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Equality at Work, Is Legislation Alone Enough?

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After a raft of legislation precluding employers and employees from partaking in discriminatory actions and policies, the question as to why inequality between men and women still exists within the work place, has yet to be fully explained. Feminist jurisprudence mirrors the difficulties forced upon women through acceptance of laws. It explains and highlights the difficulties women face while attempting to be accepted, on the same, equal, footing as men, to become a party to employment contracts which are in themselves reinforced by legal systems and law. Feminist scholarship has delivered a wealth of analyses of women's situation and realised much by way of attaining legal and political restructuring. As a result of, but not limited to, membership of the European Economic Community, now the European Union, and influenced by feminist legal theory, the Irish legislature has introduced a number of measures to improve workplace equality between men and women. Discrimination within the workplace and for those seeking to secure employment should not exist, however according to the reported figures; discrimination still exists as a barrier to certain groups of persons and especially women who wish to fulfill their employment goals.

Introduction

This paper will explore the question; 'Can further equality legislation lead to perfect equality between men and women in the workplace?' In doing so the paper will present an understanding to the reader of what equality within the law, and particularly employment law, is and how it is viewed by different theorists. The paper will then offer a synopsis of feminist legal theory (feminist

jurisprudence), discuss why feminist legal theory exists and critically evaluate different schools of thought which influence differing theories. It will then examine the nature and effects of feminist legal theory and the meaning of equality within legislation and law in general. The paper will also analyse and assess equality legislation in Ireland and compare it to a number of similar countries throughout Europe. Finally the paper will explore recent reports on how the legislation is working in practice and assess if it is tackling discrimination adequately with regard to gender and employment and explore if further legislation, or any other further initiatives, can in fact lead to perfect equality between men and women within the scope of the employment sphere. The conceptual framework for this exploration is provided by theories of patriarchy.

The concept of Patriarchy and its Modern Application

The concept of patriarchy has been used by social scientists throughout history (Weber 1947) to refer to societies who were governed by a method involving men ruling through their station as heads of households (Pateman 1988). Walby (1990, p.20) suggests that it is a system where social structures and practices enable men to control, repress and manipulate women. Gottfried (2013, p.29) suggested that gender inequality is entrenched in patriarchal relations which refute women's wants and necessities, restrict their economic independence and diminish the value of their qualities and labour. The resultant gender inequality causes men to enjoy superior control over and access to: power, reputation and capital (Acker 2011, p.2). However there have been changes over the last century to the degree and also the form of patriarchy. The form of private (household) patriarchy has changed to a public form of patriarchy which is based in areas such as employment and the state. The household, no longer the chief site of patriarchy, still continues to be a patriarchal structure where the patriarchy is isolationist or one of segregation and is of obedience or

acquiescence by the women to the man's superiority (Walby 1990, p.24). The narrowing gap in educational qualifications and the minor reduction in the wage gap between men and women have led to a change in the degree of patriarchy and even though some commentators hold that these minor adjustments suggest the eradication of patriarchy other facets of patriarchal relations, such as the continuing influx of women into the nursing profession rather than the medical doctor route and the increase in part time employment taken up by women in areas such as cleaning and cooking, have strengthened (Walby 1990, p.24).

Patriarchy within the Public Form

Within the public (employment) form of patriarchy, women did gradually acquire greater access to employment opportunities yet are still disadvantaged within the labour market relative to men meaning that now women are generally no longer exploited by individual patriarchs within the home but are now exploited by collective patriarchs within the workplace (Walby 1990, p.24). As women's role in global production increases, Pearson (2007, p.11) argues that it provokes a disturbing paradox. Participation in paid labour does afford women more choice and control over their lives however a lot of this labour is underpaid, demeaning, unequal and informal. Pearson (2007, p.12) further adds that paid work should not be thought of automatically translating into empowerment for women nor is it inevitably the main route to gender equality, independence and economic security. An increase in monetary remuneration for work, in and of itself, will not empower women; gender equality is more that just an issue of work place equality or equivalent wages (Gottfried 2013, p.225). The state, as well as being capitalist and racist (Walby 1990, p.21), is also a public patriarchal form. Its policies and actions are methodically prejudiced towards patriarchal interests (Walby 1990, p.21). The Irish state's patriarchal nature may be attributed to a number of influences such as the institutionalised Roman Catholic Church (Breen et al 1990; Peillon, 2001) which impacted on the state's polices for many years, or the agricultural and economic system (Breen *et al* 1990; Peillon 2001) which prevailed prior to entry to the European Union. However the European Union itself, through its slow implementation of policy, and the cultural and social construction of heterosexuality has also added to the public patriarchal form of the state (O'Connor, 1998). Connell (202, p103) argues that a set of structures involving a gendered division of labour, power and cathexis (Connell 1994, p.151) exists within each state's 'gender regime'. The 'gender regime' also includes the structure of power; this structure, within the modern state, is bureaucracy and is seen as the form of institutionalised power; it is embodied not only in the cultural masculinity of influence but also in hegemonic masculinity which promotes specialised understanding and personal competitiveness (Franzway *et al* 1989, p.46). These styles of structures are seen as irreconcilable with feminism (Ferguson 1984).

Feminist Jurisprudence

Jurisprudential, or legal theories, are political philosophies that have legal consequences (Smith 1993, p.482). Feminist jurisprudence, as well as distinguishing between sex and gender, according to Hilaire Barnett (1998, p.4), mirrors the difficulties women acquire when attempting to be accepted on an equal footing to become a party to social contracts which are reinforced by legal systems and law. Cohorts of feminist scholars, wholly mindful of divergent political, legal and cultural frameworks, have tasked themselves with researching and evaluating the circumstances in which women are placed under law (Barnett 1998, p.11). Many espouse that traditionally law has been a male construct (Barnett 1998, p.4). Through legal intercession, male domination is made to appear a feature of life, not a one-sided construct applied by force for the benefit of a dominant group (MacKinnon 1993, p.610). As such legal systems within the Western industrial 'liberal' world replicate the characteristics of their predominately male architects, the judges and the

legislatures, and impede the rights of women such as to equality and autonomy (Barnett 1998, p.9).

Concept of Equality

Equality as a concept may be challenging to demonstrate, Aristotle proffered a form of distributive justice, 'equal things should be given to equal persons and unequal things to unequal persons,' (McKean 1983 pp.2-3). This mode of formal equality necessitates that the law accord indistinguishable rights to women and men (Lacey 1987 p 413). However this interpretation of equality is incapable of taking into account the differences between women and men (Hervey 1993, p.28). In the perception of sameness or distinctiveness, equality is only abstract (Vierdag 1973, p.9-11). As two individuals can never be identical in all characteristics, outright identity cannot be pertinent to equality between persons (Vierdag 1973, p.9-11). Therefore equality depends on whether similarities or differences between the sexes are to be stressed (Hervey 1993, p.26).

Another theory has been proffered by Ronald Dworking (1978 p.227) which distinguishes between equal treatment and treatment as an equal. For Dworking the right to equal treatment is a right to equality of distribution, the same right to have an opportunity of equal resources as other persons in the same position (Dworking 1978, p.227). Dworking distinguishes this from the right to treatment as an equal where he holds that this right is the right to be treated the same as everybody else, the difference being that, this right would not result in the same substantive right being enjoyed only by all persons of a particular position as this right would not take into account differences in position of the persons being treated the same (Dworking 1978, p.227). Of these two concepts Hervey (1993, p.26) believes, in regard to legislating against gendered discrimination within employment, Dworking's (1978 p.227) concept of

treatment as an equal is more applicable as women and men do not share the same position within the employment domain. In current employment legislation, the decision has been to impose sex, therefore biological difference, as a prohibited ground on which distinctions cannot be legally made (Hervey 1993, p.26).

A shared agreement or comprehension as to the function of equality in law, or more precisely sex discrimination law, is challenging to accomplish, thus it may be easier to seek out the aims of what this particular aspect of law is hoping to achieve. One theory, proffered by Tamara Hervey (1993, p.23) is that sex discrimination law has the aim of delivering equality of opportunity for men and women in employment. This theory develops from the critical strand of radical feminism and provides a concept of equality which permits women and men to compete equally for work (Hervey 1993, p.33). This theory is also favoured by Evelyn Ellis (1988, p.13) and she further comments that social structures, including the law, should aim for a more uninhibited environment where women and men can equally share in the determination of that society. The state should, through anti-discrimination law, expose the employment market to competition from women and intervene and curtail the choices of employers who favour employing men over women (Hervey 1993, p.35). If women are not experiencing an equal starting point then the state should, through affirmative processes such as positive discrimination, implement policy to favour them (Hervey 1993, p.35).

In fact, through prioritising the protection of privacy and decency and cultural necessity, direct discrimination has been justified in most legal systems (Hervey 1993, p.145). These justifications, along with others, override the principle of equal treatment of men and women within employment (Hervey 1993, p.145). Cultural necessity can be seen operating most predominately in several Middle

Eastern countries where Islamic law and social mores make it near impossible for women to engage in business undertakings (Hervey 1993, p.146). Examples of the protection of privacy and decency may be seen in circumstances where men and women are employed in jobs where the dignity of the people they are dealing with is of upmost importance, these may include employment realms such as the prison service, where close proximity to persons is a necessary remit and the customs service where personal body searches are also an everyday occurrence (Hervey 1993, p.146). Along with direct discrimination, legal systems have also justified indirect discrimination as a means to combat inequalities within employment spheres. A number of justifications exist for indirect discrimination, for example necessary job related grounds or grounds which are essential to the performance of certain duties of the job, enterprise related grounds which are necessary for the efficient functioning of the employer's enterprise and public interest related grounds concerning public and social benefits such as governmental department gender quotas (Hervey 1993, p.184).

Legislation

Notwithstanding the articles contained within the Constitution of Ireland (Bunreacht na hÉireann 1937), article 9.3, 'no person may be excluded from Irish nationality and citizenship by reason of the sex of such persons', article 16.1, 16.2 & 16.3, 'sex of the person cannot be used to disqualify the person from membership of Dáil Éireann', article 40.1 'all persons shall, as human beings, be held equal before the law' and article 45.2(i) 'The State shall, in particular, direct its policy towards securing citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs', Ireland has also signed up to a number of international agreements concerning the equality of both men and women within the

employment sphere. Ireland in 1971 ratified the 'International Labour Organisation Convention on Equal Remuneration' (1951) as well as subsections (a) to (g) of the 'International Organisation Convention on Equality of Treatment (Social Security)' (1962). Further to these measures, in 1985 Ireland acceded to the 'United Nations Convention on the Elimination of All Forms of Discrimination against Women' (1979). However most of the change within employment equality law has emanated from membership of the European Union, formally the European Economic Community.

As a result of, but not limited to, membership of the European Union and influenced by feminist legal theory, the legislature has introduced a number of measures to improve workplace equality between men and women. The first treaty establishing the European Union, signed in Rome on March 25th 1957, created the European Economic Community (amended by the Single European Act 1986, the Treaty on European Union 1992 and the Treaty on the Functioning of The European Union 2007) with the main aim of creating a common market. Having been accepted in article 3(i) of this treaty that employment law would undoubtedly be affected in achieving the treaty goals; the European Union assumed jurisdiction to legislate in the employment domain under article 235. Included in the treaty under article 119 was that each member state applied a principle of equal pay for both male and female workers for equal work or work of equal value. In 1975 a European Council Directive (75/117/EEC) was issued with reference to these principles. However Ireland, being proactive in this area, had already enacted the' Anti-Discrimination (Pay) Act' (1974) which provided for equality of remuneration where two persons of the opposite sex are engaged in like work for the same or an associated employer in the same place. A further Directive (76/207/EEC) was issued to combat unequal treatment between men and women within the workplace with regards to access to employment, promotion, vocational training and working

conditions. Following this Ireland enacted the 'Employment Equality Act' (1977) which provided that employers of most companies or places of work within Ireland's jurisdiction had to adopt this principle along with others when dealing with male and female workers. Ireland, further introduced more legislation in the form of the 'Maternity (Protection of Employees) Act' (1981) giving working mothers the right to maternity leave from their employment, the 'Social Welfare (No. 2) Act' (1985) which implemented a further Directive (79/7/EEC) with the purpose of providing for equal treatment of men and women in matters of social welfare, the 'Pensions Act' (1990) adding a prohibition of discrimination based on family status to those based on sex and marital status, the 'Worker Protection (Regular Part-Time Employees) Act' (1991) extending the benefits of maternity, holidays, redundancy, unfair dismissals and insolvency protection to regular part time workers, the 'Employment Equality Acts' (1998, 2004), the 'Civil Law (Miscellaneous Provisions) Act' (2011) and the 'Equal Status Act' (2000). These legislative measures expanded the scope of equality for both men and women within the workplace and put employment law, and more importantly anti-discriminatory employment law, on a sound statutory footing.

National Comparisons

In order to evaluate the progress Ireland has made with regard to equality between men and women within the workplace comparisons can be made between similar member states of the European Union. Ireland is located in seventh place on the Human Development Scale (Gender Inequality Index 2011). This index highlights the disadvantages faced by women and girls within education, health and the labour market and exposes differences in the distribution of achievements between men and women. There are only three other similar European countries placed ahead of Ireland which are Norway; first, Austria; second and the Netherlands; third. Germany, Sweden and

Switzerland are all placed behind at ninth, tenth and eleventh respectively with Denmark being the nearest to them at sixteenth and then Croatia being the furthest away at forty sixth. In terms of labour force participation, in 2009 54.4 per cent of the overall female population who were eligible to work in Ireland were members of the Irish labour force compared to 73 per cent of males of the eligible to work category. Comparing this to Norway, the Norwegians recorded 63 per cent women and 71 per cent of men as members of the labour force (Gender Inequality Index 2011). There exists a near 19 per cent difference between men and women within Ireland as opposed to only 8 per cent in Norway. However if the Human Development Index (2011) is adjusted with regards to the actual inequalities which exist in a number of differing spheres including health, education and income, Ireland, still placed at seventh, is reported in 2011 as having a loss of 4.3 per cent in life expectancy of women compared to men, a loss of 7.2 per cent in women's educational equality and a loss of 13.8 per cent in equality in income (Inequality-adjusted Human Development Index 2011). From this it can be inferred that although Ireland is performing extremely well in relation to the other member states of the European Union within the equality in employment sphere; there still exist a number of areas in which equality is not being achieved and these areas of inequality are having an adverse effect on Ireland's development as an equal society for both men and women. In an Irish Times article (2012) Anna Carey reported that although Ireland has made great strides towards gender equality, men still rule the employment sphere. Drawing on figures from a report published by the Central Statistics Office (2012), Carey (2012) notes that although the gap between men's and women's income has narrowed, women's incomes are now 73 per cent of the average men's, up from 70 per cent in 2010, and according to the Central Statistics Office (2012, p.29) Ireland are only in 12th place on the European gender gap table with an average gender pay gap of 15.7 per cent recorded in 2009 as opposed to Slovenia who recorded only a 3.2

per cent gap. Women, if you include paid and unpaid house work and all else being equal, still work on average 39 minutes per day longer than men (Economic and Social Research Institute, 2008). This is still a fact even though women are outperforming men in education – 53 per cent of young women hold third level degrees as opposed to only 39 per cent of young males (CSO 2012).

Initiatives within Ireland

In 1999 Ireland, in its on-going commitment to combat unequal treatment within the workplace, established the Equality Authority. The remit of this organisation is to address discrimination in areas covered by the Employment Equality Acts (1998-2011), the Equal Status Acts (2000-2011) and the Intoxicating Liquor Acts (1924-2010). However, to enable the organisation to operate effectively, they also deal with queries coming under the remit of the Maternity Protection Acts (1994 & 2004), the Adoptive Leave Acts (1995 & 2005) and the Parental Leave Acts (1998 & 2006). During 2011 this organisation dealt with 8168 enquiries of which 1946 or 23.8 per cent were related to equality within the employment sphere (Equality Authority 2012, p.16). The top three grounds for making the enquiries were gender, disability and age. Of the 1946 queries 250 were made on the ground of gender related equality issues with 143 queries regarding dismissal and 107 regarding harassment (Equality Authority 2012, p.17). A further breakdown of the 1946 queries reveal that 237 queries were made concerning access to employment (Equality Authority 2012, p.18), which would indicate that the discrimination process does not begin within the workplace but in fact starts before the employment can be secured. Equal pay and equal opportunities accounted for 84 queries while sexual harassment accounted for 38 enquiries (Equality Authority 2012, p.18). These figures would indicate that, even though the legislative authorities have initiated and implemented a vast array of protections, discrimination in seeking employment and within the workplace

itself still persists. Another role of the Equality Authority is to provide legal advice and support persons whom they feel have valid cases to present before the courts. Cases that are considered to come within the current criteria are assigned to a solicitor whom prepares the case to the stage where the head of legal services will determine if legal representation will be granted (Equality Authority 2012, p.26). However it is only in a minority of these cases that aid will be granted. This is due to current resources and capacity of the Equality Authority's legal section (Equality Authority 2012, p.27) and the type of cases that get priority reflect the criteria of the strategic goals as set down by the board (Equality Authority 2012, p.27). However, the board, being funded by Justice Department, can only allocate the funding they receive. The inadequacy of current resourcing was highlighted by the resignation of the then Equality Authority Chief Executive in 2008 Mr Niall Crowley. The Authority had its funding cut by 43 per cent and Mr Crowley alleged the authority was being victimised because it tackled discrimination within the public sector, which he suggested the Government and senior civil servants felt threatened by (RTE 2008). In 2011 132 case files, 64 of them files newly opened, were processed by the legal section under the remit of the Employment Equality Acts (1998-2011). Of these case files, gender queries accounted for 31 (Equality Authority 2012, p.28). Men accounted for 3 case files based on gender while women accounted for 36 case files based on gender. The other files were from transgendered persons. These figures again highlight that discrimination is still predominantly aimed at female employees or females seeking employment.

One of the strategic goals of the Equality Authority is to educate employers and employees of the rights, duties and responsibilities of both cohorts. In seeking to achieve this goal the authority has, with the assistance of the European Social Fund, delivered programmes of activity over 2011 (Equality Authority 2012, p.60). These programmes of activity have included interaction with small to

medium enterprise, employer's organisations and trade unions. The authority, in partnership with these bodies, undertook equality projects, research and development including developing a gender pay audit tool, developing a handbook for small to medium enterprises and development of an equality benefits tool which outlines the benefits of equality in employment within the public and private sectors (Equality Authority 2012, pp.60-64). One area in particular was highlighted within the report (Equality Authority 2012) as being particularly problematic. The area of pregnancy at work was considered to be a significant barrier to women achieving full equality within the Irish labour market (Equality Authority 2012, p.69). Of 2300 women surveyed, whose youngest child was born between July 2007 and June 2009, 71 per cent stated that their employer was supportive during their pregnancy and 63 per cent were satisfied with the treatment at work (Equality Authority 2012, p.70). However up to 30 per cent felt that they experienced unfair treatment during pregnancy while 5 per cent reported that they were dismissed, made redundant or had to leave given how badly they were treated (Equality Authority 2012, p.70). Unfavourable treatment including denial of promotion or loss of salary and or bonus accounted for 10 per cent of unsatisfied women, 12 per cent of women stated that they were given unsuitable work while 8 per cent reported that they received unpleasant comments for managers and co-workers (Equality Authority 2012, p.70). However of these women that experienced unfair treatment three quarters took no action (Equality Authority 2012, p.70).

Conclusion

It is clear that feminist legal theory is difficult to define appropriately, however its aims are far more apparent in that it toils to make prevalent the inequalities that may exist within differing legal systems and battles for equality for both women and men. In doing so, international bodies and institutions have been forced to accept that inequalities within legal frameworks only restrain society

from realising its full potential to develop. These bodies and institutions have designed their policies of development with this in mind and through the enactment of either anti-discrimination or positive discrimination policies have encouraged countries, such as Ireland, to embrace equality initiatives in areas such as employment and education. Ireland, it can be said, has excelled in introducing these measures to date (Human Development Index (2011). However, as reported by the Central Statistics Office (2012, p.35) only 15.1 per cent of the Dàil is made up of women compared to 24.2 per cent average in parliaments across the European Union and women only make up a third of State board directorships and less than a quarter of elected members of local authorities. It is also clear that more initiatives are needed in other areas, where positive discrimination such as gender quotas within political institutions and the boards of public organisations may be more effective in combating the income equality deficit (Inequality-adjusted Human Development Index 2011).

With the expanse of statutory requirements regarding equality and antidiscriminatory policies within the workplace, established by the legislature over the past 40 years, it would seem that discrimination within the workplace and for those seeking to secure employment should not exist. However according to the reported figures above; discrimination still exists as a barrier to certain groups of persons and especially women who wish to fulfil their employment goals. Beyond evidently existent direct discrimination, a text published by Kanter (1977) goes some way to explain why women within corporations feel disadvantaged and describes the measures through which this takes place. Kantor (1977) suggests that the organisational features of these institutions as well as cultural pressures lead to women having less success in reaching the top echelons of the corporation than men do. The cultural and micro-structural features show how the primary management ethics of these organisations are masculine in nature and the ideologies associated with positions and vacancies at upper management levels are gender specific and count against someone of the other sex in gaining those positions. Long and non flexible working hours and conditions within these organisations can be indirectly discriminatory towards women, especially those with family responsibilities and young children, and tend to weigh more on women than men. Kantor also explains the daily effects of micro-structural features whereby she suggests that small groups of male friendships act to eliminate women from the knowledge and networks necessary to gain access to the better jobs and how promotional ladders favour the male majority rather than the female minority. This failure to gain promotion within the corporate structure results in a lack of female role models and has a sapping effect upon the psyche of women who expect failure when trying to gain promotion (Kantor (1977). Thus with reasoned consideration it may be pertinent to adduce that there must exist not only an enforceability issue with regard to the legislation but also an awareness issue at an employment structural level. The attitude of employers to statutory requirements must be addressed through education, awareness, and if needed, harsher penalties but the attitudes and concerns of employees must also be analysed and addressed in the same way. Many types of discrimination cannot be eradicated just by securing the support of the law; social embarrassment and monetary costs are also needed to deter employers (Grint 1998, pp. 207-208). However this cannot be achieved without proper resources. It is clear that, due to limited resources, the Equality Authority, the organisation established to regulate and combat discrimination within and outside the workplace, is hindered in reaching its strategic goals but is also limited in the amount of help, by way of legal aid and representation, it can offer to those persons who deservedly need it. In a study of Argentina and its political culture, Garnet (2005), found that what was critical to the effects on the representation of women in parliament and the successful implementation of equality laws was: an energetic media and civil society, open representative organisations, robust women's rights groups dedicated to gender

quotas, support by state officials (including the President) and a political culture which saw the advantage of such gender quotas. O'Connor (2008, p.141) argues that the latter two conditions do not exist in the Irish state, thus although guidelines entailing ministers to ensure that at least 40 per cent of all nominations to state boards were female were implemented in 1991, 15 years later the amount of female nominations only stood at 28 per cent. Of the women appointed there were none appointed to the Central Bank or The National Treasury Management Agency where most resourcing decisions are made and the only boards which constituted more women than men were those which could be argued to be associated with that caring role which so often characterised the traditional understanding of women's work such as the Legal Aid Board, the Equality tribunal and the Combat Poverty Agency (National Women's Council of Ireland, 2002).

Implementing change in the area of gender equality within and outside the employment sphere is, as Franzway et al (1989, p.31) proffered, 'a matter of unpicking a complex texture of institutional arrangements which intersect with the construction of masculinity and femininity'. This involves making changes to: practices and procedures of recruitment and promotion; the scope of work experiences available to women; what knowledge and work conditions are considered valuable; and the image of authority, with its masculine embodied image, whereby men define women as unsuitable leaders (Mahon, 1991; Mahon & Dillon, 1996; O'Connor, 1995, 1996, 1998, 2000). The Irish state at present, in the view of the author, has full legislative powers to combat inequality within the employment sphere and no further legislation is needed or presently warranted. However in answering the question posed at the beginning of this paper, the author has discovered that to put inequality on a statutory footing is just not enough to make any state, not merely the Irish state, an equal society in which to work and live. Change is also needed from within the society. The

capacity of the state's agencies to implement the existing legislation seems to be somewhat lacking if not evident at all. Resourcing these agencies has become a major struggle within today's economic climate and this has led to under capacity. However the gap between the rhetoric and the practice of such legislation has to be breached in order to achieve the equal society that policy dictates. The policy makers and the purse string holders must take it within their brief to close this gap and empower the agencies of the state to implement antidiscrimination policy and act on antidiscrimination legislation. Attitudes need to change and people need to be educated and shown the advantages other countries have achieved when becoming a more equal society.

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