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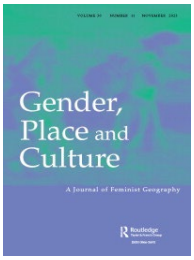
Kestilä, Iiris. "Law, Space and Power: Spatiality in the European Court of Human Rights Judgments on Homosexuality." *Gender, Place & Culture* 30, no. 11 (2023): 1509–1528.



Gender, Place & Culture
A Journal of Feminist Geography

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/cgpc20

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To cite this article: Iiris Kestilä (2023) Law, space and power: spatiality in the European Court of Human Rights judgments on homosexuality, Gender, Place & Culture, 30:11, 1509-1528, DOI: 10.1080/0966369X.2022.2072815

To link to this article: https://doi.org/10.1080/0966369X.2022.2072815

GENDER, PLACE & CULTURE
2023, VOL. 30, NO. 11, 1509–1528
https://doi.org/10.1080/0966369X.2022.2072815

Routledge
Taylor & Francis Group

Law, space and power: spatiality in the European Court of Human Rights judgments on homosexuality

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ABSTRACT

This article examines the ways in which technologies of power, and their operation in and through spaces, constitute 'deviance' in central cases on homosexuality of the European Court of Human Rights. To do this, the article deploys two concepts from Michel Foucault: heterotopia and panopticon. The European Court of Human Rights has sometimes been accused of dealing with cases relating to homosexuality in terms of the public/private dichotomy. Both heterotopia and panopticon question this division and show that this division is not as clear as is sometimes portrayed. While spatial arrangements affect the ways in which an individual is defined as 'deviant', the spatial analysis also illustrates the ways in which legal cases can be considered heterotopic themselves, this way contributing also to the discussions about the relationship between law and disciplinary power.

ARTICLE HISTORY
Received 8 April 2021
Accepted 11 April 2022

KEYWORDS
Heterotopia; homosexuality; law; Michel Foucault; panopticon

Introduction

In this article, I address the ways in which homosexuality becomes a 'problem' in certain cases of the European Court of Human Rights (later on 'the Court'). These landmark cases form a body of legal praxis that has often been discussed from the perspectives of, for example, queer and feminist studies. This is also a central element in the selection of cases. The article introduces a new perspective to these discussions by deploying two concepts from Michel Foucault, those of heterotopia and panopticon. In this article, I will analyse how do technologies of power, and their operation in and through spaces, constitute 'deviancy' in the Court's central cases on homosexuality. In other words, how does a homosexual become a 'deviant' subject depending on the spatial arrangement at hand.

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In the core of such becoming, from the perspective of this article, is the division between public and private space. This division has been extensively discussed in the field of feminist studies (see, e.g. Rose 1993; Valentine 2002; Munt 2000), and also law (see, e.g. Stychin 2000, 2001, 2009; Johnson 2014). In his book Homosexuality and the European Court of Human Rights, Johnson (2014) has argued that the public/private dichotomy has a central role in the way in which the Court establishes homosexuals as eligible for legal protection. However, the division between public and private is perhaps not as clear as portrayed by Johnson.

This article elaborates on Johnson's work by discussing the public/private dichotomy with the aid of Foucauldian concepts related to space. The article contributes primarily to the legal theoretical discussion about the Court's jurisprudence: while these approaches have to great extent drawn from Foucault in terms of governing and sanctioning the homosexual subjects, so far Foucauldian theories of space have been mostly absent from these discussions. The Foucauldian concepts of heterotopia and panopticon aid to illustrate how the public/private division is in fact vague, affecting also the Court's argumentation in the legal judgments studied in this article.

While discussing the public/private dichotomy, the article also contributes to feminist discussions about law and space, and the growing body of scholarship on Foucauldian geography. On the one hand, the feminist approaches are often grounded in practice; they analyse concrete spaces and the ways in which these spaces affect the homosexual subjects, whereas this article engages in theoretical conceptualization on the law's heterotopic qualities. On the other hand, Foucauldian geography has not yet engaged with the praxis of the Court, and doing this enables to examine the relationship between legal identities and legal spaces.

The aim of the article is to scrutinize the public/private dichotomy, and to problematize its role in constructing homosexual 'deviancy'. Instead of only asking whether there is a public/private dichotomy at play in the cases, the article also shows how this division makes the Court's argumentation problematic from a legal perspective, and finally, how does this problem affect the construction of 'deviant' subjects.

In practice, the judgments are analysed via the method of critical close reading, which has been developed especially by Hurri (2014). This method not only analyses how law operates in practice and how legal actors understand their own actions, but also investigates how judgments can be used to analyse the functioning and self-understanding of other institutions and societal powers, as they are the ones that have become problematic in legal proceedings. In practice, this research looks for and analyses passages in judgments that reveal techniques of power directed at the subject. Thus, the practical method of analysis is embedded in a Foucauldian theoretical framework.

The Foucauldian theoretical framework consists namely of power analytics, especially in the way in which they relate to space. In this regard, the focus is on two concepts: heterotopia and panopticon. By speaking about heterotopias, Foucault (1986, 3) referred to spaces that are different from all other spaces within a certain culture but which are nevertheless real, unlike utopias. Due to being different, and yet in relation with all other sites, heterotopic spaces can reflect or mirror the features of these other sites (Foucault 1986, 3). Panopticon, then, is a certain kind of utopia. For Foucault, the panopticon was the utopia of absolute power over individuals: generalised surveillance and normative judgements that discipline individuals (Davis and Walker 2013, 601).

I will discuss these concepts in more detail below, however, for now it should be noted that especially heterotopia is a contested and, to some extent, elusive concept (see, e.g. Saldanha 2008). Foucault himself hardly used the term after having invented it. Indeed, Foucault's concept of heterotopia is far from clear or systematic. However, for the purposes of this article, I believe it is sufficient to use the concepts of heterotopia and panopticon as instruments, sources of inspiration, rather than aiming for an in-depth analysis of their meaning in Foucault's register. I believe that if these concepts, in the context of law, are to be understood as analytical tools, they can indeed contribute to our understanding of the relationship between law and spatiality in the Court's legal praxis. In practice, how the concepts of heterotopia and panopticon aid in further specifying the nature of the public/private division.

In the core of this article is the construction of 'deviant' subject, by which I refer to Foucault's conceptualisation of 'deviancy', especially sexual deviancy (Foucault 1976). In Discipline and Punish, and also in History of Sexuality Vol. 1: Will to Knowledge, Foucault notes that discipline operates in the following manner: instead of repressing or excluding the unwanted behaviour, this behaviour is made visible and the 'deviant' individual is moulded into an obedient subject. Moreover, the issue is not so much with what one does, but what one is. Therefore, what needs correction is not an individual act but the individual as such (see, e.g. Foucault 2003). This way, certain bodies are rendered 'normal' while others 'deviant' (Valentine 2002, 149). A central aspect of Foucault's work relating to sexuality was precisely the production of the homosexual as a 'deviant' subject (see, e.g. Foucault 1980, 101).

Such a mechanism is often in the background of legislation and even the legal praxis of the Court. Furthermore, this type of formation of 'deviancy' in the context of law is significantly related to space. Indeed, geography has come a long way from the times when it was considered merely as the description and identification of the Earth's surface (Valentine 2002). Nowadays 'space is understood to play an active role in the constitution and

reproduction of social identities, and vice versa, social identities, meanings and relations are recognised as producing material and symbolic or metaphorical spaces' (Valentine 2002, 145–146). In a similar manner, the relation between space and power was central to Foucault's work (see, e.g. Harni and Lohtaja 2016; Topinka 2010; Elden 1998; Rabinow 1984). In this article, I examine the ways in which space produces legal identities, namely 'deviancy', and at the same time, how identities pushed to margins produce legal spaces.

This article is divided into four parts. In Sec. 1, I will address the so-called public/private dichotomy—a theme often discussed in the field of queer studies and other research related to sexual minorities—and the ways in which it is present in the Court's case law, as well as the problematic nature of such a division. The purpose of this inquiry is to set the stage for the subsequent discussion of the spatial dimensions in the Court's jurisprudence. In Sec. 2, I will address the theme of heterotopia and the ways in which heterotopic sites challenge the public/private division. This section explores the concept of heterotopia in greater depth and applies it to practice via the Court's landmark cases on homosexuality. In Sec. 3, I will discuss the concept of panopticon in a similar manner. I will address the ways in which this spatial notion can be understood in more abstract terms as a technology of power. In the practice of panopticism, the production of knowledge, which so often underlies issues concerning sexual minorities, intertwines with space and power. Finally, In Sec. 4, I will shortly address the implications of the preceding analysis for the law in general: what is the relationship between law and space?

The article concludes that spatial arrangements affect the ways in which an individual is defined as 'deviant' and that the Court is not immune to these effects. However, the way Court relies on the public/private dichotomy is problematic because, as the analysed judgments show, this division is far from clear. Indeed, this division is rather a continuum, comparable even to the famous Möbius strip. This leads the Court into argumentation that not only leaves sexual minorities vulnerable but is also unconvincing from a legal perspective. Moreover, the obfuscation of this division shows how these peculiar spaces that are present in the cases come to function as a sort of a mirror: on the one hand, the legal system sees a reflection of disciplinary power in and over itself, and, on the other hand, discipline sees its own transient and elusive form in the image of the law. In this sense, the cases are heterotopic themselves.

Public/private and the epistemology of the closet

Let us begin by addressing the so-called public/private dichotomy of the Court's jurisprudence. For example, Johnson (2014, 101) has argued that the

Court has constantly aimed to maintain a strict division between private and public manifestations of homosexuality, which has led to the reinforcement of 'the social relations of the closet' (Johnson 2014, 103–104). What this essentially means is that homosexuals gain access to rights when they keep their sexuality hidden and out of the public sphere. This, according to Sedgwick (1990, 71), provides the 'defining structure for gay oppression' as well as the 'the contemporary legal space of gay being' (70; see also M. Brown 2000; Fuss 1991). Stychin (2000, 2001, 2009) has analysed the public/private dichotomy extensively in terms of trans-national law, i.e. the human rights law and the law of European Union. For example, Stychin (2000, 612–613) mentions the concept of a 'good homosexual', derived from work of Smith (1994). This concept relates to the homosexual as 'a law-abiding, disease-free, self-closeting homosexual figure who knew her or his proper place on the secret fringes of mainstream society' (Smith 1994, 18). According to Stychin (2000, 612), this is 'an imaginary figure who, because completely discrete and closeted, has no public identity at all'. In a similar vein, W. Brown (1995, 161) argues that the public sphere is characterized within citizenship discourse as the realm of rights: as long as homosexuals stay within the sphere of privacy, they do not have access to rights that belong to the public sphere. Indeed, the scope for social, and legal, acceptance of homosexuality has been limited to those who completely respect the public/private dichotomy (Stychin 2000, 612).

However, feminist theorists have acknowledged that this dichotomy is not that clear in practice. Rose (1993), for example, notes that, in a way, gay men and lesbians can occupy places of public and private at the same time. For instance, homosexuals who work in finance, or indeed law, can be very close to the centres of power and the public sphere, and yet feel that they do not belong. They are both present and absent within the workplace (Valentine 2002, 157). Similarly, Butler (1993, 21) writes about the 'constitutive outside', the space outside the subject which nevertheless serves as a foundation for the subject. In practice, that the 'outside' only exists because of the context 'inside' (Munt 2000, 535).

If we continue with public spaces, according to Butler (2004, xvii):

> The public sphere is constituted in part by what cannot be said and what cannot be shown. The limits of the sayable, the limits of what can appear, circumscribe the domain in which political speech operates and certain kinds of subjects appear as viable actors.

Although Butler in this context refers more to political speech regarding terrorism than sexual minorities, her analysis can be considered also in the context of homosexuality and the construction of public/private dichotomy, as well as its effects. In the quotation, we can see how the boundaries of public and private already start to obfuscate. First, how public and private

are co-constitutive. The private leaks into the public: we are aware of what lurks behind the curtains although we do not speak about it. Second, this co-constitution contributes to the formation of the subjects that are considered as viable actors, politically, or in this case, in terms of law. As we will see, the arrangement of public and private at hand determines who is a criminal, who is a law-abiding citizen and what actions can be taken within the sphere of public.

Referring to Foucault, Butler (1990, 2) writes that 'juridical systems of power produce the subjects they subsequently come to represent'. That is to say, that the law is performative; it names the things it at the same time calls into being. This is also why Butler is fairly critical towards the law as means of emancipation (ibid.). While Butler is perhaps most known for her theory of performativity relating to gender as repeated acts that over time produce what comes to seem as a natural state of things (Butler 1990, 33), performativity has also been applied to questions of space. According to this approach, space, too, can be brought into being through performances and as performative articulations of power (Gregson and Rose 2000, 434). Spaces considered, for example, heterosexual, do not precede their performance but come into being through these performances while being themselves performative of particular power relations (Gregson and Rose 2000, 434; Valentine 2002, 154–155). As Massey (1999, 283) notes, 'because [space] is the product of relations, relations which are active practices, material and embedded, practices which have to be carried out, space is always in a process of becoming. It is always being made'. This is also the case with the formation of the subject as considered by Foucault and Butler.

Although this short introduction to the thematic may sound like homosexuality being repressed into silence and privacy, Foucault (1976) notes, that in fact there exist massive technologies around the subject to *reveal* the secret of sexuality, namely through the technology of confession (Kestilä 2021). This way, the homosexual individual, through this process of knowledge-production, becomes a homosexual subject whose 'deviancy' is controlled and corrected. Sexuality and knowledge are thus always interwoven. These aspects—a need to stay within the sphere of privacy and a need to confess—are well illustrated in the cases of *Dudgeon v. the United Kingdom* (application no. 7525/76, 22.10.1981) and *Smith and Grady v. the United Kingdom* (applications nos. 33985/96 and 33986/96, 27.9.1999). The latter case will be discussed more thoroughly later on. However, before beginning the analysis of *Dudgeon*, first it is necessary to say a few words about the operation of the Court.

The European Court of Human Rights, established in 1959, is a supranational court that interprets the European Convention on Human Rights (later on the 'Convention'), the central international fundamental rights treaty in Europe. Under Article 1 of the Convention, the countries that have joined

the Convention have an obligation to ensure the rights and freedoms defined in the Convention to everyone within their jurisdiction. Therefore, it is under the jurisdiction of the Court to oversee this obligation, which it does through the applications submitted to it (Hirvelä and Heikkilä 2017, 17). The ultimate guarantee of the functioning of the Convention is the systematic monitoring of the execution of judgments. The Court's judgments are, in principle, declaratory, enforced by the Committee of Ministers of the Council of Europe. The competence of the Committee of Ministers is based on Article 46, which commits State Parties to comply with the final judgment of the Court in a case to which they are parties. Accordingly, the State must implement the judgment (Hirvelä and Heikkilä, 55).

The Court always addresses cases through the following standard questions. The Court considers whether the issue falls within the scope of one of the substantive articles of the Convention; whether there was an interference with the right; whether the interference was based on law; and whether the interference pursued a legitimate aim. Finally, the Court considers whether the interference was necessary in a democratic society in order to achieve the legitimate aim in question, and whether, taking into account the margin of appreciation accorded to the States by the Convention, it was proportionate to that aim. What the last-mentioned question essentially means is that there must always be a proportionate relationship between the aims pursued by the interference and the Convention right at stake (Gerards 2013, 467). Indeed, the rights protected by the Convention are not absolute but interferences with them can be accepted if reasonable justification is provided. For example, the rights enshrined in Articles 8–11 can be breached if this is 'necessary in a democratic society'. The case at hand, *Dudgeon*, concerned Article 8 (right to private and family life), and thus the democratic necessity test applied.

Now to the case. In the case of *Dudgeon*, the Court not only decided that consensual homosexual acts between adults should be free from interference by the state but also that engaging in such acts constituted a human right (Johnson 2014, 100). The applicant in the case, Mr. Dudgeon, was a homosexual but also an LGBT rights activist in Northern Ireland. In January 1976, the police went to Mr. Dudgeon's address to execute a warrant under the Misuse of Drugs Act. During the search, also Mr. Dudgeon's personal documents, such as correspondence and diaries, were found and seized. A review of these documents revealed that Mr. Dudgeon was indeed a homosexual; something that was criminalized at the time. Mr. Dudgeon complained to the Court that his treatment together with the existence of the law criminalizing homosexual conduct constituted an unjustified interference with his right to respect for his private life, which is protected by Article 8 of the Convention (right for private and family life) (*Dudgeon*, paras 33–34).

The British government argued that while the criminalization of homosexual acts did interfere with private life, it was necessary in a democratic society and within the state's margin of appreciation. The British government claimed that the criminalization pursued two legitimate aims: protecting rights and freedoms of others and protection of morals (*Dudgeon,* paras 40 and 42). Mr. Dudgeon disputed these arguments. The Court eventually found a violation of Article 8 and famously stated that homosexual activities constitute 'a most intimate aspect of private life' (*Dudgeon*, para 52) and 'an essentially private manifestation of the human personality' (*Dudgeon*, para 60). While this has been considered a great victory in the context of gay rights, the judgement and the Court's argumentation in the case has since proven to be problematic. Although the Court can be seen as having taken a significant step away from the previous views regarding homosexuality, it nevertheless acknowledged the 'legitimate necessity in a democratic society for some degree of control over homosexual conduct' (*Dudgeon*, para 62).

This, read together with the Court's view that penal sanctions could not be justified 'when it is consenting adults alone who are involved' (*Dudgeon,* para 60), contributes to the understanding that the Court implicitly legitimized the view that maintaining homosexuality in private was necessary in order to 'protect the vulnerable' and thus protect the overall moral climate of the state (Johnson 2014, 101). While the Court established the view that homosexuals can gain access to privacy rights, access to rights is only gained when sexual practices are kept hidden from the public.

It can be argued, that the case reinforces the idea that keeping homosexuality hidden is desirable. But what exactly is 'hidden' homosexuality? This point is well illustrated by the case of *Laskey, Jaggard and Brown v. the United Kingdom* (applications nos. 21627/93, 21628/93 and 21974/93, 19.2.1997).

Heterotopia and the obfuscation of boundaries of public and private

The case of *Laskey, Jaggard and Brown v. the United Kingdom* concerned sado-masochistic homosexual acts between forty-four men in total (*Laskey, Jaggard and Brown*, para 8). During a routine investigation into other matters, the police found film material of said acts. As a result, the applicants were charged with a series of offences, including assault and wounding, relating to the sado-masochistic activities that had taken place over a period of ten years. The acts included, for example, maltreatment of the genitalia and ritualistic beatings. These activities were consensual and were conducted in private (ibid.). The activities took place at a number of locations, including rooms equipped as torture chambers. Video cameras were used to record the events and the tapes were copied and distributed amongst members

of the group (*Laskey, Jaggard and Brown*, para 9). The applicants claimed that their prosecution and convictions for assault and wounding was in breach of Article 8 of the Convention (*Laskey, Jaggard and Brown,* para 35).

According to the applicants, the sado-masochistic acts were all done willingly between adults, were carefully restricted and controlled, and the acts were not witnessed by the public. Neither did the acts cause any serious or permanent injury (*Laskey, Jaggard and Brown*, para 38). The British Government submitted that behind criminal law there were also moral concerns: criminal law should seek to deter certain forms of behaviour (*Laskey, Jaggard and Brown*, para 40).

The Court began its evaluation by noting that 'necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued' (*Laskey, Jaggard and Brown,* para 42). According to the Court, the State was entitled to consider not only the actual seriousness of the harm caused but also the potential for harm inherent in the acts in question (*Laskey, Jaggard and Brown*, para 43–46). As to whether the measures taken against the applicants were proportionate to the legitimate aim or aims pursued, the Court noted that the charges of assault were numerous and referred to illegal activities which had taken place over more than ten years. The sentences could also be appealed. Based on these factors, the Court considered that the measures taken against the applicants were not disproportionate (*Laskey, Jaggard and Brown*, para 49).

The case as a whole is very interesting. However, one particularly noteworthy aspect is the way the Court at first questioned whether the acts fell within the scope of Article 8, that is whether they are protected by privacy:

> The Court observes that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8. In the present case, the applicants were involved in consensual sado-masochistic activities for purposes of sexual gratification. There can be no doubt that sexual orientation and activity concern an intimate aspect of private life […] However, a considerable number of people were involved in the activities in question which included, inter alia, the recruitment of new 'members', the provision of several specially equipped 'chambers', and the shooting of many videotapes which were distributed among the 'members'. It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of 'private life' in the particular circumstances of the case. (*Laskey, Jaggard and Brown*, para 36)

Whilst the Court eventually found that the acts in question did fall within the scope of Article 8, its decision has been criticised for being based mainly on a moralizing view of the sexual activities which can gain protection as private (see, e.g. Moran 2003). As explained by Johnson (2014, 103), 'the Strasbourg organs [i.e. the Court] have consistently maintained a particular moral view about what types of activities can be regarded as private'. However, it would also seem that there is something about the space where

the activities took place. Although these happened behind closed doors, there was something that would seem to connect them to society in general. This becomes visible in the Court's moral concerns. I will now address this relationality with the aid of the concept of heterotopia.

The concept of heterotopia is perhaps most closely associated with the lecture Foucault gave to architects in 1967, and that was later published under the name of '*Des espaces autres*' ('Of Other Spaces'). Indeed, in the lecture, Foucault describes heterotopias as 'other spaces', present but always on the outside. In Foucault's analysis, heterotopia comes to represent a certain kind of counterpart for utopia, which is only imagination and does not exist concretely (see, e.g. Lee 2009, 649). As noted by Lee (2009), 'heterotopia emerge when utopian ideals are expressed in forms of relational difference that offer an alternative ordering of space and society'. Similarly, heterotopia differs from the panopticon—another important Foucauldian concept in terms of spaces. Whereas the panopticon in Foucault's work is an apparatus of constant surveillance and control, both internalised and dispersed, heterotopias have also been interpreted as places of resistance (Topinka 2010; Lefebvre 1991, 39). According to Tennberg (2020, 12), heterotopias are 'commonplace, concrete and real places unlike utopias or dystopias'.

In the lecture, Foucault (1986, 4) uses the mirror as an example of heterotopia: the image in the mirror is real, unlike for example the utopian image of the self, but it is nevertheless a 'placeless place'. The mirror reflects the image of a person gazing into it somewhere where the person is not and yet the gaze returns to a concrete place, to the person (ibid.). As Foucault explains:

> The mirror functions as a heterotopia in this respect: it makes this place that I occupy at the moment when I look at myself in the glass at once absolutely real, connected with all the space that surrounds it, and absolutely unreal, since in order to be perceived it has to pass through this virtual point which is over there. (ibid.)

The reflection in the mirror is both real and unreal at the same time. Indeed, heterotopias possess potential to challenge also other conventional uses and meanings of space, such as the dichotomic division of the public and the private. For Foucault (1986, 3), heterotopias are essentially sites that are 'in relation with all the other sites, but in such a way as to suspect, neutralize, or invent the set of relations that they happen to designate, mirror, or reflect'.

Moreover, in the *Order of Things*, another occasion when Foucault used the concept of heterotopia, it is mentioned that

> Heterotopias are disturbing, probably because they secretly undermine language, because they make it impossible to name this and that, because they destroy 'syntax' in advance, and not only the syntax with which we construct sentences but also that less apparent syntax which causes words and things (next to and also opposite to one another) to 'hold together'. (Foucault 1994, xvii–xviii)

As Steyaert (2010, 52) notes, 'heterotopia is a discursive modality that contradicts or contests ordinary experience and how we frame it, by unfolding a non-place within language. It points at the unthinkable "other" of our own familiar discourses and the discursive order of things'. Perhaps it could be said that heterotopias mirror, or reflect, but they do not necessarily show us what we expect to see. It shows us something that almost comes to resemble the concept of *uncheimlich* from Freud ([1919] 2003, 148; see also Kristeva 1991, 183): something that we once knew, which was anchored outside of ourselves due to fear and which returns in a frightening and unknown form, but which in fact is our own sub-conscious. However, this sub-conscious is not truly ours and the *unheimlich*, or heterotopia, shows this to us.

Could we understand the chambers in which the sado-masochistic activities of the case *Laskey, Brown and Jaggard* took place as heterotopic spaces: ones that fall within the private, while remaining connected to the public? Other elements of heterotopias that Foucault mentions would also seem to resonate with these closed spaces. First, as was explained in the previous section, homosexuality in society is preferred to be kept hidden and the places reserved for such sexual acts are expected to be kept private as homosexual individuals have, historically, been considered as deviant sexual predators subject to social exclusion (Johnson 2014, 101; Wolfenden Report, 1957). In this regard, Foucault (1986, 5) describes heterotopias of deviation. Foucault (1986, 7) also mentions the linkage between time and heterotopias. In *Laskey, Brown and Jaggard*, the sexual acts that took place in the chambers were recorded on film, freezing them in time. This also contributed to the Court's understanding of whether the space was really private. Moreover, according to Foucault (ibid.), either entering the heterotopia is compulsory, as would be the case in the context of a prison, or entering requires certain rites. In the case of *Laskey, Brown and Jaggard*, it is mentioned that everyone who took part in the activities conformed to certain rules, including the provision of a code word to be used by any 'victim' to stop an 'assault' (*Laskey, Jaggard and Brown*, para 8).

From this we could deduct that heterotopia is first, to some extent, a contradictory space, 'capable of juxtaposing in a single real place several spaces, several sites that are in themselves incompatible' (Foucault 1986, 25). Second, 'place is heterotopic not simply because of internal heterogeneity, but because of its external difference from all the rest of a society's spaces' (Saldanha 2008, 2083). It is precisely a counter-site, indeed a mirror, in some sense. Perhaps it is easy to recognize the 'torture-chambers' as heterotopic sites in themselves. However, could we also see them in a more abstract way, as a mirror for the legal system of international human rights? Law, speaking in a very general sense, is ultimately a system of language. As was mentioned above, heterotopias are disturbing because *they secretly undermine*

language. Heterotopia shows us what escapes language, and thus, what escapes law. What could be more difficult to bring into symbolic order than sexuality?

However, there is more to this. The case of *Laskey, Brown and Jaggard* shows us exactly how different homosexual acts, and in Foucauldian vein, different individuals, come to be defined as 'deviant' depending on the spatial arrangement. What takes place in the 'privacy' of home, can more easily gain protection through Article 8, as was the case in *Dudgeon*. In *Dudgeon*, it was only the possibility that the individual might be prosecuted for homosexuality that was considered to be in conflict with the Convention's privacy rights. This way, the Court subtly signalled that homosexuality in itself does not constitute deviancy. Instead, if homosexuality takes place in a context that is against public morality (sado-masochistic acts) or leaks into the public space (videotapes), it is acceptable that the individuals in question become subjected to criminal procedure. However, heterotopic sites, and heterotopic *concepts* such as sexuality, obfuscate the boundaries of private and public, thus leading also the Court to argue in a peculiar manner about what in fact constitutes private space. And yet, the artificial division between public and private, on which the Court has built an extensive body of legal praxis, was perhaps not the only problem. As was mentioned, heterotopia reflects the surrounding society, rendering visible its peculiarities and inconsistencies. What did the Court see in the mirror? This will be discussed next.

The panopticon and the utopia of absolute control

In *Discipline and Punish*, Foucault describes the utopia of the city that is subjugated to absolute control (Foucault 1995, 198). The foundation for this kind of working of power is in the prison building, designed and theorized by Jeremy Bentham. The panopticon, unlike medieval dungeons, is a prison that is full of light and is architecturally efficient. From the tower in the midst of the building, the inmates are supervised, although they do not know whether or not they are being watched and by whom. In this way, the inmates turn into objects of knowledge, instead of being participants in communication (Foucault 1995, 199–200). The all-seeing eye of panopticism observes and classifies people within the space, and thereby becomes a central mechanism of governing society at large. Thus, Bentham's idea of the perfect prison is not only an architectonic design but a utopia of absolute control. The panopticon is both a concrete way of organizing space and a certain kind of abstract machine. As Wood (2003, 235) notes, 'for Foucault the panopticon represented a key spatial figure in the modern project and also a key dispositif in the creation of modern subjectivity'.

As Foucault (1995, 202–203) described the issue, whoever is surveyed 'inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection'. Indeed, panopticon is, perhaps even more than a concrete place, a technology of power. Therefore, in this article I refer to panopticon as a practice of panopticism, by which I mean to draw a difference between panopticon as something that concretely exists (see, e.g. Bender-Baird 2016) and panopticon as a tool of analysis.

The practice of panopticism becomes particularly visible in two cases that concern the discrimination of homosexuals in the British armed forces: *Smith and Grady v. the United Kingdom* and *Lustig-Prean and Becket v. the United Kingdom* (applications nos. 31417/96 and 32377/96, 27.9.1999). In the former, both applicants served in the British Royal Air Force. Suspicions had been raised concerning their sexual orientation, i.e. whether Ms Smith and Mr Grady were homosexuals. Due to these speculations, the Royal Air Force launched investigations to find out whether the applicants were indeed homosexuals. In the background of the issue was the policy of the Ministry of Defence, which forbade homosexuals to serve in the military.

The other applicant, Ms Smith, had received an anonymous message in her answering machine a couple of months before she was to take her final exam to allow her promotion to proceed. The caller stated that she had informed the Air Force authorities of Ms Smith's homosexuality. Soon after this, Ms Smith admitted her homosexuality. After that, the assistance of the service police was requested (*Smith and Grady*, para 11–13). As a result of these investigations, Ms Smith was eventually discharged from the Royal Air Force. The events relating to Mr Grady's application were similar in that he too was subject to similar investigations and was eventually discharged.

The same policy was in the background of the case *Lustig-Prean and Becket*. In 1994 Mr Lustig-Prean was informed that his name had been given to the Royal Navy Special Investigations Branch in connection with an allegation of homosexuality. Mr Lustig-Prean admitted to his commanding officer that he was homosexual. He was then interviewed about his sexual orientation for about twenty minutes (*Lustig-Prean and Becket*, para 12–13). He was told that the interview took place because of the anonymous letter sent to his commanding officer claiming that Mr Lustig-Prean had had a relationship with a serviceman. Mr Lustig-Prean was asked to follow up on these claims. On 16 December 1994, the Admiralty Board informed Mr Lustig-Prean that his commission would be terminated and he would be discharged. The ground for discharge was his sexual orientation (*Lustig-Prean and Becket*, para 14–16).

In 'Truth and Juridical Forms', Foucault describes the idea of panopticism as one of the characteristic traits of our society (Foucault 2000, 70). According to Foucault, panopticism is founded on

> the type of power that is applied to individuals in the form of constant supervision, in the form of control, punishment and compensation, and in the form of correction, that is, the moulding and transformation of individuals in terms of certain norms. (ibid.)

Foucault refers to Cesare Beccaria and the legalistic theory, which means that criminal liability is based on individual guilt and punishments derived from the law, noting that panopticism serves as a sort of antithesis to the legalistic theory. In panopticism, supervision is not carried out at the level of what one *does* but what one *is*. The above extracts from the discussed cases show that, as Foucault argues, the panopticon is not only a concrete space such as military barracks; it is

> a type of location of bodies in space, of distribution of individuals in relation to one another, of hierarchical organization […]. Whenever one is dealing with a multiplicity of individuals on whom a task or a particular form of behaviour must be imposed, the panoptic schema may be used. (Foucault 1995, 205)

The panopticon is a technology of power which operates through a spatial schema. In the armed forces, supervision is not exercised only by the central authority but by one's peers and investigating officers. This relates to what Foucault calls a 'pyramid of gazes' (Foucault 2000, 73). Information about individuals is passed on from the lower levels of surveillance all the way to the highest point of the pyramid. Individuals become the police of each other and themselves (Lugg 2006, 42). This was the case when the anonymous caller made the phone call regarding the case of Ms Smith and when someone had tipped off Mr Lustig-Prean. This was also the case in the whole formation of the service police, an organ designed to exercise power over one's peers. After these incidents, interviews were carried out, prying into the privacy of the applicants. An important element of the panoptic organization is indeed the production of knowledge, and moreover, the production of truth. As MacMillan (2009, 157) notes, panopticism creates new targets of power and, at the same time, 'a new economy of power mechanisms where the exercise of power is inseparable from the production of knowledge'. As Foucault (1980, 93) notes,

> there can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth.

For example, in the cases discussed here, the inquiries into the applicants' sexuality continued after the people in question had already admitted their homosexuality. Such production of knowledge about sexuality relates to what Foucault describes in *The Will to Knowledge* (1976, 65): producing truth about sexuality takes place via scientific methods, namely, interrogation, the

exacting questionnaire and the recollection of memories. These are all part of a broader technology of confession. This *need* to know the truth about sexuality emerges as a central theme in Foucault's work on sexuality. The way in which deviancy is constructed in these cases takes place through panoptic practices, both external and internal supervision. While panopticism creates a pyramid of gazes that pry into the privacy of the individual—classifying them as normal and suitable for service, or as a deviant and therefore subject to discharge—it is also an internalised practice that takes place through the technology of confession (Foucault 1976; Foucault 1993; see also Kestilä 2021). The individuals subject themselves and partake in the process of becoming 'deviant'.

Finally, it is necessary to note that the operations of the military were legal, in terms of the national legislation then in force, although the Court eventually found a breach of Article 8. The panopticism of the armed forces is not invented by the individual soldiers but it is a technology which is supported by and which derives from other societal powers and institutions. It was the national law of United Kingdom which made it possible to have the said operations and procedures. Law is not immune to disciplinary power and it can be instrumentalised to serve such power. Perhaps this was what the Court saw in the mirror when addressing the case: the reflection of disciplinary power that lurks below the surface of the outspoken values of the legal system.

The law's spatiality

So far, the case law of the Court has been discussed by using the concepts of heterotopia and panopticon. I next discuss one last question: how should we understand the relation between the law itself and space?

One option would be to understand the law as a technology of power and control, as a certain kind of panopticon. Nieminen (2017, 43), for example, has noted that 'the ways of legal thinking […] shape our subjectivities, and in some cases, allow and even justify violent practices'. To my understanding, while it is clear that the workings of power are present everywhere, the same holds true for the law. This brings us to the so-called 'expulsion thesis', namely the argument according to which Foucault did not sufficiently consider the role of law in his analyses but rather saw it as completely subordinated by other powers (Fine 1984, 200; Golder and Fitzpatrick 2009, 25–26). However, this does not seem to be entirely true, as has been argued e.g. by Golder and Fitzpatrick (2009). Indeed, in *Discipline and Punish*, Foucault appears to conceptualize the law in contrast with the operation of disciplinary power. In Foucault's work, the discipline comes to form a certain kind of underside of the law: something that operates beneath the law's surface (Foucault 1995, 222; see also Hurri 2014). According to Foucault (1995, 222),

> The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines.

Foucault (ibid.) continues that 'the disciplines should be regarded as a sort of counter-law. They have the precise role of introducing insuperable asymmetries and excluding reciprocities'. Whereas law unifies, discipline separates, categorizes and classifies as well as hierarchizes individuals in relation to one another and, if necessary, disqualifies and invalidates (Foucault 1995, 223).

Understood in this way, we could say that there is a connection between law and disciplinary power; that they are each other's reflections in the mirror, somewhat alike to heterotopias as described by Foucault. For example, the military can be understood as heterotopic in relation to the law: the military as a place is distinct from the law, but it nevertheless shows us the image of the law, being a place that the law needs in order to secure its own existence, yet where the law does not seem to be in force, so to say (see, e.g. Agamben 2003). In other words, the military as a system, for its part, aims to secure the continued existence of the state, which, conversely, is the ultimate source of the law; yet, as a system the military seems to be beyond the confines of the normal operation of the law. Agamben explains this with a reference to the Möbius strip, the geometrical figure whose inside turns into an outside and back again, by noting that it, in a sense, comes to represent precisely the state of exception. According to Agamben (1998, 28), 'the state of exception is thus not so much a spatiotemporal suspension as a complex topological figure in which not only the exception and the rule but also the state of nature and law, outside and inside, pass through one another'. The cases I have discussed show the impossibility of separating between inside and outside. However, these cases also lead to another type of identity crisis in terms of legal system. They show that beneath the law's surface, which is supposed to be equal, objective and fair, lurks the disciplinary power.

Conclusions

It is now time to draw the conclusions. I started with the question, how do technologies of power, and their operation in and through spaces, constitute 'deviancy' in certain legal cases from the Court. I argued that the division between public and private is indeed one the most fundamental spatial arrangements in the Court's legal reasoning, determining whether the individual is constructed as 'deviant' in the context of human rights and homosexuality. However, this division is not as straightforward as has sometimes been portrayed. Instead, the inside and outside, private and public, are

co-constitutive and cannot be clearly separated from each other. This leads to faltering argumentation by the Court, as it tries to apply the public/private dichotomy, which in reality does not exists. Cases such as *Laskey, Jaggard and Brown* demonstrate this. This obfuscation of boundaries was further illustrated by deploying Foucault's concept of heterotopia. Foucault himself used the mirror as an example of heterotopia. Indeed, it would seem that the case of *Laskey, Jaggard and Brown* came to function as a certain kind of a mirror, which not only showed the artificiality of the public/private dichotomy but also something about the law.

This question was then addressed through the cases of *Smith and Grady* and *Lustig-Prean and Becket*. Here, I used another Foucauldian concept of space, that of panopticon. Whereas heterotopias in Foucault's register are concrete places, the panopticon is ultimately a utopia of absolute control over subjects. However, this control is not only external but also internalised. It is an inner urge to comply and supervise one's own actions although also one's peers are mobilised to this endeavour. The individual is not only shown the image of a deviant (which one must not become and which one must be wary of) but during the confessional processes of interrogation, the individuals themselves contribute into becoming 'deviant'. It was also noted that these processes are not invented by any individual person but that they derive from institutions and societal powers that surround such organisations as for example the military.

Building on this, I asked, what was it that the Court supposedly saw in the heterotopic mirror of *Laskey, Brown and Jaggard*? I have suggested that perhaps we could see discipline and law as reflections of one another. Law needs discipline, such as the military organization, in order to stay in force, while the military needs the law in order to enact its subjectivating practices. However, just as the inside and outside are indistinguishable in the Möbius strip, or how the public and private are obfuscated in the discussed cases on homosexuality, law and discipline are not strictly separate either. They already include one another.

My argument is that beneath the surface of the law live forms of discipline in parallel with the outspoken values of the law, such as justice and equality. Perhaps it is so that these forms of discipline have a certain fundamental suspicion towards sexuality that escapes governing and symbolization and therefore poses a threat to their unity. In heterotopic cases regarding homosexual subjects these disciplines see a reflection of their *unconscious*; an unconscious that separates and fragments, and thus shows that there is no such thing as unity, for everyone and everything has more than what can be rationalised and understood. While trying to exclude this ambiguous threat to their existence, the disciplinary powers exclude the suspicious subjects (see, e.g. Kristeva 1991), the homosexuals.

Acknowledgement

I would like to thank three anonymous reviewers whose thoughtful comments greatly improved the text.

Disclosure statement

No potential conflict of interest was reported by the authors.

Funding

Eemil Aaltosen Säätiö.

Notes on contributor

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