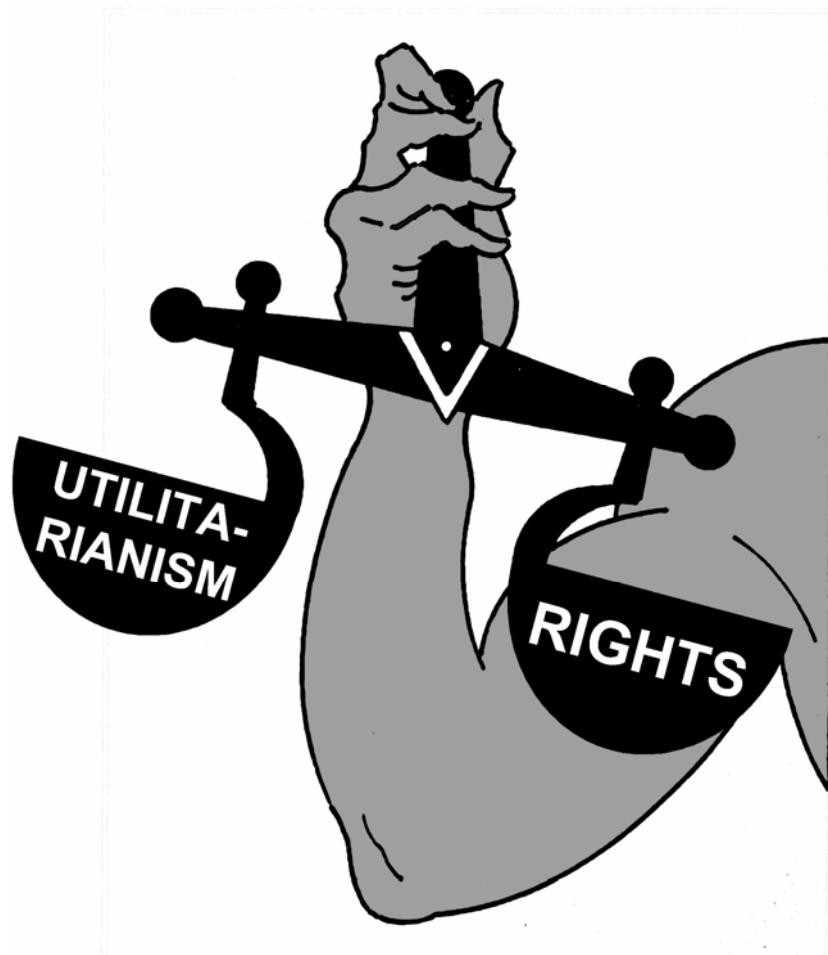


# Dworkin's Conception of Utilitarianism



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## 1. Introduction

In the establishment of his legal theory based on rights, Ronald Dworkin takes a critical approach to legal positivism as well as to utilitarianism. The focus of this paper is on the latter, viz. the manner in which Dworkin criticizes utilitarianism and in what ways he aims at overcoming utilitarian arguments.

Since the notion «utilitarianism» has been used in a vast variety of contexts and meanings, I will first briefly define the ways in which different notions of utilitarianism will be understood throughout this paper. This common vocabulary allows for the elaboration of Dworkin's critical remarks regarding utilitarianism, respectively certain specific forms of it, as well as a brief analysis of the extent to which he himself argues in favour (or at least in the line) of utilitarianism, to the form of and conditions for an acceptable version of it and to the way in which he aims at overcoming utilitarian arguments.

A personal critical remark regarding Dworkin's thoughts and proceedings related to utilitarianism will conclude the paper.

## 2. Different Aspects of Utilitarianism

The general maxim of utilitarianism lies in the *Principle of Utility*, stating that governments should aim to maximise welfare. Different notions of «utilitarianism» elaborate different meanings of what has to be understood as «welfare», and how it can be maximised.

### 2.1 Classical (Psychological) Utilitarianism

The *classical* or *psychological utilitarianism*, as argued for by Jeremy Bentham, defines the principle of utility as calling for «the greatest happiness for the greatest number.»<sup>1</sup> This form of utilitarianism is classical in that sense that all the other forms of utilitarianism in some way relate to it.

### 2.2 Act Utilitarianism

*Act utilitarianism* provides a principle of utility that can be used to morally test specific individual actions:

«Of all the possible actions open to you, perform that action with the greatest tendency to bring about the greatest balance of happiness over misery for mankind as a whole.»<sup>2</sup>

### 2.3 Rule (Institutional) Utilitarianism

*Rule* (or *institutional*)<sup>3</sup> utilitarianism does not directly apply to the justification of specific actions, but rather to the rule requiring that act:

«[A]n act is right if the general acceptance of a rule requiring that act would improve the average welfare of members of the community.»<sup>4</sup>

Acts are therefore dictated by rules, and the principle of utility should be used to select the proper rules.<sup>5</sup>

<sup>1</sup> MURPHY & COLEMAN, 74

<sup>2</sup> MURPHY & COLEMAN, 74f

<sup>3</sup> SARTORIUS, 210

<sup>4</sup> BRANDT, in Castenada, cited according to DWORKIN, Rights, 95

<sup>5</sup> MURPHY & COLEMAN, 106, note 9

## 2.4 Egalitarian Utilitarianism

The egalitarian notion of utilitarianism emphasizes the aspect of *non-specificity of persons*, thus leading to an impression<sup>6</sup> of equality<sup>7</sup> based on the inherent egalitarian premise of utilitarianism, that no person is weighted in the «greatest happiness calculation» («no person to count for more nor less than one»).<sup>8</sup> This form of utilitarianism aims therefore at a maximisation of welfare based on a *number principle*, and does not value welfare as a good in itself.<sup>9</sup>

This aspect, among others, is one of the characteristica considered more closely in sections 5.2 and 6, where Dworkin's own notion of (purified) utilitarianism will be considered.

## 2.5 Corrupted (Unrefined) Utilitarianism

Dworkin ascribes this notion to the form of utilitarianism he criticizes in his works,<sup>10</sup> which he understands as a sense of utilitarianism, that «trades wrongs done to individuals with improvements to general welfare.»<sup>11</sup>

## 2.6 Purified Utilitarianism

Proceeding from the mentioned *corrupted utilitarianism*, Dworkin promotes a form of *purified utilitarianism*, eliminating at least some of the vice inherent to utilitarian arguments (see section 6.2).

## 2.7 Economic Analysis of Law

The Economic Analysis of Law provides for a measurable and therefore practicable approximation of *utility* respectively *welfare maximisation* through *wealth maximisation*:

«Wealth maximization is, to be sure, imperfectly correlated with utility maximization, but the costs – in uncertainty, in protracted litigation, and in error – of using utility as a legal standard support using wealth as a proxy for it.»<sup>12</sup>

## 3. Dworkin's Main Ideas in Approaching Utilitarianism

The general ideas of Dworkin's theory are *interpretation in the «best light»* on the one hand, and the idea of a state's duty to treat citizen's with *equal concern and respect*. The former idea of interpretation will help us to understand Dworkin's idea about utilitarianism, while the latter will be shown to support his effort to overcome the idea of utilitarianism as well as being the foundation of the theory he elaborates in that attempt (see section 7 and 8).

<sup>6</sup> I use the term «impression of equality» here because I reserve the term «equality» for the meaning that Dworkin ascribes to it (see section 5).

<sup>7</sup> GUEST, 231

<sup>8</sup> DWORKIN, Rights, 234

<sup>9</sup> MURPHY & COLEMAN, 234

<sup>10</sup> DWORKIN, Rights, 276ff

<sup>11</sup> GUEST, 64

<sup>12</sup> POSNER, 241

## 4. Interpretation of Existing Conceptions

Dworkin's ideas are based on *interpretative conceptions* rather than on *definition of concepts*.<sup>13</sup> The essential abstract idea of «interpretation» according to Dworkin is making «the best» of something that it can be:

«If, when you make the other side's argument the best it can be, it stands on its own as a very poor argument, then you have given the best argument of all for showing that it is poor.»<sup>14</sup>

Dworkin interprets different aspects of utilitarianism, in order to see it in «its best light», before then criticizing that interpretation itself (see sections 6 & 7).

### 4.1 Act vs. Rule Utilitarianism

The problem generally raised in relation to utilitarianism is the one of *victimization*. By this is meant, that, by strictly act utilitarian arguments, the state could «use» some minority of society to raise the general welfare of the majority, e.g. by committing medical experiments on a certain amount of people in order to find a medicine providing releave for the majority of society. Such acts would be justified under act utilitarianism, because this morally condemnable act would in the long run promote the general welfare – at the cost of the minority being victimized.

The adaptation of certain general rules, assigning certain rights to persons – e.g. the right not to be experimented on without one's consent – solves this problem of victimization. The reason for adopting this rule is a strictly utilitarian reason, viz. the belief that the majority of people will be happier in the long run living in a society having a rule of this nature:

«For if citizens had no protection agains simply being used by the state whenever the state believed that general welfare could be promoted by such use, then they would never be secure, would never be able to live lives of stability and predictability, and thus could not be happy.»<sup>15</sup>

*Rule utilitarianism* – the form of utilitarianism where maximisation of general welfare is achieved through adopting the proper rules promoting general happiness - is thus to be preferred over *act utilitarianism*.

### 4.2 Economic Analysis of Law

The most recent and «scientific» contribution to utilitarian arguments has been made by the Economic Analysis of Law approach, characterized by the application of economic thoughts and models to legal ideas and theories. A short definition of its most influential models and conclusions will provide guidance in approaching Dworkin's criticism of utilitarianism.

The general idea of utilitarianism is that the *Principle of Utility* is the criterion of right conduct. Applying this principle requires *interpersonal comparison of utility*. The claim that it is possible to compare utilities is controversial; in this area the Economic Analysis of Law has contributed most to utilitarian theories – through the notions of *Pareto Efficiency* and *Kaldor-Hicks Efficiency*.

Utilitarianism aims at the maximisation of welfare. This, in economic terms, means choosing that state, which, under the relevant constraints, provides for the most efficient equilibrium of a person's utility function.<sup>16</sup> A more efficient state, in that sense, means a higher utility for the person(s) involved.

<sup>13</sup> GUEST, 23ff, 34

<sup>14</sup> GUEST, 28

<sup>15</sup> MURPHY & COLEMAN, 77

<sup>16</sup> COOTER / ULEN, chpt. 1

### 4.2.1 Pareto Efficiency

A state of the world is *Pareto efficient* to another, if and only if it is not possible to make at least one person better off without making any other person worse off.<sup>17</sup> The question, whether or not a person is better off in one state or another is answered on subjective grounds – each person is presumed to be the judge of his relative well-being. The prime advantage of this notion is the fact that there are no losers, because the losers' losses are subtracted from the winners' gains. Therefore, no decision has to be taken as to whose preferences are superior:

«The Pareto [...efficiency] criterion obviates the interpersonal comparability problem of classical utilitarianism.»<sup>18</sup>

### 4.2.2 Kaldor-Hicks Efficiency

A state of the world is *Kaldor-Hicks efficient* to another, if and only if the total of benefits exceeds the total of the costs.<sup>19</sup> According to this criterion, the winners must gain more than the losers lose.

Unlike in Pareto efficiency, in Kaldor-Hicks efficiency actual compensation of the losses does not have to take place – it must only be possible in principle:

«The Pareto [...efficiency] standard applies only where there are no losers. Most social policies and legal rules produce losers as well as winners. The Pareto test is therefore nearly useless in regard to the evaluation of most activity of concern to the social, political, or legal theorist. The Kaldor-Hicks test, based on the possibility of compensation, was introduced to obviate this problem [...].»<sup>20</sup>

### 4.2.3 Egalitarian Aspect of Economic Analysis of Law

The Pareto efficiency criteria aims at increasing net utility, thus obviating the interpersonal comparability problem of classical utilitarianism. Everybody's preferences are taken into account, no-one has to give up his preferences for the advancement of somebody else's higher valued preferences. In that sense, utilitarianism incorporates a highly egalitarian aspect.

Due to market-imperfections<sup>21</sup> and the given facts of the real world, however, Kaldor-Hicks efficiency has to be preferred over Pareto efficiency as the more workable choice. Kaldor-Hicks efficiency, in that sense, can be seen as Pareto efficiency shorn of its distributional aspect, thus made practicable.

This form of utilitarianism, provided for by the Economic Analysis of Law,

«[...] is utilitarianism of a sort particularly vulnerable to criticism strung along the dimension of equality and fairness.»

<sup>17</sup> COOTER / ULEN, chpt. 1

<sup>18</sup> MURPHY & COLEMAN, 213

<sup>19</sup> COOTER / ULEN, chpt. 1

<sup>20</sup> MURPHY & COLEMAN, 217

<sup>21</sup> Such as Monopolies, Externalities, Informational Asymmetries, Transaction Costs (→ Coase-Theorem). For a more extensive and elaborate list see: COOTER / ULEN, chpt. 1 and 3

## 5. Equality

### 5.1 Introduction of Dworkin's Ideal of Equality

«Legal practices are only to make sense against the background of a moral theory based on the idea of equality.»<sup>22</sup>

In order to fully appreciate Dworkin's criticism of utilitarianism, it is necessary to understand his notion of *equality*, the central concept of his argument.<sup>23</sup>

The basic notion of equality in Dworkin's works is that of *equal concern and respect*:

«Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Governments must not only treat people with concern and respect, but with equal concern and respect.»<sup>24</sup>

By this, Dworkin calls for the treatment of people as ends, not means to some higher cause, for treatment of people as equals, as opposed to merely equal treatment.<sup>25</sup>

### 5.2 Equality in Utilitarianism – Egalitarian Rule Utilitarianism

The non-specificity of persons in utilitarianism and the consequenting equal «weighting» of everybody seem to incorporate an inherent egalitarian premise in utilitarianism:

«[...]Egalitarian utilitarianism aims at the maximisation of welfare based on a number principle ("no person to count for more nor less than one") [...].»<sup>26</sup>

Dworkin acknowledges this *egalitarian aspect of utilitarianism* in the following manner:

«The utilitarian argument, that a policy is justified if it satisfies more preferences overall, seems at first sight to be an egalitarian argument. It seems to observe strict impartiality. [...] In Bentham's phrase, each man is to count as one and no man is to count as more than one.»<sup>27</sup>

Therefore, arguments made in the line of egalitarian rule utilitarianism seem not only to be compatible with, but indeed the consequence of Dworkin's demand for equality:

«Utilitarian arguments of policy [...] seem not to oppose but on the contrary to embody the fundamental right of equal concern and respect, because they treat the wishes of each member of the community on a par with the wishes of any other, with no bonus or discount reflecting the view that that member is more or less worthy of concern, or his views more or less worthy of respect, than any other.»<sup>28</sup>

<sup>22</sup> GUEST, 38

<sup>23</sup> As Dworkin states himself in DWORKEIN, Rights, 272

<sup>24</sup> DWORKEIN, Rights, 272

<sup>25</sup> GUEST, 228; DWORKEIN, Rights, 273f; HART, 217

<sup>26</sup> GUEST, 234

<sup>27</sup> DWORKEIN, Rights, 234

<sup>28</sup> DWORKEIN, Rights, 275

### 5.3 Dworkin's Criticism

According to Dworkin, the egalitarian aspect of utilitarianism is only illusionary<sup>29</sup>, treating people as equals only in *numerical terms*, as mere *means* to the maximisation of general welfare.

The idea of equality promoted by Dworkin, however, is a *substantive* and *non-numerical* one: people must be perceived as *ends in themselves*, not as *means to welfare maximisation*.

Dworkin, in the line of thought most splendidly expressed by Kant, criticizes the characteristic of utilitarianism, that it treats people not as human beings as such, but only as points where the individual preferences to be considered in the «great welfare calculation» emanate. The egalitarian aspect of utilitarianism, therefore, falls short of meeting a basic principle, stated by Kant in the following way:

«Always act so that you treat rational persons as ends in themselves and never as means only.»<sup>30</sup>

## 6. Corruption and Purification of Utilitarianism

### 6.1 Corruption of Utilitarianism

In Dworkin's eyes, utilitarianism falls short of meeting the requirements of his notion of equality in the sense that it does not treat human beings as equals. This section will elaborate his criticism, drawing on his distinction of personal and external preferences expressed in utilitarian arguments

#### 6.1.1 Personal vs. External Preferences

«A person's personal preferences are those which relate to his own life only. His [...] external preferences relate to the way he thinks other people should live.»<sup>31</sup>

According to Dworkin, both kinds of preferences are usually taken into account in utilitarian arguments, which leads to a «form of double counting».

#### 6.1.2 Double Counting

The satisfaction of external preferences *corrupts* utilitarianism, because it violates the important idea that no one's preferences are to be assessed in terms of worth – taking into account of external preferences therefore means *double counting*. A person stating his preference for how another person should live can negate the effect of that other person's preference, as well preserving his own preference for how his own life should be led.<sup>32</sup>

<sup>29</sup> DWORKIN, Rights, 275

<sup>30</sup> MURPHY & COLEMAN, 83

<sup>31</sup> GUEST, 232; DWORKIN, Rights, 234; SARTORIUS, 209

<sup>32</sup> GUEST, 232f

### 6.1.3 Violation of the Idea of Equality

Dworkin states that the egalitarian element is violated if votes are made on this basis of a judgement about the worthwhile nature of lives of others:

«If a utilitarian argument counts external preferences along with personal preferences, then the egalitarian character of that argument is corrupted, because the chance that anyone's preferences have to succeed will then depend, not only on the demands that the personal preferences of others make on scarce resources, but on the respect [...] they have for [...] his way of life.»<sup>33</sup>

Any form of utilitarianism based on both personal and external preferences, will not meet Dworkin's requirements of equality:<sup>34</sup>

«[A] utilitarian argument that assigns critical weight to the external preferences of members of the community will not be egalitarian in the sense under consideration. It will not respect the right of everyone to be treated with equal concern and respect.»<sup>35</sup>

### 6.2 Purified Utilitarianism

«To say that the best form of utilitarianism is uncorrupted utilitarianism, [...] is not to approve utilitarianism.»<sup>36</sup>

Although Dworkin never states in his work that he would actually accept any form of utilitarianism, he elaborates a purified, an «uncorrupted» and therefore «acceptable» form of utilitarianism:

«[T]he utilitarianism which Dworkin endorses is a purified or refined form of it in which a "corrupting" element which he finds in vulgar Benthamite utilitarianism is not allowed to weigh in determining decisions.»<sup>37</sup>

The only thing that needs to be done in order to «purify» the corrupted form of utilitarianism, is to exclude the taking into account («weighting») of external preferences in the general welfare calculation:<sup>38</sup>

«A utilitarianism refined or purified in the sense that it counted only personal preferences in assessing the balance of social welfare would for Dworkin be "the only defensible form of utilitarianism"<sup>39</sup> [...].»<sup>40</sup>

<sup>33</sup> DWORKIN, Rights, 235

<sup>34</sup> HART, 218

<sup>35</sup> DWORKIN, Rights, 275

<sup>36</sup> GUEST, 246

<sup>37</sup> HART, 218

<sup>38</sup> DWORKIN, Rights, 236; SARTORIUS, 210

<sup>39</sup> DWORKIN, Rights, 276

<sup>40</sup> HART, 219

## 7. Rights as «Trumps» over Utilitarian Arguments

For Dworkin, as stated above, only one «defensible» form of utilitarianism exists; egalitarian rule utilitarianism, in which external preferences are not taken into account in the general welfare calculation.

This form of purified utilitarianism is the interpretation of utilitarianism «in its best light». But even this interpretation, is not yet satisfactory for Dworkin, because, as he himself acknowledges,<sup>41</sup> such a form of utilitarianism is not practical in reality. Personal and external preferences are much too intertwined as to make it possible to actually distinguish them and exclude only external preference:

«It is not always possible, however, to reconstitute a utilitarian argument so as to count only personal preferences. Sometimes personal and external preferences are so inextricably tied together, and so mutually dependent, that no practical test for measuring preferences will be able to discriminate the personal and external elements in any individual's overall preference.»<sup>42</sup>

It is in the pursuance of finding a solution to this dilemma that Dworkin elaborates his notion of rights «in the strong anti-utilitarian sense.»<sup>43</sup>

### 7.1 Arguments of Principle vs. Arguments of Policy

Dworkin's notion of rights is most easily understandable when seen in the context of the distinction of *arguments of principle* and *arguments of policy*. Arguments of principle are arguments about a person's rights, while arguments of policy are arguments about community goals. This distinction is essential for Dworkin in the justification of constraints of liberty:

«A government that respects the liberal conception of equality may properly constrain liberty only on certain very limited types of justification. [...]»

There are, first, arguments of principle, which support a particular constraint on liberty on the argument that the constraint is required to protect the distinct right of some individual who will be injured by the exercise of the liberty.

There are, second, arguments of policy, which support constraints on the different ground that such constraints are required to reach some overall political goal, that is, to realize some state of affairs in which the community as a whole, and not just certain individuals, are better off by virtue of the constraint.»<sup>44</sup>

### 7.2 Utilitarianism and (Individual) Rights

Utilitarian arguments are arguments of policy, and do therefore not exhaust the position of rights:

«[U]tilitarianism does not take rights seriously because any claim of right can be submerged by appeal to the overall consequences.»<sup>45</sup>

Even the «most acceptable» form of utilitarianism falls short of protecting individual rights as soon as they are measured against general welfare. To escape this conceptional cul-de-sac, Dworkin proposes a correcting position of rights in the notion of utilitarianism:

«If we want to defend individual rights in the sense in which we claim them, then we must try to discover something beyond utility that argues for these rights. [...] We must argue on grounds of political morality that it is wrong to deprive individuals of these liberties, [...] in spite of the fact that the common interest would be served by doing so.»<sup>46</sup>

<sup>41</sup> DWORKIN, Rights, 277

<sup>42</sup> DWORKIN, Rights, 236

<sup>43</sup> DWORKIN, Rights, 277

<sup>44</sup> DWORKIN, Rights, 274

<sup>45</sup> GUEST, 65

<sup>46</sup> DWORKIN, Rights, 271

### 7.3 Individual Rights as Side Constraints of Utilitarian Arguments

Dworkin argues that in case of conflict between individual rights (arguments of principle) and community goals (arguments of policy), the former has to precede the latter:

«If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so.»<sup>47</sup>

No social policy can be justified, however well it serves the general welfare, if it violates individual rights, which therefore act as a sort of «side constraints» on community practices aiming at improving community goals:

«[...] some rights are simply not expressions of social utility; they are rather [...] absolute *side-constraints* on the pursuit of social utility – i.e., moral protections of individuals that must be unconditionally respected as one sets out to do social good, protections that preclude their being sacrificed for that social good.»<sup>48</sup>

To put it in Dworkin's words, arguments of right will «trump» arguments of policy, meaning that in cases of conflict they have priority:<sup>49</sup>

### 8. Dworkin's Interpretation of Utilitarianism «in its best light»

The only acceptable form of *theoretical* utilitarianism for Dworkin, as shown in the preceding sections, is an *purified egalitarian rule utilitarianism*, thus excluding external preferences. Since such a form of utilitarianism can not be practicable in reality, however, he introduces the notion of individual rights as side constraints limiting the use of arguments of policy:

«The concept of an individual political right, in the strong anti-utilitarian sense [...], is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals.»<sup>50</sup>

<sup>47</sup> DWORKIN, Rights, 269

<sup>48</sup> MURPHY & COLEMAN, 85; reference to NOZICK, Anarchy, State and Utopia (New York: Basic Books, 1974)

<sup>49</sup> GUEST, 65

<sup>50</sup> DWORKIN, Rights, 277

## 9. Overcoming Utilitarianism

### 9.1 Introduction

So far we have taken a look at Dworkin's interpretation of utilitarianism and reached the conclusion, that there is a certain form of utilitarianism which Dworkin is willing to call «defensible» at the most. In order to see how he aims at overcoming utilitarianism, a closer look at his elaborations in Chapter Eight (The Common Law) of *Law's Empire*, seems appropriate.

Under the title «Conceptions of Equality», Dworkin states three such conceptions, based on different grounds. He then provides for a sort of test to compare the worthwhileness of these systems, and argues in favor of what he chooses to call *Equality of Resources*.

### 9.2 Conceptions of Equality

According to Dworkin,<sup>51</sup> there are three main conceptions of equality: *libertarian* conceptions, *welfare-based* conceptions, and *resource-based* conceptions.

#### 9.2.1 Libertarian Conceptions of Equality

«Libertarian conceptions of equality suppose that people have "natural" rights over whatever property they have acquired in certain canonical ways and that government treats people as equals when it protects their possession and enjoyment of that property.»<sup>52</sup>

#### 9.2.2 Welfare-Based Conceptions of Equality

«Welfare-based conceptions [...] deny any natural right in property and insist instead that government must produce, distribute, and regulate property to achieve results defined by some specified function of the happiness or welfare of individuals.»<sup>53</sup>

Dworkin further distinguishes two forms of welfare-based conceptions, *utilitarianism* and *equality of welfare*, with *utilitarianism* meaning that government treats people as equals when its rules secure the greatest possible average welfare while taking into account the happiness of each person in the same way, and *equality of welfare* requiring government to aim at making the welfare of all citizens roughly equal, so far as possible.

<sup>51</sup> DWORKIN, Empire, 297ff

<sup>52</sup> DWORKIN, Empire, 297

<sup>53</sup> DWORKIN, Empire, 297

### 9.2.3 Resource-Based Conceptions of Equality

«A third group of theories demands that government aim at outcomes defined in the vocabulary not of welfare but of goods, opportunities, and other resources.»<sup>54</sup>

Dworkin again distinguishes two forms of resource-based conceptions, *material equality* and *equality of resources*, the former requiring government to make the material wealth of all citizens as nearly equal as possible throughout their lives, and the latter requiring it to make an equal share of resources available for each to consume or invest as he wishes:

«Equality of resources, unlike material equality, assumes that people's wealth should differ as they make different choices about investment and consumption.»<sup>55</sup>

### 9.3 Comparison of Different Conceptions of Equality

Thus having defined different conceptions of equality, Dworkin proceeds to compare them in terms of their relation to the private ambitions people might pursue – whether they are *competitive* to or *compatible* with these private ambitions.

In order to be able to make this comparison, Dworkin imagines a hypothetical state in which government has succeeded in designing the best available property scheme on each of the different conceptions of equality, then leaving each citizen free to use or exchange property assigned to him under that scheme as he wishes. If the result will undermine the form of equality originally secured by the government, then the conception in question is *competitive* with private ambitions, otherwise it is *compatible*.<sup>56</sup>

Both *equality of welfare* and *material equality* are inevitably *competitive*, while it is only «likely though not inevitable» that the *utilitarian conception of equality* would also be undermined, therefore being competitive. Only the *libertarian conception of equality* and *equality of resources* are *compatible* with private ambitions in Dworkin's eyes.

The reason why compatible conceptions are to be preferred over competitive conceptions is not elaborated extensively by Dworkin, but rather stated in a matter-of-fact way:

«[...]these three theories – welfare equality, material equality, and utilitarianism – all make private choice competitive with public responsibility, so their supporters have difficulty in answering the question I posed, why government should not enforce some general legal principle requiring people to avoid private decisions that will disturb the existing distribution of welfare or wealth.

They can solve this problem only by showing what seems implausible, that the form of equality they favor can be achieved more constantly and securely without such a principle than with it.»<sup>57</sup>

<sup>54</sup> DWORKIN, Empire, 297

<sup>55</sup> DWORKIN, Empire, 297

<sup>56</sup> DWORKIN, Empire, 298

<sup>57</sup> DWORKIN, Empire, 298

## 9.4 Comparison of «Compatible» Conceptions of Equality

Thus having opted for the «compatible» conceptions of equality, Dworkin still needs to choose between the libertarian conception and the equality of resources. However, in *Law's Empire* he does not substantiate his decision, but rather refers to common sense and intuition:

«[...] I shall not argue but only assume that equality of resources is superior to the libertarian conception: it fits our legal and moral practices no worse and is better in abstract moral theory.»<sup>58</sup>

## 9.5 Arguments in Favor of Equality of Resources

The arguments favoring equality of resources over libertarian conceptions of equality, have to be sought in the intertwinement and interdependence of Dworkin's notions of equality and freedom itself.

For Dworkin, the *idea of freedom* is important in that sense, that if a person is free to develop and shape his life in accordance with his own convictions and ambitions, he will live a better life. Resources are a source of freedom – not the only, but a major one.

Dworkin's *notion of equality* states that people are equal as human beings, thus deserving equal concern and respect. Applied to the twin ideas of freedom and equality, this leads to the following conclusion:

«Treating a person as an equal means treating him in such a way as to give him maximum freedom to develop his life in accordance with his convictions. But it must follow that the freedom of each person is to be limited to the extent that person's exercise of freedom reduces the amount of freedom of another.»<sup>59</sup>

The restriction of one person's freedom due to limiting the freedom of another person, is again a consequence from the principle of equality.

Since every person must have maximum freedom to lead his own life, and resources being a major source of freedom, it follows for Dworkin, that therefore the conception of equality of resources is the most preferable conception of equality.

Dworkin also suggests how to make real sense of the equality of resources, viz. through the idea of the economic market with its idea of relative costs.<sup>60</sup> «Freedoms» respectively its closest substitution, resources, are initially distributed equally, and then bargaining is allowed to take place in order to reflect the different choices that people make over their lifetimes.

## 9.6 Assessment of Equality of Resources

There are two advantages of Dworkin's conception of equality of resources.<sup>61</sup>

On the one hand, Dworkin's theory combines the insights of socialism, that men are inherently human beings, independent of their particular circumstances, with the insights of libertarianism, that men are at their best when they are free to live their lives according to their own convictions.

On the other hand, Dworkin provides an ethical basis for market mechanisms, and suggests ways in which the market should be corrected in accordance with that ethical basis.

<sup>58</sup> DWORKIN, Empire, 301

<sup>59</sup> GUEST, 256

<sup>60</sup> DWORKIN, Empire, 301ff; GUEST, 257f

<sup>61</sup> GUEST, 259

## 10. Personal Remarks

Dworkin most splendidly elaborates the different aspects of utilitarianism, shedding light on its advantages as well as on its shortcomings. Having interpreted utilitarianism in its best light, made it «the best it can be», he does not stop but amends it with «rights as trumps» in order to make it fit his standards.

However, as attractive and evident as his ideas seem, I cannot ignore observing certain conceptual and argumentative improvidences, which I will shortly point out in the following paragraphs.

### 10.1 Mix of Formal Arguments and Arguments Relating to Content

Utilitarianism takes the persons' preferences into account in a strictly formal, numerical manner – every man counts for one and no man for more than one. The «general welfare calculation» in that sense does not pay any attention to the reasons why a person has these preferences. Dworkin's arguments disregard this strict distinction when he claims that certain preferences have to be ruled out because of the specific motivation of the person expressing these preferences. He states, in *Taking Rights Seriously*:

«[...] corruption of utilitarianism is plain when some people have external preferences because they hold political theories that are themselves contrary to utilitarianism.»<sup>62</sup>

In ruling out external preferences because of their morally disagreeable content, however, Dworkin steps into his own conceptual pitfall – because he makes judgements about how other people should live their lives (see section 6.1.3.).

Therefore, while pretending to criticize a formal characteristic of utilitarianism (the impartial taking into account of external preferences), Dworkin in fact argues against certain outcomes of this impartiality on moral grounds:

«The objection is no longer that the utilitarian argument or a majority vote is, like double counting, unfair as a procedure because it counts in "external preferences," but that a particular *upshot* of the procedure where the balance is tipped by a *particular kind* of external preference, one which denies liberty and is assumed to express contempt, fails to treat persons as equals.»<sup>63</sup>

<sup>62</sup> DWORKIN, Rights, 235

<sup>63</sup> HART, 222

## 10.2 Assumptions Instead of Arguments

Throughout his works, Dworkin makes numerous statements and assumptions without further explanation on which grounds he makes these assumptions, simply accepting certain superficially self-evident facts:

«[...] I shall not argue but only assume that equality of resources is superior to the libertarian conception [...].»<sup>64</sup>

Sometimes he even seems to hide important steps in his chain of thought behind examples, custom-tailored to illustrate his point, but his point only, thus trying to avoid the need for further elaboration of his theory:

«Although Dworkin's argument assumes that where no individual rights are at stake, social policy is properly decided on utilitarian grounds, he never says why this should be so. [...]»

Dworkin may not feel the need to justify his underlying utilitarian assumptions because they seem on the surface to have a certain self-evident appeal. [...] But [...] this assumption is without warrant.»<sup>65</sup>

It is not, of course, appropriate to ask for airtight argumentation, apt to logical reasoning – especially not in the field of practical morality. As for a legal theory like Dworkin elaborates, however, a more stringent chain of argumentation would certainly be desirable.

<sup>64</sup> DWORKIN, Empire, 301

<sup>65</sup> SANDEL, 232