I argue that equal rights of people with disabilities are violated in the immigrants’ selection process of Canada because the nature of citizenship fundamentally excludes people with disabilities from its framework. The concept of citizenship is built on the liberalistic idea of society which values only the citizen’s capacity to work so that people with disabilities are considered nothing more than an economic and social burden to society. I present my argument in four aspects. First, there is a constitutional conflict between the Immigration and Refugee Protection Act and the Canadian Charter of Rights and Freedoms. Second, the idea of citizenship is built on the selection of people who can economically contribute to society based on their capacity to work. Third, a eugenic paradigm plays a significant role in the social construction of citizenship. And finally, I call for a change in the discriminatory immigration law by critically evaluating the paradigm of citizenship.

The practice of selecting immigrants in Canada has officially excluded people with disabilities since the 1869 Immigration Act (Chimirova, 2008, p. 38; Capurri, 2010). In recent times, although ‘disability’ is not explicitly stated as a factor of inadmissibility, the 2001 Immigration and Refugee Protection Act still contains health–related criteria which determines the admissibility of immigrants based on a medical report (p.38). Accordingly, the admission of people with disabilities and their families to Canada is legally denied. For example, in 2012, Sungsoo Kim, who had lived in Canada for 9 years with a work permit, was denied permanent residency and ordered deported to his country because his son was found to have autism. Similarly, in 2010, Mr. Barlagne’s application for permanent residence was rejected due to his daughter’s cerebral palsy. The Kim and the Barlagne families faced rejection of permanent residency for the same reason: their child’s disability was expected to bring a costly burden to the health and social service of Canada (CCD, 2011, 2012). Not only are immigrants with disabilities inadmissible in Canada, but refugees with disabilities also face barriers in the resettlement process.
because developed countries, Canada included, view them as a potential burden to the state (Mirza, 2011, p.526-527; Anani, 2001, p.28).

The Immigration and Refugee Protection Act (IRPA) contradicts the Canadian Charter of Rights and Freedoms in its stipulation of the constraints on immigration for people with disabilities. To be specific, Section 38(1)(c) of the IRPA states: “a foreign national is inadmissible on the health grounds if their health condition might reasonably be expected to cause an excessive demand on health and social services.” This means that people with poor health conditions or with disabilities are legitimately denied admission to Canada based on the fact that they presumably drain a great amount of social resources from the state. Many applicants whose applications of permanent residency were rejected under this provision tried to appeal these decisions in courts of law. Most court decisions indicate that only families are allowed to immigrate in so far as the family of a disabled child is willing to pay for the special education and health treatments for their child, instead of using social services (Chimirova, 2008, p. 43–48). Chimirova points out that it is very unfair to demand immigrants with disabled children to pay for their own medical expenses as a condition of immigration, while non-disabled citizens can enjoy the universal and socialized health care system. According to Chimirova, this provision stems from the idea that people with disabilities are neither capable of being independent nor productive and therefore are burdens to society. Accordingly, in this line of thought, a state, as a sovereign instrument, should prevent non-citizens with disabilities from coming into the country and spending the money of domestic tax-payers (p.49, p.50).

However, as Chimirova (2008) argues, these health-related restriction are not consistent with the values and purposes of the Charter. Not only does the Charter states the formal and procedural equality rights of people with disabilities under section 15, but the Supreme Court’s analyses of the Charter shows that adverse discrimination of people with disabilities is also taken into account when examining barriers people with disabilities face in the public sector of society (p.55). In this sense, the accommodation for people with disabilities is necessary to guarantee substantial equal rights for them (p.25). Also, since the Charter’s purpose was clarified by the court as to protect the dignity of minorities (p.26), Section 38 (1)(c) can be said to violate the spirit of the Charter (p.57).

The Section 38 (1)(c) “excessive demand” phrase presumes that people with poor health conditions or disabilities are burdens to society. This provision demeans the dignity of people with disabilities by intensifying a prejudice and stereotypes against them. It is also important to note that the court’s analysis of the Charter clarified that non-citizens are also protected under s15 of the Charter (Capurri, 2010), so the IRPA’s exclusive provision can legitimately be overridden by the Charter.

Despite this, the principles of the Charter are not incorporated well into court decisions regarding the immigration of people with disabilities. According to El-Lahib and Wehbi (2011), in 2005 Supreme Court ruling in the case of the Barlagne family, the court ordered Immigration Canada to perform an individual assessment of immigrants with disabilities to consider the financial factors of the immigrating family, rather than making a decision merely based on the medical criteria. The authors criticize that this ruling intensified the notion of the charity model for people with disabilities by calling for “humanitarian grounds” for the family with disabilities, instead of taking a human rights approach (El-Lahib and Wehbi p. 99-101).

Moreover, El-Lahib and Wehbi (2011) point out that the immigration merit system, which screens out immigrant applicants based on point criteria, eliminates the chances of people with disabilities to gain permanent resident status. The merit system of immigrant selection criteria consists of six factors, such as applicants’ education, language ability in English and/or French, age, work experience, arranged employment, and adaptability. They criticize that people with disabilities from the global south are less likely to meet this criteria because people with disabilities are under the oppressive power relations that systemically exclude the people from education and employment in their home country (p.97-98). Therefore, the merit point system of Canada is not fair for people with disabilities when it comes to assessing the merits of those people from the global south (El-Lahib and Wehbi, 2011, p.98-99).

The medical and merit criteria also reduce chances of refugees with disabilities being permitted entrance to Canada. Refugees with disabilities are generally rejected admission in Canada after going through the selection criteria (Anani, 2001, p. 28). Mirza(2011) notes that despite the recommendation of the United Nations’ High Commissioner for Refugees (UNHCR)’s program for developed countries to annually accept more than 10 refugees with disabilities,
most countries stick to their discriminatory admissibility criteria for economic reasons (p. 527).

Secondly, the legal and systemic barriers that prevent people with disabilities from gaining Canadian citizenship reveal the liberalistic nature of how Canadian citizenship is legally defined. In other words, the perception towards people with disabilities as a medical and social burden represents the characteristic of the concept of dis-citizenship (Devlin & Pothier, 2006, p.17). The concept of dis-citizenship means that citizenship substantially excludes people with disabilities from having full civil rights because the nation evaluates citizens in cost-benefit terms according to their productivity and efficiency (p.17). The substantive condition of Canadian citizenship is constructed according to the notion of productivity and efficiency of citizens and, in so doing, naturally excludes citizens who do not fit into this notion. The inadmissibility of people with disabilities based on physical competence generates fundamental questions of who is included as citizens in the first place. Although citizenship is a framework which ensures people's equality within the nation, the liberalistic characteristics of citizenship prevent people with disabilities from having full access to equal rights.

Capurri (2010) illustrates the ideological aspect of the Canadian identity formulation process that creates “legitimate citizens”. She argues that people with diseases or disabilities were restricted from entering the country based on the concerns about the social and moral impact of people with disabilities, such as racial degradation (Capurri, 2010, p.356). However, according to her, contemporary concerns are more related to the public expense people with disabilities might impose on the society (p.356). This shows how a public paradigm regarding citizenship has shifted in accordance with capitalist market economic imperatives.

Historically, people with disabilities are de-valorized due to the systemic requirement of maximized body functions in capitalism (p.52). In this process, culture, politics, and economy went together to prioritize healthy, industrious, and exploitable bodies while devaluing presumably unfit bodies. Consequently, this process results in stigmatizing and institutionalizing people with disabilities, denying their full access to citizenship (p.53, p.55). Given the fact that immigration is a central part of the Canada’s national identity, the exclusion of people with disabilities from the selection system indicates Canada’s political intention to erase people with disabilities from the Canadian citizenship formulation of “rightful citizens”.

Furthermore, Abberley (1999) argues that citizenship is created and granted on the grounds of individuals’ capacity to work in the process of the capitalist development. According to him, conservative social theorists argue that people with disabilities are destined to be left out from the social arrangement comprised by the web of occupational structures because people with disabilities’ physical impairment prevents them from participating in any occupation (p.6-8).

Marxist theorists attribute the society’s rejection towards people with disabilities to the inhumane characteristics of capitalism that produce and jeopardize impairment (Abberley, 1999, p.6-8). However, according to Abberley, neither of those social theories can offer a solution for the marginalization of people with disabilities in labor since both of those theorists presume that the basic human condition is the capacity to work (p, 11-12). Abberley (1999) argues that, in these social schemes, it is determined that some people are, no matter what they do, not able to create social value because the social value and wealth are integral to the interests of the majority of the society (p.12).

In this respect, people with disabilities’ incapacity to work do not come from their impairment per se. Rather, the people with disabilities are considered as incapable to work or unproductive due to the socially constructed notion of “work.” Therefore, it is reasonable to say that Canadian citizenship has been constituted in a way to marginalize people with disabilities by constituting the people as an economic and social burden of the nation.

Thirdly, a eugenic discourse embedded in the immigrant’s selection criteria also minimizes the equal rights of people with disabilities. Carey (2003) argues that eugenic restrictions are integral to the “legitimate citizen” selection discourse through the systematic medicalization and institutionalization of people with disabilities (Carey, 2003, p.423, p.424). According to her, legal and political system goes hand in hand with the eugenic ideology to control minorities in the name of the medical care and protection. To be specific, people with intellectual disabilities and mental disabilities fall into the category of ‘deviance’ in the liberalistic concept of citizenship.
Liberalism is based on the assumption that citizens are rational agents who agree on the state protection in exchange for some extent of their freedom being handed over to the state. In this sense, individual competence and autonomy are the key elements that make up citizens. Accordingly, a nation built on liberalism legitimately restricts the civil rights of people labeled as “feebleminded” for the sake of the society as a whole. Carey (2003) also maintains that moral narratives play a role in the construction of citizenship. Moral narratives stigmatize and segregate people with intellectual disabilities based on the perception that people with intellectual disabilities are unable to distinguish moral value. Congruently, the eugenic discourse and moral narratives construe people with disabilities as total dependents on family, community and the society (p. 418).

The liberalistic ideas that form the foundation of Canadian citizenship and underlay the Immigration and Refugee Protection Act require amendment. A new approach should be designed in such a way that equity of people with disabilities are promoted in the global context, embracing the spirit of the UN’s Convention of Rights of Persons with Disability (UNCRPD, 2006). The immigrants’ selection system and the practice based on medical examination are inconsistent with the Canadian Charter of Rights and Freedom as well as the international protocol of rights of persons with disabilities. Thus, only a shift in the paradigm of citizenship, and how we construct notions of citizenship, will make a change.

I suggest that, under the IRPA, section 38(1)(c) “excessive demand” provision should be amended in a way that reflects an equitable approach to people with disabilities as proposed by the Supreme Court’s analysis of the Charter. To be specific, Chimirova (2008) argues that “excessive demand” phrase should be replaced by “undue hardship” phrase to change the paradigm of immigrants’ selection system. The “excessive demand” phrase violates their equal right to have an access to the health and social services of Canada as well as undermining their right to immigrant since it places responsibilities for providing medical care and education on the families of people with diseases or with disabilities. On the other hand, “undue hardship” phrase implies that a state has a duty to provide people with disabilities with health care and social services equally unless it is proven that the equal services for people with disabilities would cause an unbearable amount of cost to the nation. In this way, the provision can be founded on the premise that people with disabilities are regarded as equal applicants as people without disabilities.

When it comes to the matter of refugees, Canada officially accepts refugees under the categories listed by the Convention Relating to the Status of Refugees in 1951. This category constitutes the status of refugees as people “under the well-founded fear of persecution because of social group or political opinion” (Parekh, 2009, p.4). The word “persecution” includes social “restrictions on his rights to learn his livelihood, rights to practice religion, or his access to normally available facilities (UNHCR)” (Parekh, 2009, p.6). This means that the absence of social, economic, and cultural rights is also taken into account when establishing refugee status. Thus, there is room for refugees with disabilities to be legitimately accepted by Canada under this definition of refugees in the United Nations’ Refugee Convention (Parekh, 2009).

In conclusion, frameworks of citizenship can be further expanded by fully embracing the social model of disability in the legal and social system of Canada. By understanding disability as a social creation occurred under the national and international power relations, and by moving away from the medical model of disability which associates people with disabilities to economic and social burdens, Canada can implement different immigrant policies that incorporate social justice globally. In this way, it will also move forward with the reconstruction of citizenship paradigm.

References


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Yoonmee Han was raised in Seoul, South Korea. She majored in philosophy at Korea University and studied social science and human rights at York University in Toronto. As being a member of the Student Committee for Human Rights of People with Disabilities at Korea University, she encountered the disability rights movements in South Korea. She also came across with the basic concepts in feminism and disability studies throughout the student seminars in those years. These experiences led her to pursue her academic interests in feminism, identity politics and disability studies relating to the issues of human rights and social justice after she moved to Toronto.