

WELFARE, RESOURCE OR CAPABILITY  
A CASE OF AFFIRMATIVE ACTIONS IN INDIA\*\*RITABRATA ROY & TRIMAN GOEL<sup>1</sup>1. Introduction

Distributive justice has arguably been one of the most attractive areas of research for the economists and political philosophers since decades.<sup>2</sup> The terms such as 'fairness' and 'equality' seem to have been the most difficult code to crack in the allied discourse platforms.<sup>3</sup> The central question in all the wide range of debates, conducted on this issue has been 'Equality of What?' for the likes of John Rawls, Ronald Dworkin and Amartya Sen.<sup>4</sup> Indeed, the question has generated plethora of responses ranging from "fairness" to equality of 'welfare' and 'resources' and so on,<sup>5</sup> admittedly, the search for the perfect response is still ongoing. However, it was Ronald Dworkin who arguably made a path breaking analysis in his book *Sovereign Virtue* on the issue.<sup>6</sup> He categorically rejected the idea of *equality of welfare* which he thought to be too subjective for being a threshold of equality. Instead coined the idea of equality of resources within which he explored the aspects of responsibility (that is generated from the choices that an individual makes) and sheer bad luck (which he calls the effects of those circumstances that are beyond the control of the individual). This idea was innovative as, resource egalitarians, for the first time ever, started distinguishing between the kinds of luck and the factor of individual responsibility that might flow from the "option" luck while discussing equality in distribution of resources.<sup>7</sup> However, in due course of time, his theory of equality of resources has not been immune from criticisms by others such as Cohen, Michael Otsuka and Amartya Sen. In my view

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<sup>3</sup> Nicholas Rescher, 'Treating Claims Impartially', *Fairness: Theory and Practice of Distributive Justice* (Transaction Publishers 2002).

<sup>4</sup> Amartya Sen, 'Equality of What?' (The Tanner Lecture on Human Values, Stanford University, 22 May 1979) <[http://www.ophi.org.uk/wp-content/uploads/Sen-1979\\_Equality-of-What.pdf](http://www.ophi.org.uk/wp-content/uploads/Sen-1979_Equality-of-What.pdf)> accessed 11 August 2020.

<sup>5</sup> Juan Moreno-Ternero and Roberto Veneziani, 'Social Welfare, Justice and Distribution' (2017) 49 *Social Choice and Welfare* 415.

<sup>6</sup> Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2002).

<sup>7</sup> Richard Arneson, 'Dworkin and Luck Egalitarianism' in Serena Olsaretti (ed), *The Oxford Handbook of Distributive Justice* (Oxford University Press 2018).

each of those criticisms add much flesh to the quest of finding the right model of equality. The core question of this study is to what extent does the provisions of affirmative actions in India pass the egalitarian scheme of Dworkin, Otsuka or Sen? My hypothesis is that, while Dworkin and Otsuka present extremely strong cases for their scheme of egalitarian distributive justice, yet it is Amartya Sen's capability approach that explains the affirmative action schemes under the Indian Constitution. For this research, we have adopted the doctrinal methodology, primarily premising on the scholarly books, academic articles and statutes made available to us by University of Sussex, Library.

For this purpose, in the subsequent sections, I will start by analytically explaining Dworkin's model of equality of resources, alongside addressing various objections to different aspects of the model which have been raised by various critics time and again. Subsequently, I will shift my focus towards an analysis of the affirmative action scheme that is laid down by the equality clauses of the Constitution of India.<sup>8</sup> Thereby, I will argue that such a scheme is rather based on Sen's capability approach and show how Dworkin's resource model might even attract adverse results towards satisfaction of equality in the Indian society. Let us now critically discuss, Dworkin's model of 'Equality of Resources'.

## 2. Dworkin's Equality of Resources

Dworkin strongly objects to the concept of *equality of welfare* as a means to achieve the egalitarian goals of equality, instead he floats the idea of *equality of resources* as an alternative.<sup>9</sup> Dworkin criticizes the theory of equality of welfare on the grounds that people might have different tastes and preferences. Therefore, their level of satisfaction with the quality of welfare received will be directly proportional to their taste and preferences. For example, a person with an expensive taste will not be satisfied with an equal amount of welfare compared to another person with not so expensive taste and preference.<sup>10</sup> Thus, largely due to their differences in tastes, the level of satisfaction could differ from person to person. This variation in Dworkin's view is incompatible with the basic principle of distributive equality.<sup>11</sup>

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<sup>8</sup> Frank de Zwart, 'The Logic of Affirmative Action: Caste, Class and Quotas in India' (2000) 43 *Acta Sociologica* 235.

<sup>9</sup> GA Cohen, 'On the Currency of Egalitarian Justice' (1989) 99 *Ethics* 906, 916.

<sup>10</sup> Ronald Dworkin, 'What Is Equality? Part 2: Equality of Resources' (1981) 10 *Philosophy & Public Affairs* 283.

<sup>11</sup> *ibid.*

### 2.1. Dworkin's imaginary island model

In his book *Sovereign Virtue*, Dworkin imagines an island where survivors of a wrecked ship take shelter. The island is full of resources (primary goods of private nature) which needs to be distributed among the survivors.<sup>12</sup> He coins a test called the envy test and demands that the distribution should take place in such a way that at a point of time the envy test would be satisfied in other words, that after the distribution and redistribution no one would envy others bundle of primary goods.<sup>13</sup>

He also floats the idea of an imaginary auction where all the survivors participate with equal purchasing power (the clamshells in his example) and bid for their desired bundle of goods. It is also to be noted that till this stage of the auction the primary goods to go under the hammer are of external nature.

In this context, Dworkin argues that his *envy test* falls short of satisfaction if the internal characteristics and abilities of each participant is taken into consideration. This is because, with equal share of goods but with indifferent abilities and talents the talented people will make a better outcome leaving the less talented to envy the former.<sup>14</sup>

To mitigate these differences, Dworkin coins the idea of an imaginary insurance scheme which will also be up for auction and people may bid for them being fully aware of the fact that there will be indifference in their talents but being unaware of the fact whether they are the ones who will be in the rung of being the least talented. An important thing that is to be noted is that the insurance will provide compensation for *ex-ante* inabilities and not for the *ex-post* ones.<sup>15</sup> In other words, the insurance scheme is designed to provide compensation for the inabilities which a person may have in the future but not for the inabilities that he actually has prior to the auction.<sup>16</sup>

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<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> Tom Parr, 'How to Identify Disadvantage: Taking the Envy Test Seriously' (2018) 66 *Political Studies* 306.

<sup>15</sup> Dworkin (n 9).

<sup>16</sup> Douglas Bamford, 'The Holistic and Policy-Focused Interpretation of Hypothetical Insurance' (2015) 2 *Moral Philosophy and Politics* 141.

Interestingly, Dworkin differentiates between the kinds of luck that his insurance scheme is to compensate i.e. 'brute luck' and 'option luck'.<sup>17</sup> According to Dworkin, the ill effects of brute luck i.e. those which are beyond anyone's control are to be compensated but not for the option luck because those effects will flow from the kinds of choices a person make. Therefore, he holds people responsible for their choices.<sup>18</sup> In fact, by making the insurance policies available in the auction he gives a chance to the participants to change their brute luck into option luck. Thus, if anyone does not spend on insurance cover for future blindness and ends up being blind due some accident then the individual is not entitled to receive any compensation as they have exercised their option luck not to buy any insurance.<sup>19</sup>

### 3. Challenges to Dworkin's resource model

Though Dworkin's model of equality of resources seems very plausible at the first glance, yet it is also not entirely free from criticisms. In this section I will discuss some of the prominent challenges to the equality of resource model posed by other philosophers.

#### 3.1. Arneson and Cohen on Dworkin ..... (Objections based on the welfare approach)

##### 3.1.1. *Arneson on Dworkin*

Richard Arneson pointed out two issues with Dworkin's resource model. Firstly, it is impossible for the distributive authority to individually and perfectly compensate for each newborn's personal talents to ensure equality of resource. Therefore, the appropriate possibility in that case is rather to distribute equal share of everyone's talent to each other. He notes that Dworkin himself is aware that this distribution scheme would lead to 'slavery of the talented'.<sup>20</sup> Such unfortunate scenario will happen because, in such case, the talented would find the cost of their leisure heavier than the less talented. Arneson suggests that other method, that can be used is to hold people responsible for altering their dreams and ambitions and way of life according their share of resources after the equal distribution of primary resources is done. In contrary to

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<sup>17</sup> Martin E Sandbu, 'On Dworkin's Brute-Luck-Option-Luck Distinction and the Consistency of Brute-Luck Egalitarianism' (2004) 3 Politics, Philosophy & Economics 283.

<sup>18</sup> *ibid.*

<sup>19</sup> Dworkin (n 9).

<sup>20</sup> Richard Arneson, 'Equality and Equal Opportunity for Welfare' (1989) 56 An International Journal for Philosophy in the Analytic Tradition 77.

Dworkin, he points out that sometimes we might have some preferences for which we are rather not responsible.<sup>21</sup>

Therefore, Arneson opines that Dworkin's claims on personal responsibility with respect to one's preferences is not always true because there may be circumstances beyond our control that leads to transforms the preferences of the individual to the present state. Therefore, to hold a person responsible for these preferences is rather unjust.<sup>22</sup>

Here Arneson makes a distinction between *equality of welfare* and *equal opportunity of welfare* and points out it is not the former that may serve as a plausible principle of distributive justice but rather the later.<sup>23</sup> In other words, if we give equal opportunity/means to two persons to satisfy their respective levels of welfare and then by choice someone ends up not satisfying his welfare expectation fully, then such choice does not come in to the way of distributive equality. For example,

If equal opportunity of welfare obtains between Smith and Jones, and Jones subsequently undergoes religious conversion that lowers his welfare prospects, it may be that we will take Jones' conversion either to be a voluntarily chosen act or a prudently negligent act for which he should be held responsible and will not be entitled to any compensation.<sup>24</sup>

Therefore, the *equal opportunity of welfare* model puts forth that, people should have effectively equivalent array of options to satisfy their welfare expectations.<sup>25</sup> Thereafter, each person has to take the responsibility of the choices that they make.

### 3.1.2. Cohen on Dworkin

Though, Gerald Cohen strongly agrees to the model of equal opportunity of welfare yet he opts to refine the concept as 'equal access to advantage'. This is because, he largely believes that such refinement will not only pose a stronger counterclaim to Dworkin but also do away with the shortcomings of Dworkin's proposed equal opportunity of welfare model.<sup>26</sup> In his 'Dual

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<sup>21</sup> *ibid* 79.

<sup>22</sup> *ibid* 79-82.

<sup>23</sup> *ibid*.

<sup>24</sup> *ibid* 85.

<sup>25</sup> *ibid* 85-86.

<sup>26</sup> Cohen (n 8) 916.

Disability Model' Cohen imagines a person whose both legs are paralyzed but even though he is exceptionally good at moving his arms, such movement of his arms causes a lot of pain. In other words, though the person has no difficulty as such in respect to his arms but the cost of exercising his ability in regards to his arms is extremely high. Being aware of the fact that a resource egalitarian would readily be willing to compensate for the man's *lack of resource* to move his hands without any pain in effect would be putting forward an equality of welfare argument as in this case, what the resource egalitarian is concerned with is not the man's lack of resources (as in Cohen's example the man can move his arms better than others) but rather with the welfare deficiency that the man possess.

For it seems not coherently egalitarian to cater only to the difficulty of moving and not independently to the pain which moving occasions. So, there is an irreducible welfare aspect in the case for egalitarian compensation in real-life disability examples.<sup>27</sup>

Therefore, he proposed the 'equal access to advantage' as a viable model of distributive justice. Cohen was largely of the opinion that though Dworkin's model addresses the issue of people's choices and responsibility in obtaining things but rather fails to accommodate the difference in their abilities to obtain.<sup>28</sup> In other words, Cohen's model accommodates both disadvantages in respect of welfare and resources and seek to provide for those disadvantages in both welfare and resources for which people are not responsible; while on the other hand, Dworkin's model only compensate for resource deficiency. According to Cohen, "we should not draw a line between unfortunate resource endowments and unfortunate utility function".<sup>29</sup>

#### 4. Some other objections to Dworkin's Theory

Now, I will critically reflect upon some other scholarly criticisms to the *resource egalitarian theory* of Dworkin. These objections do not necessarily call for a shift towards the welfare scheme. They rather raise important concerns regarding the essential features of the resource egalitarian scheme, such as Dworkin's insurance policies and even questions the authority that Dworkin imaginatively empowers with the right for distribution of the resources. Lastly, I will

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<sup>27</sup> ibid 919.

<sup>28</sup> ibid.

<sup>29</sup> ibid 922.

critically analyse the *capability approach* of Amartya Sen that explains why neither the welfare scheme nor the resource distribution scheme is effective to attain the goals of the distributive justice. Rather we need to move towards a capability-oriented approach for better results. In Section 5, I will argue how all these objections to Dworkin's model poses some practical concerns in terms of implementation and (even if mimicked, as Dworkin calls for) fails to bring effective desired results in a country like India. Let me begin the discourse with a critical analysis of Michael Otsuka's objections to the insurance scheme of Dworkin.

#### *4.1. Otsuka on Dworkin*

Michael Otsuka noted three pre-requisites about Dworkin's observation and opined that every individual will have the opportunity to be insured if all these pre-requisites are met. These are: every individual has the same risk of suffering that harm, every individual has a tentative knowledge about the quantum of the risk and finally every individual has ample opportunity to buy insurance against such harm available in the free market.<sup>30</sup> Otsuka is highly skeptical about Dworkin's shifting of individual liability owing to the choice of not buying the insurance policies to convert 'brute' luck into 'option' luck. According to Otsuka, Dworkin's egalitarian justice scheme is oblivious to some practical situations. Otsuka points out three such possibilities. Firstly, unavailability of an insurance policy for the harm, the individual is anticipating, secondly, under Dworkin's scheme of things, there is no absolute guarantee of full compensation being provided for the suffering and thirdly, even if the previous two conditions are met, the insurance policy itself might be beyond affordability of the individual. Therefore, Otsuka observes that Dworkin's insurance scheme of equal opportunity to insure is going to be conditionally successful only if "reasonably and modestly priced insurance could fully compensate any instance of brute bad luck".<sup>31</sup> Otsuka further opines that if any government desires to adopt Dworkin's scheme then, in addition to the insurance scheme, they have to deprive the able-bodied persons from any impersonal resources and transfer those resources to the severely disabled (brute luck unlucky). Such 'discriminatory' policy of deprivation has to continue till the point is reached when no incapacitate person would prefer any able-bodied person's personal or impersonal bundle of resources. Simultaneously, the government must

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<sup>30</sup> Michael Otsuka, 'Luck, Insurance, and Equality' (2002) 113 *Ethics* 40, 42.

<sup>31</sup> *ibid* 45.

ensure that no able-bodied person would envy the personal or impersonal resources provided to the incapacitated.<sup>32</sup> Therefore, he calls for levelling down through ‘mutual sharing of misery’ rather than Dworkin’s idea of compensation through insurance. Additionally, Otsuka notes that, in some cases one individual’s ‘brute luck’ can be affected by another’s ‘option luck’. Particularly, this phenomenon is common in cases of transfer of fortune as gifts to relatives outside the free market. Therefore, if some parents transfer their large fortune to their children then effectively, the recipient would be starting in an indifferent platform of equality on attaining adulthood.<sup>33</sup> However, discussing the merits of that claim is beyond the purpose of this research. Noteworthy that, Dworkin in a revised commentary on his book, *Sovereign Virtue*, further addressed the aforementioned issue of *expensive insurance policies* which is worth discussing. He contended that in his hypothetical example, he has taken into account actual cost of the insurance market in practical scenarios which includes the profits of the insurance provider as well as other administrative costs that would be included in the price of the insurance policy. According to him these costs are crucial for the sustainability of a healthy insurance market. Additionally, he claims that in his scheme, the insurance agencies need not act as ‘agencies of justice’ and not make profit. Only these insurance providers are supposed to take into consideration the “Moral Hazards” i.e. “the risk that the insured will not take adequate steps to avoid that event, or that they will bring it about themselves, undetected, or that they will successfully feign its occurrence”,<sup>34</sup> while pricing their policies. It is imperative to note that Otsuka’s position of *ex-ante* insurance cover as a route to egalitarian distributive justice has attracted staunch criticism from the scholars such as Martin Sandbu.<sup>35</sup> Sandbu is of the opinion that in some circumstances, *ex-post* insurance has to be also provided to attain those goals. According to Sandbu, Otsuka misunderstands Dworkin, in stating that Dworkin proposed for the insurance to make the blinded policy holder equally satisfied after the accident by fully restoring his position as before. Sandbu suggested that, such a claim may be of interest to the welfare egalitarians but Dworkin is explicitly only concerned with the equalization of “resource stocks as measured by their social opportunity cost, since this better meets the requirement of ambition

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<sup>32</sup> *ibid* 46.

<sup>33</sup> *ibid* 51.

<sup>34</sup> Dworkin (n 5) 108-111.

<sup>35</sup> Andrew Williams and Michael Otsuka, ‘Equality, Ambition and Insurance’ (2004) 78 Proceedings of the Aristotelian Society, Supplementary Volumes 131, 137.

sensitivity".<sup>36</sup> In the next section, I will dwell into a critical discourse of Amartya Sen's capability model of distribution of resources which is rather a shift from the ones discussed above.

#### *4.1.2. Sen's Capability approach*

Amartya Sen criticizes John Rawls and Ronald Dworkin on the ground that both Rawls and Dworkin are somewhat limited in their notion of primary goods equalization. This is primarily because, in Sen's view, both scholars do not take into consideration the 'actual' value of these goods to an individual. The values of these primary goods are only determined depending upon the potentials of the individuals to who the goods are made available. In other words, whether it is the utilitarian model of equality or the resource egalitarian model of equality, both have to depend upon the basic capability equality to achieve their goals.<sup>37</sup> He observation that since human beings are not identical in their capabilities, the conversion of goods to capabilities also differs from individual to individual. Therefore, equality of primary goods need not necessarily be equivalent to equality of basic capabilities.<sup>38</sup> However, Sen caveats his claim by asserting that the application of equality of capability principle should also be culture-specific. In my opinion, such a 'qualified' application of the principle as opposed to the Dworkinian scheme is more viable as it effectively promotes the values of 'equality among equals'.<sup>39</sup>

Elsewhere, Sen argues that,

The "capability set" thus stands for the actual freedom of choice a person has over alternative lives that he or she can lead individual claims are to be assessed not by the resources or primary goods the persons respectively hold, but by the freedoms they actually enjoy to choose between different ways of living that they can have reason to value.<sup>40</sup>

However, this does not imply Sen's intention to negate the principle of equality of resources as he maintains that the primary goods are to be converted into freedoms that are represented by the capabilities of a person. Sen affirms that,

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<sup>36</sup> Sandbu (n 16) 288, 308.

<sup>37</sup> Sen (n 3) 218.

<sup>38</sup> *ibid* 219.

<sup>39</sup> *ibid*.

<sup>40</sup> Amartya Sen, 'Justice: Means versus Freedoms' (1990) 19 *Philosophy and Public Affairs* 111, 114.

Since the conversion of these primary goods and resources into freedom to select a particular life and to achieve may vary from person to person, equality in holdings of primary goods or resources can go hand in hand with serious inequalities in actual freedoms enjoyed by different persons.<sup>41</sup>

Therefore, Sen's capability model is rather a sophisticated version of Dworkin, Otsuka and Sandbu which is mostly focused on increasing the productivity of the resources based upon the capability of the individuals.

In the next section, I will present a critical outline of the affirmative action scheme laid down under various provisions within Part III of the Constitution of India. Subsequently, I will dwell into the analysis of these schemes in the light of the Dworkin-Otsuka and the Sen one.

##### 5. Affirmative action scheme in India

The Indian society has been ridden with the age-old practice of caste stratification since the *Vedic* ages. The evils of such practices are not also unknown to the world. Despite constitutional mandates against such practices, the continuance of such practice in various parts of the country is an ongoing reality.<sup>42</sup> It is however noteworthy that the Indian Constitution provides for some effective measures under Part III, to eradicate such practices. Article 29(2) provides that no citizen shall be denied admission to educational institutions maintained or aided by the state.<sup>43</sup> Furthermore, a new clause (4) was added to Article 15 in the year 1951 (which prohibits discrimination on the grounds of caste sex and religion),<sup>44</sup> providing for enacting any special provisions for the benefit 'socially' and 'economically' backward classes and the 'Scheduled Castes and Scheduled Tribes'.<sup>45</sup> Additionally, the entire affirmative action framework under Articles 14 to 18 provides for protection against various kinds of discriminatory practices,<sup>46</sup> complemented by some affirmative measures towards the marginalized section of the population as enshrined in the Constitution. Over the years these provisions have been transformed vividly, largely by the interpretation of the Honorable judiciary, in their quest make the provisions relevant to the changing needs of the society. On bi-product of such evolution is the principle of

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<sup>41</sup> *ibid* 115.

<sup>42</sup> Mason Olcott, 'The Caste System of India' (1944) 9 *American Sociological Review* 648.

<sup>43</sup> Constitution of India, 1949 Art. 29(2).

<sup>44</sup> *ibid* [Art. 15].

<sup>45</sup> MN Srinivas, 'Caste in Modern India' (1957) 16 *The Journal of Asian Studies* 529, 542.

<sup>46</sup> See n (42) [Art. 14-18].

'Creamy Layer' that is a fascinating creation of the Supreme Court of India, borne out of their interpretational minds. I will discuss about this principle in greater details at the backdrop of Dworkin and Otsuka's model of distributive justice.

It is appropriate now to go back to Dworkin's resource model. In my view, a near perfect manifestation of mimicking the auction and the insurance scheme can be witnessed in the Indian context.

Putting things into perspective, in India after the auction (setting up of the non-discriminatory distributive system) of the primary goods (for e.g. education), the brute luck victims (for e.g. people born in the marginalized castes and tribes) are compensated through insurance policies (constitutionally supported affirmative actions in their favor) to ensure equality with respect to the primary goods.

The problem with this scheme is that, especially in the 21<sup>st</sup> century there are many 'so-called brute luck victims' who have actually not faced any discriminations or atrocities with respect to their caste, sex or religion. However, they end up getting the fruits of this age-old reservation policies in their favor, while people belonging to the 'privileged' group, who might actually be in need of compensation because of their present economic and other disadvantages, are left out of the scheme owing to their disqualification on the birth criterion. Therefore, they will end up envying primary resources of the others. This problem is pointed out by Sandrine Berges in a reply to Thomas Pogge, in support of the capability model.<sup>47</sup>

#### 6. How to resolve this problem?

One of the ways to resolve this problem (within Dworkin's model) is to modify the application of the affirmative action scheme by excluding the 'creamy layer' from the scheme of affirmative action to reduce the effects of the potential inequality and 'reverse discrimination'.<sup>48</sup> The term 'creamy layer' can be referred to those belonging to the marginalized section who have attained a stage of economic and social improvement either at par or more than the privileged category.<sup>49</sup>

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<sup>47</sup> Sandrine Berges, 'Why the Capability Approach Is Justified' (2007) 24 *Journal of Applied Philosophy* 16, 21.

<sup>48</sup> Vani K Borooah, Amaresh Dubey and Sriya Iyer, 'The Effectiveness of Jobs Reservation: Caste, Religion and Economic Status in India' (2007) 38 *Development and Change* 423.

<sup>49</sup> *ibid.*

However, the task of excluding the creamy layer, though not an impossible task is indeed a herculean task for the legislative branch.

Therefore, I would agree to Berges' view that capability approach of Amartya Sen is the best alternative to resolve these problems. Firstly, the capability approach aims at equalizing the 'freedom' of options for individuals, rather than equalizing resources, taking into consideration the individual's diverse capabilities. Therefore, Berges claims that equalizing resources may lead to inequality to access those resources within one household. Moreover, Sen, being aware of the practical problems that can be encountered in a country such as India in applying Dworkin's model, rather call for the resources to be converted into freedoms that is the indicator of one's capabilities. Therefore, the capability approach also arguably accommodates individual welfare, in representing freedoms as 'goods', rather than being oblivion to this aspect as Dworkin.

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