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Dissolution of Dáil Éireann: Constitutional principles

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Introduction: The power of dissolution and its significance

The power to dissolve parliament is significant because with it, crucially, comes the power to control the timing of general elections. This, in turn, gives the holder of that power a relatively greater measure of influence within the political system. Therefore, constitutional rules and principles concerning the dissolution of parliament have an important influence on political life in practice. Where a constitution vests this power in a Prime Minister or equivalent, this tends to strengthen his or her hand both in relation to the parliament as well as the other members of the government. By contrast, constitutional rules that limit the Prime Minister's power to decide a dissolution may have some effect in moderating his or her power within the political system. A similar effect might be achieved, alternatively, through constitutional provisions that allow for the timing of general elections to be fixed in law.

The issue is important, then, because the constitutional provisions must strike a balance between allocating clear responsibility for deciding the timing of elections, on the one hand, and moderating the political effects that stem from this power, on the other. A constitution may grant the Prime Minister or leader of government a relatively unfettered power to trigger general elections at will. Alternatively, it may be thought desirable either to limit this power, or to remove it altogether by allowing the timing of elections to be fixed in law.

In summary, the Irish Constitution does not provide for a fixed parliamentary term, but only a maximum parliamentary term. The Taoiseach enjoys the power to request a dissolution and thus, to trigger a general election at any point before the expiry of this term. The President has the power to refuse this request only where the Taoiseach has lost the support of the majority of Dáil Éireann ("the Dáil"). The parameters of this presidential power are somewhat uncertain, and it has never been used.

The term of Dáil Éireann

The Constitution does not set down a fixed term for the Dáil. Instead, it only provides for a *maximum term*, while giving the Taoiseach discretion – subject to limits – to trigger a dissolution of the Dáil at an earlier point. Article 16.5 provides:

> The same Dáil Éireann shall not continue for a longer period than seven years from the date of its first meeting: a shorter period may be fixed by law.

Ever since the Electoral (Amendment) Act, 1927, the maximum period has been set at five years.[1] There is nothing, constitutionally, to prevent this from being shortened or extended (to a maximum of seven years) by an ordinary Act of the Oireachtas.

The Taoiseach's power to advise dissolution

While a maximum term for the Dáil is set in law, there is no minimum term. Subject to one specific exception described below, the Taoiseach otherwise enjoys an unlimited discretionary power to advise a dissolution of the Dáil at any time within the maximum period.

Formally speaking, it is the President who summons and dissolves Dáil Éireann. However, in most instances, this is purely a formality and the President is advised – which effectively means, *instructed*, by the Taoiseach – as to the timing of the dissolution. This is made clear in Article 13.2.1°, which provides:

> Dáil Éireann shall be summoned and dissolved by the President on the advice of the Taoiseach.

Limits on the Taoiseach's power

The Taoiseach's power to advise dissolution of the Dáil is of considerable significance in Irish politics because of the power and influence we assume it grants him vis-à-vis the Dáil. However, the power to advise dissolution is not absolute. There is some provision, as in other constitutional systems, to counterbalance this power or to safeguard against its potential misuse. This power might be misused, it can be assumed, in at least two specific ways. Firstly, where a Taoiseach has lost the confidence of the Dáil, and is therefore obliged to resign, the power to advise dissolution might be used opportunistically in the hope that a "snap" general election will return the Taoiseach to power. Secondly, the threat of dissolution, whether implicit or otherwise, might be used to exert some measure of influence or control over votes on confidence issues in the Dáil. This might frustrate the Dáil in its constitutional function of holding the Taoiseach and the Government to account.

The solution provided by the Constitution is effectively to grant the President a limited, conditional power to override the Taoiseach's decision. This power of refusal applies in limited circumstances: specifically, it applies where the Taoiseach has already lost the support of the Dáil. This is evident from Article 13.2.2°, which provides:

> The President may in his absolute discretion refuse to dissolve Dáil Éireann on the advice of a Taoiseach *who has ceased to retain the support of a majority* in Dáil Éireann. (Emphasis added).

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[1] The maximum term is currently set down in the Electoral Act, 1992, s. 33 which provides: "The same Dáil shall not continue for a longer period than five years from the date of its first meeting." It should be noted that the maximum term is five years from the meeting of the first Dáil rather than from the date of the preceding general election.

Uncertainties surrounding the presidential power of refusal

The presidential power of refusal provided for in 13.2.2° has never formally been used (although the possibility or anticipation of it being used may have been decisive).[2] There is some uncertainty as to the scope of the power, and as to the specific circumstances in which it may be used. In particular, there is uncertainty as to what specific events or circumstances allow the President to exercise the power of refusal. The Constitution states that the power may be used where the Taoiseach has lost "the support of a majority" in the Dáil, but the question of what political events indicate such a loss of support is unclear. There is no definition in the Constitution as to what a loss of majority support means in practice. Indeed, to a large extent, the meaning of these constitutional provisions has been guided by political convention and political history rather than by case law or any strictly "legal" sources.

It might be assumed that the Taoiseach has lost the support of the Dáil majority only where he has lost a formal vote of confidence in the Dáil. This interpretation has the merit of requiring clarity as to whether or not the Dáil has actually withdrawn support. However, this view is probably untenable because, as a matter of political convention, it is understood that the Taoiseach must resign – in other words, that he has lost the confidence of the Dáil – where the Government loses certain Dáil votes other than votes relating explicitly to the Taoiseach's tenure. For example, it is widely understood that a Dáil defeat on a budgetary issue effectively signals a loss of confidence in the Taoiseach and Government. Therefore, it can be assumed, at the very least, that the President's power applies where the Government has lost a Dáil vote on what are commonly referred to as "confidence and supply" issues.

Again, there is no legal or constitutional definition as to what counts as an issue of "confidence" or "supply". It is assumed that a defeat on a budgetary issue is one such matter. On non-budgetary or non-financial issues, the position is less clear. However, the Government may itself engage its own confidence, on a non-financial issue, by declaring a particular issue to be an issue of confidence. Hogan and Whyte state the position as follows:

> A defeat on a budget resolution is clearly one such [confidence] issue. Votes on other matters may be converted into motions of confidence by a declaration from the Taoiseach that he considers the vote to be such. Defeats on issues of intermediate importance are usually cured by securing a victory on an early vote of confidence and thereby avoiding the obligation to resign.[3]

There is, however, a third possibility as to how "the support of a majority" might be interpreted. It is arguable that the President may understand the Taoiseach as having lost the "support of a majority" without a formal vote in the Dáil itself ever having taken

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[2] Casey cites the circumstances surrounding the fall of the Reynolds government, which was not followed by a general election, in November 1994. James Casey, *Constitutional Law in Ireland* (Dublin: Round Hall, 2000), p. 86

[3] Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (Dublin: Butterworths, 2003), p. 208

place – such that, effectively, the President might take other, extraneous events into account. For example, the collapse of a coalition government, and the resignation of ministers from a certain coalition party, might signal an *imminent* or effective loss of support before any formal defeat has been suffered. As Hogan and Whyte speculate, the position might be decided "by counting probable heads, without a confrontation in the Dáil division lobbies."[4]

On the surface, this seems somewhat implausible – it might seem obvious that the Dáil could only withdraw support from the Taoiseach by stating this explicitly and unambiguously through a vote. However, this view nonetheless has some merit. If the Presidential power of refusal could only be used once the Dáil had formally withdrawn confidence, this might allow the Taoiseach to effectively pre-empt any formal vote by requesting a dissolution where such a defeat was imminent. In effect, this would allow a Taoiseach to circumvent and frustrate the presidential power. There is some merit in the view that the Constitution must be interpreted in such a way as makes the relevant powers *effective*. As Hogan and Whyte put it:

> It is arguable that the exercise of the Presidential discretion … to refuse to dissolve the Dáil should not be limited to cases in which a formal vote of no confidence in the Taoiseach has been taken, for otherwise a Taoiseach who had lost the support of a majority of the Dáil could pre-empt such a vote and insist the President grant a dissolution in accordance with Article 13.2.1°.[5]

There is a further possible ambiguity, not as to the method or medium through which loss of support is expressed, but rather as to the meaning of "majority" itself. In particular, it is unclear whether the term "majority", in Article 13.2.2°, refers to the majority of members *as such*, or the majority of members present and voting on any specific issue. This is significant because, in the case of a minority Government, the Taoiseach has received the support of a majority of members voting, but not of the majority of members overall (that is to say, it is only a "majority" when abstentions are excluded). A Taoiseach can be appointed in this way, by a Dáil "minority", because Article 15.11 specifies that "[a]ll questions in each House … shall be determined by *a majority of the votes of the members present and voting* …" (emphasis added). However, this definition of "majority" only applies to "questions in each House". Arguably, any assessment made by the President under Article 13.2.2° is not a question "in" either House; therefore, it could be argued that a Taoiseach leading a minority Government never has the "support of a majority", at least for the purposes of Article 13.2.2°.

Judicial guidance?

It should be noted, furthermore, that there is no case law to guide the meaning of these constitutional provisions. Effectively, there could never be any such case law because any decision made by a President to refuse a dissolution is immune from judicial review. According to Article 13.8, "[t]he President shall not be answerable … to any court for

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[4] *ibid*
[5] *ibid*

the exercise and performance of the powers and functions of his office." Therefore, if a President were to make a controversial decision under Article 13.2.2°, concerning whether or not the Taoiseach had lost majority support, it appears no legal challenge could be taken.

However, there may be some guidance offered by case law from other jurisdictions. For example, the Privy Council ruling in *Adegbenro v Akintola*[6] indicated that under a similar constitutional system in Nigeria, a "loss of support" did not necessarily have to be indicated through a formal parliamentary vote. In that case, the signing of a letter by a majority of members, at a time when the parliament was not in session, was deemed sufficient. Lord Radcliffe observed:

> ... speeches or writings outside the House, party meetings, speeches or activities inside the House short of actual voting… are all capable of contributing evidence to indicate what action this or that member has decided to take … there are many good arguments to discourage a Governor from exercising his power … except upon indisputable evidence of actual voting in the House, but it is nonetheless impossible to say that situations cannot arise in which these arguments are outweighed by considerations which afford to the Governor the evidence he is to look for, *even without the testimony of recorded votes*.[7] (emphasis added)

The Presidential power of refusal in practice

There is no guidance from the Constitution as to how the President should exercise the power granted in Article 13.2.2°, or as to what considerations should be taken into account. It is assumed the purpose of the presidential power is to avoid any unnecessary dissolution in circumstances where a new Government can be formed from within the existing Dáil – thus preventing any scenario where the Dáil might, in effect, be routinely dissolved following the defeat of a Taoiseach. In principle, the Dáil should be able to remove a Taoiseach without this automatically entailing an early general election. Therefore, it might be surmised that a key question for the President, in exercising this power, is whether or not an alternative majority coalition might plausibly be formed from within the existing Dáil. However, there is no provision for the President to formally invite any candidate to form a Government, as occurs (under the Monarch) in the British system.

Indeed, James Casey notes that the prevailing view in equivalent jurisdictions is that a dissolution should not be refused *unless* an alternative government can be formed, and where it can be expected to continue for a reasonable length of time. He notes: "the difficulty of predicting whether these conditions will be fulfilled need hardly be stressed. Consequently, to allow a dissolution will normally be the wiser and less controversial course."[8]

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[6] [1963] AC 614
[7] [1963] AC 614, 618
[8] James Casey, *Constitutional Law in Ireland* (Dublin: Round Hall, 2000), p. 85

Indeed, in practice, it seems there has been a default assumption that dissolutions should be granted even in circumstances where the President clearly enjoys an "absolute discretion" to refuse. For example, President Patrick Hillary granted two dissolutions, in the Spring and Autumn of 1982, in instances where the Taoisigh in question had clearly lost the support of the Dáil – with the result being that three general elections were held within the space of 18 months over 1981 and 1982.[9] The reasons for President Hillery having acceded to the requests are not known, but the episode confirms a pattern of presidential acquiescence or deference concerning the calling of early general elections. The result, in part, has been that it is relatively unusual for a defeated Taoiseach to be succeeded by a candidate from an opposing political formation without an intervening general election.

Impact on Seanad Éireann

The dissolution of the Dáil impacts on the electoral cycle of Seanad Éireann as Article 18.8 provides that elections to Seanad Éireann must take place no later than 90 days after the dissolution of the Dáil.

The constitutionality of a fixed parliamentary term

There remains the question of whether it would be possible for the Oireachtas to enact legislation to create a fixed parliamentary term without amending the Constitution as it currently stands. The aim of any such reform, it is assumed, would be to legally prevent the dissolution of the Dáil before the expiry of a prescribed term.

On the one hand, it is already possible, based on Article 16.5, for the Oireachtas to legislate concerning the length of the Dáil term. However, this only allows it to prescribe a *maximum* term, rather than a fixed term. Article 13.2.1° makes clear that the Taoiseach must retain the power to advise a dissolution at any point before the expiry of any maximum term that is set down in legislation. A Fixed Term Parliament Act, of the kind that was enacted in the United Kingdom, would therefore probably be held unconstitutional in Ireland, under the current constitutional text, as it would be inconsistent with this power that Article 13 clearly vests in the Taoiseach. Therefore, it is likely that any Fixed Parliament Act would first require the amendment of Article 13 so as to make clear that the Taoiseach's discretion to advise a dissolution could be constrained or removed by legislation. The precise duration of the fixed term could either be set in the Constitution itself, or delegated to the Oireachtas, in the same way that it may currently decide the maximum parliamentary term. A key question is whether the amended Constitution would itself *prescribe* a fixed parliamentary term (of whatever duration) or *allow for* the creation of a fixed term at the initiative of the Oireachtas itself. A further key question is whether or not any such amendment would provide for exceptions to the fixed term, allowing for early dissolutions in defined, limited circumstances.

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[9] For discussion, see Casey, *Constitutional Law in Ireland*, pp 83-85.