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Problem kwalifikacji prawnej balkonu w orzecznictwie sądów administracyjnych i powszechnych. Analiza prawnoporównawcza

Część I

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Streszczenie:

W niniejszym artykule autorzy podejmują się rozważenia zagadnień definicyjnych związanych z pojęciem balkonu, loggii i tarasu, albowiem w obowiązującym porządku prawnym ciągle brak jest legalnych definicji w tym zakresie. W pierwszej kolejności przedstawiono zatem dotychczasowe publikacje poświęcone problematyce statusu prawnorzeczowego balkonu (tarasu, loggii) zarówno poprzez uwzględnienie aspektów teoretycznych, jak i praktycznych, związanych np. z kwalifikacją architektoniczną. Przedstawiono poglądy prezentowane dotychczas w doktrynie, konfrontując je z praktyką orzecznictwa i potrzebami rynku nieruchomości. Ponadto przeprowadzone badania orzecznictwa wykazały znaczne zróżnicowanie wypowiedzi co do kwalifikacji normatywnej i przestrzennej balkonu jako części nieruchomości lokalowej, bądź nieruchomości wspólnej. W konsekwencji zaproponowano *de lege ferenda* zmiany w dotychczasowych rozwiązaniach prawnych. Omówienie statusu prawnorzeczowego balkonu następuje poprzez odwołanie się do rozumienia nieruchomości wspólnej i nieruchomości lokalowej. Opracowanie tego zagadnienia, ze względu na obszerność i liczne wypowiedzi orzecznictwa sądów powszechnych i administracyjnych zostało - w ramach publikacji - podzielone na dwie zasadnicze, wzajemnie dopełniające się części: pierwsza (obecnie prezentowana) związana z kwestiami definicyjnymi i językowymi pojęcia „balkonu”, oraz druga odnosząca się do proponowanych przez nas zmian legislacyjnych, w tym związanych z próbą doprecyzowania pojęcia „nieruchomości wspólnej” na tle ustawy o własności lokali.

Słowa kluczowe: balkon, loggia (łodzi), taras, nieruchomość wspólna, lokal mieszkalny, służebność balkonu

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The problem of legal classification of a balcony in the jurisprudence of administrative and common courts of law: A comparative legal analysis.

Part I

Abstract:

This article takes up the subject of definitional problems relating to the concept of a balcony, loggia (recessed balcony) and terrace, as the current law still lacks the legal definitions thereof. Thus, firstly, so far published contributions devoted to the problem of the legal status of a balcony (terrace, loggia) have been outlined, both from a theoretical as well as practical angle, which involves matters such as their architectural classification. The approaches taken so far in legal scholars' writings have been presented and confronted with the practical approach of the jurisprudence and the needs of the real property market. In addition, the review of the case law has revealed a considerable differentiation of approaches as to the normative and spatial classification of the balcony, i.e., either considering it to be part of a private apartment or common areas of a property. As a result, *de lege ferenda* amendments to the existing legal solutions have been proposed. The legal status of a balcony is discussed by reference to the understanding of common areas of a property and private apartment. Due to the sheer volume and number of references in the case law of common courts of law and administrative courts, these deliberations have been divided for the purpose of their publication into two elemental, mutually complementary parts: the first part (contained in this paper) is devoted to the definitional and linguistic aspects of the concept of "balcony", while the second part focuses on the legislative changes proposed by us, including those related to our attempt to clarify the concept of "common property" against the background of the law on the ownership of property.

Keywords: balcony, loggia (recessed balcony), terrace, common property, residential apartment, easement of balcony

1. Initial remarks

1.1. Issues related to the juridical qualification of real estate in the context of the interpretation of Art. 46 of the Civil Code and real estate mentioned there (land, building and premises) and the basic *superficies solo cedit* principle of real estate law are extensively discussed in Polish civil law literature, especially since we have had several monographs for a long time, which, despite the passage of many years since their publication, do not lose their validity. In reference to the proposed title of considerations related to the legal and actual characteristics of the balcony (loggia, terrace), it is therefore necessary to mention the works of Aleksander Wolter⁴, Jerzy Ignatowicz⁵, Gerard Bieniek⁶, Stanisław Rudnicki, Zbigniew Radwański⁷, Stefan Grzybowski⁸,

⁴ A. Wolter, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1979; A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1996.

⁵ J. Ignatowicz, *Komentarz do ustawy o własności lokali*, Warszawa 1995; also: J. Ignatowicz, *Przyszłość odrębnej własności lokali*, [in:] *Rozprawy z prawa cywilnego. Księga Pamiątkowa ku czci Witolda Czachórskiego*, ed. J. Bleszyński, J. Rajski, Warszawa 1985.

⁶ G. Bieniek, S. Rudnicki, *Nieruchomości. Problematyka prawna*, Warszawa 2013.

⁷ *Funkcja społeczna, treść i charakter prawny odrębnej własności lokali*, *Studia Cywilistyczne*, v. 11, ed. Z. Radwański, Warszawa 1968; also: Z. Radwański, A. Olejniczak, *Prawo cywilne - część ogólna*, Warszawa 2021.

⁸ S. Grzybowski, *System prawa cywilnego*, v. 1 *Część ogólna*, Wrocław 1985.

Ryszard Strzelczyk⁹, Adam Doliwa¹⁰, Roman Dzikczek¹¹, Krystyna Krzekotowska¹², Konrad Osajda and Bogusław Lackoroński¹³, attempting to characterize the legal and substantive property of housing, and within it, also their component parts. The observations of Jerzy Skąpski¹⁴, Edward Drozd¹⁵, Mirosław Nazar¹⁶ are also valuable, made in numerous scientific articles published in the 1990s in the context of the discussion on the assumptions for the current law on the ownership of premises and the reform of the housing law in general. Noteworthy are also the glosses (often critical) to the judgments issued by the Supreme Court regarding the legal and substantive status of a balcony, loggia, terrace, parking space in an underground garage and shared property by Małgorzata Balwicka-Szczyrba¹⁷, Michał Niedośpiął¹⁸ and Ryszard Strzelczyk¹⁹.

Recently, attempts have been made to define the legal and substantive status of a balcony as an element of a housing property, referring to the various views presented in the jurisprudence of common courts. A monograph on the occasion of the 25th anniversary of validity in Poland of the Act on the ownership of premises, entitled *Własność lokali. Teraźniejszość i perspektywy* edited by Ewelina Badura and Aneta Kaźmierczyk²⁰ containing substantive analyses and *de lege ferenda* postulates of practitioners and theoreticians related to the law.

It is also necessary to mention the works of Agnieszka Żelazna²¹, Eugenia Śleszyńska²², Rafał Golał²³, Bernard Łukańko²⁴, Adrian Malicki and Małgorzata Radkowska²⁵, Magdalena Deneka²⁶, Edward Gniewek²⁷. The comments of Nikodem

⁹ R. Strzelczyk, *Prawo nieruchomości*, Warszawa 2019.

¹⁰ A. Doliwa, *Prawo mieszkaniowe. Komentarz*, Warszawa 2021.

¹¹ R. Dzikczek, *Własność lokali. Komentarz*, Warszawa 2021.

¹² K. Krzekotowska, *Własność budynków i lokali*, Poznań 2013.

¹³ K. Osajda, B. Lackoroński, *Ustawa o własności lokali. Komentarz*, 2022, Legalis (el).

¹⁴ J. Skąpski, *Własność lokali w świetle ustawy z 24 czerwca 1994 r.*, Kwartalnik Prawa Prywatnego" 1996, b. 2, pp. 198-235.

¹⁵ E. Drozd, *Lokal jako przedmiot regulacji ustawy o własności lokali*, „Rejent” 1994, no. 12, pp. 45-66.

¹⁶ M. Nazar, *Odrębna własność lokali. (wybrane zagadnienia)*, „Państwo i Prawo” 1995, no. 10/11, pp. 24-41.

¹⁷ M. Balwicka-Szczyrba, *Głosa do postanowienia Sądu Najwyższego z dnia 7 marca 2008 r.*, III CZP 10/08, „Gdańskie Studia Prawnicze. Przegląd Orzecznictwa” 2009, no. 4, pp. 85-92.

¹⁸ M. Niedośpiął, *Głosa do uchwały Sądu Najwyższego z dnia 7 marca 2008 r.*, III CZP 10/08, „Przegląd Sądowy” 2010, no. 10, pp. 116-120.

¹⁹ R. Strzelczyk, *Głosa do wyroku Sądu Najwyższego z dnia 3 października 2002 r.*, III RN 153/01, „Nowy Przegląd Notarialny” 2012, no. 4, pp. 111-113.

²⁰ E. Badura, A. Kaźmierczyk, *Własność lokali. Teraźniejszość i perspektyw*, Warszawa 2020, w tym w szczególności rozdział VIII autorstwa K. Ryszkowskiego *Charakter prawny balkonu, który służy do wyłącznego użytku właściciela lokalu*, pp. 99-107; A. Kaźmierczyk, *Nieruchomość wspólna właścicieli lokali. Problematyka prawno-rzeczowa*, Warszawa 2015.

²¹ A. Żelazna, *Kto ma zapłacić za remont balkonów w budynku wspólnoty mieszkaniowej?*, „Nieruchomości” 2022, no. 5, pp. 9-12.

²² E. Śleszyńska, *Balkon w nieruchomości wspólnej*, „Nieruchomości” 2009, no.1, Legalis (el.).

²³ R. Golał, *Status prawny balkonów*, „Nieruchomości” 2017, no. 11, pp. 19-21.

²⁴ B. Łukańko, *Ciężar obowiązku utrzymania i remontów balkonów we wspólnocie mieszkaniowej - rozważania na marginesie orzecznictwa SN*, „Monitor Prawniczy” 2019, no. 7, pp. 377-381.

²⁵ A. Malicki, M. Radkowska, *Prawnorzeczowy status balkonu*, „Monitor Prawniczy” 2019, no. 23, pp. 1277-1284.

Rycki are also valuable and up-to-date²⁸ undertaken as part of comparative legal research by the Institute of Justice, which was presented in a recently published monograph *Część budynku jako odrębny przedmiot własności*. A new impulse in the understanding of the constituent parts of housing real estate, as well as the spatial understanding of property rights in general, are brought, among others, by works by Kamil Zaradkiewicz²⁹ related to the possibility of separating the ownership of spatial plots³⁰ (the so-called "3D property"), which has been present for many years in selected legal orders³¹.

Discussion related to the issue of the so-called property rights to buildings, which would undoubtedly bring about quite significant changes in the current understanding of the *superficies solo cedit* principle and would require a reinterpretation of many concepts related to property law, became the main reason for considering the title issue as well. It concerns, in particular, the issues of introducing terminological changes related to the applicable act on ownership of premises in terms of the interpretation of the notion of common real estate and housing real estate, also in the context of their demarcation. Thus, the clarification of the legal-substantive status of the balcony (loggia) appears here as a preliminary issue.

Only on the sidelines of the above considerations, and as a supplement to the above-mentioned scientific works, it can still be indicated that the problem related to the proper use of balconies (loggias, terraces), as well as the so-called home gardens as part of multi-storey residential development is also gaining importance in the current journalism³². This process is undoubtedly related to the recent changes in consumer preferences in the real estate market as a result of the pandemic and lockdown, which have already been noticed by developers as part of their investment processes. It is therefore time to pay attention to these issues also to the Polish legislator.

1.2. The main research problem undertaken in this article is *de lege lata* determining the ownership status of a "balcony" (loggia, terrace) by analyzing the current legal solutions (the act on ownership of premises, the civil code, construction law³³) and by

²⁶ M. Deneka, *Uczestnictwo współwłaścicieli nieruchomości lokalowej w podejmowaniu uchwał dotyczących zarządu nieruchomością wspólną*, „Annales Universitatis Mariae Curie-Skłodowska”, Sectio G Ius, 2013, no. 60, b. 1, pp. 7-19.

²⁷ E. Gniewek, *Nieruchomość wspólna według ustawy o własności lokali*, „Kwartalnik Prawa Prywatnego” 1995, no. 2.

²⁸ N. Rycko, *Część budynku jako odrębny przedmiot własności*, Instytut Wymiaru Sprawiedliwości, Warszawa 2021.

²⁹ K. Zaradkiewicz, *Własność trójwymiarowa (3D) - zarys koncepcji zabudowy w polskim prawie cywilnym*, „Kwartalnik Nieruchomości@” 2021, special volume no. 5, pp. 27-46. This article is a modified version of the paper presented at the International Scientific Conference "Real Estate Yesterday, Today and Tomorrow" in Warsaw on October 20, 2021.

³⁰ *Three-dimensional property rights, air space parcels, strata titles*.

³¹ E.g. Australia (New South Wales, Victoria), Canada, USA, Singapore. The stratified ownership right, in various formulas, also occurs in the legal regulations of European countries (e.g. in Germany, Sweden or France).

³² By way of example: M. Zaczyński, *Balkonoza*, „Polityka”, 26 maja 2021, p. 92; A. Krzyżanowska, *Deweloperzy tną balkony w inwestycjach*, „Rzeczpospolita”, 14 grudnia 2021, p. A11; J. Świątek-Wojnarowska, *Wspólnota mieszkaniowa i części wspólne nieruchomości*, „Kurier Szczeciński”, 14th of April 2021, p. 8.

³³ The Act of July 7, 1994, Construction Law, (consolidated text: of December 2, 2021, Journal of Laws of 2021, item 2351, hereinafter referred to as: u.p.b.).

mutual confrontation of views present in the doctrine and jurisprudence against the background of the issue at hand. In addition, the contained in Art. 3 par. 2 of u.w.l. negative definition of "common property"³⁴ was subjected to critical analysis. An assumption was also made based on the view expressed in the justification of the Supreme Court judgment of June 28, 2002, I CK 5/02³⁵, that the component parts constitute a complex thing if they are physically and functionally related so that they together form an economic whole, also when technically and easily dismantled³⁶. Thus, applying the functional criterion, it was found that the common property³⁷ it is a complex property that is the subject of joint ownership, which, due to its purposes, is intended to serve all the owners of the premises, not just one of them. This is the basic criterion that differentiates the construction of individual property (which includes housing property) from the construction of a common property. The above thesis is consistent with the content of the applicable Art. 3 par. 2 in principio u.w.l. Therefore, a shared property has a specific spatial scope, and the legal ties are specified in Art. 3 par. 1 u.w.l., providing that the share of the owner of the separate premises in the common property, calculated in accordance with art. 3 par. 3 u.w.l., is the right related to the property of the premises³⁸. As a whole, therefore, the common property is a legal relationship of joint ownership, and the share of the owner in this joint ownership, in view of the wording of Art. 50 of the Civil Code, has the status of a component part of a housing property³⁹.

A similar assumption was made in the interpretation of the concept of housing real estate, also classified as a complex thing⁴⁰. Because every complex thing, due to the criterion of character and structure, consists of component parts⁴¹, an additional assumption was made that a balcony, loggia or terrace may be classified as the

³⁴ G. Bieniek, S. Rudnicki, *Nieruchomości. Problematyka prawna*, Warszawa 2013, pp. 420-421. Autorzy wskazują, że przyjęta przez ustawodawcę definicja (połączenie definicji negatywnej i wyliczenia przykładowego) proves that buildings are the most diverse category of building structures. The downside of a negative definition is that it does not capture the essence of this type of information. Therefore, when looking for a positive definition of simple information, it can be concluded that such information is information that an obliged entity may make available. RC in Piotrków Trybunalski of October 6, 2016, I C 1441/15, Legalis No. 2083455 and numerous literature indicated there, including, above all, the view of J. Ignatowicz, *Komentarz do ustawy o własności lokali*, Warszawa 1995, p. 33, which indicated that "the negative definition of the common property is imprecise and the legislator should use a positive wording and state that the parts of the building that are used by the owners of the premises for common use are included in it".

³⁵ Legalis no. 57312.

³⁶ *Kodeks cywilny. Tom I. Komentarz art. 1-449¹*, ed. T. Sokołowski, w M. Gutowski, Warszawa 2016, s. 285-286.

³⁷ Zwana także nieruchomością wyjściową, z uwagi na fakt, że to z niej wyodrębniane są lokale, które będąc dotąd częściami składowymi gruntu, stają się odrębnymi nieruchomościami; tak: A. Doliwa, *Prawo mieszkaniowe. Komentarz*, Warszawa 2021, s. 680.

³⁸ Cf. decision of the Supreme Court of November 24, 2010, II CSK 267/10, Legalis no. 407515.

³⁹ Cf. judgment of the Court of Appeals in Szczecin of July 12, 2017, I ACa 212/17, Legalis no. 1696459.

⁴⁰ T. Sokołowski distinguishes between the concept of "things" according to the functional criterion (more precisely: "the criterion of relationship and structure"), between complex things and simple (uniform) things. Complex things are made up of component parts. Component parts, on the other hand, are "essentially material things, functionally and physically related to the other parts that make up the whole thing, connected in a substantially permanent and lasting manner, and the disconnection of which would damage, significantly change or destroy the whole thing or the disconnected component part"; cit.: T. Sokołowski, *op. cit.*, pp. 284-285.

⁴¹ Pursuant to the judgment of the Supreme Court of June 28, 2002, I CK 5/02, Legalis No. 57312, the constituent parts constitute a complex thing if they are physically and functionally related, so that they together form an economic whole, also when it can be technically and easily dismantled.

so-called unequal component part⁴² of housing premises (as it differs fundamentally in terms of structure and functions)⁴³. The legal qualification of the balcony from the perspective of Art. 50 of the Civil Code was also considered. Pursuant to this provision, real property also include rights related to property ownership, such as land easements. The so-called functional concept of the common property and the legal status of the balcony (loggia, terrace) was characterized on its background. The dogmatic method was used, with the complementary support of comparative, comparative and historical methods as adequate to the issues discussed in this article.

2. Terminology and definition issues

The starting point for the analysis of the research problem being the subject of this study is the decoding of the meaning of the terms "balcony", "loggia", "terrace". Although these terms are commonly known, they have not been defined separately in the legislation so far. Both the Construction Law Act and the executive regulations to this act, in particular the ordinance of the Minister of Infrastructure of April 12, 2002 on the technical conditions to be met by buildings and their location⁴⁴ or the regulation of the Council of Ministers of December 30, 1999 on the Polish Classification of Construction Objects⁴⁵ do not contain legal definitions of a balcony, loggia or terrace. Similarly, there are no provisions specifying the understanding of the indicated terms at the level of the Civil Code or the Act on the ownership of premises. In the literature, on the other hand, a balcony is defined as an architectural element of a building, suspended, having an open form, usually equipped with a reinforced concrete slab with a balustrade or brickwork, cantilevered or supported on brackets protruding from the wall⁴⁶. According to the definition of the PWN Polish Dictionary, a loggia is a covered balcony⁴⁷ in the form of a recess in the wall of the building, "element set back in the outer wall of the building", or classified as "a room open to the outside with arcades"⁴⁸. The terrace, on the other hand, is defined as a large balcony, located on the ground floor, on the first floor or on a flat roof, or as a "plate with a balustrade located outside the building, connected with internal rooms by a door"⁴⁹. In this context, terraces are a

⁴² Cf. T. Sokółowski, *op. cit.*, p. 285.

⁴³ If the individual parts of a given device are physically and functionally related so as to form an economic whole, they are constituent parts of one complex thing, even though the whole could be physically separated easily. Such a whole is created by a balcony that is physically permanently connected to the building, which is necessary for placing the elements in it; Cf. S. Rudnicki [in:] G. Bieniek, S. Rudnicki, *Nieruchomości. Problematyka prawna*, Warszawa 2011, p. 41.

⁴⁴ Consolidated text: of April 8, 2019 (Journal of Laws of 2019, item 1065), which uses - but without defining - such terms as "terrace", "gallery", "balcony" or "loggia".

⁴⁵ Journal of Laws 112, item 1316.

⁴⁶ W. Szloginia, *Ilustrowana encyklopedia dla wszystkich. Architektura i Budownictwo*, Warszawa 1975, p. 23.

⁴⁷ It is interchangeably referred to as a "covered terrace", "terrace - loggia", "loggia - balcony" being integrally and functionally connected with the structural elements of the building. See the judgment of the Provincial Administrative Court in Szczecin of July 10, 2019, II SA/Sz 419/19, Legalis No. 2215282; judgment of the Provincial Administrative Court in Poznań of March 22, 2018, IV SA/Po 619/17, Legalis No. 1789189.

⁴⁸ *Uniwersalny słownik języka polskiego*, Wydawnictwo Naukowe PWN, v. 2, ed. S. Dubisz, Warszawa 2003, p. 667.

⁴⁹ *Słownik języka polskiego*, v. 3, ed. M. Szymczak, Warszawa 1979, p. 480.

kind of catwalk and most often serve as recreation areas⁵⁰. In practice, a loggia is confused with a balcony, which is distinguished by its location in relation to the facade of the building (the loggia is a platform set back into the facade of the building), the possibility of permanent use (e.g. in the form of an orangery), and the possibility of including the usable floor area of the apartment (with due to the possibility of year-round use)⁵¹.

2.1. The concept of a balcony, loggia and terrace in the jurisprudence of the Supreme Court and common courts

The lack of normative definitions of the terms "balcony", "loggia" and "terrace", with their simultaneous importance for legal relations of both private-law and public-law nature, resulted in the necessity to fill the indicated "normative gap" with judicial decisions and doctrine. Their analysis leads to the conclusion that there is no uniformity of views in terms of terminology, and, on the contrary, there are significant interpretative differences in the perception of the above concepts in the jurisprudence of the Supreme Court, common courts, administrative courts and legal science.

When proceeding with the analysis of the above issue, it should first be noted that the courts classify a balcony, loggia and terrace inconsistently as part of a residential property or common property, firstly, as a component of a building, and secondly, as a component of a dwelling, third, as an auxiliary room, with none of the above views prevailing.

The position contained in the resolution of the Supreme Court of March 7, 2008, III CZP 10/08 is of key importance for the analyzed problem⁵². The Supreme Court stated that the term balcony "refers to the structurally, architecturally and visually different parts of the building. The statutory premise for recognizing it as an element of the common property is a determination that it is not used exclusively by the owner of the premises. "In the justification of its position, the Supreme Court stated that in a situation where the balcony which is part of the building is for the exclusive use of the owner of the premises, it cannot be regarded as element of the common property, and then the only possibility remains to qualify it as a component of a dwelling:

"balconies may, depending on the architectural concept of a given building, be either part of the facade, serving only a decorative function, or be intended for use

⁵⁰ Judgment of the Supreme Administrative Court of November 21, 2008, II OSK 1442/07, Legalis No. 182491; the judgment of the Supreme Administrative Court of June 19, 2013, II OSK 455/12, Legalis No. 764805.

⁵¹ Sometimes the meanings of both terms are even juxtaposed ("balcony loggia"); see the judgment of the Provincial Administrative Court in Opole of October 26, 2017, I SA/Op 359/17, Legalis no. 1699136.

⁵² Resolution of the Supreme Court of March 7, 2008, III CZP 10/08, Legalis no. 95368.

by the general public, or belong to individual residential premises and be intended for the exclusive use of their owners"⁵³.

In the second case:

"a balcony adjacent to the dwelling, which is the subject of separate ownership and for the exclusive use of its owner, is a component of the premises, and the costs of maintaining it in good condition, including its reconstruction, do not burden the housing community of the building, but the owner of the dwelling"⁵⁴.

However, the Supreme Court did not settle in an unequivocal and universal manner the issue of whether balconies belong to a shared property or to separate premises. It pointed out that the internal elements of the balcony or terrace, such as the floor, balustrade, side walls and ceiling, are part of the premises. In turn, the elements of the architectural structure of the balcony (terrace) permanently connected to the body of the building and located outside in relation to the space used for the exclusive satisfaction of housing needs by people living in the premises are considered to constitute a common property. According to the views adopted in the judicature, such elements are: foundations, roof, load-bearing walls, staircase, pipes, water and heating installations, etc. Therefore, the jurisprudence has adopted the concept that a balcony or loggia adjacent to a specific premises and intended for the exclusive use of the occupants of that premises constitute a component of that premises. It is noted, however, that this applies only to the "internal" part of the balcony or loggia, while their external elements and structural elements directly adjacent to the body of the building are elements of the common property⁵⁵.

In another resolution of June 19, 2007, the Supreme Court stated that:

"in the absence of juridical criteria to define this concept, it should be assumed that the concept of "balcony" as a part of a building which is also a component of a dwelling should be understood as only that part of the building that is used exclusively by the owner of the premises and people living with him. It is an internal space, usually separated by a floor and a railing, and sometimes also by side walls and a ceiling, with the exception of always the front wall, the absence of which allows this part of the building to be considered a balcony and at the same time allows it to be used as intended⁵⁶. The Supreme Court also pointed out that "the elements of the architectural structure of the balcony are permanently connected to the body of the building and generally located outside in relation to the space

⁵³ Decision of the Supreme Court of May 19, 2004, I CK 696/03, Legalis no. 68328.

⁵⁴ The judgment of the Supreme Court of October 3, 2002, III RN 153/01, Legalis no. 57113.

⁵⁵ *Ibidem*.

⁵⁶ Resolution of the Supreme Court of June 19, 2007, III CZP 59/07, Legalis no. 83243.

used for the exclusive satisfaction of housing needs by people living in the premises should be considered as such parts of the building that are not exclusively used for the owner of the premises, therefore - pursuant to Art. 3 par. 2 u.w.l. - should be qualified as constituting common property⁵⁷.

In the jurisprudence of common courts, there is a position according to which:

“a balcony is an auxiliary room within the meaning of Art. 2 par. 2 u.w.l. but if it serves only to meet the housing needs of people entitled to use a dwelling, and being such a room, it is also a component of the dwelling”⁵⁸.

It is worth recalling the decision of the Supreme Court of July 14, 2010, in which the court ruled that the loggia and balcony, used exclusively by the owner of the premises being a separate property, are subject to disclosure in the land and mortgage register in section 1.4.4 in the field "description of premises". The Supreme Court therefore treated such loggias and balconies as auxiliary rooms⁵⁹. Balconies, as already indicated in the case law of the Supreme Court, depending on whether they serve only the owner of the premises or are intended for the use of all owners of the premises, may be either a component of specific premises or be included in a common property. In the judgment of the Supreme Court of October 3, 2002, III RN 153/01⁶⁰ a balcony for the sole use of the owner of the premises, with an entrance leading only to this premises, was included in the adjoining premises, and in the resolution of the Supreme Court of March 7, 2008, III CZP 10/08⁶¹ however, such a balcony was considered to be an auxiliary room.

The qualification of a balcony or loggia as an auxiliary room, serving only the housing needs of people living in a dwelling and thus not part of the common parts of the property, is controversial⁶². As far as the case law⁶³ allows such a possibility due to the functional connection of the balcony with the dwelling and the architectural separation from the body of the building (arg. from art.2 par. 2 in connection with art.13

⁵⁷ *Ibidem*.

⁵⁸ Judgment of the District Court in Kraków of November 14, 2013, I C 1454/13, Legalis no. 2048627.

⁵⁹ Decision of the Supreme Court of July 14, 2010, V CSK 31/10, LEX no. 610138.

⁶⁰ Legalis no. 57113.

⁶¹ Legalis no. 95368.

⁶² Judgment of the Provincial Administrative Court in Poznań of January 18, 2018, II SA/Po 884/17, Legalis No. 1715669; judgment of the Court of Appeals in Warsaw of December 10, 2015, VI ACa 1705/14, Legalis No. 2124440; decision of the Supreme Court of July 14, 2010, V CSK 31/10, LEX No. 610138; judgment of the District Court in Kraków of November 14, 2013, I C 1454/13, Legalis No. 2048627; Resolution of the Supreme Court of March 7, 2008, III CZP 10/08, Legalis No. 95368.

⁶³ Cf.: judgment of the Provincial Administrative Court in Poznań of January 18, 2018, II SA/Po 884/17, Legalis No. 1715669; judgment of the Court of Appeals in Warsaw of December 10, 2015, VI ACa 1705/14, Legalis No. 2124440; decision of the Supreme Court of July 14, 2010, V CSK 31/10, LEX No. 610138; judgment of the District Court in Kraków of November 14, 2013, I C 1454/13, Legalis No. 2048627; Resolution of the Supreme Court of March 7, 2008, III CZP 10/08, Legalis No. 95368.

par.1 u.w.l.), in this matter the doctrine takes a fundamentally opposite position, recognizing that the absence of one wall does not allow for such a classification at all⁶⁴.

Another controversial issue in the jurisprudence is the identification of the concept of loggia. According to the PWN Dictionary of the Polish Language, "loggia" is a covered balcony in the form of a recess in the wall of the building, or a room open to the outside with arcades⁶⁵. In the jurisprudence, a loggia is defined as a particular type of balcony or as an auxiliary room separate from the balcony⁶⁶, or as a "platform set back down the line of the building's facade"⁶⁷.

According to one jurisprudence trend, a loggia referred to as "a niche"⁶⁸, is defined as a particular sub-type of balcony⁶⁹ or as a variant of it. There is also the opposite view, according to which the definition of a balcony is not the same as the definition of a loggia, as the structural elements of a building in terms of balconies are not architecturally identical to the structural elements of a loggia⁷⁰. In the construction law, on the other hand, loggias and balconies are referred to as "undeveloped elements", which thus are not included in the building area⁷¹.

The concept of a terrace, similarly to "balcony" and "loggia", has also not been defined on the normative basis. Although it functions on the basis of the regulation of April 12, 2002 on the technical conditions to be met by buildings and their location⁷², in which it is used without giving it a normative meaning. In order to decode the meaning of the term "terrace", it is therefore necessary to use the achievements of judicial decisions and the interpretative doctrine established by the courts, based on dictionary definitions according to which "terrace" (within the meaning of the construction law) is an open, flat part of a building surrounded by a balustrade⁷³ or "terrace" is an open, flat

⁶⁴ Cf. K. Bielawski, *Czy spółdzielnie mieszkaniowe czekają rewolucyjne zmiany? Wybrane zagadnienia*, „Nowe Prawo”, November / December 2012, p. 36; T. Sokołowski [in:] M. Gutowski, *op. cit.*, p. 280-281; G. Bieniek, [in:] G. Bieniek, S. Rudnicki, *Nieruchomości. Problematyka prawna*, pp. 416-417, who says: "The balcony is not an auxiliary room, because it is not a room at all. This assessment cannot be changed by any interpretation of Art. 2 par. 2 of the Act on Ownership of Premises "; R. Strzelczyk, *Prawo nieruchomości*, Warszawa 2011, pp. 68-69; J. Skąpski, *Własność lokali w świetle ustawy z 24 czerwca 1994 r., „Kwartalnik Prawa Prywatnego”* 1996, b. 2, p. 211.

⁶⁵ *Słownik języka polskiego PWN*, ed. M. Szymczak, Warszawa 2002, p. 46.

⁶⁶ Judgment of the Provincial Administrative Court in Szczecin of June 9, 2005, II SA/Sz 285/04, Legalis No. 336808; judgment of the Provincial Administrative Court in Szczecin of 10 July 2019, II SA/Sz 419/19, Legalis No. 2215282; judgment of the Provincial Administrative Court in Gdańsk of January 5, 2006, II SA/Gd 889/03, Legalis No. 663798.

W. Szolginia: *Ilustrowana encyklopedia dla wszystkich. Architektura i Budownictwo*, Warszawa 1975, p. 23; also: judgment of the Provincial Administrative Court in Warsaw of May 29, 2018, IV SA/Wa 3267/17, Legalis No. 2317740, where the dictionary definition was referred to: "loggias are elements withdrawn in the outer wall of the building"; see the distinction: the judgment of the Provincial Administrative Court in Krakow of April 19, 2011, II SA/Kr 347/11, Legalis No. 423219.

⁶⁷ Judgment of the Provincial Administrative Court in Warsaw of May 29, 2018, IV SA/Wa 3267/17, Legalis no. 2317740.

⁶⁸ SAC judgment of March 17, 2022, II OSK 881/21, Legalis No. 2686238; judgment of the Provincial Administrative Court in Gorzów Wielkopolski of January 27, 2021, II SA/Go 576/20, Legalis No. 2535156; judgment of the Provincial Administrative Court in Gorzów Wielkopolski of June 6, 2019, II SA/Go 246/19, Legalis No. 1942762.

⁶⁹ Judgment of the Court of Appeals in Warsaw of December 10, 2015, VI ACa 1705/14, Legalis No. 2124440.

⁷⁰ Such a position was presented in the judgment of the District Court in Słupsk of September 28, 2015, I C 430/14, Legalis no. 2014608.

⁷¹ Judgment of the Provincial Administrative Court in Gdańsk of April 24, 2019, II SA/Gd 663/18, Legalis no. 1916032.

⁷² Consolidated text: of April 15, 2022 (Journal of Laws of 2022, item 1225).

⁷³ *Uniwersalny słownik języka polskiego*, ed. S. Dubisz, v. 4, Warszawa 2008, p. 24.

part of the building, surrounded by a balustrade and adapted to the presence of people⁷⁴.

On the other hand, the jurisprudence indicates that the concept of "terrace" should be understood as a horizontal surface located in the building, either at the level of the ground floor, but also on the first floor, or on the roof, adapted to the presence of people, constituting a kind of a catwalk and most often serving as recreational places⁷⁵.

The analysis of the case law of common courts leads to the conclusion that there is quite a lot of freedom in defining the concepts and the freedom to identify them. In addition to the terms "balcony", "loggia", "terrace", which are often used interchangeably, additional terms function interchangeably, i.e. the terms: "recess"⁷⁶; "loggia-like recess"⁷⁷; "oriel"⁷⁸; "covered terrace"⁷⁹; "terrace- loggia"⁸⁰; "balcony - loggia"⁸¹; "adjoining room"⁸²; "auxiliary room"⁸³; "court loggias - secular and church"⁸⁴, as well as the "loggia of the apartment belonging to the apartment"⁸⁵; „annex permanently connected with the house"⁸⁶; "balcony loggia"⁸⁷; "loggia as a special type of balcony"⁸⁸; "open auxiliary area". Professional terminology, introducing the concepts

⁷⁴ *Słownik języka polskiego*, ed. M. Szymczak, v. 3, Warszawa 1979, p. 480.

⁷⁵ Judgment of the Provincial Administrative Court in Szczecin of July 10, 2019, II SA/Sz 419/19, Legalis No. 2215282.

⁷⁶ Cf. interesting arguments on this subject: the judgment of the Provincial Administrative Court in Gorzów Wielkopolski of January 27, 2021, II SA/Go 576/20, Legalis No. 2535156; judgment of the Provincial Administrative Court in Gorzów Wielkopolski of June 6, 2019, II SA/Go 246/19, Legalis No. 1942762 (here in the context of the definition of the allotment arbor); judgment of the Court of Appeals in Warsaw of December 10, 2015, VI ACa 1705/14, Legalis No. 2124440; judgment of the Provincial Administrative Court in Kraków of April 19, 2011, II SA/Kr 347/11, Legalis No. 423219.

⁷⁷ "A recess with a loggia character" as a space surrounded by walls on all sides except the west one; as in: the judgment of the Provincial Administrative Court in Poznań of September 28, 2017, II SA/Po 666/17, Legalis No. 1694515.

⁷⁸ Judgment of the Provincial Administrative Court in Warsaw of May 29, 2018, IV SA/Wa 3267/17, Legalis No. 2317740.

⁷⁹ "Covered terrace" = "loggia", which are integrally and functionally related to this building and therefore cannot be considered as secondary elements. There is no doubt that the parts of the object in question are structurally closely related to the rest of the building, on which the roof structure rests, and form a uniform, structural and functional whole; judgment of the Provincial Administrative Court in Szczecin of July 10, 2019, II SA/Sz 419/19, Legalis No. 2215282.

⁸⁰ Judgment of the Provincial Administrative Court in Szczecin of July 10, 2019, II SA/Sz 419/19, Legalis No. 2215282.

⁸¹ Cf. Judgment of the Provincial Administrative Court in Poznań of March 22, 2018, IV SA/Po 619/17, Legalis No. 1789189.

⁸² So among others in: the judgment of the Regional Court in Olsztyn of January 25, 2016, I C 299/15, Legalis No. 1986213; also: the judgment of the Supreme Court of October 3, 2002, III RN 153/01, LEX No. 76824; terminological issues - see also: the decision of the Constitutional Tribunal of December 14, 2005, SK 24/05, Legalis No. 72066; generally about the belonging room in the context of the constitutionality of the provisions of the Civil Code also in the judgment of the Constitutional Tribunal of March 5, 2002, SK 22/00, Legalis No. 53820; the decision of the Supreme Court of May 19, 2004, I CK 696/03, Legalis No. 68328..

⁸³ Judgment of the Provincial Administrative Court in Poznań of January 18, 2018, II SA/Po 884/17, Legalis No. 1715669; judgment of the Court of Appeals in Warsaw of December 10, 2015, VI ACa 1705/14, Legalis No. 2124440; decision of the Supreme Court of July 14, 2010, V CSK 31/10, LEX No. 610138; judgment of the District Court in Kraków of November 14, 2013, I C 1454/13, Legalis No. 2048627; Resolution of the Supreme Court of March 7, 2008, III CZP 10/08, Legalis No. 95368.

⁸⁴ R.A. Tokarczyk, „*Proksemika ogólna jako podstawa proksemiki sądowej i proksemiki prawniczej*”, „*Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia*” 2009/2010, vol. LXI/LVII, p. 189.

⁸⁵ The adjective "housing" defines things related to the apartment, the existence of which is necessary for the proper use of housing by their residents, as well as facilitating their access to the apartment building and ensuring its efficient functioning and administration.

⁸⁶ Judgment of the Provincial Administrative Court in Warsaw of February 26, 2020, VII SA/Wa 2154/19, Legalis No. 2514338.

⁸⁷ Judgment of the Provincial Administrative Court in Opole of October 26, 2017, I SA/Op 359/17, Legalis No. 1699136.

⁸⁸ Judgment of the Court of Appeals in Warsaw of December 10, 2015, VI ACa 1705/14, Legalis No. 2124440.

of portfenet⁸⁹ or projection⁹⁰ increases the numerous difficulties in defining the analyzed concepts.

Summarizing the above remarks, it should be noted that the lack of a uniform definition of a balcony, loggia and terrace actually requires the reconstruction of their normative foundations contained in many different legal acts. It also creates difficulties with the legal qualification of balconies, terraces and loggias, e.g. in the context of the rules for bearing renovation costs, determining the amount of property tax or usable floor space of residential premises, or determining the boundaries of premises and common property⁹¹. In the jurisprudence of the Supreme Court and courts of lower instance, courts quite often refer to the dictionary, and therefore the colloquial understanding of the terms "balcony", "loggia" or "terrace". The Supreme Court, as indicated in the justification of the resolution of March 7, 2008, III CZP 10/08⁹², left the above issue open at all, pointing out that "life experience proves that the term is used to describe the structurally, architecturally and visually diverse parts of the building".

In the jurisprudence of common courts, one can also note the view on the possibility of establishing the so-called balcony easement consisting in the right of every owner of a real property to use a balcony located on the neighboring property ("balcony easement"). In the judgment of the Regional Court in Gdańsk of February 8, 2016, case file no. XV C 618/13, it was indicated that the following easements are most often used in practice: chimney easement consisting in the entitlement of each owner of a property having the right to use a chimney located on an adjacent property; balcony easement consisting in the entitlement of each owner of a holding property to use a balcony located on a neighboring property; eaves easement consisting in the right of each owner of the real estate to direct rainwater to the adjacent property; window opening easement consisting in the right to open the window to the outside, within the boundaries of the adjacent property; wall easement which consists in making it possible

⁸⁹ A high floor-to-ceiling window in palaces from the 17th and 19th centuries, secured with an external balustrade. Currently, it is used as a replacement for a balcony, especially in high-rise buildings and where the building facade is assumed to be flat.

⁹⁰ The term projection and loggia are not legal terms. Therefore, they should be presented in accordance with the commonly accepted understanding of these terms or dictionary definitions. In the Universal Dictionary of the Polish Language, edited by prof. Stanisław Dubisz, Wydawnictwo Naukowe PWN Warsaw 2003, the term "projection" is defined as the protruding part of the facade of a building forming a whole with it from the foundations, located in the middle or at the corners of the facade (vol. 4, p. 248). On the other hand, "loggia" is defined as a recessed balcony, a balcony niche open to the outside of the building (vol. 2, p. 667). Compare the distinction: the judgment of the Provincial Administrative Court in Krakow of April 19, 2011, II SA/Kr 347/11, Legalis No. 423219.

⁹¹ Cf., inter alia the judgment of the Provincial Administrative Court in Warsaw of March 2, 2018, IV SA/Wa 3034/17, Legalis No. 2317278. This problem is also dealt with by interpellation No. 31425 to the Minister of Development and Technology "on the legal loophole regarding the belonging of balconies, loggias and buildings of communities and housing cooperatives" of February 11, 2022, <https://www.sejm.gov.pl/sejm9.nsf/interpelacjaTresc.xsp?documentId=166E7C63C150560FC12587E-B002AA616&view=S>, Sejm of the 9th term, [date of access: 10.06.2022].

⁹² Legalis no. 95368.

for every owner of a real estate to lean the building against a wall located on the neighboring real estate⁹³.

2.2. The concept of a balcony, loggia and terrace in the jurisprudence of administrative courts

The decoding of the concepts of "balcony, loggia and terrace" and their classification constitute a significant challenge for the jurisprudence of administrative courts in correlation with the civil understanding of the notions of "things", "components of things", "belonging", "common things". The analysis of the judicial and administrative judgments leads unfortunately to the conclusion that it has not been possible to develop a uniform understanding of the concepts indicated. In the jurisprudence of administrative courts, on the basis of cases in the field of construction law, quite different terminology is used related to the understanding of the concepts of a balcony or loggia, also equated with such terms as "recess"⁹⁴, or "loggia-like recess" defined as a space surrounded by walls on all sides except one⁹⁵, or as annex.

In judicial and administrative judgments, the possibility of unifying the definitions of the terms "terrace", "balcony" and "loggia" is questioned⁹⁶. In the justification, the administrative courts indicate that the above-mentioned terms define separate building elements not only in colloquial speech, but also in technical vocabulary, differing both in terms of construction and architecture, which is also indicated by the nomenclature used, inter alia, in the Ordinance of the Minister of Infrastructure of April 12, 2002 on technical conditions to be met by buildings and their location. Identification of balconies, loggias and terraces as possible independent construction objects, building components, components of residential premises, parts of common properties or auxiliary rooms is of significant importance in public law relations from the point of view of the legal and tax qualification of real estate when determining the real estate tax and in the construction process.

In the judgment of March 9, 2021, II OSK 1504/18⁹⁷, the Supreme Administrative Court excluded the possibility of classifying the balcony as an independent construction object, pointing out that:

„balconies do not constitute an independent construction object, but a part of the building, i.e. a construction object that is permanently connected to the ground,

⁹³ Judgment of the Regional Court in Gdańsk of February 8, 2016, XV C 618/13, Legalis No. 2004706.

⁹⁴ Judgment of the Provincial Administrative Court in Gorzów Wielkopolski of January 27, 2021, II SA/Go 576/20, Legalis No. 2535156; judgment of the Provincial Administrative Court in Gorzów Wielkopolski of June 6, 2019, II SA/Go 246/19, Legalis No. 1942762 (here in the context of the definition of the allotment arbor); judgment of the Court of Appeal in Warsaw of December 10, 2015, VI ACa 1705/14, Legalis No. 2124440.

⁹⁵ Judgment of the Provincial Administrative Court in Poznań of September 28, 2017, II SA/Po 666/17, Legalis No. 1694515.

⁹⁶ Judgment of the Supreme Administrative Court of June 19, 2013, II OSK 455/12, Legalis No. 764805.

⁹⁷ Legalis nro. 2566537.

separated from the space by building partitions, and has foundations and a roof. Structural elements of the balcony, such as the ceiling (which is also a flat roof above the premises on the lower floor), insulation layers or walls in the case of a loggia, are common parts of the building⁹⁸.

In the judgment of the Provincial Administrative Court in Warsaw of June 8, 2018, VII SA/Wa 2076/17⁹⁹ however, it was found that the lack of a definition of a balcony allows it to be included both in the common part of the property and as a component part of the premises for the exclusive use of its owner. In the judgment of January 5, 2021, the Provincial Administrative Court in Gdańsk¹⁰⁰ qualified the terrace as part of the communal property, indicating that:

"If more residents of a multi-family building have access to the terrace (balcony), it is part of the shared property. However, when access is possible only from one premises and the terrace is for the exclusive use of the owner of this premises, it is not part of the shared property."

The Provincial Administrative Court in Wrocław made a similar opinion in this respect, which in its judgment of February 28, 2006 (case file ref. II SA/Wr 466/04)¹⁰¹ stated that the common property should also include, *inter alia*, balconies, loggias, terraces and balustrades; roofs with their load-bearing structure and flat roofs and gutters, flashing and ceilings between individual storeys. Such qualification of balconies or terraces, even though they are usually intended for individual use, is justified, in the opinion of the court, by the fact that they constitute an integral part of the external façade and devices located on the façade (e.g. rainwater gutters), hence their renovation should be carried out simultaneously and in a uniform manner. The court pointed out that the individual user of the premises cannot control the technical condition of "his" terrace, in particular its lower surface, and it is not possible to renovate it without the consent of another owner¹⁰².

The Supreme Administrative Court took a different position, indicating in the judgment of May 8, 2018 that loggias are not common parts, but are intended for the exclusive use of the owners of the premises, which excludes the possibility of recognizing them as part of the common property. They serve to meet housing needs,

⁹⁸ Judgment of the Supreme Administrative Court of March 9, 2021, II OSK 1504/18, Legalis No. 2566537; similarly, the judgment of the Supreme Administrative Court of March 7, 2018, II OSK 1139/16, available in CBOSA; see also the resolution of the Supreme Court of March 7, 2008, II CZP 10/08, Legalis No. 95368.

⁹⁹ Legalis no. 1795554.

¹⁰⁰ Judgment of the Provincial Administrative Court in Gdańsk of January 5, 2021, II SA/Gd 530/20, Legalis No. 2523602, see also the judgment of the Supreme Administrative Court of October 23, 2015, II OSK 1245/14, available in CBOSA.

¹⁰¹ Legalis no. 1444244.

¹⁰² Judgment of the Provincial Administrative Court in Wrocław of February 28, 2006, II SA/Wr 466/04, Legalis no. 384790; judgment of the Provincial Administrative Court in Warsaw of October 2, 2019, VII SA/Wa 596/19, Legalis No. 2520249.

rest and undoubtedly show a functional relationship with the rest of the premises. In support of its position, the Supreme Administrative Court will refer to the judgment of the Supreme Court of March 7, 2008., III CZP 10/08¹⁰³, in which the internal elements of the balcony or terrace, such as the floor, railing, side walls and ceiling, are included in the premises¹⁰⁴. According to the judgment of the Supreme Administrative Court of October 23, 2015:

"If more than one resident has access to a terrace or balcony, it is part of the shared property, when access is only possible from one premises and the terrace is for the exclusive use of the owner of that premises, it is not part of the shared property. Therefore, its reconstruction does not require the consent of the entire community"¹⁰⁵.

Administrative jurisprudence indicates that balconies do not exist independently and belong to a building/apartment. According to the view represented by some of the jurisprudence, the expression "part of the construction work" used in the provision of Art. 48 par. 1 u.p.b. should be understood primarily as an independent construction work, the construction of which has not yet been completed, or as part of another work, which is sufficiently independent from the rest of the legally built part that it can be dismantled without significant interference with that remaining part of the construction work¹⁰⁶.

It should be noted that the construction law also includes architectural structures of a nature similar to the concept of a balcony, i.e. oriels¹⁰⁷, portfenets¹⁰⁸ or projections¹⁰⁹. The Provincial Administrative Court in Lublin, in its judgment of March 10, 2021, included the lack of central heating, adequate insulation or the fact of building with easily dismantled construction elements as the main features distinguishing them from the structure of a given construction work. It also pointed out that they should be treated as the "external part of the building" and may not be included in the usable area of the premises or treated as a living room¹¹⁰. In the judgment of the Provincial Administrative Court in Szczecin of June 9, 2005, II SA Sz 285/04, "loggia" was characterized as a

¹⁰³ Legalis no. 95368.

¹⁰⁴ Judgment of the Supreme Administrative Court of May 8, 2018, II OSK 2979/17, Legalis No. 1791049.

¹⁰⁵ Judgment of the Supreme Administrative Court of October 23, 2015, II OSK 1245/14, available in CBOSA.

¹⁰⁶ Judgment of the Provincial Administrative Court in Rzeszów of January 28, 2016, II SA/Rz 668/15, Legalis No. 1444244;

judgment of the Provincial Administrative Court in Warsaw of March 20, 2014, VII SA/Wa 2066/13, Legalis No. 907966;

judgment of the Provincial Administrative Court in Opole of September 26, 2013, II SA/Op 166/13, available in CBOSA;

judgment of the Provincial Administrative Court in Kraków of November 4, 2015, II SA/Kr 941/15, Legalis No. 1371333.

¹⁰⁷ Judgment of the Provincial Administrative Court in Warsaw of May 29, 2018, IV SA/Wa 3267/17, Legalis No. 2317740.

¹⁰⁸ See footnote 89

¹⁰⁹ In the *Universal Dictionary of the Polish Language*, edited by S. Dubisz, Warsaw 2003, vol. 4, p. 248, a "projection" is defined as the protruding part of the facade of a building forming a whole with it from the foundations, located in the middle or at the corners of the facade; terminological issues: judgment of the Provincial Administrative Court in Kraków of April 19, 2011, II SA/Kr 347/11, Legalis No. 423219.

¹¹⁰ Judgment of the Provincial Administrative Court in Lublin of March 10, 2021, I SA/Lu 421/20, Legalis No. 2597954.

recessed balcony, a balcony recess, open to the outside of the building, in architecture a part of the building with an open colonnade or arcades instead of front walls¹¹¹, relatively qualified as "element recessed in the outer wall of the building"¹¹².

3. Conclusions

In summing up the considerations on terminological issues, including the decoding of the concepts of balcony, loggia and terrace, it should be emphasized that there is ambiguity and vagueness of the indicated concepts. It violates the principle of specificity of legal provisions and adversely affects the uniformity of the jurisprudence of administrative and common courts. Due to changes in the real estate market, as well as intensive *de lege ferenda* development investments in recent years, the need to clarify the terms under discussion should be considered, in particular in terms of the understanding of "residential premises" *sensu largo*, and "common property". In our opinion, the above legislative change would be possible through an amendment to the act on ownership of premises with regard to the definition of the above-mentioned normative concepts. The mere use of the achievements of judicial decisions and the interpretative doctrine established by courts, based primarily on dictionary definitions, is insufficient in the current social and legal conditions, and is also the source of the above-mentioned discrepancies in the jurisprudence. The current, very broad redaction of Art. 3 par. 2 u.w.l. entails too wide a margin of interpretative freedom, which adversely affects the uniformity of the jurisprudence of courts, which is confirmed by our analysis of the judgments of the Supreme Court, common courts and administrative courts. The analysis of the justifications of the judgments of common (civil) courts also leads to a thesis about the overrepresentation of references to dictionary definitions (linguistic interpretation), instead of taking into account the features that individualise the structure of a balcony, loggia or terrace appropriate to construction law. There is also no consistent practice of land and mortgage registers as regards the description of the premises in section I-O of the land and mortgage register, i.e. with possible consideration of a balcony (loggia, terrace) as an auxiliary room (sub-heading 1.4.4.), or as a specific easement of a balcony constituting a sub-type of land easement of Art. 285 of the Civil Code (division I-Sp as a list of rights related to property)¹¹³.

Quite often a balcony, loggia or terrace are equated with an auxiliary room or an adjoining room. It is additionally related to the legislator's lack of precision in qualifying a room (chamber) on the plane - as it seems - only of the u.w.l., as an enclosed space, while balconies, loggias and terraces simply do not have such a physical structure. It would be valuable to refer - at least in this part - to the definitions already present under the construction law, or even the Act of June 21, 2001 on the protection of tenants' rights¹¹⁴. The allegation described in this article of the lack of precision in the scope of

¹¹¹ Legalis No. 336808; see also: judgment of the Provincial Administrative Court in Gdańsk of January 5, 2006, II SA/Gd 889/03, Legalis No. 663798.

¹¹² Judgment of the Provincial Administrative Court in Warsaw of May 29, 2018, IV SA/Wa 3267/17, Legalis No. 2317740; judgment of the Provincial Administrative Court in Kraków of April 19, 2011, II SA/Kr 347/11, Legalis No. 423219.

¹¹³ Cf. Judgment of the Regional Court in Gdańsk of February 8, 2016, XV C 618/13, Legalis No. 2004706.

¹¹⁴ Consolidated text: of December 2, 2021 (Journal of Laws of 2022, item 172).

terminology used in u.w.l., although it was raised by some doctrines at the time of its entry into force, it was not satisfactorily resolved in the jurisprudence¹¹⁵. In our opinion, this is not a problem located solely at the level of the application of law, but rather the problem of the lack of positive statements by the legislator as regards the normative qualification (definition) of common real estate and its proper demarcation in relation to housing real estate. In addition, the arguments of a pragmatic nature support the need to clarify the terms commented on, as the possibility of the owner using a balcony, loggia or terrace affects the value of the property (economic aspect).

Bibliography

Legal acts:

1. Act of April 23, 1964, the Civil Code (consolidated text: of June 9, 2022; Journal of Laws of 2022, item 1360, as amended).
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3. Act of June 24, 1994 on the ownership of premises (consolidated text: of May 21, 2021; Journal of Laws of 2021, item 1048).
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