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1 An Overview of Immigration Justice: For and Against Open Border Theory

1-1 Open Border Theory

One of the most prominent advocates of Open Border Theory, Joseph Carens, criticizes almost all current restrictions of immigration in developed countries. The points of his argument are as follows.

- (1) Freedom of movement is a universal right of human being. It is also the prerequisite of many other freedoms, especially an equal freedom to pursue everyone's own conception of good, i.e., goal of life.
- (2) Moral justification of restricts of immigration must consider the interests of those who are excluded as well as the interests of those who are already inside.
- (3) Chances for employments, residences, educations, and social benefits should be distributed equally between insiders and outsiders, especially between citizens of developed countries and those of developing countries.

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(4) Acceptance of migrants contributes to global distributive justice. Migrants from poor developing countries can often enjoy greater incomes and more stable lives. Sending money (international remittances) by migrants from host (rich) countries to home (poor) countries corrects disparity between these countries.

For Carens, recent restrictions of immigration do not concern about the universal freedom of movement. They unfairly favor insiders and leave outsiders' freedom out of consideration.

1-2 Moral Significances of Limited and Discretionary Political Membership: An Argument against Open Border Theory

There are many objections to Open Border Theory, but in my view the most important critique is David Miller's liberal nationalism. He argues as follows.

(1) The states' discretionary power to determine their own conditions for membership is a necessary condition for political autonomy and self-determination.

(2) Political membership is a basis of respect to public decisions. We need public goods provided by our state, such as national defense, police, dispute settlement, infrastructures, and so on. And we expect our state to implement our fundamental human rights, for example freedom of expression, freedom of belief, social rights such as basic worker rights and right to decently healthy and cultural life.

However, there are (sometimes deep) disagreements between us about how these public goods should be provided, and how these human rights

should be implemented. It is inevitable for us to make public decisions (often, majority decisions in Diet), and for the minorities to respect and defer to the public decisions. Political membership and fraternity (or solidarity) between members are the basic motivation of respect and deference to public decisions.

How should we evaluate these arguments for and against Open Border Theory? My points of this presentation consist of two claims. (1) In order to construct a promising theory of immigrant justice, we must focus not only on immigration policies for foreigners to enter the host countries, but also on the policies that are necessary for migrants' social inclusion. Frequently migrants are not sufficiently integrated into host countries job market, are isolated and segregated from native people, (if they have children) cannot give their children enough education. (2) To answer whether Open Border theory succeed in presenting morally justifiable immigration policies, we should argue about whether states' particular membership can be morally justified, and the moral justification of states' membership is relied on the theories of political obligation.

2 Moral Significance of States' Membership: How Migrants Should Be Socially Included?

2-1 Why Social Inclusion of Migrants Is Morally Important?

2-1-1 Migrants' Social Exclusion

Though arguments for and against Open Border theory mainly focus

on (whether or not there are moral bases of) institutional restrictions on entrance into host countries, we should pay more attention to how migrants do and will live in host countries and communities.

They say many migrants, especially those who are low-skilled and have insufficient language competences, are ‘**socially excluded.**’ Usually, most migrants in developed countries do not suffer from absolute poverty, that is, wants of fulfillment of most basic needs for subsistence, and some migrants are even not living in relative poverty. However, they are very vulnerable because they do not enjoy enough social connections and participations, that is, they are socially excluded.

Their circumstances of social exclusion can be (roughly) described as follows.

(a) Insufficient language competence

Especially the extent of integration into host countries’ job market, and how the relationship between migrants and ‘native’ members will be built, depend largely (but not completely) on migrants’ language competences.

(b) Precarious employment, income, and other work environment

For migrants who are relatively lowly-skilled and have less competence of host countries’ languages, it is not easy to get highly-paid jobs and stable employments. For example, the population of Japanese-Brazilians living in Japan decreased drastically after the bankruptcy of Lehman Brothers and the subsequent recession in Japan (about 320, 000 in 2007 → 190, 000 in 2017). One of the factors of this decrease (and returning home) was that non-regular workers of Japanese-Brazilians were fired and lost incomes.

(c) Segregation of residential areas

There is a tendency that migrants live concentratedly. We can find various reasons for that (to guess, relatively lower incomes that affect af-

fordable house rates, needs to share knowledge and information for living in host communities between migrants, etc.), but segregation of residential areas seems to be one of the cues of social isolation and exclusion (Mori 2016).

(d) Barriers for migrants' children to enjoy adequate educations

Migrants' children often have troubles in their education. For example, they face difficulties to follow up classes, to be understood their circumstances, to be helped in learning host countries' language and their 'mother tongues,' difficulties for children's parents to understand and go along the significance of host countries' and communities' school education (at the same time, difficulties for the schools to explain to and get understanding of parents).

(e) Misrecognition and its effects on migrants' lives

'Misunderstanding' or lack of understanding of migrants' 'culture' (lifestyles, religions, etc.) may cause misrecognition and alienation. If there is an essential relation between enhancing and protecting our dignities and being respected our own ways of life and our conceptions of good (lives), misrecognition and alienation harms our dignities.

Some may argue that migrants enter host countries voluntarily and it is a matter of self-responsibility to overcome their social exclusions, but in my view how we should deal with their social exclusion is a matter of justice. Members of host countries should share burdens of solving migrants' exclusion under certain conditions. Why? The reasons are (a) a conception of equality in relational egalitarianism, (b) a conception of 'stakeholder citizenship,' and (c) morally important correlation between the particular membership of state to which we belong and political obligation.

2-1-2 Social Exclusion and Equality

How should we deal with migrants' social exclusion? In my view, the conception of relational egalitarianism is very hopeful.

Christopher Wellman argues as follows. For every person to live good lives equally, it is insufficient to distribute relationship-independent goods, such as guaranteeing the individual property right, and treating every person fairly. It is morally essential to have concern under what relationship every person lives his or her life. We cannot enjoy our good lives if we would be under relations in which we are dominated or exploited one-sidedly. Any conceptions of justice should consider not only about relationship-independent goods but also about relation-dependent goods.

Wellman claims that, among relation-dependent goods, we should treat seriously collective rights of self-determination of states, rights to determine the characters of states to which we belong. What immigration policies we adopt relates fundamentally to the character of states, so it is morally necessary for us to decide our immigration policies discretionally (Wellman and Cole 2011: 61-64).

There are objections to Wellman's argument, especially based on luck egalitarianism. For luck egalitarian, where we are born and raised is a matter of "brute luck." People born and living in poor countries and hoping to move to developed countries should be accepted by these countries, for their immigrations and escapes from poverty are one of the ways to correct inequalities based on brute luck.

The points of this controversy are as follows.

(1) Migrants' social exclusion seems to be, for relational egalitarianism, the lack or shortage of relationship-dependent goods. If we should treat the

distribution of relationship-dependent goods as a matter of justice, migrants' social exclusion is also a matter of justice.

(2) For Wellman's relational egalitarianism, it is morally important for us to decide our immigration policies discretionally. But why it is? This problem is related to the moral significance of border and citizenship of state.

(3) In order to answer the objection of luck egalitarianism which seems to support Open Border theory, it is necessary again to defend that citizenship of states should be closed in a certain extent. How can we defend it?

2-2 Social Inclusion and Citizenship: Stakeholder Citizenship

How should we understand the moral significance of citizenship? We can have some hints from Rainer Baobäck's argument of '**Stakeholder Citizenship.**' He treats as stakeholders of citizenship those who entrust a particular polity to protect basic rights of individuals and connect individuals' welfares with the same polity's common good, that is, have an **interest in membership itself.**

Many foreign residents who are socially excluded, in my view, are or hope to be stakeholders of citizenship. Of course, there are foreigners who only want to earn enough money to support themselves and their families living in national origins. However, as Joseph Carens says, as migrants live in host countries for a long time, they generally make relations with neighbors, colleagues, parents of classmate of their children, and so on. They sink deep roots in communities where they live. They are, in Carens' terminology, if they are not regular citizens, 'social members' (Carens 2010, p.17).

Citizenship is one of the most important conditions or backgrounds for social inclusion. We should recognize migrants' citizenship in certain con-

ditions and share burdens for their social inclusion, because they are citizens of our countries.

However, in my view, to express an interest in membership, we must fulfill political obligation as members of each particular political community. Why should we think so? Now we should tackle with the relation between states' membership and political obligation.

3 What is the Best Justification of States' Membership? : (Re) introduction of Theories of Political Obligation

To justify states' particular and limited membership morally, one of the promising ways is to look for the best moral justification of political obligation. There is an assumption of successful theories of political obligation that we must search "for an account of our special ties to the states in which we resides, for an account of particularized obligations that bind us to our counties of residence before all others" (Simmons 1993, p.203). Simmons calls this assumption 'particularity requirement (PR).'

3-1 Functional Justification and Relational Justification

Advocates of theories of natural duty of justice for justifying political obligation (NDJ) do not winch at Simmons' claim, however, and PR places too much emphasis on special ties, that is, commitments to special relations between members of the states. We can justify our political obligation based on necessity for government that implements justice and also necessity for coordination and avoidance of conflicts between plural governments effective in the same society (Jeremy Waldron). Or we can justify

based on allocation of responsibilities for implements of justice between states (Robert Goodin).

How should we deal with PR? In what follows, I will argue the significance of PR and present some reformed version of PR: we should defer to our governor of the states in which we reside, under some institutional guaranties of her claims justice in good faith.

3-1-1 Particularity of What?: Two Ways for Satisfying Particularity Requirement

Before examining theories that deal with PR, we must clarify on what those theories focus in order to satisfy PR. There are mainly two ways to satisfy PR.

Relation-based arguments for particularity (RBA), to show a particular moral relation between members of each state

Function-based arguments for particularity (FBA), to show moral functions of each state that limit the scope of obligation to support and cooperate with the state

According to RBA, we must point out an existence and a sufficient moral justification of relation between members of each state. For example, a consent of each person to be a member of a state in which he or she resides, each person's acceptance or receipt of public goods that the state provides, or a nonconsensual ties members of states develop, are candidates of the basis of moral justification of that relation. If we actually consent to be a member, accept or receive public goods, or have a nonconsensual rela-

tion with other members, we are under a particular moral relation that justifies political obligation. We should therefore answer two questions as follows: (1) What is a moral relation of members that can justify an obligation to obey the law? (2) Is there actually such a relation?

On the other hand, according to FBA, we should focus on moral functions of state, especially the implements of justice. We assume (as many think) that the scope of justice is universal, that is, justice and an obligation to cooperate with the implement of justice, in principle, applies to everyone inhabiting the planet Earth. However, addresses of political obligation are limited to people residing in a particular state. The task of FBA is bridging the gap of scope between justice and political obligation based on some specific features of state's functions. So, FBA must answer two questions: (1) What are the feature of moral functions of state that can justify an obligation to obey the law? (2) Do governments actually perform the functions?

The aim of this section is clarifying the limits of FBA and finding the appropriate way to overcome it. Firstly, I will review shortly some arguments for and against the theories of natural duty of justice (NDJ), because in my view many theories of NDJ are the most prominent FBA. Then, I will make sure that in order to overcome the limits of NDJ, we have to reconsider RBA and try to find some integrated theories of FBA and RBA. I will present that one of the most successful complementary theory is Philip Soper's way which is based on deference to the governor of the state in which we reside.

3-1-2 Limits of Function-based Arguments for particularity

3-1-2-1 Simmons' Critique of the Theories of Natural Duty of Justice

The theories of NDJ claims as follows. We have a natural duty of justice. We should support and cooperate with the efforts to implement justice. If we cannot be anarchists, then we have to accept states as the necessary functional scheme of enforcement of justice. We should not hold back states from the function of achieving success in making justice happen in reality. Political obligation is a natural duty to go along with our states' functions attaining justice.

John Simmons diagnoses that the theories of NDJ do not success in justifying political obligation. Theories of NDJ do not satisfy PR. NDJ only require to some state which has an aspiration to realize justice and do implement at least most of justice. However, political obligation is a requirement to obey our particular state. Let us presume United States follows justice more than Japan. Then, even if some of Japanese did not obey laws of Japan and instead obey laws of US, we should evaluate their action as carrying out the natural duty of justice (Simmons 1979, Ch.6).

3-1-2-2 Waldron's Defense of a Theory of NDJ

Jeremy Waldron defend a justification of political obligation based on NDJ against Simmons' critique. His defense are mainly constituted of two claims. (1) Justice is certainly universal, but the application of it can differ between states and the scope of application can also be limited within each state. For example, constitutions of developed countries generally seem to be compatible with justice, but their contents are different and cover only each country or jurisdiction. (2) The necessary condition of justifying po-

litical obligation is that the government of our state in which we reside generally conform to justice, and the sufficient condition is that the government has enough salience in a certain jurisdiction to monopolize people's supports and cooperation against other possible competing governments. Waldron recognizes that almost all of governments of developed countries is actually adequately salient (Waldron 1993).

In my view, the crux of Waldron's argument is that (a) it is not the relation between members of our state, but the functions of the state, that is, implements and applications of justice that drive the justification of political obligation, (b) he treats PR basically as a requirement to explain and justify the limited range of enforcement of justice by each state.

However, do Waldron really satisfy PR? Let us examine Goodin's NJT argument.

3-1-2-3 Goodin's Argument from Allocating Responsibility to Protect the Vulnerable: Specifying the Limits of Function-based Arguments for Particularity

For Robert Goodin, justice is protecting the vulnerable. It is inevitable for us to become vulnerable to others. When we make a contract with someone, we are vulnerable to her (for example) about her fulfilling the contract. If we need someone's looking after us, we are vulnerable to him about his care. Justice requires us to protect the vulnerable. Then we the members of our state should protect our fellow countrymen, for example, by guaranteeing a revenue source of their decent minimum from our tax. Goodin thinks that political obligation can be one of our essential performances of protecting the vulnerable (Goodin 1985).

It is very important, however, to remark that Goodin presupposes responsibilities to protect the vulnerable should be allocated between most promising agents. He writes as follows:

Presumably ascribing responsibility is always essentially a matter of pointing fingers. What distinguishes the standard model of responsibility from the one that I shall here be advocating is the purpose for which fingers are being pointed. With the standard model of responsibility, fingers are being pointed for purposes of fixing blame. With my model of responsibility, fingers are being pointed for purposes of assigning duties, jobs or (generically) tasks. Hence, I shall dub my model one of ‘task-responsibility’. In it, questions of ‘who has been assigned what tasks?’ become truly central to the business of ascribing responsibilities (Goodin 1989, 168).

How should we think about the situations when someone being ascribed a task fails to attain it? From Goodin’s viewpoint, it is morally desirable to subrogate him to other persons who are efficient to accomplish that task. When elder persons are not sufficiently cared by some recent polices or agents, it is the better to subrogate these to other policies or agents. If the members of a certain state cannot protect the vulnerable, other states should replace them. It is a matter of allocation of responsibilities. If Goodin’s claim is true, some dictatorships formed by coups or some invasions by foreign states can be morally justified to replace the last governments, if the last governments did not or could not fulfill the task of protecting the vulnerable.

To state simply, Goodin has a relatively small hesitation for replacing the current governments to attain justice. I believe that more than a few

persons must be astonished when they face the Goodin's argument, but it seems to be a very natural consequence if we may accept that every state has a task-responsibility to fulfill justice. What should we do when we face unjust laws in our country? Should we calculate the loss and gain in welfare, rights, or other basic goods of our countrymen in the cases of subversion of our current government? Should we permitted to change one government (e.g., U.S. federal government) after the others (e.g. Canadian federal government) according to the calculation? Then, may the legitimacy of our state be subject to the assumed balance in achievement of justice comparing the existent government and the possible governments? Is it not too impatient for us to abandon our actual government simply based on the calculation of the balance?

The same question should be directed to Waldron. Because for him the implement of justice is a necessary condition for justification of political obligation. If our state may fail to implement justice, Waldron cannot also avoid making sure the assumed balance in attaining justice and judge the current government should be overthrown.

It seems to be a matter of course that we have (natural) rights to resist and overthrow our current evil or inhumane government with our own hands or with foreign states' forces. However, if we might go against our partly unjust but generally just government and be secretly connected to another more just government, should not we be blamed simply as deserters? If so, Waldron and Goodin should be criticized for failing to elucidate fully the legitimacy of State or the particularity of political obligation. The central problem is that if we may justify political obligation only from FBA, we seem to be permitted weighing the merits of one state and those of another state and/or sitting on the fence two or several states.

3-2 Reassessment of RBA and the Desirable Way to Integrate FBA and RBA

We should call back that Simmons had already made critical objections to most of RBA. As mentioned previously, Simmons argued that if we actually make intentional and deliberate consents to be a member, accept intentionally and deliberately public goods from the social cooperation under our state, or have a nonconsensual relation analogous to that of families or friends with other members, we are under a particular moral relation that justifies political obligation. But, we are rarely under that relation.

Of course, we can contend with Simmons for the correctness or incorrectness of his diagnoses of RBA. One of the most disputed points is how we can refute Simmons' voluntarist premise that we are under political obligation only if we intentionally and deliberately assume it (or take actions which should be treated as an assumption of it). For Simmons, the moral relation which justifies political obligation are not made until we voluntarily commit to be members of a particular political society (Simmons 1979, Ch.8).

It is essential to see that we must introduce the value and the actual existence of some involuntary relation between members in order to make a success in justifying political obligation and satisfying PR. And the focal point, in my view, is to explain why involuntary relations are needed to accomplish the moral functions of state, though these relations are not enough to guarantee the state's justice and nevertheless have rich contents to justify political obligation. RBA can sometimes justify political obligation to obey evil regimes. For example, we can consent to Nazi's regime and

assume political obligation. Certainly, when we treat political obligation just as a *prima facie* duty, political obligation to obey Nazi's inhumane orders may be overridden by other moral requirements, such as some procedural constraints of Rule of Law, or a humanitarian duty to protect minimal human rights. But, even if it may be so, we must ask why relations between members, such as consensual relations, social cooperation to provide public goods, and so on, have moral values.

My answer is as follows. (1) We cannot accomplish justice directly, because we are under deep disagreements about conceptions of justice, and we need laws and/or political decisions to arbitrate these disagreements. (2) The process of arbitrating disagreements and making laws and political decisions itself has some relational values. For example, Ronald Dworkin claims that laws are solutions of theoretical disagreements about normative questions about what law (law as it is) is, and that the solutions should be based on the principle of integrity which are accepted by 'the Community of Principle.' "[The model of principle] makes the responsibilities special: each citizen respects the principles of fairness and justice instinct in the standing political arrangement of his particular community, which may be different from those if other communities, whether or not he thinks these the best principles from a utopian standpoint" (Dworkin 1986, 213). (3) It does not always happen that members of a state respect the principle of integrity, that are constituted by the condition of 'fit' (that requires each law consistent with past laws and decisions) and the condition of 'morality' (that requires each law be justified by the most attractive moral principles). We should not focus on scenes of contextual justification of law, but the coercive relations between the governor and the governed of our state, because they are more ubiquitous conditions for us. For Philip Soper, every governor

makes a claim of justice in good faith to the governed, as every person does when he or she orders and tries to make other persons obey. The governed defers to the governor's decisions because when the governor tries to answer the possible objections from the governed under deep disagreements about principles of justice, the governor's sincerity is worth respecting (on a counterfactual imagination of changing the governed position to the governor).

To sum: The particularity of political obligation should be based not solely on FBA or RBA, but on the controversies of justice and the relation between the governor and the governed that is based on the former's sincerity to answer opponents and the deference of the governed.

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