The Transnationalization of National Membership in the Era of Globalization: Ethnizenship and Beyond

Visiting Professor of Law Chulwoo Lee

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Dean Kellye Testy:

Well good after noon everyone. It’s a pleasure to welcome you all to this lecture by the Garvey, Schubert and Barer visiting professor Chulwoo Lee. I’m Kellye Testy as you probably know and I’m really happy to see a nice full room today and have you all here. So, very special welcome. I want to give a particularly warm welcome to the members of the firm Garvey, Schubert, and Barer who are here with us today. Ken Shubert Jr. is here who was actually involved when we first set this up and I’ll talk about that more in a moment. We also have Bruce Robertson here. Welcome Bruce, so glad to see you. And Sarah Sanford is here also today and she’ll be sharing a welcome with you in just a moment.

This firm’s history is really entwined with this law school’s history. There is many ways in which they are just so fused and I want to give a special recognition today to the firm because for one, we’re so proud of its founders. We’re so proud of all of our alumni that have been members of the firm. And we’re so thankful for all the ways that that firm has enriched the life of this law school. It’s just been phenomenal in so many ways both through the reputation the alums at the firm have created for the law school’s excellence. And also just for the ways the law firm has supported the school in many of its efforts.

And in one of those that has been very significant and it’s certainly not the only one is that in 1988 the firm chose to establish this professorship at the school of law. And at the time that they did that, it was the first time a firm had established a professorship here. And so it kind of set a trend in a way because thereafter of course it was a nice model and other firms wanted to step up and do that as well.

At the time it was also only the second professorship in the law school’s history. And this is something that’s so important in terms of attracting and retaining the most outstanding faculty. And today we have eighteen of those professorships. And so again it was really trend setting and really helped us move forward in a very important way.

When the press release was done announcing the establishment of this professorship, Mr. Shubert was quoted as saying, “The reason the firm chose to support the law school in this way was because of its own experience. Each quarter a visiting professor from UW Law would work with the firm’s attorneys offering seminars and otherwise sharing knowledge and the firm greatly benefitted from this and believes that a strong faculty is the very heart of a law school.” And I just couldn’t share that more firmly. It is so important for us that we continue to build faculty excellence here which in turn attracts the wonderful students that we have many of those with us today. And I’m so happy to see so many of our students here.

This gift to the law school and this professorship has really shown that outstanding faculty members are indeed so important to legal education. And the wonderful professor that we have with us, Professor Chulwoo Lee as the Garvey, Schubert visiting professor there’s just no better
example of that. And I will introduce him shortly and share more about his background but before I do that I did just want to offer this little bit of history, this warm welcome to you and then also ask Sarah to share some remarks with us.

Sarah Sanford:

Thank you Dean Testy. It’s in my capacity as one of the leaders of Garvey, Schubert, Barer’s international practice that I’m honored to welcome everybody today and also to share in hearing professor Lee’s presentation. When GSB started the visiting professorship one of the objectives in it being a visiting professorship was to bring in new ideas and new approaches and stimulate thought within the law school. We also wanted to afford a worthy professor with an opportunity to spend time among the wonderful faculty and students at UW Law School. So we hope that these kinds of interactions and the other school’s resources would further the professor’s research and be of mutual benefit in the same way that Dean Testy described we’ve enjoyed enriching our experiences at the firm through visiting legal scholars of both lawyers and professors.

Professor Lee fits the criteria of this post just beautifully. We are so pleased and certainly today’s topic promises to make us all consider global relations in a new perspective. So I look forward to that without further ado I’ll turn it back over to Dean Testy, but I just wanted to thank you all for being here and for the honor. It’s really a pleasure.

Dean Kellye Testy:

Well it’s an honor for me to introduce Professor Lee to you today. Not only were we so fortunate to have him as a visiting professor with us last year. He was with us Winter and Spring quarter of 2011 and he is also an affiliate professor of law at UW Law, something that we’re very proud of.

One of the things that I wanted to share in addition to having him here with us, though is that just last Fall many of us visited Korea. We visited Seoul in order to visit with our alumni and to establish academic partnerships with a number of law schools and also to participate in the East Asian Law and Society Conference. And I was able to travel there and to do that along with several of my colleagues including John Eddy and Clark Lombardy and Jonathan Kang as well. And at that time, we were able to work very closely with Professor Lee. We were co-host of that conference that was held at his home institution which is Yan Se Law School in Seoul, Korea. And it was a fabulous conference and we were really privileged to be a part of that and to share and learn from the professors who presented at that conference as well.

At that time, I was so impressed with his law school, getting to know his dean, the faculty there and just to see the law school. And as someone who, I know a lot of you tease me for being kind of a marketing maniac about UW Law, I particularly loved these big banners that I saw in front of their law school saying, “The first and the best,” right? They are just clearly a leading school in Seoul, Korea.

Professor Lee is an expert in the sociology of law and also in areas of citizenship and migration. And it’s those areas and related ones that he teaches in and also works and performs his research and scholarship. And those are great fits for the law and society work both the organization that does work in the US which he is a part of I know that he will be at its annual conference this summer as will many of our faculty here, it’s also a great fit with the East Asian Law and Society work that he leads. In fact next time that this conference comes forward it will be in China in the Spring of 2013 and Professor Lee is one of the members of the very distinguished planning committee for that and so we look forward to continuing our partnership with him.

I also had the benefit of his office while I was in Seoul, Korea so I have a very personal thank you...
for letting me hang out and get a bit of work done while I was there. And I want to note that in addition to our very warm personal relationship with Professor Lee, he is indeed one of Korea’s most distinguished academics having received his LLB and LLM from Seoul National University. He also received an LLM from Georgetown and a PhD from the London School of Economics and Political Science.

So it’s a great pleasure for me to say welcome we’re so glad you’re back here Professor Lee and I’ll turn this over to you for your presentation today. Thank you for being with UW Law.

Professor Chulwoo Lee:

Thank you very much Dean Testy. I cannot find suitable words to express my gratitude to the University of Washington School of Law and Garvey, Schubert, Barer for giving me the wonderful chance to speak in this prestigious event. There are so many people that I have to thank. Special thanks should be given to Professor John Eddy, Dr. Raigrodski, Jonathan Kang, and all members of the Asian Law Center, and also assistant Dean Stephanie Cox and Miss Hanna Houston at the law school administration. I should not forget to thank Miss Trinie Thai-Parker at the Law School law library who has helped me a lot in collecting some of the information that I am going to introduce in my talk today.

I enjoyed tremendous hospitality during my service as Garvey, Schubert, Barer visiting professor last year. And this memory sensitizes me to the proposition advanced by the migration scholar Yasemin Soysal in the early 1990’s. According to Soysal, “we are living in an age where national belonging is no longer important. Instead of national belonging, universal personhood is becoming the normative base of our rising status.” Soysal refers to a number of phenomena and concludes that, “the nation state is no longer the special unit of citizenship. National citizenship is giving way to a novel post national form of membership.” My experience at the UW School of Law makes me feel as if I have become a global citizen living in a post-national law. I must thank my colleagues at eh UW school of Law for giving me the privilege of being part of this diverse and open minded academic community.

But at the same time, this feeling of being privileged brings me to the German scholar Christian Joppke’s criticism of Yasemin Soysal. Joppke criticizes Yasemin Soysal and other post-nationalists for telling their stories in the name of migrants. Perhaps national citizenship and state boarders are no longer to these global academics who move between continents to attend conferences and so on. But Joppke warns that we should not forget that the vast majority of people are still locked up in the personal and physical boundaries of the nation state. For Joppke, the nation state remains the dominant mode of organizing our political life and the institutional point of reference for citizenship.

As we see in Soysal and Joppke, globalization and citizenship studies have been debating as to whether nation state is in demise or resilient and whether and to what extent national citizenship is reconfigured by forces of globalization. I was happy to think of these questions in light of my experience when I was here last year and I’d like to share some of my ideas on those questions. But my talk today unfolds itself from a rather different angle. When migration scholars discuss the transformation of citizenship, they tend to limit their focus to situation and treatment of incoming migrants. They are interested in the human rights of migrant workers, they celebrate the strengthening of the rising status of resident aliens whom they call denizens and discuss how the rise of denizenship reconfigures the existing notion of citizenship.

Assimilation versus multiculturalism in the integration of immigrants is also another important topic. Nowadays, scholars are increasingly interested in border controls and security concerns in immigration policy and practice. But compared with this, there has been much less interest in the
relationship between immigrants and their country of origin. This is because scholars who dominate the field of discourse are located in rich countries, countries of integration rather than immigration. Their interest in their own societies naturally makes them neglect the other side of the migration circuit. As the Algerian sociologist Apter Malek Sayad remarked, “One country’s emigration is another country’s integration.” The two are indescribable aspects of the single reality and one cannot be explained without reference to the other. This point is even more pertinent if we consider the fact that the distinction between sending and receiving states is becoming less clear cut as more and more countries are becoming involved in global migration processes.

Over the past years, migration scholars have made efforts to correct the neglect of the emigration side of the migration circuit. Transnationalism theory constitutes one of those efforts. While the term transnational is used in very diverse ways, transnationalism in recent sociological and anthropological discourse has a distinctive denotation. Trans here connotes horizontal or cross global movements. Whereas global connotes a space vertically upward in the nation state or a process decentered from state territories. Transnationalism is a descriptive concept characterizing activities, relations, networks and organizations spanning across the borders of two or more states. Transnationalism is practiced by emigrants in social processes in their country of residence and country of origin at the same time or who retain their identity as members of the nation of birth regardless of the state of residence.

Agents of transnationalism are not confined to individual migrants. States also practice transnationalism. Features of state practiced transnationalism or what scholars term transnationalism from above if you like are well captured by accounts of policies and strategies of states that seek to reach out and engage with their diasporas. Among diaspora engagement policies are various ways of economic incorporation such as creating incentives for remittances and investments and cultural incorporation such as supporting language education for younger generation expatriates. Diaspora engagement policies are not unique to poor labor sending countries or countries that have tragic backgrounds of dispersion.

Countries known as immigration countries like New Zealand and the United Kingdom have developed, or are in the process of developing programs for immigrants. The council of Europe has adopted a resolution of recommendation entitled “Links between Europeans living abroad and their countries of origin” to encourage European countries to strengthen their ties with emigrants and expatriates. This tendency relativizes the difference between nations with tragic backgrounds of dispersion and the homelands of economic migrants including middle-class high skilled ones.

Nowadays the term diaspora is not used only for Jewish or Armenians, but is used so loosely and brutally that even Brits abroad are called the British diaspora. Diaspora engagement policies include political and illegal incorporation. According to one international research institute 115 out of 214 countries or autonomous political regions in 2007 were found to have provisions on external voting. The Council of Europe encourages its member states to provide for external voting by non-residence citizens. In fact there is no international norm that says non-resident citizens should have equal voting rights to resident citizens. Countries that have a large number of non-resident citizens such as Ireland and Israel understandably limit external voting in one way or another. Many countries including Britain, Canada, Australia, and New Zealand do not allow external voting by citizens who have been away for too many years out side of the country. But there is a trend towards expanding external voting. In this April, overseas South Koreans will have their first opportunity to vote in a national election since 1972.

Another crucial means of political legal incorporation of immigrants is the toleration of the US citizenship. The 1990’s witnessed a widespread trend of legal change in favor of tolerating the dual citizenship of emigrants and expatriates or co-ethnics living abroad. Six Latin American countries including Mexico and Brazil changed their laws in that direction while some East European states
used US Citizenship in incorporating their ethnic kin living in neighboring states.

The toleration of dual citizenship of emigrants or co-ethnics abroad is a very good way of creating a so-called deterritorialized nation state when it is coupled with other strategies and practices of transnationalism from above and below. This term deterritorialized nation state was introduced in a book entitled Nations Unbound authored by Basch, Schiller and Blanc. The authors characterized a deterritorialized nation state as a state whose people may live anywhere in the world and still not live outside of the state. They distinguished this from a diasporic situation. A diaspora is a population outside of the homeland but for a deterritorialized nation state there is not diaspora because wherever people go the state goes go. This sounds like an academic musing, but it is an interesting attempt to highlight the defiance of some states and trans-migrants against the hegemonic logic of the territorially bounded nation states. Whereas US citizens are still citizens, some states have created a third category between citizen and alien to incorporate expatriates or coethnics abroad who are not their citizens or citizens of other countries-the countries where they reside. The Austrian political scientist Rainer Baubock coined the term ethnicenship to denote this kind of external quasi-citizenship and it is this strategy that I’d like to focus on in the rest of my talk today.

One example of ethnicenship comes from South Korea. This country has legislation that gives preferential treatment to members of its diaspora whom it calls coethnics of foreign nationality. Lawyers are familiar the term nationality in international law, but if you go Eastern Europe, people use this term in a very, very different way. So I would rephrase this to coethnics of foreign citizenship instead of nationality to avoid confusion. Coethnic or foreign citizenship is defined as a former Korean national or his or her lineal descendants up to two generations. Such a person may obtain an overseas Korean or a full visa. With this visa, the person can reside and work for income in Korea with much greater freedom than ordinary foreigners who are not of Korean origin. The person can also enjoy national treatment in financial transactions, land ownership and social benefits such as national health insurance but some of these provisions are redundant because land ownership and national health insurance had become liberalized by the time this scheme was introduced already. The overseas Korean visa is for three years, but it can be renewed as many times as possible. While the holder of this status is not allowed to have a manual labor job in Korea there is another scheme that’s especially for coethnics from certain countries who wish to work in low skill job sectors. This so-called working business scheme is open to members of Korean minorities in China and the former Soviet Union, and unlike the overseas Korean status, the working visa status often called the H2 visa status cannot last for five years or more. But its holders have greater freedom in employment and choice of jobs and guest workers of non-Korean ethnic origin admitted through the so-called employment permit system.

Let me show you some statistical data. Can foreigners who are of the same ethnic origin with the state that reaches out to those foreigners. Can foreigners among foreigners as of 31st December, 2011, Korea had a total 1.4 million foreigners on their soil. Among them 1.1 million registered foreigners. Koreans of foreign citizenship account for about half of these registered foreigners. Among those are citizens of PRC who account the majority of those kin-foreigners and US citizens also form a small percentage of them. So from this picture and also the next one, visa statuses of kin-foreigners, you see, F4 visa that is for overseas Korean visa and as we saw that is for middle class high skilled ethnic migrants who would not work in low skill job sectors. That group accounts for about 24.8 percent of the total number of so-called kin-foreigners. But as H2 visa holders, these people work in rather 36 low skilled job sectors and they account for 55 percent. Again, people from the People’s Republic of China form the great majority of these people. Kin-foreigners in the legal market: there are about 600,000 foreigners with working visas in Korea and specialize in high skilled account for only a very small minority. But as guestworkers form the majority of foreigners with working visas and again E9 visa holders account for 42.8 percent of all foreigners with working visas. As we saw, 96 percent of these E9 visa holders are from China. So what we see in this picture is the nature of immigration in Korea. Korea’s immigration is mostly predominantly
ethnic migration and Korea’s immigration policy is heavily intertwined with diaspora policy.

What we see now is a result of two decades of evolution in Korea’s diaspora policy. Statutory preference scheme first came to exist in 1999 by way of the Overseas Koreans Act. Before then there was some preferences given to kin-foreigners but mainly they were about how to give a greater quota to ethnic Koreans coming from China in allocating quotas amongst industrial trainees which is just a disguised form of labor import. But the Overseas Koreans Act was the first statutory scheme to give preferences to kin-foreigners. When this law was introduced there was much controversy because co-ethnics from China and the former Soviet Union had to be excluded categorically from the scope of the law. The exclusion was for two reasons: first, there was criticism from China. The Chinese ambassador to Korea criticized the Korean government for creating this kind of scheme which he saw as the same as creating fewer citizens and he said that was inimical to China’s minority policy. It would disturb China’s policy towards the Korean minority in the northeastern part of China. Secondly, there was concern with Korea that a massive influx of Korean Chinese would disrupt the labor market in the wake of the Asian financial crisis which created a great stress in the labor market already. Therefore, the Overseas Koreans Act was created with 2 million Korean Chinese and half a million coethnics in the former Soviet Union excluded from the scope of the law. But as soon as the national assembly passed the law, free Korean Chinese brought a constitutional complaint in the constitutional court and in 2001 the constitutional court ruled that the Overseas Koreans Act unconstitutionally discriminated between different groups of coethnics. The Overseas Koreans Act was amended in 2004 to embrace all former Korean nationals and their lineal descendants up to two generations regardless of in which country they live or in which period they emigrated. But discrimination continued in practice as coethnics from China and the former Soviet Union were subject to prohibitive requirements in visa application and no one from those countries was given an F4 visa until 2008. As there was continuing grievance, the South Korean government began to give F4 visas to coethnics from China and the former Soviet Union in 2008 and shortly before then, it created another ethnicinship and that is the working visa scheme.

Discussions surrounding the Korean practice of ethnicinship have centered on discrimination between different groups of coethnics and the smooth management of the work visa program as a part of the guestworker system that forms the backbone of migrant labor policy. But there has also been some debates about the legality and legitimacy of ethnicinship in light of international standards. The Seoul National University professor Chang Kyung-sup castigated the Overseas Koreans Act as racially discriminatory. Koreans’ ministry of foreign affairs also expressed displeasure when the Overseas Koreans Act was about to be introduced. What is interesting is that both critics of the Overseas Koreans Act had very little knowledge of similar policies in other parts of the world when the law was enacted and challenged. I interviewed the former ministry of justice official in charge of drafting the Overseas Koreans Act and he said very proudly how he and his team drafted the law without referring to any foreign example because there was no foreign example, and critics of the Overseas Koreans Act for that reason. It’s so peculiar to Korea. No other countries in the world have this kind of law that was their criticism. By the time the Overseas Koreans Act was introduced, however, a number of countries had schemes of preferential treatment of former nationals, expatriates, or coethnics living abroad. Mexico in 1993 amended its nationality law to allow natural born Mexicans who lost Mexican nationality to enjoy property rights on a par with Mexican nationals whereas foreigners in general were subject various kinds of restrictions in land ownership. In 1995 Turkey enacted a so-called lex [inaudible 32:04] and issues pink cards to people of Turkish origin who lost Turkish national citizenship and gave them national treatment in land ownership, employment and other economic rights. In 1997, Slovakia enacted its law on expatriate Slovaks. It was pretty similar to the Turkish scheme: issuing expatriate cards, giving visa free entry, residence and employment and national treatment in real estate ownership and even some social support. In 1999, India introduced the persons of Indian origin scheme to make persons of Indian origin enjoy the same rights as so-called nonresident Indians who are citizens of India.
But Korean law makers should not be blamed for their lack of comparative knowledge because legislation for preferential treatment of kin-foreigners was rarely heralded in most parts of the world. The world was ignorant of the phenomenon of ethnicenship until 2001 when there was a huge [inaudible 33:25] between Hungary and two neighboring states Romania and Slovakia due to a piece of Hungarian legislation entitled Act on Hungarians Living in Neighboring Countries better known as the Hungarian Status Law. The Hungarian Status Law provided for preferential treatment of persons of Hungarian ethnic origin living in six neighboring states where a total of 2.5 million ethnic Hungarians lived. That is: Romania, Slovakia, Ukraine, at that time Yugoslavia, which is now Serbia, Croatia and Slovenia. These differ from emigrants of what we normally call a diaspora because they were separated from the kin-state not because they migrated but the borders moved and the border moved as a result as a result of the 1920 Treaty of Trianon for peace settlement following the First World War.

Among the benefits given by the original 2001 status law were a seasonal three months’ work permit in Hungary, medical care, pension benefits, travel discounts, university scholarships and training for teachers and support for families in the neighboring countries who have children going to Hungarian language schools, but the work permit, medical care and pension benefits were removed in the 2003 amendment. So now only cultural benefits remain and most of these benefits should be given in Hungarian territory whereas the original 2001 status law distributed many benefits in the territories of neighboring states.

Now the Hungarian Status Law has lost much of its meaning and functions. Firstly, it was because two major countries where a large number of ethnic Hungarians, Romania and Slovakia also became members of the European Union. Slovakia became member of the European Union at the same time as Hungary and Romania exceeded later. When Hungary introduced this law, its main idea was to make up for the expected separation of Hungarians living in neighboring countries from their homeland because the [inaudible see 36:09] borders will be imposed on them. [inaudible 36:09]will separate Hungary from countries outside of the European Union. But now that many of the ethnic Hungarians are citizens of the European Unions, the use of the law has much decreased. Secondly, Hungary amended its nationality act in 2010 to allow preferential naturalization by people of Hungarian ancestry in neighboring countries who can now acquire Hungarian citizenship without moving to Hungary or residing in Hungary.

Nevertheless the Hungarian Status law has been an important point of reference in the comparative study of ethnicenship. The term status law has become a generic term for laws creating ethnicenship. While ethnicenship is an analytical term and no government, no people or governments do not use this term. But status law has become a kind of generic term to describe laws that create this kind of preferential treatment for kin-foreigners.

The central position of the Hungarian case owes much to the intervention of the Venice Commission of the Council of Europe in the controversy between Hungary and Romania surrounding the status law. In response to the two countries’ request, the Venice Commission conducted research of similar laws in Europe and found 9 cases of statute or administrative regulation. I think you can see 9 European countries were found to have similar laws starting with Austria in 1979. This law is for German, [inaudible 38:19] speaking people in the Italian province of Bolzano and other countries, Bulgaria, Greece, Italy, Romania, Russia, Slovakia, Slovenia and so on. The Venice Commission issued its report in 2001 and after them two other countries enacted similar laws. One is Poland in 2007, the Act on Polish Ethnicity Card. And Ukraine, Ukraine enacted law entitled Law on the Status of Foreign Ukrainians in 2004. So as far as I know there are more than 10, 11 countries in Europe that have so called status laws whose characteristics are not exactly the same of course.

European status laws are as I said very diverse in nature. I can’t spend too much time on discerning
the similarities and differences between these cases. And I should say that this table is rather incomplete. It’s not just incomplete, but it might be misleading because there are myriads of laws outside of the main status law that address issues that relate to kin-foreigners. For example, Hungary, the Hungarian Status Law says nothing about the visa status of ethnic Hungarians when they travel to Hungary but it has immigration law and the immigration law provides for visa status for those people. When I just mention the contents of the status law only it might not give you a complete picture but in any case we can use this as a template and make a typology by reference to the criteria I mention here such as whether the law targets all diaspora or can minorities in particular states rather the law also addresses citizens living in foreign countries as well as kin-foreigners or kin-foreigners only. And whether special identity cards are issued and whether the law gives immigration preferences and whether the benefits are cultural or economic, whether kin-foreigners enjoy economic privileges like property or business interest or employment and particularly, whether benefits are given in the state of residence or only when the kin-foreigner comes to the kin state.

The Venice Commission report which is entitled “The Report on the Preferential Treatment of National Minorities by their Kin-state” remains the most authoritative and perhaps the only general treatise for normative evaluation of ethnicenship practices. It sets out four principles. The principle of territorial sovereignty of state, pacta sunt servanda, friendly neighborly relations, Human rights and fundamental freedoms: particularly the prohibition of discrimination.

Let’s firstly take a look at how the Venice Commission judged status laws in the light of the principle of territorial sovereignty of states. Status laws and laws that create ethnicenship are problematic because they have effects on citizens of foreign countries without the consent of that country. But the Venice Commission seemed to say that as long as those effects take place within the territory of the kin-state there is no infringement of the sovereignty of another state. According to this observation, many ethnicenship laws including the Korean law are sound. And Slovakia defended its law in challenging the Hungarian status law because it provided for benefits to be enjoyed only in Slovakia unlike the Hungarian status law. The Venice Commission simultaneously recognized situations where the kin-state could legitimately do something on foreign citizens in their state of residence. That’s when the kin-state distributes cultural or educational benefits such as scholarships or research grants. But even when this takes place the activity to be supported should have a link with the culture of the kin-state. One of the problems with the initial 2001 Hungarian Status Law was that it provided for support for university students and teachers of Hungarian ethnic origin regardless of what they studied or what they taught. So criticism drove Hungary to remove these benefits when it amended the law in 2003. But suppose South Korea selects a Korean American law professor as a global Korean talent and gives him a grant to support his study of American constitutional law. Would this constitute an infringement of the territorial sovereignty of the United States.

The second sub-principle the Venice Commission declares is that the kin-state should not exercise its powers outside its borders. Issuing visas at the consulate also involves exercise of public power. Well, this is okay according to the Venice Commission. What the Venice Commission was mostly concerned about was the Hungarian practice of certifying people of Hungarian ethnic origin when one, it made compulsory for an applicant for recognition of his or her Hungarian ethnicity to obtain a recommendation from a Hungarian ethnic organization operating in the country of residence and that recommendation was compulsory so the Venice Commission saw that as a kind of empowering of a non-state organization registered in the country of residence to perform some sort of public functions and the Venice Commission saw that as an infringement of the sovereignty of that state. So Hungary removed its recommendation requirement in its 2003 amendment.

The following two principles, the principle of pacta sunt servanda and friendly neighborly relations have some unique context, European context which do not apply to other ethnicenship practices.
Hungary designed and justified a status law in the name of protecting its minorities in neighboring countries. But there are already treaties, the war treaties that Hungary were parties to. Hungary had a friendship treaty with Slovakia, another friendship treaty with Romania which also invoked the most important multinational minority protection treaty, the framework convention for the protection of minorities. So most of the measures that a kin-state might like to take for its kin-minorities are already preempted by these existing treaties, but this doesn’t apply to other ethncisship practices and policies. As for the Overseas Koreans Act and the working visa scheme, some Korean scholars think of it in terms of Korea’s policy towards its minorities in foreign countries particularly the nearer abroad China and the former Soviet Union, but Korea doesn’t bear to declare it as a kind of policy towards the kin-minorities in other countries because China would be incensed if Korea does that, so Korea doesn’t address this kin-minority problem when it reaches out to its kin-foreigners with these special skills. And Turkey, India, all these cases, this has no relevance to those cases.

But the principle of friendly neighborly relations has wide applicability. The Venice Commission construes this principle as also meaning that a state should not create a political bond with its ethnic kin among a foreign population. The Commission was particularly concerned about misuse of ethnic cards issued by kin-states. The Hungarian card initially looked like a passport carrying Hungarian national symbols. The issuance of such cards in the host state might raise suspicion of infringing on the sovereignty of that state. This is why South Korea abandoned its initial idea of issuing overseas Korean registration cards and decided to issue cards when overseas Koreans reported their residential address in Korea. A fundamental question that arises is whether the creation of a group of ethncisship itself, the ethnic taxonomy itself is violative of this principle. Such action might be seen as creating a political bond even to the degree of creating a trans-border nation. The Venice Commission doesn’t grapple with this question extensively and discusses the ethnic targeting aspect of status laws in the context of the principle of equality and non-discrimination.

The Venice Commission’s discussion of the equality principle is quite deficient. It talks of three kinds of discrimination between, the discrimination between preferentially treated ethncisens and the citizens of the kin-states, between ethncisens of the host state and between kin-foreigners and all other foreigners. Then the Commission conflates these three different dimensions of discrimination which Michael Wolzer would see as forming different spheres of justice and this conflation results in the application of the affirmative action doctrine to the action of the kin-state including its discrimination between kin-foreigners and their fellow citizens in the state of residence over whom the kin-state has no jurisdiction and therefore no affirmative action is possible.

Secondly, the Venice Commission opined that preferential treatment is legal only in the field of education and culture and is acceptable only in exceptional circumstances in fields other than education and culture. This opinion is a response to the Romanian grievance with a three months’ work permit given by Hungary to ethnic Hungarians in Romania. The Romanian grievance drove Hungary to grant the work permit to all Romanians. And this was in the end removed in the 2003 amendment. But the Venice Commission’s opinion seems to be blind to the widespread ethnic preferences in various fields other than culture and education. The Venice Commission admits that ethnic targeting is common in citizenship laws. It is true that discrimination by reason by ethnic origin is prohibited in citizenship rules too, but facilitated ways of acquiring citizenship for former nationals, for example, are not just allowed but even encouraged by international instruments such as the European Convention on Nationality. At least three of the status laws that the Venice Commission examined: the Bulgarian, the Greek, and Slovak laws carried heavy elements of preference in citizenship, acquisition, immigration, and employment, although Slovakia amended its law in 2005 to remove economic benefits. The Korean, Turkish, and Indian belong to that category. As for the Turkish pink card scheme: one commentator described the pink card holders as denizens in their home country.
For those status laws which give immigration preferences and economic benefits within the kin-state, the problem of ethnicenship collapses into the brutal question and immigration policy: namely the question of whom to let in. In that regard Christian Joppke’s breathtaking book, Selecting by Origin is a source of great inspiration. In that book, Christian Joppke examines a number of different constellations of immigration policy. The first is the settler state constellation represented by the United States and Australia. The second is the European post-colonial constellation which divides into the Northwestern European and the Southwestern European types, and lastly, the Israeli and German diaspora constellation. He revised these into two different types of discrimination: negative discrimination and positive discrimination. The thrust of Joppke’s argument is that the contemporary liberal state is in the crossfire of de-ethnicisation and re-ethnicisation and that ethnic migration but it will continue only within liberal constraints.

Joppke is often portrayed in propagating a universalizing discourse but I would shed light on his nuanced differentiation between various regimes of discrimination firstly, more pernicious negative discrimination versus less pernicious positive discrimination, and secondly, between different rationales and language of discrimination.

This issue is as much a domestic constitutional issue as an international legal issue but I haven’t got much information of cases in which ethnicenship is challenged in national courts. The Hungarian constitutional lawyer and the leading in the free democratic party, Yanus Keys argued that the status law was unconstitutional because it created without mandate a third category between the two categories of subjects of public rights that the constitution recognized that is all persons and citizens. But this challenge doesn’t seem to have been channeled into a formal constitutional dispute. The Korean constitutional court ruled against the Overseas Koreans Act but it was because the rule, the law discriminated between different groups of coethnics. Although some commentators took issue with the fundamental problem of discriminating between different groups of foreigners, the court did not look into that question.

With regard to this question, the National Human Rights Commission gave its opinion, interestingly, and it said that preferential treatment by reason of past citizenship, in other words, preferential treatment of former nationals is not contrary to the constitutional principle of equality and nondiscrimination whereas different treatment by reference to ethnic origin is at variance with the principle. Christian Joppke also makes reference to this difference although that difference turns out to be less than fundamental in his overall discussion.

Let me wrap up my talk by discussing some of the implications of ethnicenship. The main question is how anomalous this practice is? As we have seen, ethnicenship practices are much more widespread than people originally imagined. Advocates of ethnicenship in Korea point out that Japan also gives preferential treatment to persons of Japanese origin called Nikagian in South America. There are about 360 Nikagian among Japan’s 2 million foreigners. So it also shows that Japan’s emigration policy and particularly the foreign labor policy is very much inclined towards ethnic migration. While China once criticized the Overseas Koreans Act, it has a similar law, law on the protection of the rights and interests of the returned overseas Chinese effective 1990. Britain also has a preference scheme for persons of British ancestry. There is a special visa called UK Ancestry Entry Clearance. Both advocates and critics of ethnicenship often compare ethnicenship with dual citizenship. The Chinese government criticized the Overseas Korean Act as deliberate attempt to create virtual dual citizens. On the other hand, advocates stress that ethnicenship falls short of citizenship. They ask what’s wrong with granting coethnics whereas many countries give the coethnics citizenship, without asking them to renounce their previous citizenship. As I mentioned, dual citizenship is used as a powerful strategy for creating a trans-border nation. Romania made many citizens in Moldova its citizens by allowing for their remote naturalization. Croatia allows dual citizens in neighboring countries to vote in its national elections. In the mid nineteen nineties, the country’s nationalist president Franjo Tudjman was not very popular in
Croatia particularly in Zagreb, but he could keep his position by obtaining massive support from
Croats in Bosnia Herzegovina. Hungary’s 2010 amendment of its nationality act is also seen as a
threat by some of their neighboring states. In retaliation, Slovakia changed its law to make it
possible to denationalize citizens who acquire Hungarian citizenship by remote naturalization. In
December, in last December, so less than two months ago, a 100 year old woman named Ana
Detomas got deprived of her Slovak citizenship because she had acquired Hungarian citizenship.
Although dual citizenship can engender this kind of conflict, there are few affective international
mechanisms to suppress it being used as a means of long distance ethnic nationalism. The European
Union exhorted Romania not to give out its citizenship to Romanian Moldovans, but it was only to
suppress third country nationals jumping into the personal boundaries of the European Union.
Romania resumed its practice after exceeding to the European Union and its policy is no longer
affectively challenged. Compared with these measures, ethnicship looks relatively benign, but
under the hegemony gaze of the international legal order it may look anomalous. It registers a
dissociation of the nation from the state disturbing the myth that is at the heart of the nation state
based world order-the myth that the nation and the state should coincide with each other. In 2003
parliamentary assembly of the council of Europe adopted the resolution which reaffirmed that
public international law is based on the concept of state and citizenship and there is no room for the
concept of nation. This conceptual proposition in condemnation of the Hungarian Status Law was
followed by a more extensive report entitled “The Concept of Nation” adopted by the same
assembly 2005. The report contained a study of how the concept of nation is used in different
countries in Europe. When I visited Budapest in 2006, a nationalist scholar told me in jubilant
mood that it was a victory for Hungary because the report made it clear that the west European way
of using the term

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