Chapter Six

Benevolent Contestations

Mainstreaming, Judicialization, and Europeanization in the Norwegian Gender+ Equality Debate

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[6.0] This chapter discusses the framing and reception of a set of proposals from a Norwegian public inquiry commission with a focus on the argumentative strategies that were employed to promote and resist policy change. The Norwegian Gender+ Equality Commission¹ was appointed by the centre-left cabinet of Jens Stoltenberg during its second term in office, from 2009 to 2013. The Commission was mandated to investigate gender equality status and policies, paying particular attention to the intersection of gender, ethnicity, and class. The Commission delivered two reports: NOU² 2011:18, Struktur for likestilling (Structure for Equality) and NOU 2012:15 Politikk for likestilling (Policy for Equality).

[6.1] Although not a member of the European Union (EU), Norway is deeply affected by European integration, not least owing to its participation, since 1994, in the European Economic Area (EEA) Agreement which made Norway a full participant in the EU’s internal market (Eriksen and Fossum 2015; Holst and Stie 2016). Norway’s commitments to the EEA also apply to the area of gender policy (NOU 2012: 2, in particular 17.5). Consequently, a natural expectation of the primary inquiry commission in this policy field would be that its discussions and recommendations reflect Norway’s increasing embeddedness in EU regulations and its reliance on EU institutions.

[6.2] One might further expect the Stoltenberg government to evince a general interest in promoting new, ambitious gender equality measures. The dominant coalition partner, the Labour Party, has a strong history as a ‘champion’ of gender equality policies. In addition, one of the junior partners, the Social-
ist Left Party, promised 'action' on gender equality repeatedly during its decades in opposition, and once it became part of the governing coalition, the party needed some strong results to show its predominantly female voters. Consequently, during Stoltenberg's two terms in office, from 2005 onwards, several comprehensive childcare and parental leave reforms were pursued. A massive development of publicly financed childcare facilities and nurseries was implemented, and the 'daddy quota' of the parental leave scheme was increased from six to fourteen weeks. Moreover, when the second Stoltenberg government appointed the Gender+ Equality Commission, the Commission was given an extensive and quite open mandate. Significantly, this mandate expressed a clear will to activate a gender equality policy beyond the positive incentives facilitated through work–family policies. The members appointed to the Commission were scholars and experts with backgrounds in gender equality research and/or long-standing experience in gender equality policy making. Presumably, they—or we, as the three authors of this chapter were among the Commission members—were all well acquainted with the gender equality policy toolbox and aware of the relatively 'friendly' political–ideological environment in which we were to analyse and propose policies. To be sure, administrative and fiscal restrictions were always involved, but apart from this obvious limitation, on the whole, the Commission was given substantial leeway to redirect and redesign policy and to set new goals for equality.

The reception of the two reports was quite complex. The cabinet commented on the proposals through two governmental papers: a bill proposal (Prop. 88 L (2012–2013)) and a policy statement to Parliament (Meld. St.44 (2012–2013)). In 2013, the policy statement was withdrawn, following the establishment of a new conservative-right cabinet. In 2015, this cabinet presented both a new policy statement and a separate bill proposal to unify the equality and anti-discrimination legislation. All of these documents contain frequent references to the Commission's work and its proposals. However, large-scale reforms of public equality work have yet to occur.

Feminist institutionalism (FI) suggests that scholars can combine elements from different strands of new institutionalism (NI) to better capture the dynamics of policy development—in our case, gender equality policy development—'in line with a trend towards convergence in recent institutionalist scholarship' (Mackay, Kenny, and Chappell 2010, 573; see also Krook and Mackay 2011). In this chapter, we make use of conceptual distinctions from historical (HI), sociological (SI), and discursive institutionalism (DI), to reflect on both the path-dependent characteristics of the Commission's proposals and the mixed reception that these proposals received. More specifically, we are interested in how two important equality norms—legal protection from discrimination and gender equality mainstreaming—were framed. We consider two concrete proposals which express these norms. These proposals
include a recommendation to strengthen the protection against intersectional discrimination through the provision of explicit bans in the equality legislation, including the establishment of effective sanctions within the low-threshold system, and a recommendation to develop the competence to implement gender+ mainstreaming by building a national bureaucratic equality structure. In this analysis of the Gender+ Equality Commission’s presentation and embedding of these recommendations, our focus is on pinpointing argumentative strategies for institutional change and understanding the relationship between different change strategies and the development of a ‘Nordic’ versus a ‘European’ framing. We ask, what is the role of Europe in the Commission’s argumentation, and how can we best interpret it?

[6.5]

We believe our approach, which combines insights from various schools of NI and tests a hypothesis around the Europeanization of soft governance in the gender equality policy area, is quite novel. Until quite recently, Norwegian gender equality policy has been understood through the lens of ‘state feminism.’ The state feminism literature commonly addresses ‘the degree to which women’s policy agencies forge alliances with women’s movements and help them get access to policy arenas’ (McBride and Mazur 2010, 5). While issues of framing and agency constitute central dimensions of (any) state feminism analysis, the specific role of academic gender equality expertise in policy-making processes has rarely been singled out for in-depth study. Explicit engagements with scholarship on FI and/or NI have also been rare in the traditional Norwegian scholarship on state feminism (but see Øyslebo Sørensen 2013; Teigen 2016). Finally, the Gender+ Equality Commission exemplifies the institution of Nordic public inquiry commissions that play a vital role in Nordic countries’ decision making and knowledge production. These commissions are, on the whole, understudied (Tellmann 2016), and as far as we know, the present analysis is the first systematic attempt to address the discursive policy change strategies which a commission of this kind might employ and the discursive resistance which such strategies may encounter.

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Thus, we aim to add to the growing research on the contestation of gender equality norms among equality-oriented groups—groups which, at the outset, have no stake in questioning the high legitimacy of key gender equality norms. Analyses of resistance to gender equality have been gaining momentum not least from the perspective(s) of FI. However, resistance is still generally theorized in terms of explicit/implicit and/or individual/institutional terms (Mergaert and Lombardo in this volume). We analyse benevolent contestations—our conceptual label for gender equality-friendly actors’ resistance against gender equality—as two powerful ‘anti-discourses’ that are explicitly non-gendered and potentially powerful across policy domains. This is, first, an ‘anti-bureaucracy’ discourse which critiques the administrative and technical costs attached to—in this empirical instance—gender
mainstreaming, and second, an 'anti-judicialization' discourse which, here, is applied to counter efficient legal protection against discrimination.

We start the next section with a brief presentation of the institutionalization of Norwegian gender equality policy. We introduce two competing frames: one emphasizing Norwegian policy as part of a Nordic model, the other emphasizing how Norwegian gender equality policy and policy making are increasingly being Europeanized. The section that follows anchors the analysis in a mixed set of institutionalist strands, relying in particular on Mahoney and Thelen’s account of institutional change through strategies of ‘layering’ and ‘conversion’ (2010), and Carstensen and Schmidt’s (2015) notion of resistance and opposition as embedded in discourses. We, however, apply the conceptualization of layering and conversion strategies to understand argumentative styles in proposals for institutional changes rather than actual institutional changes. We continue with a closer examination of the Gender+ Equality Commission and its proposals on mainstreaming and legal protection. The empirical analysis follows: first, we analyse the mainstreaming debate and, second, the judicialization debate. Here, we describe how the mainstreaming proposal was promoted through an argumentative strategy of layering but met resistance in the form of an anti-bureaucratization discourse. By contrast, the legal protection proposal can be reconstructed in terms of a conversion strategy, and the opposition partly drew on an anti-judicialization discourse. In our analysis, we highlight that many of the domestic references can be explained through the use of a layering strategy. In contrast, many European references are best explained through the use of conversion. We conclude that anti-bureaucracy stands out as a form of contestation which is considered broadly appropriate and legitimate by a variety of gender equality–friendly actors. This contestation mobilizes practically grounded protests about routinization and reporting overload as well as protests based on principle. The analysis of such benevolent contestation, thus, offers a general caution for mainstreaming enthusiasts: anti-bureaucracy must be recognized as a powerful contestation. In our concluding section, we elaborate on what this case can tell us about the role of academic gender experts in processes of gender policy change, about Europeanization, and about some important, not-to-be-overlooked tasks for FI.

EQUALITY POLICY—NORDIC OR EUROPEANIZED?

Historically, the Nordic region has been viewed as both a strong and unified agent of equality advocacy. Nordic countries have comparatively strong gender equality records, and Nordic gender policy innovations travel the world. However, for decades, law and policy making have been primarily domestic concerns, and they have remained largely insulated from international norms.
Consequently, different Nordic polities have, through their own initiative, produced gender equality innovations including low threshold monitoring of equality legislation (1970s), gender mainstreaming of public policies (1980s), bans on the purchase of sex (1990s), and corporate board quotas (2000s). The 'Nordic-ness' of gender equality policy is most famously recognized in the Nordic model of welfare state policies to promote work–family balance through extensive parental leave and public childcare schemes (Esping-Andersen 2009; Leira 2012; Walby 2009).

However, when Finland and Sweden joined Denmark as members of the EU in the mid-1990s, the established Nordic legacies met a different and unfamiliar judicialized gender equality regime. The clash between established practices and the EU’s judicialized gender equality regime was quickly apparent in the European Court of Justice’s prohibition of Swedish preferential treatment policies. At approximately the same time that Sweden and Finland joined the EU, the EU policy agenda was significantly broadened through the Amsterdam Treaty, adding multiple equality strands to the anti-discrimination framework, anchoring mainstreaming as an overarching principle for policy making, and incorporating protection against violence as a major concern. Despite remaining outside the EU, Norway has been heavily affected by processes of Europeanization. The national governance system has had to adapt to Europe-wide norms and EU institutions (Olsen 2002), and this has had significant implications for gender and gender equality policy (Liebert 2016). Furthermore, the EU affects Norwegian hard law, through the EEA and also through the seventy-three additional agreements currently in place between the EU and Norway. Furthermore, policies and governance have been Europeanized more softly through the increased coordination among the different levels of public administration in Europe, including the Norwegian ministries, agencies, and offices, as well as transnational social movements and civil society actors, and through Norwegian participation in border-crossing epistemic communities, such as the European Commission’s expert groups, or when national inquiry commissions are influenced by Europeanized value sets, problem definitions, and conceptions of best practices (Eigeberg and Trondal 2015).

As we know, gender equality policy varies considerably among EU member states. However, there has also been substantive hard law harmonization as a result of the EU regulations and court decisions (Kantola 2010). Most of the central EU gender equality directives have been transposed into Norwegian legislation, as part of the EEA or as a result of voluntary subscription, resulting in amendments to, for example, Norwegian anti-discrimination law, positive action regulations, and equal-pay legislation (Skjeie and Teigen 2003; NOU 2012: 2). Currently, less is known about the Europeanization of Norwegian public administration, expert communities, and civil society in the gender equality policy area. In this chapter, we test a hypothesis of
increased soft Europeanization of Norwegian gender equality policy by investigating the use of references to EU law and policy documents as an indicator of how a ‘European’ or EU framing is replacing alternative territorial and organizational framings, in particular the familiar ‘Nordic’ framing, referring to the tradition of Nordic region gender equality policy and Nordic best practices.

FRAMES, ARGUMENTATIVE STRATEGIES AND CONTESTATIONS

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Framing is a concept developed within the school of sociological institutionalism (SI), referring to an approach to political institutions and policy making which reflects shared understandings of ‘the way the world works’ (Thelen 1999, 386). Such understandings manifest in formal rules and practices, but also in ‘symbol systems, cognitive scripts and moral templates that provides the “frames of meaning” guiding human behavior’ (Hall and Taylor 1996, 947; see also Mackay et al. 2010). Accordingly, what we are investigating is the territorial and organizational aspect of the Commission’s worldview. In other words, we are asking whether a European framing here is about to replace a Nordic framing in the Norwegian gender equality policy area, and how the Commission tries to produce effective policy promotion—concretely, how different argumentative strategies are applied to promote different forms of policy change. We rely on a conceptual scheme developed with another branch of NI, namely, HI (Streeck and Thelen 2005; Waylen 2009) and distinguish between ‘layering,’ ‘conversion,’ ‘drift,’ and ‘displacement’ as potentially viable argumentative strategies. We recognized quite early in our investigation that the two latter strategies—drift and displacement—were less relevant. The Gender+ Equality Commission did not pick up on a vocabulary of something ‘new’ replacing the ‘old,’ and the environment was relatively stable, with no economic, political, or organizational shocks or shifts. Thus, we focus on the extent to which the Commission’s approach to policy change fits with the two remaining modes. We ask whether, and how, new rules were introduced alongside, or on top of, existing ones—a layering strategy—and whether, and how, the rules introduced were aimed at changing institutional core obligations—impling a shift known as ‘conversion.’

From yet another new institutionalist strand—namely, DI—we rely on the notion that ‘ideas matter’ in politics. Ideas provide ‘interpretive frameworks’—frames of meaning (SI) or institutionalized strategies (HI)—‘that [. . . ] make political and economic interest actionable’ (Carstensen and Schmidt 2015, 1; Schmidt 2008). Actors are empowered when they succeed in promoting certain ideas at the expense of others. The Gender+ Equality Commission’s success as a promoter of ideas was limited by two opposition-
al discourses that can be conceptualized, once more in accordance with DI terminology, as ‘power in’ discourses. This refers to the notion that actors can profit from background ideational processes reflecting the historically specific structures of meaning or the institutional setup of a polity or a policy area (Carstensen and Schmidt 2015). As our analysis will clarify, the actors confronting the Commission relied heavily on, and utilized distinctively, such path-dependent structures of meaning in contestations of anti-bureaucracy and anti-judicialization. Moreover, as these actors—ministries and municipalities, social partners, voluntary organizations, academics, and political parties—were not ‘hostile’ to gender equality, but rather keen to promote it, we refer to this discursive resistance as ‘benevolent contestations.’


[6.16] In the Nordic countries, governments rely on policy advice from numerous sources. However, temporary commissions of inquiry have traditionally held a special place within the Nordic knowledge regimes. These commissions are appointed by the government to investigate a specific policy problem and propose appropriate solutions which are based on an in-depth analysis of the issue. Commissions usually work for a substantial amount of time, synthesizing existing knowledge and, in some cases, carrying out or commissioning new research. Their advice mainly feeds into the policy formulation stage of the decision-making process—that is, before policy decisions are officially proposed by the government. Commission members can be drawn from the civil service, political parties, interest groups, the private sector, and/or academia. There has been considerable growth in the number of academic commission members, and there have been suggestions that expert commissions are about to take over from the ‘hybrid’ policy advice commissions of the 1970s and 1980s (Krick 2015; Tellmann 2016).


[6.18] This ‘scientization’ or ‘expertization’ of Norwegian gender equality policy making (Habermas 1963/1971; Turner 2003) has also taken place in a context where the two other corners of the state feminist ‘triangle’ (Hernes 1987; Woodward 2004) are relatively weakly institutionalized. This applies
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to civil society, where strong and effective gender+ organizations are lacking and there are few channels for movements and interest groups to influence government on gender equality policy (Skjeie 2013). The power vested in the Ministry of Children, Equality and Social Inclusion is also modest, not least with regard to the actual implementation of gender+ equality policies. It is a small ministry with limited resources. Moreover, the Ministry has no fixed authority in matters of public equality work. Since the 1980s, Norwegian authorities have built the implementation of public gender equality policy onto the mainstreaming strategy. All equality efforts should be integrated into the daily work of all authorities, in all decision-making processes, and by all relevant actors. All ministries are supposed to integrate equality concerns and develop equality policies within their respective domains of responsibility. Anti-violence policies should be developed by the Ministry of Justice; labour market and workplace policies by the Ministry of Employment; education and research policies by the Ministry of Education; and so on. The Ministry of Equality’s main task is to guide and coordinate equality policies developed and administered by other ministries, in addition to being in charge of the development of equality legislation and the low-threshold mechanism of the Equality Ombud and the Equality Tribunal, and administering the public funding for the parental leave scheme.

Given the background of weakly institutionalized state feminism, we could still expect the appointment of the Gender+ Equality Commission to make a difference. There were few competing promoters in the policy field, the political-ideological climate was friendly under the Stoltenberg government, and the Commission consisted of experts who were comparatively well acquainted with the gender policy toolbox. Concretely, the mandate of the Gender+ Equality Commission was to report on the current status, and possible improvement, of Norway’s gender equality policy in the intersections between gender, ethnicity, and class, while applying to this analysis a life course perspective. The comprehensive mandate also included the development of a principle-based defence of why gender equality and gender equality policies are important to pursue. In addition, the mandate asked for a comprehensive review of public equality work at the national, regional, and local administrative levels. Two reports were delivered to the government over the Commission’s mandate period from February 2010 to November 2012. The theoretical and empirical work carried out by the Commission was supplemented by practical attempts to strengthen gender+ perspectives in actual public policy. Our focus is on two major proposals:

- A recommendation to strengthen the protection against intersectional discrimination through the provision of explicit bans in the equality legislation, suggesting exactly how legal bans could be shaped to fit the existing anti-discrimination framework which, in Norway, consists of four ground-
specific comprehensive laws. This recommendation was accompanied by a demand for a reform of the low-threshold system of law supervision—the Equality Ombud and the Equality Tribunal—so that punitive sanctions could be located at this level. Currently, matters of compensation must be tried before the regular courts, and there is no legal-aid scheme in place regarding discrimination complaints before the courts.

6.21 A recommendation to develop the competence to actually implement gender mainstreaming by building a national bureaucratic structure in charge of mainstreaming equality within state and municipal sectors on all protected and combined strands—namely, gender, ethnicity, religion, age, disability, and sexual orientation. Modelled on clauses first incorporated in the Gender Equality Act in 2002, all the comprehensive equality laws contain clauses on the duties of public authorities to work actively to promote equality in their respective areas of authority, and to report in annual accounts on the actual measures implemented. However, no one is in charge of supervising active public equality work or its reporting.

6.22 The reports underwent broad public consultation with much acclaim for the thoroughness of the Commission’s status and policy analyses. However, the responses to the main policy proposals outlined above were mixed, and the dominant partner within the cabinet, the Labour Party, was neither eager to strengthen the implementation policies nor to reform the supervision of the equality laws.

6.23 THE MAINSTREAMING DEBATE: LAYERING AND ANTIBUREAUCRACY

6.24 Norwegian public administration has only modestly developed structures to minimize conflicts between administrative systems. Each ministry controls its own policy and administrative area. Administrative systems with such silo arrangements tend to struggle with problems of policy coordination and cooperation (Christensen, Lægreid, and Rykkja 2015). Consequently, it is a major challenge to implement horizontal coordination schemes—a challenge that, to some extent, has been strengthened as a consequence of the effects of New Public Management within public administration (Peters 2006).

6.25 Gender mainstreaming, since its international launch through the Beijing Platform of Action in 1995, has been portrayed as a potentially transformative equality tool. Notably, it presupposes coordination and cooperation across silo arrangements. The main idea of gender mainstreaming is to promote gender equality by means of institutionalizing gender-sensitive norms and practices in all structures and processes of public policy. To any student of public administration, such an idea would, of course, seem risky initially.
Not surprisingly, most studies show that although the gender mainstreaming strategy is widely adopted, its implementation remains lacking and inconsistent. According to Daly (2005), Sweden represents an ‘exceptional case,’ where an entire package of integration strategies and structures across levels of administration has been put in place (Sainsbury and Bergquist 2009). In Norway, by contrast, although gender mainstreaming is adopted as a main policy-making/implementation strategy, it is not seriously implemented (NOU 2011:18).

The Gender+ Equality Commission’s investigation into the implementation of mainstreaming activities at the national, regional, and local public administration levels made it abundantly clear that such activities were scarce and sparse. Although mainstreaming duties had been anchored in equality legislation as a generally stated activity duty since the early 2000s, and had been included in the governmental instructions about policy preparation as an obligation to do impact analysis since the mid-2000s, there was no actual oversight of these written commitments. No comprehensive gender budgeting was in place. No systematic assessment of equality consequences in legislation and policy formulation was carried through; equality work was mainly temporary in nature, in the form of various ‘action plans’ on different areas. There was little equality expertise available to guide authorities, and so on. Our conclusion in the Commission report (NOU 2011:18) about such deficiencies was a major motivation for the Commission’s proposition to establish a national bureaucratic structure in charge of mainstreaming equality within both the state and municipal sectors. Specifically, the Commission advised establishing a new directorate with the authority to oversee equality policy implementation on all protected and combined strands—that is, gender, ethnicity, religion, age, disability, and sexual orientation.

A main argumentative strategy of layering was employed in the Commission’s consistent anchoring of such proposals as the necessary concretization of legal provisions already in place. References were also made to the fact that mainstreaming had been enshrined in the gender equality policy documents of all Norwegian governments since the late 1980s. Nonetheless, some of the new proposals obviously implied a rather drastic conversion. For example, the newly proposed authority structure would clearly break up the established structure of ministerial independence. Yet, this was not argued by the Commission as a radical change. The Commission justified the proposal in a combination of references to established UN norms and Nordic best practice examples. There was no reference made to the Amsterdam Treaty’s mainstreaming obligations, and EU-based mainstreaming efforts were generally not discussed. Instead, the Commission first explained the overarching importance of the Beijing Platform of Action to anchor the equality mainstreaming efforts and then extensively outlined the Swedish government’s large-scale investment in mainstreaming activities over the past decade.
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[6.28] The proposition to build a national bureaucratic structure, and in particular the proposal to establish a directorate responsible for equality policy development and implementation, met with strong opposition. The opposition was expressed by representatives from political parties, both left and right, as well as in the general public debate and in the public hearing of the Commission report. Those in favour included the main trade unions and the gender equality experts, but not the main employers’ organizations or most of the municipalities that participated. These responses demonstrate the broad scepticism about the creation of new bureaucratic structures per se. Within the employers’ organizations in particular, such bureaucracy was seen as adding to what is already considered to be a general political-administrative burden resulting in ‘reporting overload’ imposed on businesses and municipalities alike. This anti-bureaucracy contestation was replicated in the Labour Party’s subsequent dismissal of the Commission’s mainstreaming proposal. However, small adjustments were made, as the government’s white paper (Meld St. 44 (2012–2013)) outlined a new regional structure of public ‘equality centres’ to provide advice on regional and municipal equality work. Such a structure was not, however, put in place by the subsequent government.

[6.29] The equality perspective held by the Commission implied that mainstreaming should be ‘Gender+.’ Such multidimensional mainstreaming could arguably be seen to further complicate both policy making and implementation. However, we have been unable to identify any explicit counter-arguments in this respect. Overwhelmingly, the opposition to the Commission’s recommendation was related to a set of general contestations of bureaucracy and policy development within the framework of Norwegian public administrative structures as such. The successful anti-bureaucracy contestation provides a general lesson for mainstreaming enthusiasts. It further highlights a tension within the gender equality policy debate. This tension is acutely pronounced as a question about the appropriateness of the mainstreaming strategy itself. In part, mainstreaming scepticism is witnessed in the international literature, where gender mainstreaming is criticized for being a technocratic, neoliberal strategy (Squires 2007). While the technocratic potential of gender mainstreaming is emphasized, its transformative potential is often devalued.

[6.30] In the Norwegian setting, we would also highlight the general policy challenge that the Commission’s quest for bureaucratic implementation represented. The dominant gender equality policy tradition in Norway prioritizes, first, promoting gender-balance norms through quotas and various forms of preferential treatment and, second, building family-oriented welfare state policies through publicly financed childcare facilities and generous parental leave schemes (NOU 2012:15, chapter 2). The broad welfare state orientation of work–family balance is universally embraced. In contrast, the
creation of an implementation structure including administrative routines, learning, and planning could well be viewed as a fundamental change of direction. Employing layering strategies to promote institutional change in this respect seems mainly to have convinced actors already committed to the idea of mainstreaming who had experienced severe mainstreaming difficulties.

THE JUDICIALIZATION DEBATE: CONVERSION AND ANTI-JUDICIALIZATION

Judicialization essentially addresses the balance between legislatures and courts and is a discourse about the questionable limitations to majority rule that judicially enforceable individual rights may produce. Anxiety about judicialization is primarily a domestic concern driven by the increasing influence of international human rights treaties and bodies on domestic law and policy making. It resonates across Europe as a result of the enforcement of the European Convention on Human Rights by the European Court of Human Rights, and through EU member states' obligations to comply with the rulings of the Court of Justice of the EU. In Norway, attempts to broaden the scope of directly enforceable human rights through 'full text' incorporation of international conventions have been met with resistance and avoidance strategies by every government since the early 2000s. Women's rights might be broadly accepted as core human rights; however, an oppositional frame to the expansion of individual rights and the enforcement of these rights is being built through the advocacy of democratic national control over state power and sovereignty. As a form of contesting claims about rights expansion, judicialization problematises, in general terms, the deplorable shifts in legislative power which might be brought about through a court-based interpretation of state obligations.

The dynamic interpretive style of international human rights bodies is argued in particular to skew the balance. In the Nordic context, dynamism has been viewed traditionally as a problem in itself, as it may increase the power of the courts to legislate. Christoffersen (2006) outlines how a critical discourse here may follow one of two optional axes: a vertical axis which positions the 'national' against the 'international' and a horizontal axis which positions the 'political' against the 'judicial.' From this combined 'judicialization and power transfer' thesis follows what, in the Norwegian context, has been called a doctrine of 'appropriate restraint' (Skjeie 2009). Statutes must be sufficiently clear to be applied by courts and sufficiently broad in balancing different considerations.

The comprehensive set of EU directives on protection against discrimination, adopted in the early 2000s, grant judicially enforceable rights to indi-
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individuals. Their transposition in member states has also meant a spread of low-threshold anti-discrimination bodies previously found in just a few countries. In general, discrimination was not operationalized as a legal concept, remedies were largely left to be managed through the regular court systems, and there was little recognition of the need for special legal procedures to provide backing and support for victims (Krizsan, Skjeie, and Squires 2012, 211). Most Nordic countries, however, had developed low-threshold supervision systems in the form of Ombud arrangements and equality tribunals to monitor the gender equality legislation. With the transposition of new EU directives on discrimination, these low-threshold systems were—albeit in different ways—extended to new protected strands (Borchorst et al. 2012).

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The sanctions available within Nordic low-threshold systems vary considerably. The efforts of the Norwegian Gender+ Equality Commission to draw attention to the lack of effective sanctions within the Norwegian system clearly tap into the new European development to strengthen protection against discrimination. At present, this Norwegian low threshold merely rules on discrimination complaints, deciding whether or not discrimination occurred. The parties to the complaint are expected to acknowledge the rulings and agree among themselves on what, if any, form of compensation is appropriate. Basically, the Commission advocated two types of reforms to this system. First, it recommended a mandate for the Equality Tribunal to rule on compensation for discrimination. Second, it argued in favour of a system of free legal aid for those cases which the tribunal would recommend to be tried before the regular courts. To justify effective sanctions, here, the Commission pointed to recent UN guidelines for access to justice in the Paris principles and to the relevant EU directives on low-threshold mechanisms.

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While hardly any references were made to EU policy guidelines in the argumentative strategy to promote effective mainstreaming, the same cannot be said of access to justice argumentation. Here, EU references were prevalent. The Commission described the whole development of anti-discrimination legislation in Norway in the early 2000s as mainly EU-inspired and the issue of ‘effective sanctions’ placed within this context. Stressing the acute need for effective protection against discrimination, the Commission mainly followed an argumentative strategy of conversion, pointing to the obvious political inconsistency of combining strong substantive legislation with weak enforcement mechanisms. The Commission, in general, deplored the lack of reform in this respect—that is, the blatant neglect of legal efficiency during nearly forty years of expanding legislation. For remedies, one relevant model was borrowed from Denmark and the competencies of the Danish equality tribunal to rule on compensation. An alternative model was borrowed from the competencies of the Swedish Equality Ombud to try discrimination cases in court. The proposal to strengthen the protection against intersectional discrimination through the provision of explicit bans in the equality legislation
was simply argued as constituting a direct follow-up to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) committee’s General Comment Number 28 on the state’s duty to provide full protection against intersectional discrimination.

When analysing the written responses to these recommendations, we recognized that issues of access to justice were not highly placed. Only about half of those who responded commented on the damages proposal, with support split almost equally between those in favour of the proposal and those opposed. Those who were against the proposal frequently cited concerns relating to doubts about the proper judicial status and composition of the Equality Tribunal. Others referred to doubts about the quality of the review process at the tribunal. Opponents believed that only the regular courts should handle issues of compensation arising from cases of discrimination. However, they were not eager to establish a free legal aid arrangement in discrimination cases before the courts. In the public hearing, we observed the employers’ organizations uniting against the issue of compensation and, again, arguing against the main trade unions. When they commented on a proposal, the civil society organizations were unanimously supportive of the recommendations. The two actors in the low-threshold system itself—the Ombud and the Equality Tribunal—were also supportive. However, very few commented explicitly on the Europeanization frame. Counter-arguments were mainly made around issues of purely domestic concerns.

In the centre-left government’s response (Prop. 88 (2012–2013)), the anti-judicialization frame was applied only indirectly, and mainly as a point of view stressing the (present) inappropriate judicial status of the Norwegian low-threshold system. Actual problems relating to either the composition or the review process of the tribunal could quite easily be amended by the government, but this was not identified as an important task linked to the government’s review of the proposal. Similarly, the government could not be bothered with imposing explicit bans on intersectional/multiple forms of discrimination. Instead, it deemed these unnecessary, as long as the existing low-threshold practice was able to handle such cases. With the governmental change of guard to a predominantly rightist cabinet in 2013, the tables turned, and the new administration promised a reform of the sanction system. The new cabinet’s bill proposal on a unified equality and anti-discrimination law also includes explicit protection against multiple forms of discrimination.8

Widely divergent responses are quite understandable in light of the Commission’s conversion strategy. The harsh critique of the lack of sanctions placed the blame mainly on the legislative ‘fathers’ of the low-threshold system at its founding in the 1970s (i.e., during the still golden age of the social democratic regime). If a social democratic government were to act on the Commission’s proposal, it would have to acknowledge these basic defi-
ciencies in the system itself. The new rightist government of 2013 could much more easily champion legal efficiency.

However, we mainly ascribe the more general lack of expressed concern about access to justice in the Norwegian context as being due to embedded views on the (in)appropriateness of judicialization. A public legal-aid system, such as the one proposed by the Gender+ Equality Commission, would undoubtedly offer a strong incentive to bring discrimination cases to court. A mandate to award damages would change the low-threshold system from a ‘negotiation’ body, where the Ombud and tribunal mainly act as go-betweens, to a court-like body, where discriminatory actions are actually punishable.

CONCLUSION

In this chapter, we addressed the strategic framing of new policy proposals and their consequent contestation that we have termed as ‘benevolent,’ as it stems from actors that, at the outset, have no stake in questioning the legitimacy of key equality norms. Empirically, we relied on two major policy proposals from the Norwegian Gender+ Equality Commission (2010–2012) respectively relating to the systematic implementation of gender mainstreaming and efficient individual access to justice.

Furthermore, we outlined the argumentative strategies that the Gender+ Equality Commission employed in terms of layering and conversion. Proposals to strengthen mainstreaming were justified as new necessary means to carry out established policies and secure their proper implementation. This layering strategy, however, did not directly correspond to the reality of the situation. Rather, (some of) the means proposed would certainly challenge the established authority structure within the Norwegian public administration. Proposals for securing legal effectiveness within the low threshold system were justified as necessary to overcome severe discrepancies within the general framework of protection against discrimination. This conversion strategy pitted a substantive strong legislation against an ineffective sanction system. While the layering strategy mainly made use of rather vague UN references, the conversion strategy combined references to CEDAW, the Paris principles, and EU law. However, on the whole, the frame remained largely Nordic, as references to comparable Nordic best practices dominated both lines of argument.

The chapter explored the anti-bureaucracy contestation which critiqued the administrative and technical costs attached to the implementation of the mainstreaming strategy, and the anti-judicialization frame which opposed effective legal protection against discrimination. We conclude that the anti-bureaucracy frame stands out as a form of contestation which is considered
broadly appropriate and legitimate across different groups of equally equality-friendly actors. This benevolent contestation has mobilized practically grounded protests about routinisization and reporting overload as well as principle grounded protests. Anti-judicialization is not as clear-cut in terms of its overall legitimacy and support within different actor groups. From a purely strategic point of view, it is not surprising that civil society organizations would support proposals for strengthening the enforcement of individual rights. It is equally unsurprising that employers, as well as state and municipal actors, would oppose such proposals. What is more interesting is that the actors were generally reluctant to draw on, and engage with, arguments about ‘the need for restraint,’ which are otherwise common to the judicialization debate. In the specific scenario discussed here, regular courts are not seen as unduly intervening forces. On the contrary, the courts here become the appropriate instruments of justice in a democratic system—strategically framed in contrast to semi-legal/quasi court arrangements, such as ‘lay’ equality tribunals.

Major points of the feminist critique of both mainstreaming and judicialization (Krizan, Skjeie, and Squires 2012; Squires 2007) clearly resonate with the viewpoints offered through the public consultation on the proposals. The Gender+ Equality Commission appears to have challenged the social democratic legacy on gender equality policy by recommending policies that systematically stressed the need to build institutional capacity on the gender+ equality problematic. The social-democratic elite did not embrace such capacity-strengthening efforts. Thus, it is interesting to note that the Labour Party, now out of office, has warmed considerably to these ideas in its new position as parliamentary opposition. Labour’s traditional gender equality policy approach has been to build and expand gender equality-friendly welfare state arrangements which could ease the work–family reconciliation. In comparison, individual and systemic discrimination in schools or workplaces has received far less attention. This also means that it is mainly processes of Europeanization which, in the Norwegian context, have contributed to widening protection against discrimination through the inclusion of new strands in the anti-discrimination framework.

The lessons from our experience in terms of the role of academic expertise in gender policy making are not straightforward. In accordance with some other recent studies emphasizing the importance of experts as ‘active gender framers for feminist policy adoption’ (Hoard 2015, 2; see also Sauer 2010), our Commission’s use of layering and conversion strategies has certainly given it some non-trivial agenda-setting power. However, adoption has been hampered for a long time and remains severely limited. In the end, the benevolent contestation of both judicialization and bureaucracy has proven to be quite forceful, despite the Commission’s active attempts to tie its propo-
sals to the Nordic model path widely cherished among gender equality-friendly actors.

[6.47] However, the Commission’s composition seems also to have played an opposition-generating role. In accordance with the general increase of academic members of Norwegian public inquiry commissions, the Gender+ Equality Commission, as already noted, comprised exclusively professors and researchers. There was no representation of social partners, no political party representatives, no bureaucrats, and no advocacy group representatives. In the public hearing of the reports, general criticism of the expert composition of the Commission came from the social partners, including both the trade unions and the main employers’ organizations, but also from one of the feminist activist groups. The hearing reports from gender studies research centres and from the national organization of gender research also highlighted the Commission’s expert composition, but they applauded it and interpreted it as a novel recognition of the need for gender+ equality policy making to be based on knowledge and systematic analysis. The latter arguably reflects an on-going controversy in the wider feminist community over how to interpret the significant role of ‘gender experts’ in contemporary gender policy making (Hoard 2015; Holst and Seibicke forthcoming). In this trend, critics see the development of a feminism that is less committed to political equality and democratic inclusion and participation (Fraser 2013). Others focus on how policy making that grants a larger scope for knowledge and expertise has the potential of ensuring better policy outcomes, advancing more than hampering the realization of rights and opportunities (Walby 2011).

[6.48] It has been a long time since Europeanization theory was simply a theory about a straightforward top-down harmonization of Europe-wide norms, laws, and policies, if it ever was. Our study adds to the complexity of this scholarship, inspired not least by SI, emphasizing the filtering role of nation-specific meaning frames and ‘appropriateness’ scripts (Börzel and Risse 2003). Given the trend of the Europeanization of Norwegian soft governance in other policy fields, we might have expected ‘Europe’ to be somewhat more present in reports authored by gender equality scholars, who are well aware of European-level agendas, regulations, and initiatives in the mainstreaming and anti-discrimination area. In light of the strong discursive links between support for gender equality and the Nordic model in Norwegian public debate and policy making, the persistent Nordic framing is not very surprising.

[6.49] In addition, we see this study as contributing to the on-going synthesising efforts of FI. Instead of sticking schematically to one or the other branch of NI, we utilized overlapping and complementary reference points and conceptual distinctions from SI, as well as HI and DI. Recent articulations of FI correctly stress how institutionalism can be relied on in explorations of gen-
dered suppositions and implications of policy processes in all areas. Seemingly ungendered policies and institutions can turn out to be quite gendered. As shown in this chapter, explicitly gendered interventions can also be countered by means of ungendered discursive strategies. We are certain that there are lessons to be learned across policy fields from the Gender+ Equality Commission’s use of both layering and conversion strategies to promote policy change and from the discursive opposition which it encountered.

NOTES

1. We have adopted the ‘gender+ equality’ concept from the European research project, ‘Quality in Gender+ Equality’ (QUING) coordinated by Mieke Verloo; see http://www.qling.eu. The QUING conceptualization captures, in simple terms, the Commission’s multidimensional mandate.


3. Such restrictions are highlighted in the Instructions for Official Studies and Reports; see https://www.regjeringen.no/en/dokumenter/Instructions-for-Official-Studies-and-Reid107582/.

4. The full range of Commission proposals totalled thirty-five. The estimated costs were more than three billion NOK per year—this was, however, mainly due to the cost of the proposed work-family reforms (not discussed in this chapter).

5. This link is also made by Mackay, Kenny, and Chappell (2010, 578), who point out how the layering/conversion/displacement scheme marks ‘a renewed focus (of historical institutionalism) on the “inner life” of political institutions,’ and ‘draws upon the earlier insights of SIs, who observed that institutional change occurs through internal processes of interpretation, imitation and adaptation. It is also the focus of various discursive institutionalists, who attempt to “endogenize” change and agency by exploring the ways in which “sentient actors” attempt to consciously change institutions, through deliberation, contestation, as well as consensus-building about ideas’ (Schmidt 2010, 12).

6. Once more, we see the how concepts from discursive, historical, and sociological institutionalism relate closely to one another. Carstensen and Schmidt (2015, 15) link up their notion of ‘power in discourse explicitly to the notion of ‘framing’ (sociological institutionalism) and ‘path dependency’ (historical institutionalism, see also Pierson 2000, 2004).

7. Illustrative of this are the seven years of concerted advocacy efforts before CEDAW found a place within the Norwegian Human Rights Act (Skjeie 2009).

8. A reform of the sanction system is, however, still under consideration, and a unifying bill has not yet been passed by Parliament.

9. Older agendas were, however, also included in proposals to improve both work–family balance and gender+ balance in public life.

10. Most Commission proposals are now included in the Labour Party’s new gender-equality agenda, publicly presented on 8 March 2016 and further laid out as a set of opposing recommendations in the parliamentary debate on the current cabinet’s gender equality white paper (see https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2015-2016/inns-201516-228/).

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