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Problem kwalifikacji prawnej balkonu w orzecznictwie sądów administracyjnych i powszechnych. Analiza prawnoporównawcza (część II)

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Streszczenie:

Niniejszy artykuł stanowi część drugą, będącą kontynuacją opracowania dotyczącego kwalifikacji prawnej balkonu (loggii) w orzecznictwie sądów administracyjnych i powszechnych, będącego równocześnie próbą rekonstrukcji pojęć balkonu, tarasu, oraz loggii z punktu widzenia normatywnego[4]. W części I przedstawiono stan badań dotyczący zagadnienia, będącego przedmiotem opracowania, wskazano założenia i hipotezy badawcze, zagadnienia terminologiczne i definicyjne w odniesieniu do ich znaczeń słownikowych, praktykę orzeczniczą Sądu Najwyższego i sądów niższych instancji oraz praktykę orzeczniczą sądów administracyjnych. Ponadto poddano analizie normatywnej regulacje zawarte w ustawie z dnia 24 czerwca 1994 r. o własności lokali[5], ustawie z dnia 23 kwietnia 1964 r. - Kodeks cywilny[6], ustawie z dnia 6 lipca 1982 r. o księgach wieczystych i hipotece[7] oraz wypowiedzi doktryny i orzecznictwa sądów. Jednym z podstawowych celów badawczych podjętych w pracy stało się również przedstawienie instytucji nieruchomości wspólnej w kontekście ewentualnej kwalifikacji balkonów, loggii, tarasów - alternatywnie - jako jednego z elementów składowych nieruchomości wspólnej, bądź też poprzez ich kwalifikację w ramach struktury nieruchomości lokalowej. W niniejszym opracowaniu autorzy podjęli próbę analizy definicji nieruchomości wspólnej zawartej w art. 3 ust. 2 u.w.l. de *lege lata,* prezentując najistotniejsze cechy obecnie obowiązującej koncepcji normatywnej, z czym dalej łączą się zaproponowane w konkluzjach do niniejszego artykułu wnioski *de lege ferenda, w* szczególności co do zakresu stosowanej przez ustawodawcę terminologii. Rozważania natury teoretycznoprawnej zostały uzupełnione analizą poglądów obecnych zwłaszcza w

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[5] Tekst jedn.: z dnia 21 maja 2021 r. (Dz.U. z 2021 r., poz. 1048); dalej jako: u.w.l.

[6] Tekst jedn.: z dnia 9 czerwca 2022 r. (Dz.U. z 2022 r., poz. 1360) ze zm.; dalej jako: k.c.

[7] Tekst jedn.: z dnia 22 lipca 2022 r. (Dz.U. z 2022 r., poz. 1728); dalej jako: u.k.s.h.

aktualnym orzecznictwie sądów powszechnych i administracyjnych, a także odniesienia do rozwiązań normatywnych niektórych zagranicznych porządków prawnych.

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

The problem of legal classification of a balcony in the jurisprudence of administrative and common courts of law: a comparative legal analysis (Part II)

Abstract:

This article forms the second part that continues the study on the legal qualification of balconies (loggias) in jurisprudence of administrative and common courts and at the same time attempts to reconstruct the concepts of a balcony, terrace, and loggia (recessed balcony) from a normative point of view.[8]

In part one, we have outlined the state of research on the issue being the object of the study, our assumptions and research hypotheses, the terminological and definitional issues in reference to their dictionary meanings, the jurisprudence of the Supreme Court and lower courts of law and the jurisprudence of administrative courts in determining the terminological meaning of the notions of balcony (loggia) and terrace. Furthermore, a normative analysis of legal provisions contained in the Premises Ownership Act (POA) of 24 June 1994 *(consolidated text promulgated on 21 May 2021 in Dziennik Ustaw 2021, item 1048),* the Civil Code (CC) of 23 April 1964 *(consolidated text promulgated on 9 June 2022 in Dziennik Ustaw 2022, item 1360, as amended),* the Land and Mortgage Registers Act (LMRA) of 6 July 1982 *(consolidated text promulgated on 22 July 2022 in Dziennik Ustaw 2022, item 1728)* as well as the writings of legal scholars and jurisprudence was undertaken. One of the basic research objectives in this study was also to present the institution of common real estate in the context of a potential qualification of balconies, loggias and terraces alternatively as one of the elements constituting common real estate or by classifying them as part of real estate in the form of premises.

In this article, the authors attempted to analyse the definition of common real estate set out in Article 3, item 2 of the POA in a the framework of current law, presenting the most important features of the currently applicable normative concept. This attempt resulted in suggestions for future provisions, which were offered in the concluding part of this article, in particular as regards the scope of terminology used by the legislator. The considerations of a theoretical and legal nature have been extended by an analysis of views present especially in the current jurisprudence of common courts of law and administrative courts, as well as references to normative solutions adopted from certain foreign legal systems.

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

1. Classification of real estate in Polish law. Basic assumptions.

[8] *Problem kwalifikacji prawnej balkonu w orzecznictwie sądów administracyjnych i powszechnych. Analiza prawno-porównawcza (część I)* [The *problem of legal classification of a balcony in the jurisprudence of administrative and common courts of law: a comparative legal analysis (Part I)],* Nieruchomości@ N# 3, 2022, pp. 97-120.

Article 46(1) of the Civil Code enumerates three categories of real estate known to Polish law: lands, buildings and premises. Therefore, real estate includes firstly lands understood as isolated portions of the Earth's surface which form a separate object of ownership,[9] and secondly, buildings or parts thereof which might form a separate object of ownership if a special provision so stipulates, as well as premises. It must be remembered that establishing a right of separate ownership of premises requires entering the right into a land and mortgage register. In addition, since the Property Law decree of 11 October 1946 entered into force,[10] the legislator connected the existence of real estate in the form of premises also with "a share in common real estate as a right related to ownership of premises" (argued from Article 3, item 2 in connection with item 1 of the POA) as compulsory joint property.[11]

The property law status of the buildings themselves and parts thereof as constituent parts of land is specified primarily in Articles 47 and 191 of the Civil Code. These provisions formulate the basic real estate law principle (*superficies solo cedit*) which means that everything permanently connected to land forms part of land. For this reason, land in the legal sense is an isolated portion of the Earth's surface that forms a separate object of ownership together with its constituent parts (argued from Article 46 of the CC in connection with Article 143, first sentence of the CC). Because Article 48 of the CC also suggests a principle that constituent parts of land include in particular buildings and other structures permanently connected to land, premises can be classified as a constituent part of a building, which in part forms a constituent part of land. In many instances, however, the legislator allows for deviations from the general *superficies solo cedit* principle sketched above. This means that objects permanently connected to land do not become its constituent parts in the legal sense but are by the will of the legislator treated as separate real estate, since they can be owned by someone else than the owner of the land. One of the most far-reaching deviations from the *superficies solo cedit* principle is introduced by the Premises Ownership Act, in which the legislator defined self-standing residential premises and premises with other purpose, both of which may constitute separate real estate (Article 2(1) of the POA). From this it is clear that premises separated on the basis of the provisions of that act will be an object of ownership separate from land. This provision is supplemented by Article 1(2) in connection with 24 of the LMRA, pursuant to which

[9] Por. także definicję z art. 4 pkt 1 ustawy z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami, tekst jedn.: z dnia 17 września 2021 r. (Dz.U. z 2021 r., poz.1899 ze zm.).

[10] Dz.U. z 1946 r. Nr 57, poz. 319 ze zm.

[11] Dla nieruchomości wspólnej, tak jak według zasady dla każdej nieruchomości, właściwy sąd rejonowy Wydział Ksiąg Wieczystych prowadzi odrębną księgę wieczystą; A. Doliwa, *Prawo mieszkaniowe. Komentarz*, Warszawa 2021, s. 685.

land and mortgage registers[12] are maintained solely for land, building and premises real estate as well as a cooperative member's right to residential premises.[13]

Separating real estate in the form of premises (main right to the residential premises together with the auxiliary right to a share in common real estate) may, however, raise doubts concerning the delimitation of boundaries of such premises, and hence the limits of the owner's rights. Real estate in the form of premises is physically an integral part of the building. However, as noted above, pursuant to Article 3(1) and (2) of the POA a building contains in addition to separate premises also a so-called common real estate, which includes in particular foundations, load-bearing walls, staircases and roof.[14] Accordingly, premises are essentially an enclosed space limited by walls and ceilings which form part of common real estate.[15] Premises that form a separate object of ownership are only part of the real estate from which they have been separated.[16] The part of the building remaining after separating the premises and the land form an independent real estate and are jointly held by all owners of premises. The legal separation of common real estate is therefore a necessary condition for separate ownership of premises. However, common real estate is not uniform in a material sense, as suggested by Article 3(2) of the POA, according to which it consists of: "land and those parts of the building and structures that are not used exclusively by owners of premises." In this case, the legislator had recourse to a somewhat flexible formula, based on the assumption that in many cases it is difficult to accurately state which part of a building is used exclusively by a particular owner and which should constitute common real estate. Particularly essential is interpreting the notion of "use," which should be connected to the availability of a part of a building and the possibility of using it either exclusively by the owner of single residential premises or all building residents.

In order to correctly interpret the analysed notion of "use," it would be justified to refer to functional criteria to determine whether a specific part of the building serves exclusively the owner of single premises or is meant to be used by other owners, and

[12] Zestawiając treść art. 46 § 1 k.c. i art. 24 u.k.w.h. w orzecznictwie sądów powszechnych, za trafną uznano koncepcję wieczystoksięgowego rozumienia nieruchomości, wyrażającą się w formule „jedna księga wieczysta - jedna nieruchomość" jako „najlepiej uargumentowaną, racjonalną i odpowiadającą potrzebom obrotu, zwłaszcza w praktyce notarialnej"; por. postanowienie Sądu Okręgowego w Łodzi z dnia 27 maja 2021 r., III Ca 2061/19, Legalis nr 2667781; postanowienie Sądu Okręgowego w Łodzi z dnia 8 kwietnia 2021 r., III Ca 274/20, Legalis nr 2667333.

[13] J. Pisuliński, [w:] *Księgi wieczyste i hipoteka. Komentarz,* red. J. Pisuliński et al., Warszawa 2014, s. 31.

[14] Zob. przykładowe wyliczenie: A. Doliwa, *op. cit.* s. 682-683.

[15] Wyrok Sądu Okręgowego w Piotrkowie Trybunalskim z dnia 6 października 2016 r., I C 1441/15. Legalis nr 2083455.

[16] *Ibidem.*

whether it can form a constituent part of specific premises or be classified as common real estate.[17]

The definition of common real estate adopted by the legislator (combining a negative definition and enumeration of examples) therefore proves that this category includes varied architectural elements whose normative classification has been left for individual assessment on a case-by-case basis. In many instances, however, this is difficult to do without referring to the opinions of construction and real estate experts or property appraisers. In addition, the basic shortcoming of negative definitions is that they do not capture the essence of the issue they describe. Therefore, attempts were undertaken in legal theory and jurisprudence to make this notion more precise in order to search for a positive definition of "common real estate."[18] In current law, grounded upon the Premises Ownership Act, a few variants of interpreting the ownership status of technical facilities, balconies, loggias, terraces or parking spaces in underground garages have been formulated, taking into account the architectural requirements of each structure. Because of the object and purpose of this publication, they will be subsequently restricted to characterising the property law status of balconies, terraces and loggias in the context of the binding definition of common real estate and the normative construct of residential premises (Article 2, item 2 of the POA).

2. Legal qualification of a balcony (loggia) as an element of common real estate

The problem related to the legal nature of balconies, loggias and terraces was analysed multiple times, both in legal theory and Supreme Court jurisprudence, over many years.[19] As a rule, it is assumed that the legal status of balconies and terraces in residential buildings depends on legal title to the premises. Both the rights and obligations of owners of premises are regulated primarily by the Premises Ownership Act and by the Civil Code. While pursuant to Article 3(2) of the POA common real estate consists of land and parts of buildings and structures that are not used exclusively by owners of premises, under Article 12, item 2 of the POA the costs of maintaining common real estate are imposed on all members of the housing

[17] Por. m.in.: wyrok Sądu Okręgowego Warszawa-Praga w Warszawie z dnia 8 maja 2018 r., I C 741/17, Legalis nr 2138280; wyrok Sądu Apelacyjnego w Łodzi z dnia 31 stycznia 2013 r., I ACa 1064/12, Legalis nr 734351; wyrok Sądu Apelacyjnego w Katowicach z dnia 13 sierpnia 2013 r., I ACa 484/13, Legalis nr 1025587.

[18] Por. m.in.: wyrok Sądu Apelacyjnego w Warszawie z dnia 22 marca 2017 r.. VI ACa 68/17, Legalis nr 1636916; wyrok Sądu Okręgowego Warszawa-Praga w Warszawie z dnia 8 maja 2018 r., I C 741/17, Legalis nr 2138280; wyrok Sądu Okręgowego w Łodzi z dnia 30 maja 2017 r., III Ca 1878/16, Legalis nr 2068817.

[19] Szczegółową analizę pojęć: „balkon", „loggia": i „taras" zawarto w części pierwszej opracowania. Zob. *Problem kwalifikacji prawnej balkonu...*

association in proportion to the shares they hold in the common real estate. While a balcony or terrace is usually used by the owner of single premises, objectively it is also part of the structure of the building and its façade, which are common parts of the building. Hence, based on the principle expressed in Article 3, item 2 of the POA it cannot be unequivocally decided whether a balcony (loggia) or terrace form common real estate or the individual property of each owner of premises, and also where does the boundary between them run. The provision of Article 3, item 2 of the POA is, as already noted, referring to functional criteria, defining common real estate as parts of buildings and structures that are not used exclusively by owners of premises. The meaning of "use" here is usually not strict and can be reduced to the possibility of using a particular part of building, provided that it can be accessed. It must be noted that a structural wall of a building which lies within the bounds of premises does not form part of such premises merely because it can be accessed only by the owner of the premises and because they alone can use it. For this reason, it must be assumed that the notion of "use" in the meaning of Article 3, item 2 has a wider scope that needs to be referred to the function of each part of a building.

3. The dual property law status of terraces and balconies

In determining the property status of a balcony or loggia, one should also distinguish between real estate constituting premises and common real estate, which may be difficult in practice. With such an assumption, it can rightly be said that those elements of a balcony (loggia) used exclusively to satisfy the needs of an owner of premises are constituent parts of such premises in the meaning of Article 47 of the CC. According to that provision, a constituent part of a thing is everything that cannot be detached from it without damaging or essentially altering the whole or damaging or essentially altering the detached object. There can be doubt, after all, that no element of a balcony can be detached "without damaging or essentially altering the whole or damaging or essentially altering the detached object." Thus, all balconies (in their entirety) are constituent parts of a building. This, however, does not determine their property law status from the viewpoint of the POA provisions and the Civil Code and by itself is merely a certain generalisation. In practice, especially considering the analysis of rulings of the Supreme Court and common courts, the internal space of a balcony, separated by the floor and railing, and sometimes also by side walls and ceiling, is included in the premises as their constituent part. In the opinion of Zbigniew Radwański, a thin layer of plaster covering boundary walls, the floor lining and partition

walls inside the premises is also the object of separate ownership of premises.[20] In extreme cases, the object of such ownership may be limited to the surface alone.[21] Using the above-mentioned statements of legal theory and views adopted in jurisprudence, it can therefore be assumed that the ownership of premises also extends to flooring that does not form part of building isolation. An example might be ceramic tiles laid on the balcony slab which at the same time do not isolate the building (and usually belong to the owner of the premises). On the other hand, elements of the architectural structure of the balcony which are permanently attached to the body of the building and usually situated outside space used for exclusively satisfying the residential needs of persons living on the premises form part of the building that is not used exclusively by the owner of the premises. In other words, external structural elements of a balcony (loggia) that are not meant for individual use of any of the owners of residential premises are an element of common real estate. The above distinction and classification of balcony (loggia) elements serves as a basis not only for defining entities obligated to incur the costs of their maintenance, but also entities liable when damage is caused (for example if a balcony is torn off in whole or in part, argued from Article 12, items 1 and 2 of the POA). On that basis, the owner of premises is also obligated to incur expenses related to maintaining the part of balcony (loggia) used exclusively to satisfy their residential needs. On the other hand, expenses to maintain structural elements of a balcony (loggia) forming common real estate are incurred by the housing association.

In consequence, each part whose meaning (function) extends beyond the bounds of separate premises should be considered as belonging to common real estate. In legal theory, it was precisely the understanding of the notion of “common real estate” that was subject to criticism due to the legislator’s use of a negative definition. Such a position is presented by among others Jerzy Ignatowicz who argues that the failure of the legislator to offer a clear definition of how common real estate should be understood is the source of “obvious misunderstandings” concerning the interpretation of “common real estate,”[22] which may cause justified interpretative doubts when applying law (delimitation of premises and common real estate).[23] A similar position in legal theory is also upheld by Gerard Bieniek who asserts that the wording of Article

[20] *Funkcja społeczna, treść i charakter prawny odrębnej własności lokali,* red. Z. Radwański, „Studia Cywilistyczne” 1968, t. 11, s. 74.

[21] Wyrok Sądu Okręgowego w Piotrkowie Trybunalskim z dnia 6 października 2016 r., I C 1441/15, Legalis nr 2083455.

[22] J. Ignatowicz, *Komentarz do ustawy o własności lokali.* Warszawa 1995, s. 32-33.

[23] Wyrok Sądu Okręgowego w Piotrkowie Trybunalskim z dnia 6 października 2016 r., I C 1441/15, Legalis nr 2083455.

3(2), "not used exclusively by owners of premises," is rather imprecise and ambiguous, because common real estate may include elements whose connection to separated premises varies.[24] In our opinion, such an understanding of this provision does not meet current normative needs (considering that legal regulations should be definite), as it combines, in fact, a negative definition and an enumeration of examples of common real estate. This construct, as can be seen when analysing the decisions of common courts and partially also administrative courts, is now giving rise to rather numerous interpretative doubts. The very reference to the construct of common real estate defined in Article 3(2) of the POA, even in situations when balconies, loggias and terraces are indeed used exclusively by owners of premises (because they can be accessed solely from inside residential premises) is also insufficient and does not in any case remove the interpretative doubts on how to define common real estate and its bounds.[25] An analysis of court decisions we conducted points to numerous interpretative doubts as regards delimitation of premises and common real estate.

4. Normative classification of a balcony (loggia) as an appurtenant or auxiliary room

The classification of a balcony (and also a loggia) as either so-called appurtenant or auxiliary room in separated premises or a part of common real estate has not been explicitly regulated in provisions and decided in jurisprudence so far. On the other hand, the terminology adopted in the POA, and especially the definition of "self-standing residential premises," "auxiliary room," and "appurtenant room," have been soundly criticised in legal theory by Jerzy Skąpski, for whom the expressions used by the legislator are merely "comic oddities,"[26] and hence "not worth one line of writing."[27] A critical position in this respect is also taken by Edward Drozd who asserts that: "distinguishing auxiliary rooms in addition to appurtenant rooms serves only to introduce terminological turmoil and has no other purpose. This is a nicety fit for scholastics or Talmudic scholars." The theorists cited above suggest that any potential doubts related to the definition and understanding of the expressions used will be decided by jurisprudence on a case-by-case basis. Likewise, in the opinion of Ryszard Strzelczyk the terminology now used in the Premises Ownership Act causes numerous controversies and destabilises the legal environment. Using a linguistic interpretation

[24] G. Bieniek, [w:] G. Bieniek, S. Rudnicki, *Nieruchomości. Problematyka prawna.* Warszawa. 2013, s. 397.

[25] Wyrok Sądu Okręgowego w Warszawie z dnia 11 maja 2018 r., III C 1275/17, Legalis nr 2127362.

[26] J. Skąpski, *Własność lokali w świetle ustawy z 24 czerwca 1994 r.,* „Kwartalnik Prawa Prywatnego" 1996, z. 2, s. 211.

[27] *Ibidem, s.* 211 *in fine.*

of statutory expressions, the author supports following common sense in construing the meaning of "room," which excludes parking space in an underground garage or, even more so, a balcony or loggia.[28] A similar position is also presented by Gerard Bieniek, according to whom a balcony cannot be classified as an auxiliary room in the meaning of Article 2(2) of the POA because it is not a room at all but a partially open space, which makes it impossible to classify structures of this kind as rooms (understood as spaces partitioned by durable walls).[29] An opposite view is offered by Ewa Bończak-Kucharczyk who asserts that a balcony (loggia) undoubtedly serve to satisfy residential needs of people (as a place of relaxation), and thereby show a functional connection to the rest of the premises. Hence, in the opinion of that author, a balcony (loggia) should be classified as an auxiliary room within the premises, and the very fact that a balcony is situated outside the bounds of premises is not enough to exclude it from the description.[30] Similarly, in the opinion of Karol Ryszkowski a balcony "used exclusively by the owner of the premises and entered exclusively from inside the premises forms an auxiliary room of such premises" and therefore that author postulates that the current wording of Article 2 of the POA should be amended by making it more specific that a balcony is an auxiliary room of separate residential premises[31] and expanding the cited article by another editing unit which would include a special definition of a balcony.[32]

The jurisprudence of the Supreme Court and common courts, on the other hand, offers the idea that the category of "appurtenant room" as a constituent part of premises in its functional meaning is flexible enough to "neither allows nor excludes classifying this room as an appurtenant room."[33]

When considering whether a balcony or loggia are appurtenant or auxiliary rooms, one should cite the contents of Article 2(2) of the POA, which defines self-

[28] R. Strzelczyk, *Prawo nieruchomości,* Warszawa 2011, s. 67.

[29] G. Bieniek, *Odrębna własność lokali,* [w:] G. Bieniek, S. Rudnicki. *Nieruchomości. Problematyka prawna,* Warszawa 2011, s. 417.

[30] E. Bończak-Kucharczyk, *Własność lokali i wspólnota mieszkaniowa. Komentarz,* wyd. III, LEX (el.); *eadem, Ochrona praw lokatorów. Najem i niektóre inne formy odpłatnego używania mieszkań w świetle nowych przepisów,* Warszawa 2007, s. 33-45.

[31] K. Ryszkowski *Charakter prawny balkonu, który służy do wyłącznego użytku właściciela lokalu,* [w:] E. Badura, A. Kaźmierczak, *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,* s. 99-107.

[32] Tj. art. 2 ust. 2^1 u.w.l. o następującej treści: „Balkon, który służy do wyłącznego użytku właściciela samodzielnego lokalu mieszkalnego z wejściem prowadzącym wyłącznie do tego lokalu stanowi pomieszczenie pomocnicze". In our opinion, if the currently applicable Article 2 of the POA would need to be changed at all as suggested by K. Ryszkowski, the following statement should be added after the current wording of Article 2, item 2: "The provision applies accordingly to self-standing premises used according to their designation for purposes other than residence and to balconies, loggias and terraces" (our emphasis).

[33] Postanowienie Sądu Najwyższego z dnia 19 maja 2004 r., I CK 696/03, Legalis nr 68328.

standing residential premises as a room or set of rooms in a building separated by durable walls and meant for the permanent residence of people, which together with auxiliary rooms serve to satisfy their housing needs, and in accordance with Article 4(2), the premises may also include its constituent parts or rooms, even if not directly adjacent or situated within the land real estate outside the building in which such particular premises were separated, in particular a cellar, storage room or garage (appurtenant rooms). Auxiliary rooms include those that facilitate or even allow satisfying housing needs, such as a bathroom, WC, internal communication routes, mezzanines or cupboards. Accordingly, they may not include also parts of premises not separated by walls, for example an open internal staircase, because it is their functional relationship to rooms which classifies them as auxiliary rooms.[34] Appurtenant rooms, in turn, may be located outside the premises and be used for another purpose, satisfying needs other than housing needs (e.g. cellar, garage, private storage room). It is also noted that such classification of a balcony or loggia, which undoubtedly also serves to satisfy housing needs, for example relaxation, is supported by its functional relationship to the rest of the premises. A decision of the Świdnica Regional Court of 7 May 2013, II Cz 403/13[35] directly states that space serving as a loggia constitutes a room. In a judgement of the Poznań Provincial Administrative Court of 18 January 2018, II SA/Po 884/17 however, a view was advanced that it is the functional relationship and not being separated by walls that makes it necessary to classify a balcony (loggia) as an auxiliary room in the meaning of Article 2, item 2 of the POA.[36] A similar conclusion was adopted in the judgement of the Warsaw Appellate Court of 10 December 2015, VI Aca 1705/14,[37] which contains the opinion that a loggia constitutes an auxiliary room used solely to satisfy housing needs of persons living in the premises and therefore cannot be included in the common parts of real estate.[38] The judgement of the Olsztyn Regional Court of 25 January 2016, I C 299/15[39], likewise stressed that balconies (loggias) should be treated, as per Article 2(4) of the POA, as appurtenant rooms because they are used

[34] Postanowienie Sądu Najwyższego z dnia 14 lipca 2010 r., V CSK 31/10, LEX nr 610138.

[35] Legalis nr 2161405.

[36] Wyrok Wojewódzkiego Sądu Administracyjnego w Poznaniu z dnia 18 stycznia 2018 r., II SA/Po 884/17, Legalis nr 1715669.

[37] Legalis nr 2124440.

[38] Por. także: wyrok Sądu Okręgowego w Krakowie z dnia 14 listopada 2013 r., I C 1454/13, Legalis nr 2048627; wyrok Sądu Apelacyjnego w Łodzi z dnia 12 sierpnia 2015 r., I ACa 168/15, Legalis nr 2055274; wyrok Sądu Apelacyjnego w Katowicach z dnia 20 września 2016 r., I ACa 163/16, Legalis nr 1522787; wyrok Sądu Apelacyjnego w Łodzi z dnia 12 marca 2013 r., I ACa 1241/12, Legalis nr 1024579.

[39] Legalis nr 1986213.

solely by the owners of these premises.[40] In the facts under consideration, the court conducted detailed search for evidence, determining the functions of balconies (loggias) in the building on the basis of documentary evidence (i.e. agreements establishing separate ownership of premises and the regulations of the housing associations).[41] Because the essential feature of balconies is being physically adjacent to a building and used exclusively by apartment owners, the Regional Court considered that they cannot constitute a common area of real estate because they are only a constituent part of residential premises as an auxiliary room in the meaning of Article 2(4) of the POA.

An attempt to delimit the notions of “auxiliary room” and “appurtenant room” was undertaken among others in a judgement of the Supreme Court of 7 March 2003, III RN 29/02,[42] where it was stated that, insofar as an auxiliary room is used to satisfy the housing needs of persons who occupy such space for permanent residence, an appurtenant room, even though it is a normative concept, does not demonstrate such connection. In a functional sense, such room is not a “space” whose purpose is to directly satisfy “housing” needs of people, but to satisfy “other” needs of those who use "self-standing residential premises.” In a resolution of 7 March 2008, II CZP 10/08[43], the Supreme Court directly classified a balcony as an auxiliary room. Similarly, one can hardly agree with the view presented in a decision of the Supreme Court of 14 July 2010, V CSK 31/10,[44] according to which a balcony or loggia used exclusively by the owner of premises constituting separate property are subject to disclosure in the land and mortgage register, division I-O, section 1.4.4, field “description of premises.” Firstly, neither the Land Register and Mortgages Act nor the regulation of the Minister of Justice of 15 February 2016 on establishing and maintaining land and mortgage registers in a teleinformation system[45] provide for a possibility of registering information about a balcony or loggia in the “description of premises” or “appurtenant room” fields of the land and mortgage register, and therefore adding such information there would

[40] Podobnie m.in. w: wyroku Sądu Okręgowego w Olsztynie z dnia 25 stycznia 2016 r., I C 299/15, Legalis nr 1986213, oraz w wyroku Sądu Najwyższego z dnia 3 października 2002 r., III RN 153/01, LEX nr 76824; kwestie terminologiczne - por. także: postanowienie Trybunału Konstytucyjnego z dnia 14 grudnia 2005 r., SK 24/05. Legalis nr 72066; ogólnie na temat pomieszczenia przynależnego w kontekście konstytucyjności przepisów ustawy o własności lokali: także w wyroku Trybunału Konstytucyjnego z dnia 5 marca 2002 r., SK 22/00, Legalis nr 53820; i w postanowieniu Sądu Najwyższego z dnia 19 maja 2004 r., I CK 696/03, Legalis nr 68328.

[41] Por. także: wyrok Sądu Okręgowego w Jeleniej Górze z dnia 15 listopada 2013 r., I C 1314/13, Legalis nr 2151212; wyrok Sądu Apelacyjnego w Gdańsku z dnia 24 czerwca 2008 r., I ACa 1190/07, Legalis nr 177220.

[42] Legalis nr 56066.

[43] Legalis nr 95368.

[44] LEX nr 610138.

[45] Rozporządzenie Ministra Sprawiedliwości z dnia 15 lutego 2016 r. w sprawie zakładania i prowadzenia ksiąg wieczystych w systemie teleinformatycznym (Dz.U. z 2016 r.. poz. 312 ze zm.).

be not just redundant, but also contrary to the aforesaid normative instruments. Secondly, extending the description of premises with elements other than rooms would result in discrepancy with cadastral data which do not provide for disclosing elements such as balconies, loggias or terraces. Undoubtedly, such elements also do not meet the technical requirements for a room referred to in the Construction Law Act and primarily in the regulation of the Minister of Infrastructure of 12 April 2022 on technical conditions to be fulfilled by buildings and their locations. This regulation defines an apartment as a set of residential and auxiliary premises with a separate entrance, partitioned by durable building envelopes and allowing continuous residence of people, while the surface of balconies, terraces and loggias is included in the so-called gross building volume (external part volume). In this respect additional assistance may be provided by the definition of "usable floor space of premises and rooms attached to premises" which according to Article 2(1)(7) in connection with point 2 of the Act on protection of lodgers, housing resources of communes and amending the Civil Code of 21 June 2001[46] is the space of all rooms included in the premises, excluding however the surface of balconies, terraces and loggias. Incidentally, the sphere of construction law is not free from controversies related to the normative classification of reconstructing a building in the context of separating (closing) a loggia or balcony. Changes to the body of the building due to closing areas previously open and available from the outside lead to closing the entire body and altering its spatial boundaries, which consequently results in the building being extended with extra rooms that replace formerly unscreened and freely available spaces, which thereby lose their character as a balcony or loggia.[47]

It appears that to interpret the notion of "balcony" or "loggia," we must recognise as essential the physical feature that describes it as an element of the building's architecture "not closed on all sides" (as specified by norms on determining surface area) with all the resulting consequences, such as lack of central heating, lack of suitable isolation or not being technically self-standing, since "they are so technically independent of the building that they can be dismantled without greatly affecting the building."[48] The parameters noted above should in the view of the authors be enough to deny that these elements have the nature of rooms, whether auxiliary or appurtenant. The deciding factor should not be so much the architectural concept of a

[46] Tekst jedn.: z dnia 2 grudnia 2021 r. (Dz.U. z 2022 r., poz. 172 ze zm.), dalej jako: u.o.p.l.

[47] Wyrok Wojewódzkiego Sądu Administracyjnego w Poznaniu z dnia 25 września 2013 r., IV SA/Po 640/13, LEX nr 1491174; podobnie przyjmuję się w stosunku do zabudowy loggii: por. wyrok Wojewódzkiego Sądu Administracyjnego w Olsztynie z dnia 21 kwietnia 2011 r., II SA/OI 184/11, LEX nr 786924, jak i zabudowy tarasu - wyrok Naczelnego Sądu Administracyjnego z dnia 17 lipca 2013 r.. II OSK 668/12, LEX nr 1559852.

[48] Wyrok Naczelnego Sądu Administracyjnego z dnia 9 marca 2021 r., II OSK 1504/18, Legalis nr 2566537.

particular building seen through the lens of functions a balcony should have, but rather the fact whether the balcony is separated (closed by walls) enough so that it can be treated as a room at all. In our opinion, the view that there is a need to unduly extend the notion of "room," in particular to things or rights which do not have such nature (for example are not separated by durable walls), does not appear justified. The interpretation of Article 2(2) of the POA in connection with Article 13(1), which classifies balconies (loggias) as an auxiliary room, since "it serves solely to satisfy the housing needs of persons entitled to use the residential premises, and as such is also a constituent part of the premises" remains erroneous in the view of the authors. In our opinion, one possible solution would be to classify real estate in the form of premises as complex things from the viewpoint of civil law.[49] Balconies (loggias, terraces) would then be treated as the constituent parts of such things in the meaning of Article 47 of the Civil Code.[50] Obviously, such parts do not and can not have a different ownership status, because physically they merely belong to particular premises while offering specific recreational functions. A balcony (loggia, terrace) is therefore a constituent part of a complex thing (real estate in the form of premises)[51] with a distinct structure and floor space. They are not, however, separate rooms, because these should be separated by walls on all sides. The notion of "room" does, after all, include the element of separating it from the outside space (with walls in the view of the Supreme Court and legal theorists). This is supported by the linguistic interpretation of expressions used by the legislator in the Premises Ownership Act and the adopted wording of Article 2(2) and (4) of the POA, in which balconies as separate auxiliary rooms or rooms belonging to premises are nowhere mentioned. We can also turn for assistance to the definition of usable floor space found in Article 2(7) of the POA, according to which only spaces separated by durable walls are classified by the legislator as rooms, while balconies, loggias and terraces are explicitly denied that status. One should also approve the dominating jurisprudential view preferring the dual property law status of balconies, loggias or terraces[52] as constituent part of specific premises while

[49] Podobnie w uzasadnieniu wyroku Sądu Najwyższego z dnia 28 czerwca 2002 r., I CK 5/02, Legalis nr 57312; w doktrynie na podobną kwalifikację wskazuje m.in. S. Grzybowski, *System Prawa Cywilnego,* t. 1, *Część ogólna,* Wrocław 1985, s. 417; T. Sokołowski, [w:] *Kodeks cywilny. Komentarz,* red. M. Gutowski, Warszawa 2016, s. 285.

[50] Pewną odmianę tego poglądu reprezentuje M. Nazar, według którego ogół lokali nie wyodrębnionych stanowi tzw. złożoną nieruchomość lokalową, jako część budynku w rozumieniu art. 46 § 1 k.c.; por. M. Nazar, *Odrębna własność lokali (wybrane zagadnienia),* „Państwo i Prawo" 1995, nr 10-11, s. 30; pogląd M. Nazara jest podzielany w orzecznictwie sądów administracyjnych - por. wyrok Naczelnego Sądu Administracyjnego z dnia 14 grudnia 2017 r., II FSK 2212/15, Legalis nr 1728950; wyrok Naczelnego Sądu Administracyjnego z dnia 5 lutego 2010 r., II FSK 1414/08, Legalis nr 223471; wyroki Wojewódzkiego Sądu Administracyjnego w Łodzi z dnia 4 listopada 2020 r., wydane w sprawach: I SA/Łd 271/20, Legalis nr 2547877 i I SA/Łd 270/20, Legalis nr 2509466.

[51] A. Doliwa, *op. cit.,* Warszawa 2021, s. 675.

[52] Por. wyrok Sądu Apelacyjnego w Katowicach z dnia 20 września 2016 r., I ACa 163/16, Legalis nr 1522787; wyrok Sądu Apelacyjnego w Warszawie z dnia 10 grudnia 2015 r., VI ACa 1705/14, Legalis; wyrok Sądu

postulating that future regulations of statutory rank should set the bounds of common real estate with sufficient precision (for example by redefining Article 3(2) of the POA). This view is justified by practical doubts appearing rather frequently in current jurisprudence of the Supreme Court and lower instance courts, as well as by references to historical interpretation of provisions related to ownership of premises and comparative construction by reference to similar legislative solutions present in certain legal systems (Spain, Germany, Switzerland).

It is worth here to refer to the now obsolete regulation of the President of the Republic of Poland 24 October 1934 on ownership of premises,[53] which introduced a wide-ranging, open[54] classification of common real estate including "land, courtyards, gardens, foundations, external walls, structural walls and walls isolating individual premises excluded from common property, roofs, chimneys and any parts of the building and any equipment to be used by all owners of premises, such as attics, cellars, staircases, corridors, gates, common toilets, common bathrooms, laundry rooms, drying rooms, elevators, water, sewage, central heating and lighting installations etc. which form the joint property of all owners of individual premises." A similar legislative solution can be found in the contents of the currently applicable Article 396 of the Spanish Civil Code,[55] which lists the elements of common real estate in considerable detail. In this provision, the Spanish legislator makes a peculiar division of common real estate into basic (land, foundations, roof) and additional structural elements of the building, under which balconies (loggias, terraces) are classified, precisely stating that they include also elements closing them off from the outside, as well as the façade ("image") itself. On the other hand, a slightly different construct was used in the Swiss Civil Code, where Article 712 and Article 712b(1) state that the delimitation of floors and their parts must be made in the so-called condominium declaration.[56] In essence, it was decided that premises (whether residential or commercial) should form a single whole, be sufficiently separated from other premises,

Okręgowego w Jeleniej Górze z dnia 15 listopada 2013 r., I C 1314/13, Legalis nr 2151212; wyrok Sądu Apelacyjnego w Warszawie z dnia 16 stycznia 2014 r., I ACa 763/13, Legalis nr 797461; wyrok Sądu Apelacyjnego w Łodzi z dnia 6 grudnia 2013 r., I ACa 773/13, Legalis nr 761123.

[53] Dz.U. Nr 94, poz. 848 ze zm.

[54] Pogląd o taksacyjnym wyliczeniu elementów nieruchomości wspólnej prezentowany w uzasadnieniu wyroku Sądu Okręgowego w Piotrkowie Trybunalskim z dnia 6 października 2016 r., I C 1441/15, Legalis nr 2083455 jest w naszej ocenie błędny jako sprzeczny z literalnym brzmieniem komentowanego przepisu.

[55] *Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil.* Powołano za: https://www.boe.es/eli/es/rd/1889/07/24/(1), [dostęp: 8.06.2022]. Miejsce pierwotnej publikacji: Gaceta de Madrid» núm. 206, de 25 de julio de 1889, páginas 249 a 259 (11 págs.)

[56] Ustawa z dnia 10 grudnia 1907 r. - *Schweizerisches Zivilgesetzbuch* (ZGB), SR 210, AS 2020. Powołano za: https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/24/233_245_233/20200101/de/pdf-a/fedlex-data-admin-ch-eli-cc-24-233_245_233-20200101-de-pdf-a.pdf, [dostęp: 7.06.2022].

and the bounds of the "object of exclusive right" should be precisely set in the declaration establishing that right. It is worth here to cite a similar view found in the justification to the judgement of the Supreme Court of 22 October 2004, II CK 98/04,[57] in which it was postulated that an agreement establishing separate ownership of the first premises, due to the fact of allocating shares which requires determining the usable floor space of all premises together with rooms belonging to them, should be decisive in determining what is and what is not common real estate. The meaning is that the decision on what building elements (parts) are not included in the sum of usable floor space of all self-standing premises in the building in the meaning of Article 2(1) of the POA, and hence what belongs to common real estate, should be made when establishing separate ownership of the first premises in particular real estate.

To supplement this discussion, one can also cite the jurisprudence of German courts, which also presented views postulating the obligation to retain the structural unity of the building in the context of distinguishing between common areas of building real estate and individual areas related to the ownership of specific residential premises. This issue was tackled among others in the judgement of the Nürnberg-Fürth Land Court[58] of 19 January 1990 issued in case with reference number 7 S 6265/89, which settled a dispute concerning the possibility of using a balcony for purposes related to drying clothes and erecting a suitable installation on it.[59] The court has ultimately allowed this possibility, pointing to the fact that any structural changes that may occur within a balcony cannot alter its usability or image. The purpose is to maintain a uniform visual standard of all balconies located in a particular building. For this very reason, the façade of the building, or its external part, was classified among common areas of real estate.

5. Conclusions

Summarising the discussions on how to qualify a balcony (loggia) in legal norms, the authors assert that one cannot approve of the thesis formulated by M. Niedośpiał in a critical gloss to the resolution of the Supreme Court of 7 March 2008, III CZP 10/08, according to whom "a balcony forms either a constituent part of the premises or the common real estate (exclusive disjunction), there is no other possibility. As it appears, it is not possible for the internal part of a balcony belong to the premises and the

[57] Legalis nr 304487.

[58] *Landrecht.*

[59] Źródło: https://www.kostenlose-urteile.de/LG-Nuernberg-Fuerth_7-S-626589_Mieter-duerfen-Waesche-auf-dem-Balkon-trocknen.news9722.htm, [dostęp: 8.06.2022],

external part to the common real estate."[60] At any rate, a similar position in this respect was also adopted by the Supreme Court in its decision of 19 May 2004, I CK 696/03,[61] where it stated that balconies may, depending on the architectural concept of a particular building, form part of the façade whose function is purely ornamental, be accessible to all building residents or belong to individual premises and be used exclusively by their owners.[62] Although the general idea to make the understanding of balcony status in property law uniform remains valid, approving a view that classifies a balcony in its entirety as a "constituent part of the premises" would be contrary to the basic principles of construction law. Such a classification of balconies, loggias and terraces, even though such spaces are usually meant for individual use, is justified by the fact that they are inherently an element of the façade[63] and the installations found thereon, and hence any renovations thereof should be done simultaneously and uniformly. Generally, the obligation to maintain such parts of the building in a proper and aesthetic condition rests on the housing association.[64] Care about the external appearance of the entire real estate, which includes such elements as awnings, balconies or the colour of walls, is part and parcel of obligations of the housing association and not individual residents. It would be difficult to imagine a situation in which each resident painted a part of the building in any colour they like, or installed a different awning over their balcony – made from varied materials, with varied supports and varied parameters – or no awning at all. Likewise, the potential use of the external side of balconies for advertising purposes, among others, is considered use of an area included in common real estate.[65] One should also consider that a poor technical condition of balconies, terraces and loggias has a negative impact on common real estate while creating a risk for residents and others who use communication routes and affecting the shape of the building and façade aesthetic. It should also be pointed out that an individual user of premises is unable to inspect the technical condition of their balcony, especially its underside, and to renovate it without the consent of other

[60] M. Niedośpiał, *Glosa do uchwały Sądu Najwyższego z dnia 7 marca 2008 r., III CZP 10/08,* „Przegląd Sądowy" 2010, nr 10. s. 118.

[61] Legalis nr 68328.

[62] Podobnie w wyroku Sądu Najwyższego z dnia 3 października 2002 r., III RN 153/01, Legalis nr 57113; R. Strzelczyk, *Glosa do wyroku SN z dnia 3 października 2002 r., III RN 153/01,* „Nowy Przegląd Notarialny" 2012, nr 4, s. 111-113.

[63] Chodzi o tzw. lico bądź fasadę, czyli część frontową muru, cokołu lub elewacji budynku wraz ze wszystkimi występującymi na niej elementami zdobiącymi.

[64] Wyrok Wojewódzkiego Sądu Administracyjnego w Łodzi z dnia 12 sierpnia 2015 r., I ACa 168/15, Legalis nr 2055274.

[65] Wyrok Sądu Rejonowego w Koninie z dnia 23 marca 2016 r., V GC 841/15, Legalis nr 2110444.

owners.[66] An attempt to make the used terminology uniform should therefore take into account not only civil law arguments, but also the required elements of construction law related to the architectural structure of the building. This was mentioned among others in a judgement of the Supreme Administrative Court of 9 March 2021, II OŚK 1504/18,[67] where a view was offered that common areas of the building include also structural elements of a balcony, such as the ceiling (which is simultaneously the underside of a balcony located on a higher story), isolating layers[68] or walls in the case of a loggia. Balconies (loggias) are also usually the dominant visual element of the external part of the building and have a major impact on the aesthetic of the façade and achieving the purpose of limiting the loss of heat.[69] For this reason, parts of the building located outside separate premises and having a decisive effect on the façade must, as a rule, be treated as parts of common real estate. This is because they are classified as structural elements of the building and not parts attached to residential premises. In the context of construction law, this view finds support in the contents of Article 48, item 1 of the Construction Law Act which uses the notion of "structure or part thereof." However, a balcony (loggia) or terrace are not considered able to form self-standing structures or even parts thereof, because as a rule they cannot be dismantled without a major intrusion into the remainder of the structure (body of the building).[70] The view concerning lack of independence of a balcony and the impossibility to qualify it as a structure is commonly accepted in the jurisprudence of administrative courts.[71]

6. Dispute about the property law status of a balcony (loggia) in jurisprudence

[66] Na co zwrócono uwagę m.in. w wyroku Naczelnego Sądu Administracyjnego we Wrocławiu z dnia 28 lutego 2006 r., II SA/Wr 466/04. Legalis nr 384790, oraz w wyroku Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 2 października 2019 r., VII SA/Wa 596/19, Legalis nr 2520249.

[67] Legalis nr 2566537.

[68] Jednak w wyroku Naczelnego Sądu Administracyjnego z dnia 8 maja 2018 r., II OSK 2979/17, Legalis nr 1791049 wskazano, że: „Dołożenie nowego dotychczas nie istniejącego elementu docieplenia, mającego zasięg na loggię, która stanowi część składową lokalu mieszkalnego nie jest zatem częścią wspólną i będzie mieć wpływ na tę część składową lokalu".

[69] Wyrok Naczelnego Sądu Administracyjnego z dnia 8 maja 2018 r., II OSK 2979/17, Legalis nr 1791049.

[70] Wyrok Naczelnego Sądu Administracyjnego z dnia 1 września 2015 r., II OSK 28/14, Legalis nr 1395604.

[71] Tak m.in. w: wyroku Naczelnego Sądu Administracyjnego z dnia 9 marca 2021 r., II OSK 1504/18, Legalis nr 2566537; wyroku Wojewódzkiego Sądu Administracyjnego w Poznaniu z dnia 18 stycznia 2018 r., II SA/Po 884/17, Legalis nr 1715669; wyroku Wojewódzkiego Sądu Administracyjnego w Rzeszowie z dnia 28 stycznia 2016 r., II SA/Rz 668/15, Legalis nr 1444244; wyroku Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 20 marca 2014 r., VII SA/Wa 2066/13, Legalis nr 907966; wyroku Wojewódzkiego Sądu Administracyjnego w Krakowie z dnia 4 listopada 2015 r., II SA/Kr 941/15, Legalis nr 1371333.

The above analysis shows that there is no uniform view in legal provisions as well as in jurisprudence and legal theory on how to determine the property law status of a balcony (loggia or terrace). The fuzziness of the notion of a balcony (loggia) has been many times mentioned in jurisprudence of the Supreme Court. The resolution of the Supreme Court of 7 March 2008, III CZP 10/08,[72] stated that "the notion of 'balcony' as a part of building which is also a constituent part of residential premises should be understood to include only the part meant exclusively for the use of the owner of the premises and persons living together with them. The balcony is an internal space, usually separated by means of floor and a railing, and sometimes also by side walls and ceiling, always to the exclusion of the front wall, whose lack allows this part of the building to be recognised as a balcony and used according to its purpose. Considering the above, elements of the architectural structure of a balcony which are permanently connected to the body of the building and usually situated outside the space used for exclusively satisfying the housing needs of persons living on the premises should be recognised as building parts not meant for the exclusive use of the owner of the premises and consequently, under Article 3, item 2 of the POA, should be classified as forming common real estate."

In a resolution of 19 June 2007, III CZP 59/07,[73] the Supreme Court, referring to the issue of responsibility for costs of renovating a balcony, stated that such responsibility should be divided by the owners themselves or the owners of premises making up a housing association, depending on whether renovation costs apply to the part used solely by the owner of single premises or to architectural elements of the balcony permanently attached to the body of the building. This idea was detailed in the judgement of the Katowice Appellate Court of 13 August 2013, I ACa 484/13.[74] The judgement noted that in premises located on an above-ground story, a floor made of boards, parquetry or tiles is meant for the exclusive use of the owner of the premises. The ceiling in the form or finishing or lighting is meant exclusively for general use and is an element for whose condition the housing association is responsible. A partly divergent position is however found in the judgement of the Poznań Appellate Court of 31 January 2018, I Aca 840/17,[75] where it was stated that insofar as balconies, terraces or loggias form the roof of residential premises found underneath, their side partitions are load-bearing walls, and floors of balconies overhanging the building serve as an awning for balconies located below, it should be considered that they usually serve at

[72] Legalis nr 95368.

[73] Legalis nr 83243.

[74] Legalis nr 1025587.

[75] Legalis nr 1829190.

least two apartments and are part of the architectural assumptions of the building. In the cited judgement, the Appellate Court in Poznań approved of recognising the dual property law status of terraces and balconies, because such structures are not used solely to satisfy the housing needs of owners of residential premises. In addition, they are important for the architectural concept of the entire building and therefore cannot be classified solely as a constituent part of particular residential premises. Attention was paid to the fact that certain construction elements such as the balcony slab are due to their nature combining the functions of roof of one premises and the ceiling of another. For this reason it was recognised that the balcony structure is common to both, because it does not serve the owner of single premises only. The structure was deemed to consist in particular of horizontal isolation and concrete underlayment securing such isolation, as well as the façade of the balcony. Specific practical difficulties with distinguishing common parts of a balcony from parts meant exclusively for the use of owners of individual premises as their constituent parts were in turn noted in the judgement of the Warsaw Appellate Court of 16 January 2014, I Aca 763/13.[76] In the cited ruling, it was considered that one cannot, in particular in the case under consideration, divide the internal part of railing of a balcony (loggia) which might possibly form a constituent part of the premises from its external part which is a piece of the common real estate (façade). In the opinion of the ruling panel, such distinction would generally not be possible and any attempts to make it more precise, for example by a resolution of the housing association, would not be rational considering the proper maintenance of these parts. It was assumed that while the very space of a balcony, loggia or terrace might be classified as a constituent part of premises (auxiliary room), all “distinguishing elements” of such space would nevertheless form a piece of common real estate in the meaning of Article 3(2) of the POA. This is supported not so much by normative considerations, but rather by purely practical aspects, i.e. those related to the need to maintain the elements of a balcony (loggia) responsible for the safety and condition of the building’s façade in a suitable condition. The view that the property law structure of a balcony consists of three elements and is subject to separate regimes was also cited. The three elements are: 1. the “structural” part of a balcony as a constituent part of real estate, 2. floors and railings understood as constituent parts of premises adjacent to the balcony, 3. the lower part of the balcony slab, classified as the constituent part of premises located underneath the balcony. Likewise, the judgement of the Łódź Appellate Court of 12 August 2015, I ACa[77], noted that it was not possible to precisely determine the delineation between the ownership right of the

[76] Legalis nr 797461.

[77] Legalis nr 2055274.

individual owner and common real estate. The practical nature of balconies itself, it was further argued, suggests that they are usually used by at least two apartments (as a peculiar terrace or awning) and also form a structural element of real estate.

One should also take note of the view that it is possible to establish a so-called easement of balcony as the right to project part of the structure of the building into the outside space.[78] Such a normative construct can be classified as a subtype of land easement (Article 285 of the Civil Code).

7. Summary – conclusions concerning current law and proposals for future regulations

To conclude, in the view of the authors the lack of uniform definitions of balconies, loggias and terraces leads to the necessity of construing the provisions of private law, in particular those of construction law and tax law. The proper identification of the above notions is of essential importance for entities vested with property rights to real estate and obligation rights related to use of real estate. As assessed by the authors, the conducted analysis leads to the conclusion that the issue of rights of balconies, loggias and terraces should be regulated in legal norms. Under currently applicable law, the definition of common real estate (Article 3(2) of the POA) which distinguishes only land and "parts of the building and structures that are not used exclusively by owners of premises," and the normative construct of "residential premises" (Article 2(2) of the POA) or "auxiliary room" (Article 2(4) of the POA), do not allow to refer them directly to the property law description of balconies (and, by analogy, of loggias or terraces). The authors believe that the practice of actually classifying these spaces as "rooms" should be abandoned, because due to their physical properties (space that is open on at least on side) and also applicable construction law properties the structure of a balcony undoubtedly deviates from such a description. There are no grounds to assume any broader interpretation of the notion of "room" compared to that used by the legislator in the POA. This statement is not contradicted by the architectural variety of buildings and (building) structures used in them. An analysis of jurisprudence practices of administrative and common courts demonstrates peculiar reliance on dictionary definitions, that is those used in everyday speech, especially due to lack of legal ones. This situation is, however, the main source of numerous discrepancies in court verdicts. In addition, it may be noted that the definitions used by common courts often do not take into account the realities of construction law.

[78] Wyrok Sądu Okręgowego w Gdańsku z dnia 8 lutego 2016 r., XV C 618/13, Legalis nr 2004706.

In current social and legal circumstances, balconies (loggias, terraces) are becoming increasingly important in practice (due to recreational, aesthetic and economic functions) and at the same time have a specific economic value. For this reason, recognising the variety of notions used and the diverse practices followed by developer companies, it appears that compliance with the principle that legal provisions should be definite requires more precision and thereby involvement on the part of the legislator. Developer practices, however, tend increasingly to divide common real estate, based on Article 206 of the Civil Code in connection with Article 1(2) and Article 12(1) of the POA, so as to grant each of the joint owners a physically separate part of (common) real estate for their own exclusive use. The view that dividing common real estate in this manner is allowed remains controversial, however. Opponents point out that this possibility is denied by the fact that some parts of common real estate (for example the staircase which allows entry to an apartment) are indispensable for every premises.[79]

One should also abandon the practice of classifying a balcony, loggia or terrace "in their entirety" as a constituent part of residential premises or common real estate as contrary to the assumptions of the POA and construction law. For this reason, a solution similar to the one adopted in the Swiss Civil Code, namely introducing a provision stipulating the obligation to set precise bounds of common real estate (and hence residential premises) already in the condominium declaration appears worthy of consideration.

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