

# PRIMACY OF FACTUALITY<sup>♦</sup>

## Remarks on Kenneth Westphal's "Hegel, Natural Law and Moral Constructivism"

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*Abstract:* I begin my comment on Westphal's study by exploring briefly his refutation of "the arbitrariness thesis," and then focusing on the "*conditio humanae*," i.e. the conditions of life as freedom realized in *common life*. As I understand it, coordination and cooperation among persons are required because employing freedom *in the presence of others* presupposes an act of recognition that acknowledges *a priori* the necessity of universal respect. The right to use and possess things within the institution of property is an illustrative example of this necessity. Justice requires possession not in the form of some equal distribution (which is a matter of contingency) but as a normative requirement *that* "everyone shall have property." One must have property in order to enter the world of inter-subjectivity and become a person. This has important implications for determining how poverty is related to the validity of laws, which depends on the joint legislative will of all persons.

My aim in this short comment is to explore some important and interesting points of Kenneth Westphal's study on Hegel, natural law and moral constructivism. Certainly there are many important points worth exploring further – Ken's text is very rich and condensed – so this comment should be considered a preliminary analysis of that study. Furthermore, Westphal's study could be seen in the same way – as an incentive for further exploring some of the most important aspect of our life and its reality. I begin by offering some critical remarks at the outset, followed by some more constructive and (I hope) substantial analysis by the end.

Westphal duly starts with "a basic distinction in moral theory," and refuting what he calls "the arbitrariness thesis." This he does by showing how Hume's articulation of the rules of justice can be artificial without being arbitrary (§2). The appearance of arbitrariness comes from the intuition that what's subjective must be relative; this I believe to be false (§3): "Subjective" does not imply arbitrariness because "subjective" means *presence of motivation*, i.e. being interested in or caring for

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something, experiencing *its importance*. That need not be at all arbitrary! Subjective and objective are not opposites, and subjective can be objective. For example, autobiographical statements are entirely subjective (*i.e.* they depend on *whose* statement they are) and at the same time objective (*i.e.* they must be either true or false). Especially *criteria* (criteria of evaluation) are not subject to arbitrariness; they, it seems, simply express a specific point of view which is supposed to be stable and in principle permanent – despite the fact that all evaluations also contain an interest in the object evaluated. The subjective status of *criteria* of evaluation does not, as such, render them arbitrary.

The fact that “historically and geographically (regionally, culturally) these various kinds of subjective basic elements vary significantly” (§3) does not, in my opinion have much epistemological impact: those “elements” vary also from one individual to another, or within the same individual over time – “subjective elements” are interests, have motivational aspect (or dimension), they *depend* upon being interested in something (which is more than just conceiving it, or being curious regarding it) – being interested varies in all aspects, and the freedom as the power to make the real difference is producing all possible sorts of variations in the content of interest, which vary as much as our imagination power permits. Still, it is not necessarily arbitrary: Even where they are relative (as the values often are), they may be non-arbitrary.

Another point in this regard is that the presence of motivation, or even the act of making decisions, does not imply the presence of *moral* motivation: Being interested in something *prima facie* is *not* a moral motivation, moral evaluation comes later, at least in logical order. We are not *prima facie* interested in anything just because we are interested that what we do should be morally right (in the sense that we are interested in the consistency of what we are with what makes possible for us to be such, *i.e.* beings who have and exercise reason). We are interested in something because we are attracted by the *possibility* to realize an end we can adopt and attempt to realize, and this is the primordial issue of the origin of motivation: we wish, or desire something and then *decide* to make it real because we are equipped with the capacity or power, the power of freedom, to do so. In the first instance there is no morality there. Of course, it only appears so, as we will encounter resistance by our own reason if so doing is contrary to moral requirements. In such case we must either overcome that resistance (and so do something wrong, which is also within that same power), or we abide by it and resist our motivation. But if there be no such opposition by moral requirements we may proceed without noticing the hidden presence of morality, which functions as a broad colander of permissibility to do what we want to do, *i.e.* if it so happens that we want it. Morality will produce a real motivation only if what we intend and so decide to do is blocked by the “moral colander,” and

that motive will then behave as any other motive within the field of motivations, with a certain competitive power which must be present but which does not guarantee the victory of moral motives over other kind of motives (if they happen to be immoral ones): freedom implies the capacity to chose evil, and even for evil's sake. Freedom is the basis not only of morality but of all agency, including action of violating moral law. Immoral motives are *prima facie* equally free as the moral ones.

In short, the human condition comprises these capacities: 1. *conceiving* (comprising everything that is *possible*); 2. the possibility to be interested in something that has been conceived, which thus becomes the object of desire (it may seem mysterious how something previously conceived merely as possible becomes attractive or repulsive, to say it's because there are *reasons* to pick some possibilities and give them a privileged status appears to be as unsatisfactory as the desires, which are to be formed only after some such picking has occurred, should themselves be motivating reasons for so acting); 3. to set the object of a desire (of interest) as the end to be realized, in a *decision* to attempt to realize it; 4. to produce, *i.e.* attempt to produce, the reality of the set goal as materialized by activity based in (and starting by) decision to set a conceived and desired end as a real end, *i.e.* attempting *to find means* by which that end could be realized. Unlike the first two tenets, the last two are *necessarily within time*, *i.e.* contain the working of freedom which consists in finding and using needed means for producing ends set.

As our human condition involves fallibility, which reflects the temporal character of all actions as events that should occur in real time and make a difference within the world by producing something which otherwise wouldn't be there, with our real and full capacity to decide differently, *i.e.* to not set those ends which we had set (and the possibility that *accidental* chains of independent causes might interfere with acting, perhaps making it ineffective). Such fallibility implies the possibility of failure.

I think this gives the relevance and importance to what Westphal designates as *conditio humanae*, on the next page in the same paragraph, §3. Westphal develops the position of “mutual interference” as the most important *relevant fact* of the *social* life, which is the normal context of life containing needed and necessary conditions of *life as realized freedom*, and freedom can be realized only in *common life* (*i.e.* it would not be real, if perhaps still possible, if there is only one person existing in the world). Here Westphal invokes Hobbes' two “decisive insights,” then adding four others which he ascribes to Rousseau and, in part, to Hobbes and Hume. In the context of common life Hobbes' insights are obviously of crucial importance: (1) unlimited (*individual*) freedom of action undermines anyone's

effective action due to (*unpredictable*) interference, and (2) the *ignorance* of what belongs to whom implies a kind of “total mutual interference.” Yet if freedom is unlimited, there is no way to know what belongs to whom: to “know” here means that freedom is limited to the scope of legitimate use (so that there is a demarcation line between legitimate and illegitimate free action), which is the introduction of use rights as the scheme of functional, limited freedom. Unlimited freedom would make impossible any durable use of means to realize any end by anyone; this robs prospective resources of all instrumental value in any viable scheme for their being used (for the purpose of actualizing the ends to which they are means). However, to be real, a person must exercise freedom in an actual way, which requires using means to realize set ends. “Someone” who never used any means to achieve any goal would be an empty notion: it seems to me that attempting to conceive such a person is attempting to imagine someone who does not exist (which, of course, is impossible).

Westphal’s four additional insights perhaps deserve further exploration, but they seem to me of having unequal footings. (5) seems to be almost as basic as (1) and (2): problems of (mutual) interference “can *only* [italics J. B.] solved by *public*, mutually recognized principles [*i.e.* legitimate criteria – J. B.] of action together with their *institutionalization* [italics J. B.]. (6) then naturally follows as the demarcation line of justification in the process (and institute) of *legitimacy* as the requirement of equality: “that no one can attain or wield the kind of or extent of power or wealth by which s/he can *unilaterally command* [italics J. B.] the decision and action of anyone else.” Legitimacy is discussed in more detail below, but regarding the issue of institutions I have a reservation. Westphal claims that the justification of institutions is the need (or necessity) to “act in accord with our own long-term interests.” But it seems to me that institutions are needed for any common action, not only long-term ones. Long(est)-term interests are perhaps the key, or basis, for the *criterion* of justice, but, for example, permissible actions (which belong to the realm of legitimate freedom) are based in interest of various time spans. The possibility to realize any legitimate interest, not only long-term ones, should be protected by just institutions. Acting “in accord” with long-term interests can be taken, though, as frame within which all action should belong although the set ends might be, *e.g.*, short-term ones (*i.e.* not long-term).

I have another reservation regarding this paragraph, concerning the issue of “population density.” *Mutual interference*, which is the most fundamental issue in the realization of freedom, seems to me to be the matter *independent* from population density. It is the matter of freedom as the power to make real something that would never become such without a decision to make it real. And this

makes the difference between persons and things. Persons differ from things by the act of recognition, which is the matter of recognizing, *i.e.* perceiving, an entity as the necessary object of respect. This implies a normative necessity of cooperation insofar as such cooperation is required by this act of recognition, which is based in respect, *before* its being based in need for coordination. Cooperation is a broader notion than coordination: cooperation is the moral, not only rational, requirement. Of course, population density is important to how much cooperation is needed and in which regards: higher density requires greater cooperation (and especially coordination), for its more developed and comprehensive schemes. But cooperation is not needed only for solving problems of mutual interference in terms of efficiency of acting, it is also requirement of recognition of equals. Recognition comes before any need for cooperation and, of course, coordination.

There is interesting point at the beginning of §4. Noting that (rightful) acquisition, possession, exchange, promise and contract are life's necessities "for us very finite human beings," Westphal takes the position that finitude is the decisive condition for the scheme of all institutions of legitimate freedom. There is an interesting question here, though, which may not be merely scholastic: Is finitude a *condition for* freedom? If not, it would be possible *not only* for us (as finite, temporal and *per definition* fragile beings), but arguably for all free beings that (might) possibly exist; the issue here might be that freedom, as the capacity to set ends and attempt to realize them, must be employed within time (and in space), not only to be conceived, which might imply that finitude is the condition of all practically relevant freedom. We might conceive beings who are not constrained by any limits of time, but the concept of *means* and their use would lose their usual normal meaning. Finitude here might only be that this is condition for *common freedom, i.e.*, freedom of those who are employing the capacity of freedom *in presence of others*. In that case the indicated necessities of life may be a necessary condition for common – mutual, reciprocal – freedom, which is not the natural constraint of time and space at issue here but the constraint, **we encounter in the world in which there are others; the constraint comes then from the interference with the freedom of others and all what follows from the complex net of powers therein, but also from the very fact of the presence of others.**

The fact of multiple individuals implies the need, or necessity, of cooperation (which is more than mere coordination). The principles of cooperation have been given by Rousseau in what Westphal designates as "three Rousseau's basic requirements for any legitimate legislation" (§5). These are:

Legitimate laws must protect and facilitate the material well-being of each citizen,

So that no one becomes dependent upon the arbitrary will of anyone else.

*Ergo*, so that those laws can be recognized by citizens as products of their own will.

These basic principles of justice are contained also in Kant's non-optional and non-arbitrary Universal Principle of Justice: Any action is right which itself, or according to its maxim, can be compatible with the freedom of choice of everyone else according to a universal law (6:230). This is the general frame of legitimacy – such laws are the expression of freedom as “each member within any legitimate society can obey only her or his own will.” Westphal rightly remarks that for Kant this principle, as well as “the principles constitutive of rightful possession are not analytic propositions,” and that “no normative proposition can be demonstrated or justified *merely empirically* [italics J. B.] (§6). Legitimacy overcomes arbitrariness because its constitutive rules are not based in mere facts, “merely empirically,” but are determined *a priori* in the “logic” of “necessities of life” which are not accidental or contingent but lie *a priori* in what are rational conditions of what is rightful. An action is legitimate if it is compatible with the freedom of everyone else according to universal law (Kant's Universal Principle of Justice, as explicated in *The Metaphysic of Morals*, 6:230).

There is however a certain conceptual tension regarding this in §6.1. In addition Westphal says that an action can only be legitimate if sufficient justifying reasons *can* be addressed to *all* concerned (affected) parties ... *etc.* What is the meaning of “sufficient justifying”? Is a different kind of justification needed for an agent (sufficient to create motivation) to perform an action from a justification needed for anyone else to allow that agent to proceed, *i.e.* recognize her action as legitimate? The kind of motivation is cardinally different. In the second case sufficient reasons *can* be *a priori*, independent of the accidental induction from some empirical justification, and it is sufficient that they are *not* affected or concerned in a way which would give them some vetoing right regarding that action. This seems to be important, as equality should be equality in rights not a factual equality, allowing to everyone all possible freedom within the frame of permissibility. Others should have only a vetoing right to the extent of the presence of some justificatory reasons to *prevent* an agent doing what is perceived to be a transgression of the Universal Principle of Justice. They are not allowed to issue any commanding reasons that should be motivational in the equal sense in which the desires, will and plans of an agent are. Legitimate justifying reasons to determine the action of others are not of the same kind, *i.e.* they are not actually empirical, as they *are* in the case of making a decision to do anything by the agent first person.

In §6.2 Westphal introduces the “*sole innate right*,” right to freedom as “independence from the necessitating choice of anyone else – *insofar as* [italics J. B.] this freedom is compatible with the

freedom of everyone else in accord with a [?!] universal law,” which is “the sole, original right due to every human being by virtue of their humanity” (Kant, 6:237–8). This implies innate equality, *i.e.* “the independence from being bound by others to anything more than what one can reciprocally bind them; ... the quality of human being to his own master ... [and the] authorization to do unto others whatever does not diminish what is theirs.” This “insofar as” is *not a condition* in some restrictive sense; it is only an expression of the universality: Reason (*die Vernunft*) is one and the same in all persons (as individualized minds), and this unifiedness, *i.e.* universality of the mind is the basis of the freedom (and for that matter of any will as the capacity to act freely), from which follows that exercising freedom “in accord with universal laws” – without an “a” before “universal”!, there is only one universal mind! – is the proper way, or the nature, of the mind to be what it is supposed to be: as the mind is the basis of personality this “insofar as” is *not* a restriction, but the statement of the sameness of all persons as based in the same (and one) mind. So, there is no paradox, or, as Westphal put it, “direct contravening” the “sole innate right to freedom” in “authorizing us to obligate others to respect our possession, by taking things into possession”: This innate equality is the equality in freedom which is the basis for the existence of freedom (*its ratio essendi*): without such equality freedom would be impossible because the universality would be lost. In this vein we may recall Hobbes’ example of cunning, which is the basis for lying and treachery, as being a part of universality (and virtual infinity) of the mind, and so the capacity present in everyone, *i.e.* anyone who is having the capacity of willing. The equality of freedom is clearly demonstrated here: Even the weakest and stupidest is *equally* strong and smart as the strongest and smartest on only one condition: if he has the *real will* to do what he wishes, the weakest can kill the strongest by using cunning as the means – freedom is the capacity to will, if you have the will, *i.e.* if you dare you can, in principle, to do it! (*Leviathan*, 1.13.1: “For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himself.”) There are no necessary impediments to make it impossible. Therefore, equality is the expression of universality, and universality is the basis of freedom (that we can set whichever aim and end we want to set, if it is possible at all, and *that* possibility does not depend upon whomsoever’s particular will is at stake: the possibilities as such are equally open to all). So freedom is universal or non-existent. In this sense the violation of law does not deserve to be respected although it is performed on the basis of freedom (*i.e.* the capacity to do something which is possible) because it is contrary to the reason and purpose of the existence of freedom, which is the universality (the fact that freedom *can* be misused, or abused, does not mean that this possibility

is a part of its essence). Such raw freedom is not in accord with the reason, and for Hegel it is not real (as reality and reason are the same).

When Westphal says, in §6.3, that Kant's 'Juridical Postulate of Practical Reason', by allowing "taking things into possession," may appear to contravene the "sole right to freedom," this does not (yet) take into account that "Kant's analysis shows that anyone's first acquisition of something does not involve ... unilateral imposition of obligations to others." To say that this involves no paradox means that in principle everything is, *prima facie*, a concern for anyone, but the obligation to respect the will of everyone – the will is the manifestation of the reason! – prohibits interference in someone else's freedom: Kant forbids our caring for someone else's moral "perfection" (though it is our moral duty to care for others' happiness if that is within our capacity: we cannot be merely uninterested in the welfare of others). This is the essence of universality (*i.e.* that Reason is one and the same in all its particular, individual instances); that entitlement to be authorized to obligate others to respect our possession is just an example of the authorization to obligate anyone to respect what can and ought to be respected. This authorization is the other side of the coin in the scheme of duties: by taking a thing that does not belong already to anyone or by doing anything that is not at odds with the equal freedom of all, *i.e.*, whatever under these conditions we do is a subject of necessary respect (or, *vice versa*, of necessary blame, if those conditions are not fulfilled). But the formalism of universality entails that anything that is not blamable is a legitimate candidate for respect. Anything done must be respected if only it be permissible, as it has been done by a person, who must be respected as the seat of autonomy. Actually blaming whatever is impermissible is also an act of respect of the same person, as we participate in the same world in which persons, unlike things, must be respected as such. This protects anyone's freedom and privacy; the protection comes from the moral duty to register that if someone is there s/he must be taken as free agent and has a right to decide to do what s/he wants (if the act is wrong the necessary blame will follow as the attempt to restore what was the right).

So, "insofar" is not the condition but an expression of freedom: equal freedom is what freedom is! As freedom is based in Reason, the real and full freedom of persons is the requirement of Reason. Persons are free or they are not persons, unlike things, including our bodies as things, which are not free. Therefore violation of anyone's freedom is necessarily blameworthy.

So rights to possession postulated in §6.3 are actually rights to be respected as persons (*i.e.* who bear absolute value), who have the right to use things (which bear instrumental value), for the purpose to maintain the life as the frame of the capacity of freedom: possession is the right to use

things, property is the right to delay that usage, *i.e.* overcoming time, in the same vein as deciding, which as such is to overcome the continuity of time by making events of acts (which are attempts to realize an end that, in the moment of setting, does not exist but is only projected in a point in further future, making the discontinuation in the continuum of the time).

I have an incidental remark here, and am inclined to name it “Locke’s error”: possessing is the scheme of extending use of things by persons, and though persons do have bodies as their part, and bodies are things, everything said here entails that persons *cannot* be legitimately possessed or even used. Owning myself implies the possibility of freely using the object owned, *e.g.* selling myself into slavery, or the possibility of being “taken away,” “given,” “returned,” *etc.* This overlapping of concepts of *personality* and *usefulness* would make *recognition* functionally difficult or even impossible! Additionally, the concept of postponing usage, an essential constituent of property, would become arbitrary or redundant.

§6.3 contains another important point, these four “moral-anthropological facts”:

1. “We human beings cannot achieve or obtain any ends *ex nihilo*.”
2. “Our ends ... are complex, temporary extended and ... mutually related.”
3. “We inhabit a globe, the Earth, a spatially finite space.”
4. “In most regions we have long since achieved a population density which disallows our avoiding interaction” (RL, §§ 8, 9, 13, 42).

The first “fact” expresses the transcendental necessity that all experience must be integrated within natural spatio-temporal part of the world, by allowing freedom to have its causal capacity to produce consequences in the natural world (unlike whatever is merely wished, where we *can* “achieve,” or “obtain” anything as it were *ex nihilo*: We can imagine anything conceivable regardless of whether it exists). So, to realize a set end we necessarily need means, to produce that end as a consequence. On the other side, ends, as conceived and possibly wished – but not as of yet willed – can be unrealizable, either factually or in principle; though their conceivability or even the status of being desired objects does not depend upon anything real (so, they can be “obtained” *ex nihilo*). Therefore, “we,” human beings, cannot achieve, *i.e.* realize, ends without means, *i.e.* *ex nihilo*.

The second fact (2.) is part of (1.): freedom entails the actual existence of acts as distinct to mere events, but they, the acts, must be performed in time, not merely conceived extra-temporally. Acts *are* events, although of a special kind: they, and their results, would not exist without a decision to set some end and attempt to realize it (presuming that deciding otherwise was possible), they manifest the causal power of freedom. But the necessary presence of a decision implies the presence

of someone *who* acts; hence what occurs is not merely *happening*, but something occurring on the basis of someone's decision to attempt to realize a set end: there must be a person, a being with personal identity, who, regardless of the fact that everything in time is temporary, lasts long enough to be able to act (so there is need for a kind of "unity of the soul," in a rather Platonic sense). This also implies that our ends are mutually interrelated: they are the aims and ends of the *same* person, or the same community of persons inhabiting the same world, or part of the same social world, *i.e.* they have to be related and ordered, and "belong."

Points (3.) and (4.) are different and in a way both are possibly wrong: we admittedly can leave Earth, but even then the space we live in will be finite and limited. Hence (3.) is in a way also correct and true, although not regarding the Earth as such. But (4.) is, I think, possibly wrong in the stronger sense: the *nature* of interaction does not necessarily depend on the population density – avoiding interaction is never allowed. What is correct is, as Westphal rightly states, that the third and fourth points "entail that we use material resources under condition of relative scarcity, so that one's own action inevitably affect a limit of other's prospects for acting." Relative scarcity is the condition for "need" and "price": whatever is abundant has no price, and won't require effort or work, *i.e.* acting (it will just happen to be there, as we use air in breathing; though we cannot say that we don't "need" air, there is a clear sense in which we can say: we do not *need* to provide air as it is not scarce). This implies nothing regarding importance: something can be important without being an object of need (or being valuable in the sense that it involves a price, or an effort, to obtain), as the example of air shows. So, unlike its nature, *specific articulation* of interaction might be different and possibly depend on population density, but arguably not in any definite way determined or determinable in advance.

Scarcity, which is the condition for something having a value, *i.e.* a price, is also a precondition for the existence of property: if something is abundant, like air for example, there is no point in *possessing* it (although there is a point to *use* it). The same can be said in case of something which is of no use, not usable, or simply never used (for Hegel such unused property would be an empty abstraction, *cf.* *Rph* §61Z). Possession is exclusionary, it changes the normative position of everyone, giving the owner the capacity to exclude all others from using the thing possessed. In an important way acquisition is a real change in the world; it introduces a new fact which didn't exist before. Regarding whatever is abundant, however, there is no need and also no possibility for that.

§7.2 raises an important point regarding maxims as the object of universalization, or, actually, as the pattern of acting. There is an interesting misunderstanding here concerning the relation of

*permissibility* and maxims: Echoing Allison, Westphal says: “According to Kant and to Hegel, any inclination, object or end only become a  *motive* or  *reason* for acting if and when it is incorporated by a person into her maxim by judging that so acting is  *possible, permissible, and worth while,*” [italics J. B.], adding that he designates “an aim, end or object of the will of an individual’ willing a ‘content’ of her will; Hegel speaks of the will’s *Inhalt*” (p. 13).

A maxim  *is really a content of will,* if used as a scheme to actually set an end (it is not otherwise possible to set the end) – which means that a maxim is needed also for desiring or even conceiving of a possible end (but it is not needed for conceiving a fact as such; it is needed only to conceive an  *action*). But in cases of conceiving and desiring, before an end has been set, a maxim is  *not* the content of will, as there is no will at the moment of desiring or conceiving (there is not yet any decision). A maxim refers to freedom as the power to act in accord with the  *representation of* (natural) laws,  *not* directly according to laws of nature,  *i.e.* it refers to an  *act* (accomplished or only desired or merely conceived), and not (simply) to an event. But acts must also be events, not merely conceived,  *i.e.* they must be realized in real time (on the basis of an attempt to realize a decision, which is the act of freedom); only then there is some content of the  *will, i.e.* some  *will.*

The “interesting misunderstanding“ mentioned above refers to the series “ *possible, permissible, and worth while*”: this series is misleading. A maxim does not concern permissibility, which should not be here. Otherwise impermissible actions,  *e.g.* crimes, would be mere events. But impermissible actions are possible and also considered by those who commit them to be worth while; they too are based on reasons, and are performed according to maxims. It must be so to make persons  *responsible* for doing what is impermissible: there is no responsibility for mere events. “ *Willkür,*” Hegel’s term mentioned on the next page, indicates this basic power of choice as independent of any moral constraint (this power has the feature of immediacy but should not be considered as “apparently natural”). This power refers to “indeterminate, unrestricted freedom of any individual to choose and pursue any and every thing whatever,” which includes the capacity to choose evil as such (for its own sake), and, in weighing reasons what to do, has the capacity to choose arbitrary or gratuitously. It is not need-based nor even desire-based power – both needs and desires come without asking, as if they were natural events.  *Willkür* is an independent power not determined by any such limit, which is precisely what the concept of responsibility requires.

Regarding §7.5 I have two comments. Westphal states: “To live or act at all, individual human beings must acquire particular things to serve various needs or purposes, including self-preservation”; Hegel states: “the most fundamental point regarding acquisition and use of things is

that only thus does one first realize one's own freedom, and only thus makes oneself into an actual free will." Westphal then quotes Hegel again: "ownership, as the first *existence* of freedom, is essentially an end as such" (*Rph* §45R).

It seems to me that this needs a clarification, as it should be false if we take it literally: the first existence of freedom is *Willkür*, the power to choose arbitrary (*e.g.* the power to break the law, *i.e.* the power to will anything whatever, anything that is possible to will, *i.e.* for which there are means for its realization). This holds at the factual level. But at the normative level freedom is restricted, it is under control, and in this sense Westphal is right: ownership, or property, is really the first existence of freedom, the right to freely use what one possesses: "In relation to external things what is *rational* is that I possess property ...."

Here we face the most important point, very nicely captured by Westphal in §7.5 [pp. 17-18 of ms]. Regarding property and its possession as an issue of justice, not only because it is an *object of justice* as evaluative criteria, but also, and more importantly, in the sense that possessing is a *requirement* of justice, Westphal states: "In this regard, as a matter of justice it is contingent what or how much I may happen to possess," and quotes Hegel: "As a point of justice, *what* and *how much* I possess is thus a contingency..." (*Rph* §49). What is really important is "*that* someone possesses something, and can possess something, is no contingent matter because it is a rightful condition of one's own freedom" ... "justice requires *only that* [italics J. B.] everyone shall have property" (*Rph* §492). Now we have the most important point: "Property is that in which the person *posits herself in existence* [italics J. B.], so that she is to herself objective; she attaches to herself an object" – and: "The human being must have property, not merely to satisfy needs." The direct purpose of property is to satisfy needs, as human beings are finite beings of needs, but at the same time it is the only way for such a being to become a person, to enter into the world of inter-subjectivity to participate in this kind of reality. This requirement is restricted to the very fact of possessing something, not to any specification of what that is or what is its extent. To exist, a person must possess something – this is a normative condition of its existence in the institutional world based in freedom and recognition (as the limit of valid freedom), and this condition is constitutive: it is not constitutive whatever is the content of property; what is constitutive is the *fact* that possession has been constituted. The specific content (whatever is possessed) may and will determine the articulation and quality of freedom and life, but to exist at all, *i.e.* to be constituted as a person with the right to be recognized as such, it is necessary actually to possess something: only thus does the capacity to freely use things (not merely to enter into the process of some natural event – *e.g.*, to let gravity work by jumping from a cliff)

*show* to oneself and to all others that *you* really and actually exist, that you are there. This is the pure case of primacy of factuality, the actuality of concrete singular with the capacity to be universal. Without something to be articulated (as different, used, something to be used later, *etc.*, *i.e.* things), there would be no actual freedom. Freedom depends on actual existence of both persons and things those persons possess.

This is the starting point to realize those aims and goals which are actually set by free agents, and the quality of life will depend upon accomplishments and their quality: it is not unimportant what we set as our ends and whether we realize them (*Rph* §§124, 126). The quality and also the instrumental value of someone's life thus depends on what is possessed and achieved – though not his or her reality: the reality of personhood, as the seat of freedom, depends upon its constitution by actual establishing one's distinction from the mere things, *i.e.* by using and possessing those things. Unlike ideas, we cannot conceive persons who are not there, in time and space (although we can conceive past or future persons, but again within those frames of time and space).

“Freedom gives itself existence in property” implies that freedom might be non-existent: it might be absent (in slavery), lost (in death; slavery as the normative annihilation or death of personality as such), or it also could be *delegated*, which may lead to establishing a new, collective, identity in which individuals *participate* through *new free* acts: collectives can have decision power, *i.e.* be free agents, if the collective really has an actual power to decide *as one*. As Hobbes (*Leviathan* 1.11.20) notes: “men cannot distinguish, without study and great understanding, between the one action of many men and many actions of one multitude.” In principle there are two forms of individual participation in the new, collective, identity; one is actual participation in decision-making, the other is a consent, an institution which preserves freedom because it excludes mere unilateral command. In both cases *our property* is property in the same sense as *my property* is in individual property. Moreover, such property is also individual property: *our* property is *my* property as well. By participating in an actual collective identity the individual owns what the collective owns; especially so regarding owning all institutions which facilitate free decision-making in common life.

In addition, Hegel adopts from Rousseau and Kant the *independence requirement* – which is constitutive of personal freedom, and must be found in *all social realities* so long as they are free. This may be regarded as the moral requirement to respect the freedom of each and all: what is required is that freedom actually exists, but the content cannot be determined in advance, as this is a matter of free decisions and their consequences, the content is left to the private freedom and effort of those concerned and affected (under the condition of universality, *i.e.* equal freedom of all).

In §9.3 [p. 25] Westphal raises the following question: “How are acquired rights possible?” Well, those rights come from the “sole innate right to freedom.” But at first freedom as such is not a real *right*, or not a subject of right, but the *power* or capacity to make a difference in the world (to make real something which would not exist if a decision has not been made, taking that it could have been not made or made differently). The realm of possibilities here is immense, containing anything realizable, instrumentally, though constrained by the fact of the presence of others who might set a barrier, impediment, or hindrance. It seems that some cooperation, either voluntary or enforced, is necessary for freedom to function as a purely instrumental causal power. This cooperation could take different forms, not necessarily only those which accord with reason: it might be articulated in various forms of enforced obedience (dictatorship, factual or even legalized slavery, various sorts of inequality resulting from different kinds of discrimination, *etc.*); however: only equality of rights satisfies reason. (And since according to Hegel reason and reality match each other, equality in rights is only “real,” *i.e.* if it is actual, *i.e.* if it is factual – otherwise it would be “abstract,” *i.e.* *non-actual*!). Therefore, *rights are the (ultimate) reality of freedom!* They are concrete, secured, guaranteed powers to actualize the content of freedom within the context of all other such powers (as those just mentioned, possibly containing or implying slavery or discrimination). To guarantee that rights function we need *institutions*, as formally established constitutional frame of rights. It seems to be unquestionable that a necessary condition for this is a “development of relevant anthropology,” as Westphal rightly puts in §9.3 [p. 26] of his article. Such anthropology does not come by itself, it needs a help of the process of “training to autonomy” [same page], *i.e.* upbringing and education. This implies the relevance of (factual) knowledge on at least at two levels; first, knowing what is possible, what *can* be willed and done (in the realm of space and time), and second, what really *happens to be desired* (within the scope of the virtually infinite power of conceiving and imagination). These are limits and frames of relevance. At both of these two levels (though especially at the second level), the content is filtered and articulated in more precise terms through *criteria* of values, which are rules of prioritizing desires within what is affordable (or perceived to be such), meaning that there is a *price* that could affordably be paid for the realization of that value.

In §10.1 [p. 28] Westphal says: “Hegel directly adopts Rousseau’s three conditions for any legitimate legislation” (mentioned above, [p. 5]). This is important and worth further exploration. To be direct, it seems to me that first two conditions directly imply the third (recognition). But recognition requires *respect* (without which it would be *empty* and *insincere*). It is the recognition of *the factuality* of the (perceived or presumed) existence of autonomy of those who recognize laws; this

seems to be the only way for the recognition to be actual and fully relevant in practical sense (not to be empty). However, it should not be forgotten that respect is connected with welfare, through the moral duty commanding us to care for the happiness of others if it is within our responsibility and capacity – the duty to help those in need. Disrespecting others' welfare thus violates this moral duty. This is important: it forbids arbitrariness in dealing with others and is fully covered by Rousseau's conditions. No one should depend upon the arbitrary choice of anyone else. For example, firing someone who happens to work for us is just and legitimate if it is not arbitrary, but if arbitrary, it is it is morally wrong and should be legally forbidden. Normatively, everyone is protected by rights. Freedom is universal or non-existent. The non-existence of freedom implies absence of respect, of justification *and* of legitimacy. That's why legitimacy is connected with justice and the reason why established institutions are legitimate only if they are *subject* to the criteria of justice, even if they *function efficiently* (as unjust laws sometime can do, as they did effectively in ancient times). Here we may recall Hegel's critique of "ancient" laws as defective, in comparison with "modern" laws which *must aspire* to be just, to be legitimate and valid. Ancient laws had no such aspiration because of their defective theory of freedom (other persons, *e.g.* children, women, or slaves, could be considered as a property). This precluded universality as the basis for recognition, and recognition to be based upon respect.

On the other side, although Rousseau's conditions (first two) are, as Westphal says on p. 28, "the twin roots of the welfare of any and every person," this is not welfare simply in terms of mere happiness, but includes moral and political integrity: dependence upon others' arbitrary, unilateral choices could be comfortable and pleasant, but would be tantamount to slavery and would nullify the recognition of laws (consent would be defective, as in consent to laws under occupation). In such cases laws cannot be established as legitimate. Welfare and happiness cannot justify legitimacy as they would allow the possibility that what matters could be bought or imposed or compelled (through bribery or blackmail), making autonomy and freedom redundant and irrelevant. Westphal, claiming that "no one's welfare may be secured at the expense of others welfare," is absolutely right in saying "everyone has a *right* to their own welfare *only* [italics J. B.] as a *free subject as such*."

Exactly! Only free subjects can recognize, and if recognition or consent is the condition for legitimacy, it follows that equal freedom is necessary to legitimacy; without equality there cannot be legitimacy. It follows then that *reciprocity* is a necessary consequence: if legitimacy depends upon "everyone's and anyone's" recognition it means that anyone can veto any law – if only she has a right to refuse her consent! If a law is imposed rather than accepted, there would be no difference

between lawful enforcement and violence (*i.e.* there would only be violence, actual or threatened). Laws are the expression of the free will, constituted as legislative will. If Rousseau's second condition is not satisfied the will of the subject is not free. This implies two things: First, that "declaration" is not enough, but, second, a declaration is valid *if not contested*. Recognition requires *actual consent*, but it may be, as actually it is, implicit, presupposed, taken as given. However, the process of explication must be possible through reasons, which means that it must also be possible to refute legitimacy of any law by using the same method.

Here lies the point of difference between justice and selfishness: both are sources of interest in something (not being indifferent to it), *i.e.* sources of motivation which is, in psychological sense, "egoistic" ("mine," "ours"); motivation is first-person, but may be first-person plural. I, we, care for what's mine, ours, including for justice as something as "mine," and "our." I care for my interests, but I also care for justice. If I do not care for justice I do not accept reciprocity and am putting myself outside the universal validity of otherwise legitimate laws: I lose any right to demand respect from others (I lose the right that others must respect me and what's mine). At the level of reason this is shown by the impossibility of giving valid reasons for my position (if I can, my position would be the opposite). The absence of validating reasons for placing myself under the auspices of laws makes me unreal, I become, normatively regarded, a fiction – I am not really free (not able to exist!).

This makes possible the passage to §10.2, and incorporating both the self-interest (private welfare) and the "formal justice" (as something in which individuals as private citizens are interested) into the broader "universal best" of a "concrete spirit," which implies, as Westphal put it, that Hegel argues that no individual can claim or pursue her own particular welfare at the expense of the *commonwealth*. Here Hegel repudiates a "common mistake" that "private justice and private welfare are valid in and for themselves against the state" (*Rph* §126R, end). The state or (in this context) the nation is not an *aggregate*, or a sum (or summation) of individual interests. As an outward expression of the "concrete spirit," the nation is an institutional fact and in that sense it is *not* only some "external" (regulative) normative reality (with only partial and derived actual reality) but it is, institutionally, "internal" (constitutive) actualized freedom of all, not derived from something else (as the set of all or some [majority, the strongest ones, etc.] individual interests). The actuality of the nation itself precedes political decisions (government) which determine contemporaneous life and its articulation. Here issues of poverty and unemployment get (surprisingly) their full meaning, as factors constituting the real welfare of society, which is real only if it gives anyone not merely a

chance to have the property but insures that all persons, to be actualized, are actually able to have *some* property, that no-one will stay outside the body of the common life.

Let me conclude with a short remark regarding the poverty and its importance for the freedom of the collective form of life as a place where freedom resides as an actual source of the legislative power (which cannot exclude anyone from its normative “body” as one from which springs all authority to apply and “enforce” laws). Due care for others in need entails concern and care for the continuous and permanent position of those whom we might have the duty to help. From this follows that *wealth*, if it is to be legitimate and morally justified, must *not depend* upon the poverty of others. There is nothing wrong in wealth as such, so long as this condition is satisfied. Wealth can, as it often does, result by accumulation through time, and accumulation is made possible by the capacity of freedom to overcome time (the next point in time, which natural causality cannot skip) by the power to set ends which are yet to be realized, and at the moment of their setting are not real (at that moment of their setting they are merely projected in the future and still must be actualized, through the effort of planning and keeping control of the process of their realizing – and that is, as a possibility, open to all who have the corresponding will, ambition, access to resources, *etc.*). On the other side, poverty, at some point, makes those who are impoverished into a kind of fiction, empty places where we perceive, and should recognize, persons. However, those persons do not really exist precisely because they no longer have the capacity to exercise their freedom by actual setting ends and exercising the power to find and employ the necessary means to realize those ends. Which ends? Those ends that could have been set and attempted. If so, the distinction between persons and things has been blurred, and *totally* impoverished human beings lack the *chance* to become persons. This implies a condition for defining legitimate or valid wealth: it must not depend upon anyone else’s poverty. If that entails the need to redefine the concept of wealth, this would morally, and also politically and metaphysically, imply the *necessity* of so redefining it. Wealth, as the condition of secured and highly comfortable capacity to use things for whichever ends, must be confined within the limits of legitimacy. Otherwise there is a disguised kind slavery, a state of affairs in which some persons are fictional and cannot participate in the legislative will. This would render the laws of that will invalid.