

Nature of the appointment of judges as the constitutional prerogative of the President of the Republic of Poland

1. Pursuant to Article 179 of the Polish Constitution, “Judges are appointed by the President of the Republic of Poland on the motion of the National Council of the Judiciary for an indefinite period of time”. The appointment of judges consists of two stages: stage I – the motion of the National Council of the Judiciary, whose manner of formulation and procedure of issue are determined in the special Act and stage II – the appointment of a judge by the President of the Republic of Poland. The appointment is an independent act of an institutional and constitutional nature.
2. The competence to appoint judges constitutes the prerogative of the President of the Republic of Poland (Article 144(3)(17) of the Polish Constitution). A detailed description of the prerogative concerning the appointment of judges is included in Article 179 of the Polish Constitution. The Constitution makes the exercise thereof subject to the submission by the National Council of the Judiciary of an appropriate motion (judgement of the Constitutional Tribunal of 8 May 2012, K 7/10, OTK ZU no. 48/5A/2012).
3. The president's competence to appoint judges is an essential element of the mechanism of balancing and limiting the judiciary. (Judgement of the Polish Supreme Administrative Court of 9 October 2012, case ref. no. I OSK 1883/12). This competence is of a ruling nature and constitutes the manifestation of interaction between authorities and, more precisely, manifestation of balancing competences of the judiciary by the executive to which the President belongs (K. Weitz, Comment on Article 179 of the Constitution of the Republic of Poland, in: M. Safian, L. Bosek (ed.), Constitution of the Republic of Poland, Comment, vol. II, pp. 1045–1046, J. Sułkowski, President's rights to appoint judges 2008, no. 4, p. 54).
4. The “separation” and distinction of the judiciary refer primarily to the implementation of its basic judicial function. In the scope of the administration of justice, the executive and legislative authorities are not allowed to interfere in actions of courts and tribunals (Judgement of the Constitutional Tribunal of 8 November 2016, case ref. no. P 126/15, 89/A/2016).
5. The creation of the composition of the third pillar of power is included in the mechanism of balancing competences within the principle of the separation of powers. An essential element of this process is the competence of the President of the Republic of Poland (Article 179 of the Polish Constitution). The President’s institutional role in this scope is of a basic meaning for the assessment of the legal character and importance of the appointment to a judge’s position (Kpt 1/08); it also constitutes an essential guarantee of the constitutional standard for the right to trial (Decision of the Polish Supreme Administrative Court of 9 October 2012, case ref. no. I OSK 1883/12).
6. **The act of the appointment determines the status of a judge. Pursuant to the case law of the Constitutional Tribunal, the competence in the scope of the appointment of judges is, in the light of Article 144(3)(17) of the Polish Constitution, treated as a personal right (prerogative) of the President (sphere of their exclusive competence and liability) as well as the institutional role of the President as the supreme representative of the Republic of Poland, set out in Article 126(1) of the Polish Constitution. [decision Kpt 1/08; judgement of the Constitutional Tribunal of 5 June 2012, K 18/09, OTK ZU no. 63/6A/2012].**
7. Specifying the manner of procedure in the scope of the implementation of each stage indicated in Article 179 of the Polish Constitution, the Act may not affect directly the

competence of the President in the scope of the appointment of judges. **Article 179 of the Polish Constitution constitutes an independent and sufficient (complete) legal basis for exercising the prerogative as the official act of the President.** (decision of the Constitutional Tribunal of 19 June 2012, SK 37/08, OTK-A 2012/6/69; see also decisions of the Polish Supreme Administrative Court of 9 October 2012, I OSK 1874/12, I OSK 1875/12; decision of the Polish Supreme Administrative Court of 7 December 2017, I OSK 858/17).

8. The exercise by the President of their competence “may be specified in acts, however provided that the principle of the superiority of the Constitution expressed in Article 8 of the Polish Constitution is respected”. **The Tribunal considered “the essence of the president’s prerogative in the scope of the appointment of judges” (K 18/09) to be the absolute framework of legal regulations governing the procedure of the appointment of judges by the President.**
9. **In the light of the existing case law of the Constitutional Tribunal, it should be considered that attempts to undermine the prerogative of the President of the Republic of Poland to appoint judges, either in the form of creating a kind of judicial procedure under which it would be removed due to an alleged defective nature of the procedure leading to the appointment, or under a normative act of a sub-constitutional rank, would constitute a violation of norms concerning not only the appointment of a judge, i.e. Article 144(3)(17) and Article 179 of the Polish Constitution, but also the constitutional principle of the tenure of judges referred to in Article 180(1) of the Polish Constitution. These norms co-create a coherent and complete mechanism of the guarantee of the judicial independence. Also for this reason the legislation does not allow or provide for “verification” mechanisms of the appointment of judges.**