SMPP Studia Migracyjne Przegląd Polonijny

Migration Studies – Review of Polish Diaspora
nr 4 (186)/2022, http://www.ejournals.eu/Studia-Migracyjne/
DOI: 10.4467/25444972SMPP.22.034.17207

Law, Life, Impossibility: Theorising 'Law Application' in Detention Centres for Foreigners

PRZEMYSŁAW TACIK[1]
ORCID: 0000-0001-7174-1752
Jagiellonian University in Krakow

Abstract

The paper attempts to grasp conceptually the nature of law application in zones of confined life. Drawing upon empirical research, it uses the example of closed centres for foreigners. Approaching the topic with methods of sociology of law and legal anthropology, as well as drawing on Agamben's conceptualisations of law and life, I would like to propose a more general understanding of the role that law plays in total institutions such as detention centres. A great majority of legal provisions pertaining to them is stipulated with the intention of defending the detainees from abuses of power. Nonetheless, the positivist view of the law which translates noble principles, enshrined in constitutions and international law, into low-rank acts and then regulates the behaviour of officers, is at odds with the practice revealed by the sociological and anthropological research. The law remains a foreign body to officers: it is acknowledged as a body of rules which officially regulate all the actions of the institution, but in truth it functions rather as the Other's gaze. It embodies external control and the possibility of intervention. As such, it never regulates the actions per se (it is too unfamiliar to do so), but rather constitutes an external foothold which stops officers from applying all the methods of discipline that they spontaneously invent. It also provides a free object of criticism which mediates between officers' projected goals of border guards and their expected practice. Consequently, the vision of the law as a tool that 'regulates' detention centres is empirically contradicted. The paper addresses this relation with the use of Agambenian conceptuality, seeking points of contact between the law and life as well asking to what degree life is law-repellent in confined zones.

Keywords: detention of foreigners, detention centre, law application, Giorgio Agamben

[1] Contact: przemyslaw.tacik@uj.edu.pl

Please cite as: Tacik, P. (2022). Law, Life, Impossibility: Theorising 'Law Application' in Detention Centres for Foreigners. *Studia Migracyjne – Przegląd Polonijny*, 4 (186): 35–52. DOI: 10.4467/25444972SMPP.22.034.17207.

1. Introduction

The law has a double life: the official one, carved out in the solidness of legal acts and institutions that are meant to interpret it, and the intimate, in which the law contacts life itself. The former is the domain of the doctrine and legal theory which strive to understand the law as a crucial subdomain of the normative. In this life, the law is addressed through how it needs to work in order to be effectively applicable. The intimate life of the law, however, is of a different nature. When we pose questions about it, we need to dig underneath official narratives on the goals that the law itself establishes for itself and the means it produces in order to reach them. The intimate life of the law is closer to the effective functioning of the law as investigated by sociology of law. Nonetheless, it is much more than just 'effective law-application'. It appears in all contexts when legal norms strive to regulate the day-to-day life outside of properly legal institutions. Yet from a conceptual perspective, it needs to be seen rather in the light of the picture of court-like institutions described by Kafka in his *Trial* (Kafka 2008: 28–57): the intimate life of the law appears as its neglected, ineffective and properly obscene underside of the official life. 'How dirty everything is here', exclaims K. in Kafka's novel looking at ramshackle law books that the 'court' uses (Kafka 2008: 42). Speaking more metaphorically, there is a form of o n t o l o g i c a l d i r t in the practical life of non-legal institutions applying the law. It appears precisely where the intimate life of the law reaches the basic level of contact between normativity and life that Giorgio Agamben tried to grasp in his *Homo sacer* cycle.

In this paper I am going to investigate the intimate life of the law as revealed in the legal dimension of research conducted in Polish closed detention centres for foreigners in the framework of the project *Spaces of detention*. I will use conceptuality of critical legal studies and, in particular, Agamben's theory of relations between norms and life in order to investigate how the law penetrates the social tissue of detention centres and fails in its attempt to regulate life there. Nonetheless, in order to pass to this point, it will be needed to pass through a ladder of argumentative steps. I will begin with outlining the legal context of closed detention centres for foreigners and then ask about general legal problems concerning their functioning. As the next step I will draw conclusions from interviews conducted with officers of detention centres focused on how they perceive the legal aspect of their activities. From that point I will pass to more general considerations, trying to find an anthropological conceptualisation of how law functions for officers of the detention centres. Finally, I will venture a more theoretical take on the position of the law in detention centres with inspirations from Agamben's theory.

Penetrating to the intimate life of the law – with all its complexity that branches out into normativity and life, forming an inextricable bind – is a difficult task. Nonetheless, closed detention centres – places in which detainees are under surveillance,

control and command of officers 24 hours per day – offers a unique glance into how at the most basic level rules contact life itself. In the venture to understand this underside of the law we will pass from the level of sociology of law to more philosophical conceptualisations. Only a proper theory rooted in critical legal thinking and Agamben's reflection on normativity will be able to do justice to the normative-factual complexity of reality in closed detention centres.

2. Legal dimension of closed detention centres for foreigners

As history and general overview of the Polish detention centres has been presented in other papers in this volume, for the sake of concision I will focus here exclusively on the legal dimension. From a purely normative point of view of the law, Polish closed detention centres present a complex picture.[2] They are structured by three main groups of norms: (1) regulating the legal status of foreigners, (2) pertaining to the daily functioning of detention centres, (3) protecting human rights of foreigners and limiting powers of authorities.

The first category establishes the legal basis of the foreigner's presence in the detention centre. The detainees can benefit from or await granting residence, asylum or other forms of protection (such as subsidiary protection or tolerated stay). What is crucial, norms in this group are largely applied by actors external to the detention facility – for instance the Office for Foreigners (*Urząd do spraw cudzoziemców*) or, in case of deciding on detention itself, by courts. Even in the case of procedures run by the Border Guard itself, decision-makers are located outside of the structure of the centres. Officers of the detention centres are only mediators in procedures that are being decided elsewhere. As a result, they take the role of an 'interface' of the entire system for whose decisions they are not responsible. This, in turn, puts them in an uneasy position vis-à-vis foreigners that often are not familiar with the intricacies of the system that governs their life.

The second category encompasses a broad array of institutional and procedural norms that govern the establishment and functioning of detention centres.[3] This one is the most multifarious as it regulates all aspects of life in the centres, including their internal structure, relations between members of personnel, their duties, construction of buildings, necessary equipment and organisational rules determining human behaviour within centres.

[2] General accounts of the legal dimension of the Polish detention can be found in: Klaus 2016: 178; Białas 2016: 191–207; see also Nethery, Silverman 2015.

[3] Legal history of detention centres in Poland may be found in: Klaus 2016: 178; their history in Europe, North America, South Africa and Israel is available in Nethery and Silverman 2015.

Finally, the third category has a strategically different function. Human rights norms and their corollaries (duties of officers, penal norms for breaching human rights) act as prohibitive mediators between officers and detainees. Naturally, these rules are not entirely of negative character; especially in the light of the concept of positive obligations enshrined in, among others, the European Convention on Human Rights,[4] they regulate positive duties of the personnel vis-à-vis detainees. Nonetheless, human rights act as external specimens of desirable and prohibited behaviour for the personnel and, at the same time, as legal safeguards for detainees themselves.

Even an introductory analysis of these categories of norms allows of outlining where the tensions of the legal system will appear. First, one and the same system needs to fulfil contradictory roles and expectations: at the same time it needs to decide on the status of a detainee (which takes time), hold them in the detention centre (as briefly as possible), exercise control over detainees and protect their rights. Second, there are tensions between the normative and the factual level related to socio-psychological position of the personnel: officers of detention centres are expected to play out contradictory social roles. Third, there are inter-normative clashes within all of these categories. They encompass international norms, norms of EU law and of the ECHR, constitutional norms, statutory laws and sub-statutory acts. From an anthropological point of view one final dimension needs to be added: detention centres, being by definition multi-national, multi-cultural and multi-religious, are hubs of legal pluralism in which state laws, cultural norms of the personnel as well as legal, religious and cultural rules of detainees interact and occasionally clash.

The normative pyramid of norms that operate in the spaces of detention centres is heavily variegated (see Cornelisse 2012: 207–225).[5] The first category relies on acts of international law (the Geneva Convention[6] regulating the status of refugees, the ECHR being an original legal impulse for tolerated stay and the Convention on the Rights of the Child[7]) vastly concretised in EU law (the TFEU,[8] the Dublin III Regulation,[9] four directives – the Asylum Procedures Directive,[10] the Reception Conditions Directive,[11] the

[4] Convention for the Protection of Human Rights and Fundamental Freedoms, CoETS 005.

[5] For a more detailed account of these regulations see Niedźwiedzki, Schmidt, Stępka and Tacik 2021.

[6] Convention Relating to the Status of Refugees, 189 UNTS 137.

[7] UNTS 1577, 3.

[8] Consolidated version of the Treaty on the Functioning of the European Union, OJ L. 326 (2012), Art. 78, Protocol no. 24.

[9] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L. 180 (2013).

[10] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L. 180 (2013).

[11] Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L. 180 (2013).

Qualification Directive[12] and the Return Directive[13] as well as the case law of the CJEU). Nonetheless, Polish domestic law offers important concretisations in this area as well (especially in the Foreigners Protection Act[14] and Art. 398a of the Foreigners Act[15] which provides a legal ground for the courts to decide on detention of foreigners).

The second category of norms, in contrast, may be rooted in Art. 16 of the Returns Directive (which provides some basic rights of detainees focused on contact with persons outside of detention centres and on legal help), but is regulated mainly on the domestic level. The Foreigners Act contains only skeleton norms pertaining to the rights and duties of detainees (Art. 405–421); further regulations have been contained in sub-statutory ordinances with a particularly important role of the Closed Detention Centres and Arrests Ordinance.[16] Moreover, two regulations of the Head Commander of the Polish Border Guards determine some duties of officers in detention centres;[17] crucially, Regulation no. 2 stipulates how surveillance of foreigners' rooms and personal control should be carried out. Yet below this level the second category of norms opens into an abyss of very particular, low-level rules that are local and elusive. They are produced within the structure of the Border Guard at all levels (Head Commander, Commander of the Division or Commander of the Detention Centre). Some of them are written, but a majority stem from orders given by superior officers.

It is in this area that the legal dimension of detention centres finds its limits. If we imagine – in Kelsenian spirit – the legal system as a pyramid, then the actual basis of

---

[12] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L. 337 (2011).

[13] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L. 348 (2008).

[14] Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej, Dz.U. 2003 nr 128 poz. 1176.

[15] Ustawa z 12 grudnia 2013 r. o cudzoziemcach, Dz. U. 2013 poz. 1650.

[16] Rozporządzenie Ministra spraw wewnętrznych z dnia 24 kwietnia 2015 r. w sprawie strzeżonych ośrodków i aresztów dla cudzoziemców, Dz. U. z dnia 30 kwietnia 2015 r., poz. 596. Each detention centre is created by a separate ordinance. Apart from that, key ordinances pertaining to detention centres include the following: Rozporządzenie Ministra Spraw Wewnętrznych z dnia 23 kwietnia 2014 r. w sprawie wzoru wniosku o umieszczenie cudzoziemca w strzeżonym ośrodku albo o zastosowanie wobec niego aresztu dla cudzoziemców oraz wzoru wniosku o przedłużenie okresu pobytu cudzoziemca w tym ośrodku albo areszcie, Dz.U. 2014 poz. 533 and Rozporządzenie Ministra Sprawiedliwości z dnia 6 maja 2014 r. w sprawie sposobu i trybu sprawowania nadzoru sędziego penitencjarnego nad strzeżonymi ośrodkami i aresztami dla cudzoziemców, Dz.U. 2014 poz. 597.

[17] Regulamin nr 1 Komendanta Głównego SG z 25 lutego 2010 r. w sprawie sposobu pełnienia służby przez funkcjonariuszy Straży Granicznej przy wykonywaniu doprowadzeń cudzoziemców, Dz.Urz. KGSG.2010.2.14; Regulamin nr 2 Komendanta Głównego SG z 20 marca 2008 r. w sprawie sposobu pełnienia służby przez funkcjonariuszy Straży Granicznej w strzeżonym ośrodku dla cudzoziemców oraz w pomieszczeniach, w których wykonywany jest areszt w celu wydalenia, Dz.Urz.KGSG.2008.3.26.

this pyramid will not necessarily be a close-knit network of well-adjusted rules of the lowest rank that directly determine very concrete issues of social life. In places where the law and life enter into a direct contact – such as in the detention centres – the framework of written norms gradually evolves into a thick enmeshment of unwritten, formal and informal rules. Some of them still retain the legal form (like superiors' orders), but these are not distinctively separated from those that are based just on authority and a general legal mandate. In this regard the normative dimension of detention centres needs to be seen as a structure much more complex than just the legal dimension. Art. 419 of the Foreigners Act requires the foreigners in detention centres to carry out orders given by the officers. This, in practice, gives a legal sanction to a spontaneous process of norm production. A functionary giving an order to a foreigner (for example, to withdraw to their room from shared spaces) is producing a rule that Art. 419 elevates to a legal rank, but it is in fact inseparable from the functionary's authority within the detention centre. This blurs the separation of law and fact. Naturally, officers apply more general norms, but they do so by a spontaneous production of rules of the lowest rank, thereby exercising a particular form of the 'government of the living' (Foucault 2012). It is precisely to this area of undecidability between the law and life that we will return in the last chapter.

Finally, with the third category of norms we return to high-rank acts. Amongst those belonging to universal international law suffice it to name the Universal Declaration on Human Rights, the UN Covenant on Civic and Political Rights, the UN Covenant on Social, Economic and Cultural Rights, the UN Convention Against Torture.[18] As to regional international acts, the ECHR (Białas 2016: 191–207; Teitgen-Colly 2007: 571–618; Ruedin 2010: 483–499; Vrolijk 2016: 47–72), the EU Charter of Fundamental Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[19] are the most crucial. These international acts correspond to Chapter II of the Polish Constitution with its quite elaborate system of protecting human rights, especially prohibition of torture, inhuman or degrading treatment or punishment, protection of personal freedom and private life.

This overview of the legal dimension of detention centres already demonstrates the key problems of their functioning from a normative point of view. First of all, detention centres constitute a place of encounter between norms of very different ranks, construction and level of generality. Even in an abstract perspective, finding correct interpretative links between them is demanding; if it must be done by officers on the spot – persons who act under duress without proper legal background – the task seems overwhelming. The traditionally recognised problem of underskilled

[18] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Treaty Series, vol. 1465, p. 85.

[19] European Treaty Series, No. 126.

"street-level bureaucrats" appears here with particular intensity. Then, however, the legal turns out to be just a part of a much broader normative framework that is at work in detention centres. On the one hand, legal norms interact with cultural, customary and religious norms of detainees without giving proper means of solving conflicts that may appear in this field (apart from a general injunction for officers to respect socio-cultural identity of the detainees[20]). On the other hand, legal norms branch out into a grey zone between the law and the fact, in which norms become more and more concrete up to the point of overlapping with life itself. In this perspective it is difficult to determine the exact boundary of the legal system (and to find its non-legal counterpart), as these murky rules of mezzanine level may be either incorporated into the law (on the basis of the aforementioned Art. 419 of the Foreigners Act) or identified with a no longer properly legal buffer zone between law and fact. The existence of this undecidable buffer zone demonstrates that the law seems to struggle to regulate life in its material concreteness, but in this pursuit fails and must be supplemented with non-legal mezzanine forms of normativity.

Thus it branches out into variegated methods of capillary power and disciplinary practices (Foucault 1995: 201–228, Fraser 1981: 272), gradually blurring the line between the legal, the normative, authority and fact. In *Discipline and Punish* Foucault argues that

> [i]n appearance, the discipline constitute nothing more than an infra-law. They seem to extend the general forms defined by law to the infinitesimal level of individual lives; or they appear as methods of training that enable individuals to become integrated into these general demands. They seem to constitute the same type of law on a different scale, thereby making it more meticulous and more indulgent. The disciplines should be regarded as a sort of counter-law. They have the precise role of introducing insuperable asymmetries and excluding reciprocities (Foucault 1995: 222).

There is undoubtedly an inevitable tension between disciplinary practices understood as infra-law and counter-law, but one dimension persists that Foucault does not investigate, mainly due to his anti-legal bias: disciplinary practices that compliment the law and bring them to 'the infinitesimal level of individual lives' are also acts of law-application. If so, in what relation do disciplinary practices stand to the act of applying the law? How does law include, assume and exclude discipline? Finally, how does law application relate to the law itself? To these crucial questions on the intimate life of the law we will return in the last part of the paper. Now, however, let us confront the theoretical overview of the legal dimension with empirical research on how the law is perceived by officers of detention centres.

[20] § 5.2.6 of the Regulation no. 2 of the Head Commander of the Border Guard.

3. Law in the eyes of officers

As the *Spaces of detention* research project was already presented in the introduction to this volume, suffice it to say here that its legal dimension was focused on understanding what the very term 'law' connotes in the minds of the interviewees – officers of closed detention centres. Apart from this general picture, we attempted to investigate how the officers assess the law that they are meant to apply and what resources they employ to this purpose. For the sake of brevity, I will present here only general conclusions; readers more interested in the empirical material can consult a different paper and past publications on the topic.[21] Generally speaking, the perception of the law that may be deduced from these interviews can be organised around two competing figures: hindrance and bricolage. The former connotes statements that present the law as a means of permanent control and obstacle to practical action. The latter incarnates perception of the law as not giving sufficient resources to allow of its implementation.

3.1 Law as a hindrance and gaze of the Other

In the first of its roles, the law appears in detention centres already in body language of officers. When the interviewers passed to the topic of the law and mentioned the very first word, it was usually met with stiffening of posture and averting eyes. It seemed as if the interviewees felt discomfort related to the possibility of being controlled and found wanting. Generally speaking, it may be claimed that in the practical functioning of Polish detention centres the law is perceived as an alienated and foreign body in the tissue of the social life of the institution. Our interviewees often presented the vision of the law as something that imposes incomprehensible, internally contradictory and practically non-realisable requirements which can pave the way for being controlled and punished if a supervisor does not look at the functionary with a friendly eye. In this vision the control over law application is patchy and makeshift; it happens irregularly and to the detriment of those who are controlled, because requirements of the law can never be carried out in full. As a consequence, the law appears as a permanent mechanism of surveillance through guilt and fear of officers.

Such a vision contains a number of presuppositions. First of all, day-to-day functioning of detention centres is based on a set of informal or semi-formal practices, convictions and motivations that are closer to the world of everyday life rather than a formal institution regulated by the law. Legal norms penetrate to this world, but after their pre-emptive absorption and adaptation that often involves selective application or a compromise with actual practice. For example, every detention centre has a formal document entitled 'The Order of the Day' (*Porządek dnia*) – yet given that it

[21] See note 4 above and Cegiełka, Chrzanowska, Klaus, Wencel (2011).

usually contains impractical and overtly stringent norms, officers make a compromise between its requirements and actual life practice of detainees. Moreover, norms that make it to the life-world of officers are usually simple and concrete. Our interviewees described their preference for norms that they described as 'algorithms': clear and practical schemes of action. Norms of more general scope and content – including those of strategic importance (of the ECHR or the Constitution, for example) are much more likely to be met with dislike.

As a corollary, officers of detention centres seem to display the syndrome of reversal of normative hierarchy. The Polish legal system belongs to the tradition of continental law. Art. 87 (1) of the Polish Constitution enshrines a classic pyramid of ranks that legal acts may occupy – starting with the Constitution itself, ratified acts of international law approved by the Parliament, laws, ordinances and acts of local law. Thus the Polish legal order is built upon a strong hierarchy of norms and an axiological logic that should be gradually concretised in lower acts. Nonetheless, in the perception of the officers this order is distorted. They tend to focus on the norms of the lowest ranks, possibly the most concrete and 'algorithmic'. Such reversal is not necessarily due to the low level of legal expertise among officers, but is inscribed in the very logic of the detention system. The Head Command of the Polish Border Guard often issues 'guidelines' that are not acts enumerated in the Constitution and, as such, cannot bind anyone else than the officers; yet in practice, these guidelines tend to replace general norms of the Constitution and laws in regulating the reality of detention centres. Sometimes officers are even able to bring these guidelines as an argument in court (!):

> *In many cases guidelines do not match with what we do. The guidelines say one thing, and the KPA [the Code of Administrative Procedure] says something else. And which one is more important? The judge deciding on an application will say – what? At least we have a good contact with our court and we can bring our guidelines to it every now and then so that they know what we need to do, because this is what our commander says. But it seems to me that not every court would accept that* (B-P-12-I-AS).

This reversal of normative hierarchy might have sombre consequences for detainees. According to Art. 5 ECHR, any deprivation of personal freedom must be exceptional and proportional to the goal. In the practice of detention centres, however, requesting prolongation of detention has become a common standard. Analogously, the practice of detention involves disjunction of 'algorithmic' rules from their constitutional underpinning – as in the case of disposing of foreigners' deposits apart from guarantees of private property (Art. 64 of the Constitution) or securing access to press and books apart from the constitutional freedom of access to culture (Art. 73 of the Constitution).

It seems therefore that officers tend to maintain a distorted vision of the law. Norms that they know well and apply routinely are most basic ones that often do not

even belong to the constitutional hierarchy of rules. All other norms, however, tend to be perceived as something more or less incomprehensible and distanced that may be invoked by superiors if need be to punish a functionary. *Ratio legis* of more general norms tends to be obliterated.

As a result, the law in general is often described as a foreign language used by politicians and superiors who are not familiar with everyday problems of detention centres. Our interviewees routinely pointed out impracticality or inaptitude of norms that they are forced to apply. In this line the perception of the law as such overlaps with assessment of those in power, often presented as alienated. Moreover, such a vision of the law matches the unidirectional role of legal norms within the structure of the Border Guard. The law is a one-way language of communication of superiors with their subordinates. The latter often do not understand these messages, interpret them by themselves and fear punishment for misunderstandings. At the same time information about impracticality of legal norms does not penetrate to the level of superiors.

As if in order to compensate for their flawed position in the legal-epistemic structure of the Border Guard, officers often harbour a utopian vision of the law. When asked how the law should be, they describe an almost Enlightenment-like vision of the law which is absolutely clear, certain and applied with mechanical precision. In the perspective of such simplistic positivism, the problems of contemporary law – its inherent pluralism, excess, complexity and overregulation – are perceived as a result of inaptitude of law-makers. Even if some of these critical remarks are pertinent, they are underpinned by unrealistic and idealistic vision of the law that could be turned into a coherent system of 'algorithms'. This only amplifies the inability to apply more general norms in practice and decide aptly what to do in case of normative conflicts.

To sum up, in this function the law – as described by officers – appears as a foreign body that perturbs the otherwise sensible functioning of detention centres. It is a locus of impersonal, abstract surveillance that at any time may be transformed into an actual control that hardly anyone could not be afraid of. The law connotes otherness – in a common sense – and the gaze of the Other, in the sense of Lacanian psychoanalysis. Not accidentally in *Seminar X* Lacan links fear with the permanent gaze of the Other (Lacan 2004: 200–202): '[i]n anxiety… the subject is gripped, concerned, interested by what is the most intimate in itself' ['*Dans l'angoisse … le sujet est étreint, concerné, intéressé, au plus intime de lui-même*' (Lacan 2004: 202)] precisely because the subject feels upon itself the irremovable gaze. At the same time, the law is a material hindrance to action, yet not in a sense that we would expect it to be. The officers do not bring up often human rights norms as limitations to their actions vis-à-vis detainees. It rather seems that the incomprehensibility, impracticability and internal contradictions of the law make it for them a hindrance for effective functioning of the detention centre. For this reason the more general the law is, the less applicable it becomes; 'algorithmic' rules take over to the detriment of general

principles. In the light of our previous considerations, it seems as if the practical functioning of detention centres repelled legality to a certain extent and replaced it with a thick tissue of customs and 'ways of doing things'. The law does not penetrate to this level, remains in a distance, but due to that appears as a means of surveillance.

3.2 Bricolage

Whenever the law must be applied, however – for example, when administrative sections of detention centres need to apply norms in order to apply to external decision-makers – officers need to find ways of coping with it. It is in this configuration that the law is not a hindrance to existing practices, but a pattern of action that needs to be rendered functional. Nonetheless, it is not less paradoxical than in its previous role.

Whenever the law is to be applied positively in order to find a practical solution, law application coincides with the process of extrapolating the law into a complex patterns of practices, disciplines and forms of capillary power through which the law approaches the thick web of life in closed detention centres. These practices may be either invented, especially if norms in question are not easily translatable into concrete schemes of action, or the already existing patterns may be juxtaposed with the law in order to determine whether they are legal or not. In this latter configuration, existing practices – being conscious creations of officers, ossified impersonal customs or uncontrolled patterns borrowed from other forms of incarceration or military command – may be qualified as valid extrapolations of the law. In either form, these practices share two common features: first, they are invented and maintained within a binding between power, territory and individuals (officers and detainees). Second, those who apply them act in a specific form of *non liquet*, being forced to 'do something with the law' whether they actually know what to do or not.

The first crucial factor in law application is undoubtedly legal knowledge, comprising both knowledge of applicable norms and skills necessary to apply them. In this respect our research demonstrated significant shortcomings in legal training of officers. Knowledge is unevenly distributed between different categories of officers: undoubtedly those who work in administrative sections that handle proceedings pertaining to legal statuses of detainees dispose of greatest knowledge. Nonetheless, even they have limited legal skills: although well-versed in Foreigners Act and Foreigners Protection Act, they tend to get confused whenever these two laws make references to other legal acts, such as the Procedural Criminal Code. Their knowledge is selective and lacks roots in interpretative skills.

As a result, officers of the closed detention centres – especially those who need to apply the law positively in order to issue decisions or write up applications to external decision-making institutions – are in the position of permanent structural deficit of legal knowledge. When admitted to service, officers of the

Polish Border Guard undergo a relatively brief general training with skeleton legal elements. Those who are displaced at the closed detention centres, especially their administrative sections, are not submitted to any further introductory training. Only already during their service they can make use of particular trainings focused on selected issues. Still, they lack a general legal training, which is directly translatable into the feeling of inability to deal with concrete legal problems. It seems a natural consequence that their interpretations tend to lack axiological rooting and display features of the aforementioned 'algorithmisation'.

In response to this structural deficit of legal knowledge, officers develop specific strategies of coping. Drawing upon Claude Lévi-Strauss' famous concept, they can be summarised as 'legal bricolage'. Lévi-Strauss describes a bricoleur in the following way:

> [t]he 'bricoleur' is adept at performing a large number of diverse tasks; but, unlike the engineer, he does not subordinate each of them to the availability of raw materials and tools conceived and procured for the purpose of the project. His universe of instruments is closed and the rules of his game are always to make do with 'whatever is at hand', that is to say with a set of tools and materials which is always finite and is also heterogenous because what it contains bears no relation to the current project, or indeed to any particular project, but is the contingent result of all the occasions there have been to renew or enrich the stock or to maintain it with the remains of previous constructions or destructions (Lévi-Strauss 1966: 17).

Even if the dichotomy between the engineer and the bricoleur may be dubious in light of the former's reputed claim to totalisation and the latter's alleged particularity in borrowing,[22] *bricolage* remains a useful term for coping with the law. At least in the ideology of continental legality, law-application should be an informed act of applying various levels of legal acts with adequate use of their *rationes legum* and axiology. In other words, the ideal model of norm application clearly corresponds to the totalising vision of Lévi-Strauss' engineer. Against this background officers of closed detention centres are precisely in the position of bricoleurs: always acting partially, with a concrete goal, without a coherent system of tools and methods. They act according to local customs invented in order to solve particular problems; contingent solutions tend to be perpetuated in order to cope with requirements of the law.

In this bricolage, officers often engage in brainstorming or contact persons in similar posts in other detention centres.[23] Despite this unofficial cooperation, there still seem to be important differences in law application between particular centres.[24]

---

[22] As Derrida famously remarked, '[i]f one calls *bricolage* the necessity of borrowing one's concepts from the text of a heritage which is more or less coherent or ruined, it must be said that every discourse is *bricoleur*. The engineer, whom Lévi-Strauss opposes to the *bricoleur*, should be the one to construct the totality of his language, syntax, and lexicon. In this sense the engineer is a myth.' (Derrida 2005: 360)

[23] LE-K-5-Z.

[24] B-P-11-I.

In search of their tools they do not, however, consult proper sources such as legal commentaries, monographies or case law databases. When bricolage does not yield expected results, officers resort to asking for legal help from higher units in the structure of the Polish Border Guard. This practice is as rare as frowned upon because – as one of our interviewees said – 'officers need to make it somehow'.[25]

To sum up, bricolage of officers of closed detention centres is a direct response to their acting in condition of permanent deficit of legal knowledge. At the same time they are required to apply the law, which is the system that seems structurally foreign to them. Without a proper legal training they cannot see the legal system as a coherent (at least normatively, if not descriptively) totality that has its axiological underpinning and internal logic of concretisation. They seek concrete solutions and procedures, imagined as the pined 'algorithms'. Consequently, the deficit of legal knowledge entails a crooked mirror image of the Polish legal system: instead of its elaborate multi-tier structure bound by rules of interpretation, the law is reduced to a foreign language of communication that needs to be adapted to demands of 'practical life' by turning it into a set of 'algorithms'.

4. The zone of law's impossibility

It now seems clear that closed detention centres are particularly specific zones of law application. Confined territory and permanent surveillance of officers over detainees make them in many respects akin to prisons: the key difference, however, is that detainees are subject to punishment, but isolated for reasons of state security. Hence the paradoxical goal of the centres, often mentioned in the interviews we conducted with superiors and commanders of the centres: *the very presence of detainees in the centre – possibly, without conflicts or disturbance – is the sole focus of these facilities*. In this sense, they may be seen as machines producing bare life in Agambenian sense (Agamben 1998: 71–74, 91–103). From the point of view of the sovereign power, the goals are more complex: detention mobilises elaborate discourses of securitisation. Yet from the perspective of the centres there is no superior reason of foreigners' presence, even if sometimes officers (especially guards) resort to securitist rationalisations. Foreigners' life in detention centres is therefore not subjected to any higher goal such as resocialisation: with an Agambenian intuition it may be claimed that it is *just a life*, life as it can develop in ultimately senseless confinement.

How does the law approach such a zone? Agamben's main line of argumentation would be that it regulates it by its own withdrawal:

[25] BP-P-12-I.

> [t]he relation of exception is a relation of ban. He who has been banned is not, in fact, simply set outside the law and made indifferent to it but rather abandoned by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable (Agamben 1998: 28).

Nonetheless, a closer scrutiny of detention centres reveals a more puzzling perspective. First of all, detainees are not reducible to bare life proper: in theory, they still retain what Hannah Arendt (Arendt 1979: 296–298) dubbed 'the right to have rights' and invocation of their rights within the centre may still be meaningful, if it is not ignored or lost in communication with higher instances. In this sense, they are still recognised as legal subjects, even if held within the sometimes Kafkaesque loop of interminable detention. What the above-mentioned description of how the law functions in close detention centres suggests rather that the law cannot penetrate to the thick web of behaviours, customs and practicalities that make up life within closed detention centres. It is just as if the very legal form (Pashukanis 2003: 49–64) was unable to coincide with life. Such a general recognition is, nevertheless, quite disconcerting if we take into account that from the point of view of the legal system itself, detention centres should be most heavily covered by a firm grid of protective rules. As soon as life becomes isolated in a confined zone – without an overarching legal goal, for the sake of isolation only – its law repellence mounts. Consequently, what appears as the mediating term between the law and life in detention centres is the obscene underside of the law.

This obscenity should be understood – with reference to the Latin etymology of the word – as making public the ontological dirt of the law. What was demonstrated by interviews with the officers of detention centres was that the law is a foreign language from which they feel excluded in advance, even if it requires cooperation and application. Naturally, a lot may be said about the discrepancy between how complex and multi-tiered contemporary legal orders have become and the life world of a typical functionary, but the problem seems more ontological: officers negotiate their own version of normativity which, in its changeability and extreme concreteness, is almost indistinguishable from life itself. The law and this spontaneous normativity cannot overlap; the former will always appear as the Other to which the latter refers, but tries to establish its own order. The officers we interviewed seemed acutely aware that the law is always foreign: either as a tool of control that they may be subjected to, or as an impractical system of too general rules that requires concretisation in order to become workable.

In order to understand this peculiar relation between the law and life let us first recall this part of Agamben's *œuvre* in which he attempts to understand how monasticism – mainly through the concept of use – tried to reconcile the rule and life. There is, Agamben claims, a fundamental tension between these two that monastic practices strove to overcome:

> [m]editation, which can accompany any activity, is in this sense perhaps the apparatus that permits the accomplishment of the totalitarian demands of the monastic institution. It is decisive, however, that the rule enters in this way into a zone of undecidability with respect to life. A norm that does not refer to single acts and events, but to the entire existence of an individual, to his *forma vivendi*, is no longer easily recognizable as a law, just as a life that is founded in its totality in the form of a rule is no longer truly life. (Agamben 2013: 26)

Monastic rules were often presented and interpreted as if they were not of legal nature (Agamben 2013: 29–35). The life of the monk was meant to resemble rather a work of art in its practical conflation of the rule and its 'application'. Meditation is one example of techniques of interiorisation that was to make this conflation possible. In *Opus Dei* Agamben develops a whole paradigm of operativeness based on the medieval doctrine of *opus operatum*, in which being someone and doing something become indistinguishable (Agamben 2012: 9). Finally, in the last part of the *Homo sacer* cycle, *L'uso dei corpi*, he investigates the Wittgensteinian concept of the form of life as a borderline ontology that conflates the law and being (Agamben 2014: 286–307). Form of life, he claims, is not a rule that applies to some pre-existing reality, but constitutes it ('*una regola che non si applica a una realtà preesistente, ma la costituisce*', Agamben 2014: 306). How can the rule *constitute* and not apply to reality?

> Here lies the same indeterminacy between rule and life that we had observed in monastic rules: these do not apply to the life of the monk, but constitute it and define it as such. But precisely for this reason, as the monks quickly understood, the rule resolves itself without residue in life practice; this one coincides in every point with the rule (Agamben 2014: 307, author's translation).

In other words, what monasticism discovered was precisely the conflation of the rule and life within a special, confined zone that binds territories, individuals and the law. Reaching it, however, required a complex normative and theological apparatus as well as techniques of subjectification and interiorisation. How then can these observations relate to the reality of detention centres? What is missing, naturally, is the will of the inmates – both to stay within detention or to take its rules as ground for self-constitution. The will of the officers concerns their choice of service, but not necessarily identification with the institution; probably none of our interviewees expressed the original vocation to work in a detention centre. Yet this does not mean that in the absence of free-will techniques of interiorisation the law can r e g u l a t e o r a p p l y to life. On the contrary, in the absence of the zone of conflation the law is repelled from the reality of life in detention centres and superseded with a peculiar form of normativity that I earlier dubbed the intimate life of the law.

If so, the process of law application in closed detention centres eludes the positivist scheme of juxtaposing the rule and the facts in order to concretise the former. What needs to be taken into account is how detention centres constitute a zone

that blocks and perturbs the continuity between the rule and the act of its application. First of all, the law does not grasp the life in detention centres directly. It rather transmogrifies from its official to intimate life, giving way to the complex web of customs and practices that in themselves constitute life in detention centres. This web is in many respects autonomous and autopoietic in Luhmannian sense (Luhmann 2004: 76–141). The law might penetrate it, but is either perceived as a foreign body or an all-too-general scheme of acting that requires concretisation, in which it loses some of its regulative power. Law application cannot be properly grasped without understanding this mediating role of the intimate life of the law. Such a perspective complicates the image of the official normative pyramid of norms that passes from the most general ones to the most concrete only to be finally applied. In day-to-day interactions with detainees officers do not perceive themselves as law-appliers; they are focused on particular goals related to the overarching autotelic purpose of the centres: to detain foreigners without perturbance.

Second, unlike monastic rules in Agamben's account, the law in the centres is fundamentally alienated from the reality of detention and cannot constitute it, let alone overlap with it. In this respect the centre is a space of spontaneous and uncontrolled normativisation undertaken by officers in interaction with detainees (in which the legal pluralism comes to the fore). The effect of this normativisation may be analysed as to its compliance with the law in force, but with two caveats: (1) due to generality of norms that pertain to detention not every one of them can be conclusively compared with how detention is carried out, (2) such a comparison, although mandated by the legal system, does not provide a model of how the law functions in detention. These two caveats are accountable for why officers perceive the law as a threat, if not violence against them. The model of law application is structurally incompatible with the normative-factual complexity of detention centres: if, therefore, the legal system engages in applying the law, the resulting effect of simplification is rightly perceived as a f u n d a m e n t a l l y a l i e n a t e d p r o c e s s.

As a consequence, from the perspective of the law the reality of detention centres seems to be encompassed, included within and regulated by the legal order. Moreover, as I pointed out at the beginning of this paper, detention centres are nodal points of a particularly high number of norms of variegated origin and character. Yet law application is effectively dissociated into two layers: (1) the practice of how detention centres function, with the law being repelled from their reality and superseded by the product of spontaneous internal normativisation, (2) actual acts of applying the law which in the eyes of the officers are just forms of exercising control and violence over them.

To sum up, the example of detention centres epitomises how the law and life cannot fully overlap. Even in the the Agambenian interpretation of monasticism the law reaches life – constitutes it and identifies itself with it – only at the point where it properly loses its legal character. Detention, however, demonstrates how the law fails in its attempt to regulate zones of confined life and must be replaced by its intimate

life. In this sense, the centres – being peculiar bindings between individuals, territory and power – repel the law. In turn, the legal system does not seem to recognise this specificity and reacts with the traditional model of law application, thus turning the law into a foreign body of control and violence.

5. Conclusions

The intimate life of the law, although often obfuscated or clumsily avoided, comes to the fore in specific contexts. Zones of confined life, such as closed detention centres, demonstrate how complex and uneasy the relation of the law to life is. Instead of being simply applicable to detention centres, the law reveals its position of impossibility whenever it attempts to r e g u l a t e, let alone c o n s t i t u t e forms of life in confined zones. It seems to be stopped on the threshold of detention centres by a powerful law-repellent force. It cannot cross it by itself; what it requires is concretisation in a web of customs and practices established in the process of spontaneous normativisation produced by officers, partially at least in negotiation with detainees.

As a consequence, the law appears in detention centres in two spectral incarnations. It can be either a tool of external control – a foreign language through which superior instances communicate their largely incomprehensible will and draw consequences of incompliance. In this role the law connotes discomfort unleashed by a permanent gaze of the Other. Still, the law may also need to be applied positively in order to produce concrete decisions. In this function it requires from officers some bricolage given that the level of generality makes legal rules impractical in confrontation with the reality of detention.

It is therefore difficult to claim that the law is simply a p p l i e d to detention. From its own internal perspective, the law indeed seems to apply – but the incommensurability of such a model with the reality of detention is precisely why the law appears to the officers as a foreign body. The law-repellent force of life in detention requires a more subtle conceptualisation, in which 'law application' is nothing but an internal myth of the law through which it maintains its alienated status. Ultimately, in detention life and normativity form their own world that contacts the law, but remains distinctly autonomous in relation to it. This is precisely the intimate life of the law, its – as I claimed earlier with a Kafkian reference – ontological dirt that mars the noble edifice of normative hierarchy and syllogistic models of application.

Bibliography

Agamben, G. (1998). *Homo sacer. Sovereign Power and Bare Life*. Tr. by D. Heller-Roazen. Stanford: Stanford University Press.

Agamben, G. (2012). *Opus Dei. Archeologia dell'ufficcio (Homo sacer II, 5)*. Torino: Bollati Boringhieri.

Agamben, G. (2013). *The Highest Poverty. Monastic Rules and Form-of-Life*. Tr. by A. Kotsko. Stanford: Stanford University Press.

Agamben, G. (2014). *L'uso dei corpi (Homo sacer IV, 2)*. Vicenza: Neri Pozza.

Arendt, H. (1979). *The Origins of Totalitarianism*. San Diego, New York and London: A Harvest Book.

Białas, J. (2016). Detencja cudzoziemców w Polsce a standard EKPC, in: D. Pudzianowska (ed.), *Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych*. Warszawa: Wolters Kluwer, 191–207.

Cegiełka D., Chrzanowska A., Klaus W., Wencel K., *The Observance of Foreigners' Rights in Guarded Centres. Monitoring Report*, Stowarzyszenie Interwencji Prawnej, 4/2011, source: https://interwencjaprawna.pl/wp-content/uploads/2020/04/ARE-411-monitoring-osrodki-strzezone-ang.pdf [accessed: 27 October 2022]

Cornelisse, G. (2012). Detention of Foreigners, in: E. Guild, P. Minderhoud (eds.), *The First Decade of EU Migration and Asylum Law*. Leiden: Nijhoff, 207–225.

Derrida, J. (2005). *Writing and Difference.* Tr. by A. Bass. London and New York: Routledge.

Foucault, M. (1995). *Discipline and Punish. The Birth of the Prison*. Tr. by A. Sheridan. New York: Vintage Books.

Foucault, M. (2012). *Du gouvernement des vivants. Cours au Collège de France 1979–1980*. Paris: Gallimard, Seuil.

Fraser, N. (1981). *Foucault on Modern Power: Empirical Insights and Normative Confusions*. *PRAXIS International*, 3, 272–287.

Kafka, F. (2008). *The Trial*. Tr. by M. Mitchell. Oxford: OUP.

Klaus, W. (2016). Cudzoziemcy niemile widziani. Detencja cudzoziemców jako przykład kryminalizacji migracji, in: D. Pudzianowska (ed.), *Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych*. Warszawa: Wolters Kluwer, 170–190.

Lacan, J. (2004). *Le Séminaire. Livre X – L'angoisse*. Paris: Seuil.

Lévi-Strauss, C. (1966). *The Savage Mind*. London: Weidenfeld and Nicholson.

Luhmann, N. (2004). *Law as a Social System*. Tr. by K. Ziegert. Oxford: OUP.

Nethery, A., Silverman, S. J. (2015). *Immigration detention: the migration of a policy and its human impact*. London and New York: Routledge.

Niedźwiedzki D., Schmidt J., Stępka M., Tacik P. (2021). *Strzeżone ośrodki dla cudzoziemców w Polsce jako kultura organizacyjna. Analiza prawna, politologiczna, socjologiczna i antropologiczna. Ekspertyza przygotowana na zlecenie Komitetu Badań nad Migracjami Polskiej Akademii Nauk.*

Pashukanis, E. (2003). *The General Theory of Law and Marxism*. Tr. by B. Einhorn. New Brunswick and London: Transaction Books.

Ruedin, X.-B. (2010). *Aliens' and Asylum Seekers' Detention Under Article 5(1)(f) ECHR*. *Schweizerische Zeitschrift für internationales und europäisches Recht*, 20 (4), 483–499.

Teitgen-Colly, C. (2007). La détention des étrangers et les droits de l'homme, in: M.-C. Caloz-Tschopp, P. Dasen (ed.), *Mondialisation, migration, droits de l'homme: un nouveau paradigme pour la recherche et la citoyenneté*. Bruxelles: Bruylant, 571–618.

Vrolijk, M. A. (2016). Immigration Detention and Non-removability Before the European Court of Human Rights, in: M. J. Guia, R. Koulish, V. Mitsilegas (eds.), *Immigration Detention, Risk and Human Rights Studies on Immigration and Crime*. Berlin: Springer, s. 47–72.