terrain of natural law intentions. His vindication of polyandry cites literally the same evidence that also appears in the texts of its most outspoken opponents: the testimony of ancient historians, the legacy of Stoic philosophy and the scant examples of non-European societies where marriages of this kind are said to exist. In Pufendorf's text such examples speak, as it were, their own language and the latter does not accord with the main thrust of his case against female polygamy. Without exception, the quoted cases of polyandry testify to ordered patterns of family life and property transmission, under conditions where 'all are brothers to all';[85] and yet: 'It is, however, certain that all this goes against the law of nature'.[86] Similar discontinuities between normative statements and a trail of potentially subversive evidence surface in many of our texts. They reflect the characteristic

[82] Thomasius, *Fundamenta Juris Naturae et Gentium* (Halle, 1705), III, ii, 35 f. Erle, *Ehe im Naturrecht*, p. 232.

[83] cf. H. Rinkens, *Die Ehe und die Auffassung von der Natur des Menschen bei Hugo Grotius, Samuel Pufendorf und Christian Thomasius* (Frankfurt, 1971), pp. 89–99. Buchholz, 'Erunt tres', pp. 87–91.

[84] cf. Dufour, *Mariage*, pp. 335 f.

[85] Pufendorf, *Natur- und Völkerrecht*, VI, I, 15.

[86] *Ibid.*

strategy of this natural law discourse which argues from abstract premises and, at the same time, cites copiously and indiscriminately the whole array of opinions and examples that can be found in the authoritative sources of the past. Thus, in references intended to embrace the universal experience of mankind, womankind may occasionally get a hearing too. A telling example is the topos of the Amazon — the mythical image of the independent woman in which the common perceptions of gender are turned upside down.[87] The Amazon keeps open a space, legendary though it may be, for women to conclude the marriage contract on the same conditions of autonomous choice as men, or even from a position of superior strength. True, cases like this are quoted only to be dismissed as 'irregular marriages',[88] but the counter-image causes sufficient disruption to indicate, at the very least, that the power of men over women cannot claim the authority of universal reason.

We might, finally, remember how sharply the features of unequal right are drawn in the polygamy debate. There is little ambiguity as to the nature of the interests which generate the need for women's subordination. The standard formula deployed by every writer against polyandry is the *certam sibi et suam prolem quaerere*: the one and only end for which men enter into marriage is the desire to acquire children unquestionably their own. A man, that is, 'wants to beget children for himself, not for the woman'.[89] According to the natural lawyers, it is the security of this expectation which alone will enlist the exertions of individual men for the permanent interests of civil society. Control over the links of succession is a necessary condition if men are to consider their family as 'a kind of property' in which they might perpetuate their power and 'see themselves insensibly advancing towards a kind of immortality'.[90] As mothers of sons, women control the vital intersection between private and public interest. The trouble is that this first link might disrupt the whole chain of men's property interests, all the way up to their quest for immortality. Given both the profound distrust of human sexuality and the intrinsically precarious status of biological fatherhood, only men's power over women's bodies will guarantee the presumption 'that every child will be considered the son of the mother's husband'.[91]

In the second half of the eighteenth century polygamy disappeared from legal and political discourse. In the writings of Wolff and his pupils the polygamous marriage is no longer a matter of serious debate.[92] Its demise signals a new understanding of the purposes of marriage and, similarly, of the nature of the conjugal relationship. Emphasis shifts from the biological dimensions of procreation towards the concrete

[87] *Ibid.*, VI, I, 9; VI, II, 5. Cf. also Hobbes, *Leviathan*, Ch. 20. U. Vogel, 'Eve and the Amazon: Conflicting Images of Gender in Modern Natural Law', paper presented at the 'International Symposium on Right, Virtue and Morality', University of Amsterdam, January 1990.

[88] Pufendorf, *Natur- und Völkerrecht*, VI, I, 9.

[89] *Ibid.*, VI, II, 5.

[90] Montesquieu, *Spirit of the Laws*, II, pp. 3, 5.

[91] Pufendorf, *Natur- und Völkerrecht*, VI, I, 10.

[92] cf. Wolff, *Vernünftige Gedanken*, I, II, 41–2. K.A. von Martini, *Lehrbegriff des Naturrechts* (Vienna, 1799), Ch. 25, pp. 706–8.

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responsibilities involved in the long process of rearing and educating children.[93] In this widened conception of marriage, the *imperium maritale* gives way to the *imperium conjugale*. The joint obligations of husband and wife as parents take precedence over those inequalities that stem from sexual difference. This shift does not yet entail the demand for the legal emancipation of the married woman. But although the juridical framework of the husband's superior power remains in place, its effects are mitigated in an argument that refers the concrete arrangements of everyday life to the duties of companionship and mutual assistance. In this instance, too, natural law gives an indication that the relationship between men and women is not irreversibly fixed in a hierarchy of domination and subordination.

Conclusion

What conclusions can we draw from the polygamy debate? How does it bear upon our understanding of the patriarchal history of political theory? Or is this the wrong question to ask? To reconstruct the debate from the perspective of gender is, admittedly, not unproblematic. It could be argued that to read the texts in this way is to mistake the stage-settings for the substance of the play enacted within them. The real drama unfolds in the struggle for *dominium* over the province of knowledge. Marriage is but the pawn tossed into the front line of a wider struggle between the competing claims of theology and secular natural law. Set up as a purely hypothetical scenario and disconnected from any 'real' questions about the institutional order of civil society the polygamy-debate seems to have only one, essentially strategic purpose. It is to free the terrain of moral and political philosophy from the jurisdiction of religious doctrine and to demonstrate its capacity to build the foundations of normative judgment from its own resources. We have seen, however, that the battle that is fought over the province of the marriage law does not remain enclosed within the bounds of a hypothetical model. What sets out as a dispassionate examination of the epistemological foundations of political knowledge turns at many points into an argument that affirms the traditional hierarchical ordering of conjugal right and, indeed, supplies it with a new lease of legitimacy.

According to some commentators, the detached reflection on polygamy epitomizes the emancipation of secular reasoning from the taboos of medieval theology.[94] Others will cite the ambivalent stance towards monogamy as but the most telling symptom of the fundamental defects of modern rationalism — of its failure to provide unquestionable moral legitimations for the institutional ordering of human life.[95] Both accounts refer to only one side of the story. True, the defence of polygyny liberates men from religious codes of sexual morality, and philosophy from the constraints of theology. But both liberations are predicated on unchanged assumptions about the normative significance of sexual difference. If we turn our attention

[93] cf. Wolff, *Grundsätze*, III, I, 866–9, 888.

[94] cf. Dufour, *Mariage*, p. 375.

[95] cf. Buchholz, 'Erunt tres', pp. 87–91. Schwab, *Grundlagen*, pp. 179 ff.

to the specific forms in which gender structures the premises and language of the polygamy debate, a very different picture will emerge. From this perspective it is difficult to sustain the claim that modern natural law constituted a decisive break with 'pre-modern' modes of thinking.

We might say that one of the main insights to be gained from the polygamy debate relates to the transparently contradictory strategies by which natural law reaffirmed the husband's power over the wife. The latter was submitted to the universal test of contractual legitimacy; yet it preserved residues of a right constituted by powers of ownership and lordship. A right of this nature, on the other hand, could not possibly be extracted from the premise of autonomous legal agency. Natural law neither solved nor concealed these contradictions. It is this dual perspective which defines the novel or 'modern' elements in its reflections on gender. What stood between male and female polygamy was not a universal principle of reason but men's proprietory interests. Natural law arguments claimed that the latter coincided with the common interest of civil society, but the texts themselves give numerous indications that political imperatives could not supply the required legitimation for making sexual difference the basis of special rights and obligations.

Montesquieu's *Spirit of the Laws* portrays the polygamous marriage (i.e. polygyny) as an institution that conforms only to the spirit of despotic government. Inviting his readers to imagine the consequences that would ensue if French women, 'in that full liberty with which they appear among us', were to take the place of their sisters in those despotic nations, he concludes:

> where would be the father of a family who could enjoy a moment's repose? The men would be everywhere suspected, everywhere enemies; the state would be overturned, and the kingdom overflowed with rivers of blood.[96]

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[96] Montesquieu, *Spirit of the Laws*, I, p. 256.