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The CEDAW in the UK

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1 Introduction

Although the United Kingdom (UK) signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in July 1981, it was not ratified until April 1986. This lack of interest in the substance of the Convention has marked the attitude of successive governments ever since. The CEDAW is little known and little used in the UK, even among women activists. Although the government duly goes through the motions of preparing reports and responding to questions, it does not regard the CEDAW as normative, in the sense of shaping policy or providing direction. To the extent that existing practices and policies happen to comply with the CEDAW, it is happy to report compliance; where there is a challenge or a shortfall, however, it generally finds a means to justify its reluctance to change. Thus, even when there has been significant progress on the legislative and policy front in pursuing equality for women, this cannot be attributed to the CEDAW. Correspondingly, the CEDAW on its own is not capable of evincing change where the UK falls short of its obligations. It is argued here that this is in part because of the lack of visibility and 'belief' in the CEDAW in the UK. But it is also in part because the CEDAW Committee itself has not been sufficiently incisive, either in highlighting some of the issues that are most problematic in the UK, or in identifying clear breaches of rights. The pay gap and the fact that women remain primarily responsible for childcare are the foremost examples of this. Instead of the CEDAW, of course, it is the EU that has been the strongest influence on gender equality law in the UK in recent decades. Paying more attention to the CEDAW in EU law, to the extent

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that the CEDAW lies within its competence, would give greater leverage to the CEDAW in the UK.

2 The legal status of the CEDAW in the UK

Since the UK has a dualist system of international law, treaties are not binding unless incorporated by legislation. Successive UK governments have consistently refused to incorporate the CEDAW into domestic law. This is despite the CEDAW Committee's persistent urging of it to do so. Thus, both in 1999[1] and again in 2008,[2] the Committee recommended that the UK fully incorporate the CEDAW. In its 1999 Concluding Observations, the Committee emphasised that the incorporation of the European Convention on Human Rights (ECHR) in the Human Rights Act 1998 was not sufficient, since it did not provide for the full range of women's human rights in the CEDAW or for temporary special measures. In its most recent report, in 2008, the CEDAW Committee once again urged the government to utilise the opportunity presented by the proposed introduction of a new Equality Bill to ensure the incorporation of the Convention.

The UK government has flatly rejected this recommendation on both these occasions. In particular, it refused to regard the Equality Bill as an opportunity to incorporate the CEDAW. In its response to the 2008 Concluding Observations, the UK stated: '[t]he UK rejects this recommendation on the basis that such an approach would create a separate, parallel regime within the Equality Bill that incorporates all the elements of CEDAW that are, to the extent that the UK is obliged to comply with them, already covered by or present in other areas of UK law'.[3] It justifies this by arguing that, whereas the Equality Bill prohibits discrimination in specific fields only (work, the provision of goods, facilities and services, education, premises, associations and the exercise of public functions), the CEDAW covers all fields including in particular

[1] See Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Observations, Third and Fourth Periodic Reports: United Kingdom of Great Britain and Northern Ireland*, UN Doc. A/54/38/Rev.1 (1999), part two, paras. 278–318.

[2] CEDAW, *Concluding Observations, Fifth and Sixth Periodic Reports: United Kingdom of Great Britain and Northern Ireland*, UN Doc. A/63/38 (2008), para. 248 *et seq.*

[3] CEDAW, *Response by the United Kingdom (UK) and Northern Ireland (NI) to Select Recommendations of the United Nations Committee on the Elimination of All Forms of Discrimination against Women following the Examination of the UK and NI's 5th and 6th Periodic Reports on July 10 2008*, UN Doc. CEDAW/C/UK/CO/6/Add.1 (2009), para. 5.

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social and cultural fields. Moreover, the UK does not regard many of the Convention's obligations as conferring rights on people, as the Equality Bill does. An example is the obligation to 'ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases'. According to the UK government, it is neither appropriate nor possible for legislation to address such obligations. Rather, it justifies the lack of incorporation by pointing to Article 3 of the CEDAW, which recognises that non-legislative measures can be the right way to address some of the Convention's obligations.

This approach to the CEDAW is typical of the general resistance of UK governments to incorporation of international treaties, and in particular of its resistance to the notion that socio-economic rights are human rights. A major breakthrough in this philosophy can be detected in its recent Green Paper on a new 'Bill of Rights and Responsibilities', where the previous Labour government recognised that socio-economic rights are fundamental human rights. However, even here it did not regard socio-economic rights as appropriate for judicial enforcement. Moreover, with the change of government in 2010, the more positive attitude to socio-economic rights was not sustained. The Conservative Party has made it clear that it is not only opposed to socio-economic rights as human rights, but it may well repeal the Human Rights Act 1998, which incorporates the ECHR itself. The presence of the Liberal Democrats in the Coalition government is likely to restrain such a drastic move, but the economic policy of severe cutbacks means that socio-economic rights will inevitably be deeply damaged. There is therefore, in my view, no prospect of incorporation of the CEDAW into UK law.

The approach to the CEDAW is, to be fair, no different from the UK's approach to international human rights commitments more generally. A clear dividing line is drawn between international and domestic law, and claims that the UK has breached its international commitments under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) are also unlikely to have much political traction, let alone legal persuasiveness. This is particularly so with the International Labour Organization (ILO), where the UK has regularly ignored decisions by the ILO Committee of Experts that the UK

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is in breach of ILO Conventions.[4] The situation is radically different if the UK has chosen to incorporate international commitments into domestic law, as it has done with the EU and the ECHR.

More optimistic would be an approach that attempted to bring the CEDAW before the courts as an interpretive source in respect of either interpretation of existing legislation or of the ECHR, particularly in respect of the non-discrimination provision in Article 14. It is only very recently that some reliance has been placed on the CEDAW as an interpretive aid, but even here the references are made almost in passing. Thus in *Yemshaw* v. *London Borough of Hounslow*,[5] Baroness Hale briefly referred to the CEDAW Committee's definition of gender-based violence in General Recommendation 19, in interpreting a statutory provision deeming persons to be homeless where they are exposed to violence in the home. In *Quila*,[6] the Article 16(1) right to marry and to freely choose a spouse in the CEDAW was briefly mentioned in the process of finding that an immigration rule imposing age-based restrictions on foreign spouses of British citizens was in violation of the Article 8 right to respect for family life under the ECHR. Also constructive would be a greater emphasis on the CEDAW within the EU, either through direct incorporation or as an interpretive device in European Court of Justice (ECJ) judgments, which would then filter back into UK domestic law. This in turn requires greater awareness of the CEDAW among litigators and women's groups, which is lacking at present.

3 Reservations

The CEDAW Committee has also urged the UK government to reconsider its reservations to the CEDAW. In its response to the 2008 report, the UK government assured the CEDAW Committee it was reviewing its

[4] See for example ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) Individual Observation Concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98), United Kingdom (2007); see further K. Ewing, *Britain and the ILO*, 2nd edn (London: Institute of Employment Rights, 1994); T. Novitz, 'International promises and domestic pragmatism: to what extent will the Employment Relations Act 1999 implement international labour standards relating to freedom of association?' *MLR* 63:3 (2000) 379–93; R. Dukes, 'The Statutory Recognition Procedure 1999: no bias in favour of recognition?' *Industrial L. J.* 37:3 (2008) 236–67 at 260–4.

[5] [2011] 1 WLR 433, para. 20.

[6] *R (on the Application of Quila and Another)* v. *Secretary of State* [2011] 3 WLR 836, para. 66.

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reservations. Its 2009 report contains no further information. However, it has been argued convincingly that several of the UK's reservations are in any event inconsistent with its obligations under the ECHR.[7] For example, the UK has entered a comprehensive reservation to the CEDAW permitting it to apply all UK legislation and rules of pension schemes affecting retirement pensions, survivor's benefits and other benefits in relation to death or retirement (including retirement on grounds of redundancy). It has also entered reservations in relation to certain social security benefits. This contrasts with the position under the ECHR. Not only has the UK no equivalent reservations under the ECHR, but in addition such reservations are clearly inconsistent with ECHR jurisprudence, which has held that social security benefits, including survivors' benefits, must be applied without discrimination on grounds of sex.[8]

The UK has also entered reservations in respect of 'succession to, or possession and enjoyment of, the Throne, the peerage, titles of honour, social precedence or armorial bearings, or as extending to the affairs of religious denominations or orders or to the admission into or service in the Armed Forces of the Crown'.[9] Particularly problematic is the reservation in respect of persons subject to immigration control:

> [t]he United Kingdom reserves the right to continue to apply such immigration legislation governing entry into, stay in, and departure from, the UK as it may deem necessary from time to time, and, accordingly, its acceptance of Article 15(4) ('States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile') and of the other provisions of the Convention is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the UK to enter and remain in the UK.[10]

As JUSTICE (a UK-based NGO) argues, this is an unnecessary reservation. Article 15(4) does not confer a right to remain in the UK; rather it requires that men and women should have the same rights, whatever they may be. Indeed, it could be argued that any reservation permitting the

[7] JUSTICE, *Review of the UK's Reservations to International Human Rights Treaty Obligations* (2002), available at: www.liberty-human-rights.org.uk/pdfs/policy02/interventions-dec-2002.pdf (last accessed 19 February 2013).

[8] See *Stec* v. *United Kingdom* (Appl. No. 65731/01 and 65900/01), Judgment (Grand Chamber), 12 April 2006, ECHR 2005-X.

[9] See http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm (Note 59) (last accessed 6 March 2013).

[10] *Ibid*.

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state to continue to discriminate breaches the basic principle that human rights are universal. As JUSTICE puts it, '[d]iscriminatory reservations undermine the core values of equality and non-discrimination which uphold the very objects and purposes of human rights treaties'.[11]

4 Presence and visibility of the Convention and Optional Protocol

The most salient aspect of the Convention in the UK is its lack of visibility. The provisions of the Convention and the views of the Committee are virtually unknown among the general public and possibly across branches of government too. The result is that they are not utilised by women to any great extent or operationalised by government. In its 2008 Concluding Observations, the Committee requested the UK to undertake public awareness and training programmes and to raise awareness among women of their rights under the Convention and the Optional Protocol, as well as the Committee's General Recommendations. It also requested the UK to ensure that the Convention, the Protocol, the Committee's General Recommendations and its views on individual communications are made an integral part of educational curricula, including for legal education and the training of judicial officers, judges, lawyers and prosecutors.

The response has, however, been in the opposite direction. The Coalition government in power since 2010 has cut back on public support for the very bodies that had previously created 'opportunity structures' for women's organisations to utilise the CEDAW.[12] A major victim of the cuts was the Women's National Commission (WNC), a publicly funded umbrella body that was set up in 1969 with the remit 'to make known to Government, by all possible means, the informed opinion of women'.[13] At the time of its abolition in 2010, the WNC had over 670 partners from organisations working to promote women's equality, representing the voices of an estimated 8 million women. A major part of its remit was to produce shadow reports to the CEDAW Committee in consultation with its partner organisations. The WNC has been criticised for its weakness in engaging government on behalf of women, and even its supporters have

[11] *Ibid*.

[12] L. Predelli, 'Women's movements: constructions of sisterhood, dispute and resonance: the case of the United Kingdom', FEMCIT Working Paper No. 2 (2008) at 150, available at: www.femcit.org/publications.xpl (last accessed 19 February 2013).

[13] Baroness Joyce Gould, Chair of the Women's National Commission, press statement on 14 October 2010, available at: http://wnc.equalities.gov.uk/ (last accessed 6 March 2013).

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pointed to the fact that its limited budget put real constraints on what it could be expected to achieve.[14] Nevertheless, its abolition removes the main forum within which engagement with the CEDAW has so far taken place in the UK. Other bodies, such as the Women's Resource Centre, have been actively engaged in writing their own independent shadow reports, in the attempt to raise concerns in relation to issues not covered in the WNC's 'official' shadow reports. However, like many organisations, the Women's Resource Centre is severely constrained by budgetary and capacity limitations. There have also been independent shadow reports from the UK on violence against women. However, the consultation process for these reports was facilitated by the WNC.[15] Without the extra budgetary support, it is difficult to see how this process can be maintained.

The government recognises that abolishing the WNC will change the way the UK women's NGO sector liaises with the United Nations. It argues, however, the role of submitting a shadow report will now lie with the Equality and Human Rights Commission (EHRC), and that other leading NGOs are well placed to submit shadow reports.[16] However, this ignores the fact that the EHRC has simultaneously been subject to deep funding cuts. Ministers are also considering the scope for transferring some of the EHRC's functions and services to government departments or contracting with private or voluntary sector bodies to undertake them.

Predelli found that women's organisations regarded the CEDAW as an important instrument. However, while some regarded the CEDAW as a valuable lobbying tool, others pointed out that it did not have much influence on policy-making.[17] The reporting process clearly has some traction in drawing ministerial attention to the issues, but there is little evidence of real change as a result of the CEDAW Committee's comments.

Overall, however, the CEDAW remains conspicuous by its absence within the equality community in the UK. During the whole of its lifetime, the Equal Opportunities Commission, which was dedicated to gender equality, paid no attention to the CEDAW. Because the new Equality and Human Rights Commission now has an express human rights remit, more formal attention has been paid to the Convention, including the preparation of a shadow report in the last reporting round. However, the CEDAW still has no real dynamic energy behind it. A major reason for

[14] Predelli, 'Women's movements', *supra* note 12 at 153.
[15] *Ibid*. at 195–6.
[16] Government Equalities Office, *WNC Equality Impact Assessment* www.equalities.gov.uk/news/changes_announced_to_geos_non.aspx.
[17] Predelli, 'Women's movements' at 195–200.

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this is that the actors in the field do not perceive the CEDAW as including hard-edged rights, which could be used to take matters further than existing domestic law, augmented as it already is by the EU and the ECHR. This is an issue that the CEDAW Committee should take seriously if the CEDAW is to be a real presence in the UK. Its recommendations, for example, should be much more specific as to where and in what terms the UK has been in violation of the Convention. It is also true to say that there has been little engagement with the CEDAW at an academic level. The alliances forged between academic researchers and NGOs in other countries has therefore been absent.

5 The Optional Protocol

The Optional Protocol is even less visible than the Convention itself. The UK acceded to the Protocol on 17 December 2004, and it entered into force on 17 March 2005. In its most recent report the UK acknowledged that the communications and inquiry procedures provided by the Optional Protocol and the views of the Committee were not widely known, nor sufficiently utilised by women.[18] Certainly, there is no readily accessible government guidance on the use of the Protocol, nor any public information on the rights contained in the CEDAW.[19] There have only been two cases against the UK since it acceded to the Optional Protocol. The first was brought by a woman who complained that UK law had prevented her from passing on her British nationality to her Colombian-born son (by then 52 years old).[20] On 7 March 2007 the Committee declared her application inadmissible on the grounds that the facts of the case occurred before the CEDAW Optional Protocol entered into force in the UK, and because the applicant had not exhausted all domestic means of pursuing her complaint. The second was by a woman who complained that her proposed deportation to Pakistan put her at risk from her violent husband.[21]

[18] CEDAW, *Concluding Observations, Fifth and Sixth Periodic Reports: United Kingdom of Great Britain and Northern Ireland* at para. 262.

[19] See Equality and Human Rights Commission, *Submission on the Sixth Periodic Report of the United Kingdom to the United Nations Committee on the Elimination of All Forms of Discrimination against Women* (2008), para. 12, available at: www2.ohchr.org/english/bodies/cedaw/docs/ngos/EHRC_UK41.pdf (last accessed 19 February 2013).

[20] *Salgado* v. *UK*, CEDAW/C/37/D/11/2006, 22 January 2007.

[21] *NSF* v. *UK*, CEDAW/C/38/D/10/2005, 12 June 2007.

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On 6 June 2007 the Committee declared her application inadmissible on the grounds that the applicant had not exhausted all domestic means of pursuing her complaint.

A review by Jim Murdoch for the government into the workings of the CEDAW Optional Protocol, published in December 2009,[22] concluded that it was difficult to identify any real benefits from the UK's recognition of the Protocol. He argues that the Protocol has had no impact on policy-making; it has not been used to highlight systemic problems of discrimination against women; it has not resulted in the advancement of women's rights, nor has it resulted in their mainstreaming. It had been expected that the Protocol would galvanise NGOs to engage with the Convention and the Committee, but this has not happened. In Murdoch's view, this was not coincidental. In his view:

> the near-absence of engagement by NGOs may not unreasonably be considered to reflect a lack of trust or confidence in the efficacy of the right of communication. If the CEDAW Committee were to adopt more progressive and demanding standards than the European Court of Human Rights, for example, individuals would make more use of this alternative machinery. In turn, regional (and domestic) bodies would in time be likely to reflect this emerging case-law in their own determinations.[23]

It is true that in its early years the results of cases brought under the Optional Protocol were disappointing. In 2009 of the thirteen cases in total submitted against any State Party under the Protocol since it came into effect, eight were declared inadmissible. In only five cases was a violation found. However, it may be that Murdoch's judgement was premature. All five cases dealt with in 2010 and 2011 were successful. Moreover, a relatively robust jurisprudence is developing, particularly in relation to domestic violence against women, and reproductive and maternal healthcare. At the same time, the number of cases declared inadmissible for failure to exhaust domestic remedies is worrying. Arguably, the difficulty faced by women in pursuing domestic remedies should be taken into account.

[22] J. Murdoch, *The Optional Protocol to the United Nations Convention for the Elimination of All Forms of Discrimination against Women (CEDAW): The Experience of the United Kingdom* (London: Ministry of Justice, 2009) at 27.

[23] *Ibid*. at 25.

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6 The principle of equality

Turning to the substance of the Convention, it is of great importance that the CEDAW Committee has challenged the principle of equality used in the UK, arguing that it focuses too much on gender neutrality, as well as same treatment and equality of opportunity. The CEDAW, by contrast, requires an emphasis on substantive equality and the pursuit of equality in practice for women. The Committee pointed to three areas in which the UK focus on equality of opportunity and gender neutrality are most apparent. The first can be seen in the statutory 'gender duty', which is a duty on all public bodies to pay due regard, in the exercise of all their functions, to the elimination of unlawful discrimination and the promotion of equality of opportunity on grounds of gender.[24] Here the Committee, while welcoming the introduction of the duty, expresses concern that 'varying levels of public understanding of the concept of substantive equality have resulted only in the promotion of equality of opportunity and of same treatment, as well as of gender-neutrality, in the interpretation and implementation of the Gender Equality Duty'.[25]

Secondly, the CEDAW Committee expressed the concern that new institutional structures might lose their focus on discrimination against women by including in their remit multiple grounds of discrimination. The Women and Equality Unit has now become the Government Equalities Office; and the Equal Opportunities Commission, previously dedicated to gender equality, has now been incorporated into the new Equality and Human Rights Commission, which is responsible for discrimination on grounds of race, age, disability, sexual orientation, religion and belief, as well as gender.

A third area of concern relates to affirmative action. The UK has consistently taken a symmetric or gender-neutral stand to discrimination, so that discrimination on grounds of gender is always unlawful (subject to limited exceptions) even if it aims to redress previous disadvantage or discrimination against women. In its 2008 Concluding Observations the Committee once again expressed concerns that 'although temporary special measures are provided for in some legislation, they are not systematically employed as a method of accelerating the achievement of

[24] See section 76A of the now repealed Sex Discrimination Act 1975. The 'due regard' standard is retained in section 149(1) of the new Equality Act 2010, discussed below.

[25] CEDAW, *Concluding Observations, Fifth and Sixth Periodic Reports: United Kingdom of Great Britain and Northern Ireland* at para. 264.

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de facto or substantive equality between women and men in all areas of the Convention'.[26] It therefore recommended 'further implementation of temporary special measures, including through legislative and administrative measures, outreach and support programmes, the allocation of resources and the creation of incentives, targeted recruitment and the setting of time-bound goals and quotas'.[27]

There has been some movement on these points in the Equality Act 2010, although not, it should be stressed, as a response to the CEDAW Committee. The Gender Duty has now been incorporated into a 'single equality duty' that covers all the protected grounds (race, gender, disability, age, sexual orientation and religion or belief). Although the duty now covers multiple 'protected grounds', risking dilution of the gender dimension, and although the duty is still primarily formulated in terms of equality of opportunity, a new section elaborating the duty has several distinctly substantive elements. Thus, the Act states that 'paying due regard' to the need to advance equality of opportunity, involves having due regard in particular to the need to:

(i) remove or minimise disadvantages connected to a protected characteristic (which includes gender);
(ii) meet the needs of persons with the protected characteristic which are different from the needs of others; and
(iii) encourage persons who share a protected characteristic to participate in public life or any other activity where participation by such persons is disproportionately low.[28]

This directly reflected submissions by the author and Sarah Spencer during the consultation period, to the effect that the duty should specify the aims of substantive equality by reference to a four-dimensional approach: namely, reducing disadvantage; accommodating difference; facilitating participation; and recognising individual dignity.[29] These recommendations were accepted by the government's review body in

[26] *Ibid*. para. 268. [27] *Ibid*. para. 269.
[28] Equality Act 2010, section 149(1).
[29] S. Fredman and S. Spencer, 'Beyond discrimination: it's time for enforceable duties on public bodies to promote equality outcomes', *EHRLR* (2006) 598–606; S. Fredman and S. Spencer, 'Equality: towards an outcome-focused duty', *Equal Opportunities Review* 156 (2006) 14–19; S. Fredman and S. Spencer, *Delivering Equality*, Submission to the Cabinet Office Review (2006).

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the run-up to the legislation, and substantially incorporated into the legislation.[30]

The Committee's second concern, in relation to the new institutional structure, and particularly the Equality and Human Rights Commission, is well founded. In its shadow report to the Committee, the EHRC represented the merger of the Gender, Race and Disability Commissions in a positive light. It argued that it had taken on the Gender Agenda from the Equal Opportunities Commission (EOC), which includes issues of equal pay and pensions, reconciliation of work and family life, violence against women and the caring agenda.[31] It also informed the Committee that these critical areas had been integrated into the Commission's first full business plan of 2008–9. The track record on gender issues is, however, mixed. On the one hand, one of its more prominent activities in the first years of its existence was to conduct an inquiry into sex discrimination and the gender pay gap in financial services. This yielded some stark evidence of gender discrimination, and the Commission made some important recommendations.[32] The Commission has also been active in investigating the failure of local authorities to provide support services for women who have been victims of violence. In its 2007 report, *Map of Gaps*, the Commission found that almost a third of local authorities provided no specialised support services.[33] By 2009 specialised services were still absent in over a quarter of local authorities.[34] The Commission has since written to all offending local authorities and has indicated that all have responded satisfactorily.[35] On the other hand, when it comes to enforcement activity, the Commission has paid significantly less attention

[30] Discrimination Law Review, *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (2007), paras. 5.28–5.30; *Equality Bill Government Response to the Consultation* (Cm 7454, July 2008), para. 2.25.

[31] EHRC, *Shadow Report to CEDAW Committee*, (2008), para. 6, available at: www2.ohchr.org/english/bodies/cedaw/docs/ngos/EHRC_UK41.pdf (last accessed 19 February 2013).

[32] See EHRC, *Financial Services Inquiry* (2009), available at: www.equalityhumanrights.com/legislative-framework/formal-inquiries/inquiry-into-sex-discrimination-in-the-finance-sector/ (last accessed 19 February 2013).

[33] EHRC, *Map of Gaps: The Postcode Lottery of Violence Against Women Support Services in Britain* (2007), available at: www.equalityhumanrights.com/uploaded_files/research/map_of_gaps1.pdf (last accessed 19 February 2013).

[34] EHRC, *Map of Gaps 2* (2009), available at: www.equalityhumanrights.com/uploaded_files/research/map_of_gaps2.pdf (last accessed 19 February 2013).

[35] EHRC, *Map of Gaps: Enforcement under the Gender Equality Duty* (2011), available at: www.equalityhumanrights.com/key-projects/map-of-gaps/enforcement-under-the-gender-equality-duty/ (last accessed 19 February 2013).

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to gender than to other strands. This is particularly true in respect of supporting litigants to take cases to court. Between October 2007 and 31 March 2009 the Commission undertook 203 completed cases on behalf of individuals, of which only 10 concerned sex discrimination, as against 179 in relation to disability discrimination. A similar pattern can be seen in relation to more general enforcement powers, where gender formed a significantly smaller proportion of cases than disability or race. Gender does, however, feature more prominently than the three 'new' strands of sexual orientation: age and religion and belief.[36] The EHRC has also been bedevilled by serious leadership problems, which has made it difficult for it to achieve the kind of focus that might be desirable.

There has also been some progress in relation to the Committee's third concern, namely temporary special measures. Although the new equality duty does not in itself authorise temporary special measures, and there is still no comprehensive set of such measures, there was some attempt made in the Equality Act 2010 to include limited provision for positive measures. Thus, section 158 of the Act applies to situations in which a person reasonably thinks that women (or others with a protected characteristic) are at a disadvantage, or have different needs from others, or their participation in any activity is disproportionately low. In such circumstances, proportionate action may be taken to address these issues. This will, for example, allow measures to be targeted at women, including training to enable them to gain employment, or health services to address their needs. Charities are also permitted to provide benefits to persons with the same protected characteristic (apart from colour) to prevent or compensate for disadvantage.[37] The Act also expressly permits more favourable treatment for women in recruitment and promotion if their participation is disproportionately low, or they suffer disadvantage connected to that characteristic.[38] However, this provision is hedged about with limitations. It only applies to those who are equally well qualified. It cannot be part of a general preference policy. Instead, individual assessments are required. It is permissive rather than mandatory. In addition, it must be proportionate to the aim of enabling or encouraging women to

[36] See EHRC, *A Legal Enforcement Update from the Equality and Human Rights Commission* (2009) and EHRC, *Legal Enforcement: Update from the Equality and Human Rights Commission* (2010), both available at: www.equalityhumanrights.com/legal-and-policy/enforcement/ (last accessed 19 February 2013).

[37] Provided that this is permitted by their charitable instrument: Equality Act 2010, section 193.

[38] Equality Act 2010, section 159.

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overcome or minimise that disadvantage, or participate in that activity. Even in this limited form, however, it went sufficiently against the grain for the newly elected Coalition government in 2010 to have delayed its implementation indefinitely.

7 Employment

There is not sufficient space to deal with all the Articles of the CEDAW in this chapter. Instead, I shall focus on the right to work in Article 11. In this context, as in others, the CEDAW has had little impact on the formulation of policy or legislation. However, I would suggest that even if the recommendations of the CEDAW Committee had been followed, this would not be sufficient to achieve real change. This is because Article 11 itself is not sufficiently incisive; and the recommendations of the Committee are too muted to address the complex and deep-seated causes of women's inequality in the UK workforce.

In its Concluding Observations in 2008, the Committee noted the measures taken to narrow the gender pay gap and the various measures taken to facilitate participation in the labour market and the reconciliation of family and work life.[39] This included the adoption of flexible working arrangements, and the extension of the statutory maternity pay and maternity allowance from 26 to 39 weeks. However, the Committee expressed its concern at the persistence of occupational segregation between women and men in the labour market and the continuing pay gap. It was also concerned about the lack of available and affordable childcare. It urged the UK to ensure equal opportunities for women and men in the labour market, including through the use of temporary special measures, and to continue to take proactive and concrete measures to eliminate occupational segregation and to close the pay gap between women and men, including through the introduction of mandatory pay audits. It also recommended that the UK continue its efforts to assist women and men to reconcile family and professional responsibilities and to share family responsibilities by providing, inter alia, more and improved childcare facilities. Lastly, it recommended that the UK encourage men to share responsibility for childcare, including through awareness-raising activities and through the provision of parental leave.[40]

[39] CEDAW, *Concluding Observations, Fifth and Sixth Periodic Reports: United Kingdom of Great Britain and Northern Ireland* at para. 286.

[40] *Ibid*. paras. 286–7.

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However, it is submitted that its recommendations do not go far enough to fully address this issue. This can be seen in four respects. Firstly, although it urges the UK to encourage men to share responsibility for childcare, it does not give sufficient emphasis to this crucial issue. Until men do in fact share responsibility for childcare equally with women, there will not be true equality in the labour market. Increasing paid maternity leave without ensuring that equal rights are provided for fathers will entrench the expectation that it is mothers who take paid leave. Conversely, providing more paid childcare facilities, while important, also reinforces the view that women should conform to male working patterns, rather than that paid work and family work should be reconciled. While the UK has taken some small steps in this direction, they are not sufficient.

The insufficiency of these steps can be seen by considering the right to request flexible working arrangements. The Committee referred with approval to the flexible working arrangements in the Work and Families Act 2006.[41] This permits an employee to request the employer to change her working conditions in order to care for a child or adult. However, this is not a right. The employer may refuse the request for a variety of reasons, such as the burden of additional costs, the detrimental effect on the ability to meet customer demand, inability to reorganise work among existing staff, inability to recruit additional staff, detrimental impact on quality, detrimental impact on performance, insufficiency of work during the periods the employee proposes to work or planned structural changes. This provision has had some success. New research from the Government Equalities Office shows that of those employees making requests, 81 per cent had been granted. However, only 30 per cent of working parents have made such a request, meaning that only 24.3 per cent have in fact benefited from the right. This might be because they are not aware of the right: one-third of working parents are not aware that they are entitled to request flexible working, and only 12 per cent are aware that the right has been extended to all parents of children up to the age of 16. Of even more concern is the fact that parents perceive the request as potentially having negative effects, with as many as 33 per cent concerned that they would appear to be lacking in commitment to the job if they made such a request.[42] But particularly problematic is the absence of figures as to the uptake by fathers as against mothers. It is submitted that the CEDAW

[41] *Ibid*.

[42] Department of Work and Pensions, *Building Britain's Recovery: Achieving Full Employment* (Cm 7751, The Stationery Office, 2009) at 96.

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Committee should have insisted that figures be provided for fathers' take-up, and that proper targets and benchmarks be provided by the UK to show progress in this direction.

The second problematic aspect of the Committee's recommendations under Article 11 is that, having challenged the UK government over its understanding of equality as limited to equal opportunities, the Committee reverts to the notion of equal opportunities. Although it also calls for special measures and concrete measures, this dilution of the notion of substantive equality is worrying. Here too, the Committee should require proper targets and benchmarks, to prevent States Parties from making vague and general assertions about progress.

The third problematic aspect of the Committee's response is its approach to the pay gap. Although the Committee noted with concern that the pay gap in the UK was one of the highest in Europe, it relied on figures showing that the average hourly earnings of full-time women employees amount to approximately 83 per cent of men's earnings. However, this fails to highlight the true extent of the problem. Headline statistics on the current extent of the gender pay gap tend to take the most optimistic figure available, namely the median pay gap for full-time workers, based on hourly pay excluding overtime. *Framework for Fairness*, the report of the Discrimination Law Review on which the new Equalities Bill is based, states with some pride that the gap narrowed to its lowest value since records began, reaching 12.6 per cent in 2007.[43] According to the Office for National Statistics, the gap narrowed to 10.2 per cent in 2010.[44] But this figure vastly understates the true extent of the problem. As a start, official usage has shifted to the median instead of the customary mean. Reverting to the mean reveals a significantly higher gap, namely 15.5 per cent in 2010.[45] This means that the mean pay gap has narrowed by approximately 20 per cent since 1975, the year in which the Equal Pay Act of 1970 was brought into force.[46] The Office for National Statistics explains that the median is now used because high earners tend to skew the earnings distribution, raising the mean. It is not clear, however, why the fact that high

[43] Discrimination Law Review, *A Framework for Fairness* at 53.

[44] R. Pike, 'Patterns of pay: results of the Annual Survey of Hours and Earnings 1997–2010', *Economic & Labour Market Review* 4:3 (2010) 14–40 at 14.

[45] *Ibid*. at 21. This is a slight reduction on the mean pay gap of 16.4 per cent reported in 2009. See C. Halsworth, 'Patterns of pay: results of the Annual Survey of Hours and Earnings 1997–2009', *Economic & Labour Market Review* 4:3 (2010) 59–70 at 62.

[46] D. Perfect, *Gender Pay Gaps*, Briefing Paper 2, EHRC (2011) at 7, available at: www.equalityhumanrights.com/uploaded_files/research/gender_pay_gap_briefing_paper2.pdf (last accessed 19 February 2013).

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earners are predominantly male should not be reflected in the overall figure. This is all the more so since the overall figure masks wide differences in the gender pay gap in respect of different types of jobs. In 2010 the mean gap in skilled trades was 26 per cent, compared with the smaller gap of 4.2 per cent for professional occupations.[47]

Moreover, to gain a full picture of the true gender gap, it is necessary to look well beyond hourly pay of full-time workers excluding overtime. Full-time male employees consistently earn a greater proportion of additional payments than their female counterparts. Particularly disturbing are the figures for part-time workers, where the median gap between part-time women's pay and full-time men's pay was a scandalous 39.4 per cent in 2009, a gap which seems to have widened since 2007 when it was 39.1 per cent.[48] While the earnings of full-time women have been rising relative to men's earnings, recent research points out that the gap between full-time women and their part-time counterparts (the 'part-time pay penalty') has widened since 1975.[49] The part-time pay penalty was 31.1 per cent in 2008.[50] Given that 74 per cent of all part-time employees are women, and that approximately 43 per cent of women workers in the UK work part-time (as against only 12 per cent of men), any measure tackling the pay gap must pay particular attention to part-time workers.[51]

Nor is women's pay inequality limited to their time in the paid workforce. It extends into retirement. Only 30 per cent of women reaching state pension age are entitled to a full basic state pension, compared with 85 per cent of men.[52] But the widest gender gap in retirement income is caused by differential access to private and occupational pensions. According to

[47] Pike, 'Patterns of pay' at 29.

[48] Office for National Statistics, 'Annual Survey of Hours and Earnings' (2009) at 4, available at: www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/2009-revised/index.html (last accessed 19 February 2013). The Office for National Statistics no longer presents statistics on the median pay gap between part-time women's pay and full-time men's pay; see Pike, 'Patterns of pay' at 19.

[49] A. Manning and B. Petrongolo, 'The part-time pay penalty for women in Britain', *Economic Journal* 118:526 (2008) F28 –F51 at F35.

[50] C. Dobbs, 'Patterns of pay: results of the Annual Survey of Hours and Earnings, 1997 to 2008' *Economic & Labour Market Review* 3:3 (2009) 24–32.

[51] Statistics derived from the UK Labour Market Statistics, January 2012, see Office for National Statistics, 'Labour Market Statistics' (2012) at 7, available at: www.ons.gov.uk/ons/dcp171778_250593.pdf (last accessed 19 February 2013). See further S. Connolly and M. Gregory, 'The part-time pay penalty: earnings trajectories of British women', *Oxford Economic Papers* 61:1 (2008) i76 –i97 at i76.

[52] M. Sargeant, 'Gender equality and the Pensions Acts 2007–2008', *Industrial L. J.* 38:1 (2009) 143–8 at 143.

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new figures from the Prudential Class of 2010 retirement survey, women planning to retire in 2010 expect to receive an average annual pension of £12,169, a mere 62 per cent of the average pension of their male counterparts, who expect to collect an average pension of £19,593. And the pension income gender gap has widened by £782 since 2009 when the difference between men's and women's pensions was £6,642.[53] Women working part-time are at the greatest risk of having an employer who does not offer a pension scheme.[54] And many women are left out of the pension system altogether, among them a disproportionate number of ethnic minority women.[55]

The causes of the pay gap are complex. As the Committee itself noted, occupational segregation is a major factor. Women are still concentrated in lower-paying occupations, with nearly two-thirds of women employed in twelve occupation groups, most of which are related to women's traditional roles in the family – caring, cashiering, catering, cleaning and clerical occupations, as well as teaching, health associate professionals (including nurses), and 'functional' managers, such as financial managers, marketing and sales managers, and personnel managers.[56] Other structural factors include the gender skills gap, particularly for older women, because there is less access to training in the lower-paid sectors where more women than men tend to work.[57] But most important is the fact that women remain primarily responsible for childcare. Taking time out of the labour market, amassing less experience, limitations in respect of travel to work, and part-time working, all extract a severe wage penalty.

[53] Prudential, *Pension Gap Between Men and Women Grows* (2010), available at: www.pru.co.uk/pdf/presscenter/pension_gap_grows.pdf (last accessed 19 February 2013).

[54] Department for Work and Pensions, *Women and Pensions: The Evidence* (2005) at 9, available at: www.dwp.gov.uk/docs/women-pensions.pdf (last accessed 19 February 2013). Excluding part-time employees from occupational pension schemes may result in indirect discrimination on the basis of gender; see Pension Advisory Service, *Women and Pensions* (2008) at 25, available at: www.pensionsadvisoryservice.org.uk/media/109/women%20pensions%20-%20september%202009.pdf (last accessed 19 February 2013). A reform is currently in the works under the Pensions Act 2008, which will involve automatic contributions for employees between the age of 22 and retirement age and earning more than £5,035 a year (this figure will increase in time); see Department for Work and Pensions, *Automatic Saving: Changing Workplace Pensions* (2009), available at: www.dwp.gov.uk/docs/automatic-savings-changing-workplace-pensions-nov09.pdf (last accessed 19 February 2013).

[55] *Ibid*. at 10.

[56] Women and Work Commission, *Shaping a Fairer Future* (2006), para. 8.

[57] *Ibid*. paras. 3–27. See further National Skills Forum, *Closing the Gender Skills Gap* (2009), http://www.policyconnect.org.uk/fckimages/Closing%20the%20Gender%20Skills%20Gap.pdf (last accessed 6 March 2013).

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The limitations of the Committee's report, however, go beyond its underestimation of the true extent of the wage gap. They extend too to its recommendations. As we have seen, it recommended that the state take proactive and concrete measures to eliminate occupational segregation and to close the pay gap between women and men, in particular through the introduction of mandatory pay audits. Here too the Committee might have been more effective had it been more prescriptive, requiring the UK to set targets and benchmarks. Particularly helpful would have been a recommendation that the UK put in place more effective equal pay legislation, going well beyond mandatory pay audits. The current legislative framework, which depends on individuals enforcing an individual right to equal pay for work of equal value, has not delivered equal pay for various well-chronicled reasons. The new Equality Act does little to improve matters. As a result of pressure from trade unions and activists, the Labour government in power until 2010 did make a small gesture towards mandatory pay audits, but only for employers with over 250 employees. Thus the Equality Act includes a provision giving the Secretary of State power to produce regulations requiring employers with more than 250 employees to publish information about the pay gap in their enterprises.[58] However, the current Coalition government has refused to bring this provision into force, arguing that 'it is working with business on how to best support increased transparency on a voluntary basis'.[59] The result is that the only innovation in the Equality Act is a provision making it unlawful for an employer to prevent employees from discussing their pay with each other where this relates to the gender pay gap.[60] Also problematic is the fact that even the lightweight Gender Equality Duty is being rolled back. Under the Gender Equality Duty, a public employer was required, 'in formulating its gender equality objectives, to consider the need to have objectives to address the causes of any gender pay gap'.[61] However, the Coalition government has decided to remove these specific duties and replace them with no more than a general transparency requirement. Under the new regulation, public bodies will simply have to publish information showing

[58] Equality Act 2010, section 78.

[59] EHRC, *What is the Equality Act?* (2011), available at: www.equalityhumanrights.com/legal-and-policy/equality-act/what-is-the-equality-act/ (last accessed 19 February 2013).

[60] Equality Act 2010, section 77.

[61] Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006, para. 2(5).

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how they have complied with their general duty to pay due regard to the need to eliminate discrimination, including pay discrimination.[62]

8 Conclusion

There seems little prospect in the UK of the CEDAW emerging from the shadows. While the UK has, of its own initiative, taken important steps towards gender equality, these have been taken without any genuine normative input from the CEDAW. Real change in the role of the CEDAW in the UK requires the CEDAW Committee to take a more incisive position, both in its Concluding Observations and in its developing jurisprudence under the Optional Protocol. The need for such an approach has added urgency since 2010, with the election of a government determined to make swingeing cuts in public provision and with little commitment to advancing equality legislation. Budget cuts have already had a particularly deleterious effect on women in the UK, and the government has unilaterally decided not to bring into force key aspects of the new equality legislation. This is despite the fact that such legislation was duly passed by Parliament. It is in such a climate that international human rights law, and particularly the CEDAW, should be in a position to play a central role.

[62] Equality Act, section 149(1); Equality Act 2010 (Statutory Duties) Regulations 2011, section 2.

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