

Unions and Justice

Lars Lindblom

Center for Applied Ethics,

Department of Culture and Communication

Linköping University

581 83 Linköping, Sweden

E-mail: lars.lindblom@liu.se

1. Introduction

The aim of this paper is to outline an account of unions and justice. The theory that is suggested will be justified by explaining how it deals in an appropriate way with a set of important issues and problems surrounding unions. These issues are consent, democracy and civil society's role, distributive justice, the separation of powers, the organization of firms and the insider-outsider problem. The paper takes a Rawlsian approach to justice (Rawls 1971; 1996; 2001) as its starting point and aims to spell out the implications of this theory for unions. This is done in two stages. First, the wide societal effects of unions are investigated from the perspective of Rawls's theory of justice. This connects the discussion with what Rawls calls domestic justice, which is the issue of how the framework of social institutions should be organized and with questions regarding consent, civil society and democracy. Second, issues regarding local justice are looked into. This part of the paper develops some aspect of Rawls's theory which he never fully developed. Here a theory of the employment relationship is put forward, which brings the doctrine of the separation of powers and insider-outsider theory into play. Having done this, we will have outlined a theory of justice for unions. However, we will also need to investigate whether what has been said on the two levels of institutional design and the norms of the relationship cohere. This is done by looking closer at the insider-outsider problem. Doing so

will show both that this is less of a problem than might be thought and that the two levels of our theory indeed do cohere.

2. Rawlsian labor market justice

In this paper a starting assumption is that the ideal of equal standing between members of society is a core notion of justice. This relational ideal however only serves as the starting point for investigating what distributive justice would entail. How would equals agree to an answer to the question of distributive justice? First, they would agree that any plausible answer would have to respect the ideal of equal standing. Secondly, they would agree that the answer to their question is up to them, rather than to any outside authority. This is especially so, since relational equality implies that none of them have any special authority to decide such questions. One may then wonder how they should go about finding a solution. Given their equal standing, then answer must be to figure out what they would agree to under impartial conditions. This account of the problem of justice should be recognizable Rawlsian and lead us to the most famous of Rawls's ideas: the original position.

The original position is a thought experiment designed to deliver fair terms of cooperation between equals. It models this equality by situating the parties to the social contract as symmetrically placed to come to an agreement. Moreover, it aims to ensure fairness by the use of the veil of ignorance, which blocks out reasons that risk undermining the fairness of the agreements. The parties behind this veil do not know their social class, gender, talents and the like. The parties are then tasked with choosing principles of justice from a list of such principles found in the literature and the tradition. There are several considerations that they must make. First, and most importantly, the paramount importance of the individuals' own conceptions of the good. Another important consideration is stability: the principles chosen must be able to

generate their own support over time (Rawls 2001, chapter 3). The principles must be such that the members of society can live with the strains of commitment to them. Moreover, the principles must satisfy a condition of publicity such that they can be made public and that they can be understood and used by the members of society. However, the most important part of the reasoning has to do with what is known as the Pareto argument.

The parties in the original positions are equals, make their choice under symmetrical circumstances and have no way of choosing in a self-interested manner. The salient principle for them to choose is a principle of equality, but there is one consideration that makes them prefer another principle. Namely, that if there are inequalities that improve the position for some or all without worsening the position for anyone, then these seem rational to approve of even from a starting point of equal standing. The combination of all these reasons leads to an agreement on the two principles of justice:

Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society (Rawls, 2001, pp. 42–43).

The first principle especially protects the conceptions of the good of the citizens. The principle of fair equality of opportunity is a strictly egalitarian principle regulating opportunity, whereas the difference principle regulates income and wealth by taking the Pareto argument into account. Now, Rawls takes these principles to regulate what he calls the basic structure of society. This is the system of social institutions. In other words, principles of justice are for designing the institutions of society and how they cohere as one system. However, this is not the only issue of justice one may be interested in. It is one question what justice means when

designing institution and another what justice may be when acting within such institutions. For Rawls, this is the distinction between domestic justice, which is what the two principles regulate, and local justice which concerns justice within institutions. As the topic of this paper is unions and justice, one would probably suspect that the institutions we will take as our starting point would be unions, but this is only partially the case. I take unions, in the ideal case, to be motivated by the goal of bringing about fair employment relationship. Therefore, we will start out thinking about employment in order to get a grip on the relationship between justice and unions.

What, then, would local justice be for the employment relationship? One would think that it would be the two principles again, but Rawls is a pluralist regarding problems of justice and thinks that different principles are appropriate for different problems, and there are indeed different issues at stake here. There are also some important similarities. The ideal of equal standing seems useful also for questions of justice on the labor market. The ideal free market is an ideal of contracts between equal partners. If the goal is to come up with fair terms of cooperation, it is also the case that issues like class and gender are morally irrelevant. Therefore, we can think of the problem in terms of a second original position. However, this now takes place within a framework set by the two principle of justice and this changes some aspects of the decision that the parties are tasked with making. One important implication of this is that the fundamental rights and opportunities are already guaranteed by domestic justice. This means that the parties of local original position need not decide on these issues, and that the principle they choose need not specify rights. However, there may still be issues of distribution that are undecided by the domestic principles. The difference principle is concerned with equality between classes, but even if such equality is achieved there may still be questions regarding whether Jack or Jill should get a raise.

A second point concerns something that we have not yet discussed, namely the value of desert. Rawls's argument from the two lotteries is well-known. He argues that a person's social and genetic background is a matter of luck. One is neither responsible for the genes one has nor for the family and wider social circumstances one grows up in. Therefore, the parties in the original position are justified in not taking some notion of desert as a desideratum for principles of justice. However, when we come to the local original position, we take a just social structure as a given, which means that the way the social and genetic background affect a person's life has been made a part of a just basic structure. The injustice of the two lotteries has been reformed into the justice of the basic structure. This means that the two lotteries argument no longer applies, since the background now relies on justice rather than luck, and that there is good reason to return to the value of desert. One such reason is the commonly held intuition that desert should be a factor in the compensation for work. Therefore, the parties of the local original position are entitled to take responsibility reasons into account.

Moreover, they can take the first principle and fair equality of opportunity as given since they are guaranteed by domestic justice. These principles are already implemented in the basic structure as a part of domestic justice. This means that the basic structure, which includes the organization of the employment contract, is designed to safeguard basic right and equal opportunity. There is, then, no further need for the parties to take the protection of rights into special account. They can, therefore, focus on distributive issues. The local original position again tries to model what equals would agree to under impartial circumstances and come up with the following principle:

Social and economic inequalities within workplaces in societies well-ordered by justice as fairness are to satisfy the conditions that they are to the greatest benefit of the least advantaged co-workers of the workplace, unless they are the result of choices for which

agents ought to be held responsible, in which case goods should be distributed according to desert. (Lindblom 2011, p. 591)

This principle combines considerations of equality, efficiency and responsibility. It takes equality into account by developing an account of local justice that takes equal standing as its starting point. It also incorporates the pareto argument, and thereby a concern for efficiency. Finally, by making room for the effects of responsible choice, it takes account of desert. With the theory in place, let us now turn to the implications for unions.

3. Domestic Justice and Unions

Rawls's theory of domestic justice, then, consists of two principles and we will go through their implications in turn, starting with the first principle. It says that each person has an indefeasible claim to a fully adequate scheme of basic liberties. These liberties include:

Freedom of thought and liberty of conscience; political liberties [...] and the freedom of association, as well as the rights and liberties specified by the liberty and integrity (physical and psychological) of the person; and finally the rights and liberties covered by the rule of law. (Rawls 2001, p. 44)

These rights have many implications for the employment relationship and thereby for unions. For instance, if political rights are design desiderata for the institutions that make up the basic structure, then it seems that rights to whistleblowing are robustly strong on the Rawlsian view (Lindblom 2007; Cf. Croucher, Kelly and Miles. 2012). However, here we will focus on the implications of basic rights regarding consent, and on how political rights and democracy can shed light on unions.

Given this set of basic rights, consent has a paramount role. It defends freedom of thought and conscience, safeguards political liberties and protects the integrity of the person. However, the combination of the high value of consent and the employment relationship is difficult. Employment contracts are incomplete contracts. They do not specify rules for every eventuality, but instead vests the employer with authority. The reason for having this form of contract is that the future is unforeseeable for the contracting parties. In decision theoretical terminology, the employer and employee are making choices under ignorance. (Milgrom and Roberts 1992). To opt for authority under such conditions may be rational but consent and ignorance does not go together without friction. For there to be justified consent, three conditions are standardly taken as necessary. The parties must be autonomous, their choices must be voluntary, and they must be informed. The last condition is clearly not satisfied under ignorance. This implies that acts of authority of the employer cannot be justified by consent, since the agreement to authority, by definition, is made under ignorance (Lindblom 2009).

Unions can help solve this quandary. An alternative to consent as a mechanism is the ideal of contestability as developed by Philip Pettit (1997). The idea is that one should be able to contest decisions that goes against one's interests. For there to be real ability to contest, three things must be in place: a basis for contestation, an opportunity for voice, and a forum where contested issues can be settled. The basis for contestation is an ideal for the relationship, and is given, for the purposes of this paper, by the theory of justice outlined in the previous chapter. To have an opportunity for expressing one's contestations, there needs to be some organizational measures in place, and the same goes for a forum where a decision is made on the how to act in response to the contestation. Unions play an important role for both these functions. Unions are vehicles for giving expression to the contestations of employees and collective bargaining provides a forum for coming to agreement on contestations (Cf. Hirschman 1970; Gourevitch 2016). Of course, these functions can be organized internally within the firm, but there seems to be good

reason to have contestation organized so that the party whose acts of authority are being contested does not also have authority over how to handle the contestation. (Lindblom 2019; 2018) In this way, unions can gain justification from the first principle of justice, they safeguard the rights that in most contexts are protected by consent.

There are further connections between the first principle and unions that have to do with the value of democracy. Unions are important agents of civil society. They are so in at least two ways. Unions may be sources of important social information, and they can be institutions for education into democratic citizenships. The information argument is like the contestability arguments closely related to the economics of the firm, so we will start there. The employment contract is not only different from other contracts, the organization of firms also differs from how we usually think about the market. In fact, as Ronald Coase (1937) has showed, what defines firms is that they are not markets but command economies. The coordination between different departments or individuals in a firm is not brought about through the mechanism of market, but through fiat by the boss. Markets are, as Hayek (1945) made clear, excellent engines for using information since prices both inform about supply and demand and provides incentives to act on the information. Inside firms, however, there is no price mechanism and hence no inherent information mechanism, but such information is necessary for the proper operation of the political system and for democracy. As we saw when discussing contestability, unions are vehicles for information. The information they can provide is highly relevant for justice, if justice is concerned with the design of the main institutions of society. The employment contract and the firm are such important institutions. Therefore, there is a case for unions from the starting point of the information needed for justice. Moreover, the rights that are at stake are those that the first principle aims to protect, so in unions we have an important mechanism for information that works through mechanisms that are independently protected by basic liberties.

Let us now turn to the second aspect of unions' role within civil society. Unions may be a school for citizenship. A classic argument in this vein can be found in John Stuart Mill (1994. Cf. O'Neill and White 2018). The idea starts from the plausible premise that being on the receiving end of authority can undercut one's confidence in one's own agency. In the workplace one must follow the demands, whereas in the unions can cooperate on equal footing with other workers. This provides in training for cooperation between equals, which is useful for democracy, since ideally a democracy is also a cooperative venture between equals. Moreover, for unions to carry out their functions, they need to gather and use information on facts regarding the organization of the work process, the economy and the political system. This provides a second kind of education, this time regarding the facts of the matter. If these two mechanisms are in place in unions, then, they provide citizenship education both regarding the attitude of equality and about the politically pertinent facts.

Finally, let us turn to the second principle of justice. What are the effects of unions in terms of fair equality of opportunity and the difference principle? The view of economists on such topics has changed over time, as economics has turned from being mainly a theoretical social science to taking an empirical turn in the last twenty or so years. Influential economists of the last century, such as Friedman (1962) and Hayek (1960), were mainly suspicious of the social effects of unions. But a flurry of empirical research recently has seemed to agree that unions are important for avoiding raising inequality. Especially, the weakening of unions in western economies explain why inequality has risen in those economies. This argument for unions would then be that they are an important mechanism for achieving a more egalitarian distribution of income in terms of the difference principle. Moreover, there is an important relationship between equality of outcomes and equality of opportunity. It is generally the case that the higher the level of outcome inequality, the lower level of equality of opportunity is achieved. Inequality of income and wealth makes it more difficult for people in lower classes

to improve their lot and thereby it undermines equality of opportunity (Cf. Corak 2013). Therefore, we can assume that in general results that indicate that the difference principle is better satisfied also lead to fair equality of opportunity being satisfied to a higher degree.

There are many examples of research showing the relationship between weaker unions and higher inequality. For instance, IMF found a correlation between widening inequality and the development towards less union influence (Jaumotte and Buitron 2015). Jake Rosenfeld (2014) suggested one such explanation, which identifies a link between weaker unions and growing inequality. Robert Solow has recently claimed that inequality in the US can be explained by the weakening of unions which has made it more difficult for workers to get a share of the rents that large companies can accrue (Solow 2015). In a recent survey article, Ahlquist (2017) shows how unions are associated with more equality both for pre-tax income as well as for the distribution of income after taxes and transfers. These results may not be very surprising. If the bargaining position is worsened for a contracting party, we may assume that the outcomes of the contract will also be worse for that party. If it is a general trend that the bargaining position of employees is worsened, we may, consequently, assume that the income of employees will develop in a way that is less to their benefit. Or the other way around, if the bargaining positions of employers is generally made stronger, it should not come as a surprise that they also can achieve contractual terms that are more to their benefit. If this is true, then we have justification of unions as an important institution based also on the difference principle and fair equality of opportunity. However, note that even if all these empirical results would be disputed, the argument related to the first principle would still stand. We can conclude that from a Rawlsian domestic perspective, unions have a strong justification. This outlines the domestic account of justice, in the next section, we will turn to local justice.

4. Local Justice and Unions

We have seen above that there are two distinct issues regarding justice and the employment relationship. On the one hand, there are the implications of domestic justice for this relationship, and on the other, there is the question of what a just distribution is within this institution designed in accordance with domestic justice. The principle of local justice that was developed above says that a just distribution varies with desert when this is applicable and for circumstances where it is not, that it should be to greatest benefit to the least advantage co-worker. The local principle incorporates a concern for efficiency and provides a combination of equality and desert that may be interpreted as luck egalitarian. (Cf. Dworkin 2002) It may also be understood as a version of the notion of reward according to marginal contribution that is prevalent in economics. But it also handles the point made by Anderson (1999) that marginal productivity often is indeterminate and may in this sense be more egalitarian than standard marginal productivity accounts. One further reason to accept the local principle is then that it coheres with intuitions from both a Rawlsian perspective and luck egalitarianism, as well as the standard economic account of reward. What, then, are the implications of this principle for unions?

Let us start by noting that the distributive outcomes of the employment relationship are results of bargaining. We have already seen how contestability is justified. This is important for the local interaction between employer and employees. We will see a further implication of this in this section, namely that unions can help bring about a balance of power between employers and employees. Now, the separation of powers is usually thought of as having to do with the construction of constitutions, but the point generalizes. The connection between constitutional theory and the employment contract is nicely illustrated by Hamilton in *The Federalist Papers* 79 where he notes: "In the general course of human nature, *a power over a man's subsistence*

amount to a power over his will” (Rossiter 1961, p. 472, emphasis in original). If this is true, then it provides a reason to organize contestation outside the domain of employee authority.

There are two aspects to the doctrine of the separation of powers. First, that for each kind of power, the appropriate agents should wield it. Second, that different powers should be balanced. There are two kinds of powers at stake in the employment relationship, the power to organize work and labor power. The powers of the employers and employees should be balanced to bring about just bargaining conditions. Note also that this argument can be formulated independently of organizational form. It goes through for working for government as well as for workplace democracies, because in both cases employment contracts are incomplete and there is, therefore, a case for having a mechanism for contestation, and a need for balancing different powers. If unions, then, have an equal bargaining position this both expresses the ideal of equal standing and helps create the precondition for just employment agreements. The wage premium of union members is noticeable, and as an example, in the US it is around 20% (Rosenfeld 2014, pp. 72-73).

We have seen that unions are useful for implementing Rawlsian justice on both the domestic and the local level. However, one may wonder whether the principles on both levels really cohere. This would especially be a problem if something like the insider-outsider theory of Lindbeck and Snower (1989) is true. This theory is developed to explain unemployment, but it also seems to indicate that unions create at least local injustice and probably also injustice on the domestic level. The fundamental idea is that insiders use their leverage to improve their position within the firm in a way that is detrimental to outsiders, that is to people that are not employed and have a hard time gaining a foothold on the labor market. The insiders are rent seekers that gain on the backs of outsiders. It is costly to hire new workers, and insiders use this fact to gain wages or salaries that are higher than would be the equilibrium pay in a standard market. Therefore, the level of payment will raise to a level that makes it irrational for the

employer to hire outsiders, since their marginal productivity will be less than the wages or salaries they would receive at this level of payment. Outsiders will be shut out of the labor market and their position will be worse than it would in the absence of rent-seeking on the part of insiders. One would hope that the outcome of bargaining under just circumstance would lead to just outcomes, but if an account the lines that they have developed is true, then it could be that unions turn out to be hurtful to the worst off in society.

As we have seen above, there are empirical reasons to be doubtful about the extent of this problem. If it is true that unions are strong drivers for economic inequality, or to put this another way, that growing inequality can be explained in large part of the weakening of unions, then it seems that the worst off in society may gain rather than lose from unions. Moreover, there is more local evidence about the effects on outsiders that seems to indicate that unions may in fact be helpful to their economic circumstances. Denice and Rosenfeld (2018) show that there is significant positive effect on non-unionized workers wages from unionization. The facts seem to indicate that union presence may initiate a race to the top that improves the income of outsiders. The reasons for this would be that if employers compete for employees, then if unionized firms improve labor conditions, non-unionized firms will also have an incentive to improve conditions.

There are also theoretical reasons to worry about insider-outsider theory. Insiders are understood as rent-seekers and rent is characterized as consisting of gains above the level equilibrium. But, what does equilibrium mean in this account? If this is general equilibrium, then the theory implies that there will be no firms. In general economic equilibrium, the allocation of resources is pareto optimal, which seem an attractive normative ideal. However, for there to be such an equilibrium there cannot be transaction costs, but to explain the existence of both firms and employment contracts one needs to assume transaction costs, especially such that are brought about by ignorance. This makes general equilibrium an odd ideal for the

employment relationship, since it is so much removed from the actual operations of market economies. The oddness is well illustrated by George Stigler: “The world of zero transaction costs turns out to be as strange as the physical world would be without friction. Monopolies would be compensated to act like competitors, and insurance companies would not exist” (Stigler 1972, p. 12). Why use an ideal where there are no employment relationships as a guide for how such relationships should be organized? To understand the insider-outsider problem in terms of local equilibrium also seems problematic, because then the attractive aspect of pareto optimality found in the first welfare theorem drops out of the picture. If all one can show is that there is a local equilibrium, then one has not showed that this is socially optimal.

But maybe this would be to move too fast? Rent is a concept with a historical heritage in economics. How about thinking about it in the classical way, as unearned (through work) income? In classical economics, one gets rents through ownership of land, and earns profit (including wages) from work. (Cf. Smith 2012) This interpretation of rent connects it quite directly with the notion of desert and would explain the unfairness of rent-seeking. Rent is not deserved through work. However, the local principle of justice takes account of the value of desert, so it is not in an obvious way in conflict with the classical account of rent. The wages or salaries that insiders will receive under the local principle of justice will be based on considerations of individual desert where this is applicable and distributed according to a local difference principle for cases where individual marginal productivity is indeterminate. Moreover, the normative bite of rent is that it is an unfair transfer of resources. Under such an interpretation it implies that if the employees receive higher salaries or wages than what justice demands then this could be thought of as rent seeking. In other words, one needs a theory of justice to spell out the problem of insider-outsider theory. What has been argued here is that salaries and wages should be set in accordance with justice.

One may still wonder if there could not be a situation where insiders use their leverage in such a way that it is detrimental to outsiders. John Stuart Mill (1967) expressed such a worry without the aid of insider-outsider theory. Let us assume that there could still be such a problem. How would the theory of justice that has been developed here handle it? The first thing to note is the two-level structure of the theory. The domestic principles of justice are lexically prior to the local principle. This means that if, *pace* the theoretical and empirical considerations above, there is an injustice of the insider-outsider kind, then this problem should be understood in terms of the lexically prior domestic principles. In other words, to the extent that there is such a problem, justice implies that unions should be organized and regulated to avoid causing it while still achieving the positive effects of labor organizations. An argument for unions based on this theory of justice, then, will take insider-outsiders into account and imply how they should be solved. The theory of domestic justice will imply regulations for unions, so that they do not act to worsen the position of the least advantaged in society. We can conclude that the theory both is consistent and handles the insider-outsider problem in an appropriate manner.

The Lindbeck-Snower insider-outsider theory only models the behavior of employees and outsiders; it does not take the actions of the employer into account or the effects of how the basic structure is organized on their interactions. The theory of justice developed here starts out from the basic structure and implies that both employers and employees have reasons of justice to strive for just terms in employment contracts. In particular, it provides the outline of an ethics for unions. Unions must, of course, act within the bounds set by Rawls's first principle of basic rights, but more interestingly the fact that there may be an insider-outsider problem indicates that they must balance considerations of domestic and local justice. They should focus on achieving local justice, but in such a way that they do not harm the interests of outsiders in a manner inconsistent with fair equality of opportunity and the difference principle. This means that unions have two reasons to concern themselves not only with working conditions in a

narrow sense but also with politics. Not only may politics be the best way of ensuring a just basic structure for their members and thereby a fair background for bargaining with employers, but sometimes they may also have a duty to strive for domestic equality in order to avoid harm otherwise brought about to outsiders through their bargaining.

5. Conclusions

This article has aimed to develop a theory of justice and unions. It has taken the ideal of equal standing as its starting point and used Rawls's theory of justice to determine the principles of justice. The theory proposed has a two-level structure: on the domestic level, the standard two principles of justice have been brought to bear on unions, and on the institutional level a local principle of justice, derived from Rawlsian starting points, has been used for analysis. It has been shown that Rawls's first principle of justice has implications for how to conceive of unions and justice in two ways. First, given that the design of employment contracts consent is not enough for justification of employer authority, but must be complemented with a mechanism for contestability, and unions provide this mechanism. Second, there is a close connection, via civil society, between unions and democracy, in the sense that unions can provide an education in citizenship and be valuable sources of information relevant for justice. Furthermore, there is much empirical research to suggest that unionism supports both fair equality of opportunity and the difference principle. When it comes to issues of justice within institutions, a principle of local justice has been proposed, which combines equality, efficiency and desert.

In order to test the coherence of this two-level theory, we turned to the insider-outsider problem. The discussion here proceeded in two steps. First, it was shown that there are empirical and theoretical reasons to think that the insider-outsider is less pressing and prevalent than it

might appear. In particular, this may be so if the problem is understood as conceiving of rent in terms of desert rather than as a gain of utility from a deviation from general equilibrium. When the problem is understood in these terms there is less risk of the insider-outsider problem appearing. Second, for potential cases of such problems, unions need an ethic, and this is provided by the two-level theory that is proposed in this paper. This theory of unions and justice, then, seems to provide intuitive answers to normative issues regarding unions. Moreover, it has implications for civil society, democracy, stability, distributive justice, the organization of the employment relationship and the firm, as well as for the insider-outsider problem. It connects theory in political philosophy with economics. For these reasons it promises to be useful.

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