

## UCD Constitutional Studies Group

### Government Formation in Ireland

#### Further Issues

With the country facing a very uncertain prospect in relation to the formation of a new government and the real chance of an early election, three aspects of the process are worth looking at—

- (a) How long can this process go on for, both practically and maybe also in legal terms?
- (b) If all negotiations for a new Government end inconclusively, does Enda Kenny have the power to advise the dissolution of the Dáil and a new election?
- (c) If he does have that power and he exercises it, what is the position of the President?

#### **(a) How long can the process take?**

It has been most common for an agreement on the formation of a coalition government to be made before the Dáil reassembles after the general election and for a Taoiseach to be nominated at that first meeting. Since 1987 – the last occasion on which a single-party government was formed – this has happened on four occasions – 1997, 2002, 2007, and 2011. In 1989 and 1992, an adjournment of the Dáil was necessary to enable a programme for government to be agreed and a nomination of Taoiseach agreed by the Dáil. In 1989, this took until 12 July for a government to be formed, the first meeting of the Dáil having been on 29 June. Three years later, the general election was on 25 November and the new Dáil assembled on 14 December, but it took until 12 January 1993 for a new government to be formed. (A similar interval elapsed in 1994, without any a general election, from 17 November to 15 December.)

A delay of a month or so in forming a government is thus not unusual. Given that matters have now gone well beyond that point, with little definite prospect of a new appointment of a Taoiseach, how much longer could this process take, consistent with the Constitution?

#### *Constitutional timetables*

The Constitution does not contain an explicit timeframe for appointing a Taoiseach following a general election, but it does make one key assumption which may set an outer limit for this and this relates to the election of a new Seanad. According to the Constitution: “The nominated members of Seanad Éireann shall be nominated, with their prior consent, by *the Taoiseach who is appointed next after the reassembly of Dáil Éireann following the dissolution* thereof which occasions the nomination of the said members.” (Article 18.3. Emphasis added.) This means that those Senators cannot be appointed until after the Dáil has agreed to the nomination of some person for appointment as Taoiseach. A Seanad general election must take place not later than ninety days after the dissolution of the Dáil. (Article 18.8); in the current case, this means before 3 May 2016.

However, the first meeting of the new Seanad will take place on a day to be fixed by the President on the advice of the Taoiseach and no specific time limit for that is set by The Constitution.

### *A Seanad of 49?*

The Constitution is mandatory in its language in relation to the nominated element of the Seanad's composition ("Seanad Éireann shall be composed of sixty members, *of whom eleven shall be nominated members* and forty-nine shall be elected members" Article 18.1. Emphasis added.) Perhaps therefore a new Seanad cannot be validly constituted until the Taoiseach has made these eleven nominations. If so, then it would not be possible for a new Seanad to be formed until an appointment of Taoiseach has been made. Since the Seanad is never dissolved, the outgoing Seanad can continue to function after the new Dáil has assembly, but only up to "the day before the polling day of the general election for Seanad Éireann" (Article 18.3.) (The poll for the panel members will close on 25 April 2016 and for the university members on 26 April 2016, according to orders made by the Minister for the Environment, Community and Local Government in early February.) If it is necessary for eleven Senators to be nominated for a new Seanad to come into being, there would then be a hiatus in the existence of the Seanad, of indefinite duration.

### *A single chamber parliament?*

If the Dáil had to function without a properly constituted Seanad for any length of time, this would cause considerable practical difficulties, at the very least. Does the requirement that Bills be "sent to Seanad Éireann" (Article 20.1 and Article 21.1.2°) apply when there is no Seanad to which a Bill can be sent? If a Bill can still be regarded as "sent" in those circumstances, Article 23 means that the Dáil could deem the Bill to have been passed by both Houses, even though there was no Seanad, but only after a delay of at least 90 days. In the case of a Money Bill, such as the Bill for a Finance Act, the measure would become law 21 days after being "sent" to the Seanad. If an emergency so requires, Article 24 could be invoked, with the agreement of the President, to allow a Bill to become law without any such delay, despite the fact that there is no Seanad to receive it. However, there are specific functions that require the Seanad to be in existence and functioning – such as removing certain judges from office (Article 35.4.1°) or exercising certain options for the State under European Union law (Article 29.4.8°).

These undoubtedly serious difficulties give strong reason to think that a newly-elected Seanad of 49 elected members might be considered to be validly-constituted, even without the other 11. Even if a Seanad of 49 can take up office and function as normal, pending the nomination of the other 11, it is clear from the Constitution that the framers of the Constitution never envisaged what would happen if a period substantially longer than ninety days elapsed between the dissolution of the Dáil and the subsequent appointment of a Taoiseach. The phrase "uncharted waters" seems particularly apt in that context.

## **(b) Can Enda Kenny seek a new election?**

### *“One shot” at an election?*

Can the ‘acting’ Taoiseach advise the President to dissolve the Dáil, if it appears that no new government can be formed this side of another general election? If he cannot, there could only be a new election – before 2021 – if a fresh appointment of Taoiseach is made and that person advises a dissolution. It has been suggested from time to time – based mainly on the wording of Article 28.10 – that a Taoiseach who resigns without having sought (or having been refused) a dissolution may not be entitled to go back to the President to seek one subsequently. In other words, the Taoiseach who has lost his or her majority in the Dáil may have only “one shot” at appealing to the people for a fresh mandate. The main rationale for adopting such an interpretation is to give the majority in the Dáil, not the leader of a minority within it, the final say on whether there should be a fresh election. Such an approach would certainly accord with the way in which parties and independents have thus far approached the task of forming a government in 2016. It may also be significant that it has been reported that one of the points in the document Fine Gael has proposed to the Independents with whom it has been negotiating is that a future citizens’ assembly would make recommendations on having a fixed-term parliament. If Enda Kenny cannot, as things stand, advise a dissolution, but the majority view emerges in the Dáil that another, early election is unavoidable then either Enda Kenny (or some other person) would have to be – at least in form – nominated for appointment as Taoiseach, for the sole purpose of advising a dissolution. Once the Dáil is dissolved, the Taoiseach and other Ministers in any event assume a ‘caretaker’ role of some kind (which is hard to distinguish from their role after they resign)—although it remains unclear what this means.

### *A “caretaker” government*

Although this reading of the Constitution sits well with political practice over the last few weeks, there are reasons for taking a contrary view. Article 13.2, which deals with the dissolution of the Dáil, contains no such restriction, nor is it explicit in Article 28.10 or Article 28.11.1°. The latter provides that after resigning “the Taoiseach and the other members of the Government shall continue to carry on their duties until their successors shall have been appointed”. In other contexts, one would normally interpret “duties” here as being broad enough to include powers (such as advising a dissolution). Indeed, it remains quite obscure what exactly the Constitution means when it says that the Taoiseach and Ministers “hold office” between a dissolution of the Dáil and the appointment of their successors (Article 28.11.2°) and how this differs from “continue to carry on their duties” after the Taoiseach resigns. If there is no difference between these two situations, then Enda Kenny’s resignation on 10 March may have been a purely symbolic exercise. A more logical explanation might be that Article 28.10 (which requires the Taoiseach to resign on ceasing to retain the support of a majority in the Dáil) simply does not apply during the time between a dissolution of the Dáil and the appointment of his successor, because the more specific provision in Article 28.11.2° *requires* the Taoiseach and other Ministers to “continue to hold office until their successors

shall have been appointed". As against that, ever since 1989, politicians have assumed and acted on the assumption that an incumbent Taoiseach who has failed to be re-nominated on the reassembly of Dáil Éireann after a general election is required to resign immediately and, with his or her fellow Ministers, merely "carry on their duties" until successors have been appointed. If Enda Kenny and his colleagues are "caretakers", it may be that this reflects the political reality they confront, but not any legal limitations on their powers as a Taoiseach, Ministers and a Government.

### *The shadow of the Treaty*

The view that a Taoiseach in Enda Kenny's situation is not entitled to seek a fresh election also seems to run counter to the fact that the relevant provisions of the Constitution of 1937 are deliberately different from those of the 1922 one. Under the Constitution of the Irish Free State the President of the Executive Council could advise the Governor General to dissolve the Dáil only if the President retained the support of a majority in the Dáil. In this regard, the main purpose of the framers of the 1922 Constitution was to remove any discretionary powers in this area from the Governor General, who they feared might in some degree be a representative of the government in London. Eamon De Valera deliberately sought to alter the position, so that a Taoiseach would not need to be re-nominated and re-appointed in order to advise a dissolution, because he felt that the head of government should have a chance, in appropriate circumstances (as determined by the President) to appeal to the people when he ceased to retain the support of a majority in the Dáil. It is unclear why the head of government should have only "one shot" at that, as one interpretation of Article 28.10 proposes. This is particularly so, because the Taoiseach cannot demand an election but can only ask the President to exercise his "absolute discretion" to call one. If both the Taoiseach and the President must agree that it is futile to keep the current Dáil in existence, it is hard to see why a majority of Deputies should have a veto over that.

### **(c) Can Enda Kenny demand a new election?**

One preliminary point to make clear is that only a Taoiseach can seek an election. The President's role may be to decide to refuse to act on that advice, but the President cannot take the initiative in dissolving the Dáil.

#### *Does the President's "absolute discretion" arise?*

The President must follow the advice of the Taoiseach to dissolve the Dáil, unless the Taoiseach has "ceased to retain the support of a majority in Dáil Éireann", in which case the President has an "absolute discretion" to refuse such advice (Article 13.2.2°). It seems clear that, as things currently stand, the President does enjoy "absolute discretion" to refuse the Taoiseach's advice to dissolve the Dáil. It is hard to see how Taoiseach whom the Dáil has refused (twice, at this stage) to nominate for reappointment as Taoiseach cannot have "ceased to retain the support of a majority in Dáil Éireann", even in the absence of a formal vote of no-confidence. As we have already noted, the consensus was that Enda Kenny had to resign on March 10, because he had lost the support of a majority in Dáil Éireann - as has occurred on several similar occasions since 1989. It is not tenable to suggest that he could be deemed to retain that support for the purpose of requiring the dissolution of the Dáil.

### *What factors may the President take into account?*

The Constitution is silent on what the President should consider to be relevant in exercising this absolute discretion to refuse to dissolve. Furthermore, this power has never been exercised by a President, although it could have been on several occasions.

If the President agreed with the Taoiseach's assessment that there was no clear prospect of the Dáil agreeing to the formation of a new Government then that would obviously be a strong reason to accept the Taoiseach's advice. However, even in that situation, the President might still consider whether a new election was likely to produce a significantly different outcome to the one which took place in February. In addition, it would be perfectly legitimate for the President to consider what the effect of closing off the prospect of an early election would have on the positions taken by various groups in the Dáil on the formation of a new government. In that sense, the President could be an important catalyst in the political process, by performing a function which explicitly belongs to him under the Constitution. Although one can imagine how the President could make such a decision, it still seems more likely that, if Enda Kenny came to him seeking a fresh election, the President's first consideration would be whether any other person had the prospect of commanding a majority in the Dáil on a further vote on the nomination of Taoiseach. Even if the President considers that there is still a possibility of this, he could still consider it appropriate for the people to be given a fresh say at a new general election—for example, if the combination that produced this alternative majority was completely at variance with the positions taken by the parties or individuals concerned at the last general election. It seems probable that a decision by the President to refuse a dissolution would be based on an assessment that the Taoiseach has prematurely closed the door on the prospect of a new government being formed (even if by someone else), rather than a more radical intervention by way of deciding that a new election would be futile in any event.

### **Conclusion**

The questions of whether a new Seanad can come into existence as long as the Dáil remains deadlocked, whether Enda Kenny can advise the President to dissolve the Dáil even if a majority in the Dáil does not want an early election and what scope the President has to refuse a dissolution, all take us into unfamiliar constitutional territory. If any of them have to be answered over the next few weeks and months, a significant precedent will have been set, that may be an important component of the new political attitudes and practices which seems to be developing as politicians come to grips with new electoral and parliamentary realities.

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