

Txostenaren hasieran, aurrekari historikoak aipatzen dira, eta Eskoziako parlamentuari eta gobernuari 1998ko Legearekin bat etorri besterendutako eskumenak aztertzen dira. Ondoren, 2012ko Legearen bidez besterendutako eskumenen multzoa aztertzen da, eta, azkenik, 2014. urtean eginiko erreferenduma baino lehenagoko eztabaidan atera ziren gai nagusiak jorratzen dira. Horrekin batera, erreferendumaren ondorengo negoziazioak aztertzen dira, eta hausnarketa bat egiten da Eskoziako independentziari buruzko bigarren erreferenduma egiteko aukerari buruz.

Giltza-Hitzak: Besterendutako eskumenak. Independentzia erreferenduma. Europar Batasuna. Nazio aniztasuna. Aldebiko negoziazioa. Nazioa. Estatua. Subiranotasuna.

La ponencia se inicia con los antecedentes históricos y analiza las competencias transferidas al Parlamento y al Gobierno escoceses en virtud de la Ley de 1998. Tras ello se estudia el elenco de competencias transferidas con la Ley de 2012, y por último se abordan las cuestiones que dominaron el debate previo al referéndum celebrado en 2014. Todo ello se completa con las derivadas negociaciones post referéndum y una reflexión en torno a la posibilidad de un segundo referéndum sobre la independencia de Escocia.

Palabras-Clave: Competencias transferidas. Referéndum independencia. Unión Europea. Plurinacionalidad. Negociación bilateral. Nación. Estado. Soberanía.

Le conférence commence par les faits historiques et analyse les compétences transférées au Parlement et au gouvernement écossais en vertu de la loi de 1998. Après que la liste des compétences transférées à la loi de 2012 est étudiée, on aborde enfin les questions qui ont dominé le débat avant le référendum en 2014. Tout cela est complété par la négociation après référendum et par la réflexion sur la possibilité d'un second référendum sur l'indépendance de l'Écosse.

Mots-Clés : Compétence transférée. Référendum Indépendance. Union européenne. Plurinationalité. Négociation bilatérale. Nation. État. Souveraineté.

Scotland

From Devolution to Independence?

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Thank you very much. It's a real pleasure to be here.

I always feel that it is very interesting to come to the Basque Country because for many of us who have examined the evolution of the Scottish situation in the UK, the Basque Country has been a model which we have tended to refer to very often. So, it is particularly a pleasure to be here and I would like to thank the organisers very much for the invitation.

What I'd like to do in my 20 minutes is really just to discuss some of the issues which have unfolded in the UK, because over the period since 1998 to the present, the UK has gone from being a very centralised state in the European Union to one of the most decentralised. I want to just give a more brief review of that before looking at more substantive questions revolving round the current situation.

I want to discuss four points in the course of this intervention. Let me begin briefly looking at what happened after 1998, when legislation was enacted in the UK Parliament to devolved powers to what we call the 'Devolved Administration'. Those are of course the administrations in Wales, Northern Ireland and, obviously, Scotland.

I think there is a significant difference between polities where powers are devolved downwards, from a centralised government to other substate entities as compared to the more traditional federal system when powers are transferred upwards to the central state, and I think sometimes we assume these are symmetric processes and I think certainly the evidence that we have in the UK is that they are far from symmetric processes. Devolution and federal integration are very different processes and the type of powers and the concept of the central state changes as well.

In the UK, the whole process of devolution itself was asymmetric. That is to say the devolution granted to the Scottish Government was legislative devolution and the devolution granted, at the time, to the Welsh and Northern Irish Assemblies was administrative, not legislative, although in Wales, that is changing.

Under the 1998 legislation whatever was not reserved to the UK Government, or the UK Parliament was devolved. The keys issues that were reserved to the cen-

tral state, the UK “state” were: the constitution, defence, taxation, welfare and, typically, foreign affairs. They were the main issues that were reserved. What wasn’t reserved was actually devolved. So the Scottish Parliament became competent to legislate across a wide range of policy areas including justice because Scotland is and has been since the Act of Union of 1707, a separate legal jurisdiction from the rest of the UK, economic development, health, local government and education – both issues also protected in the Act of Union – universities and so on. So there was a significant tranche of powers devolved to the Scottish Parliament under the 1998 legislation.

The key problem with that devolution scheme was that the financing of the Scottish Parliament and of its legislation remained very much in the hands of the UK Government. In other words, the devolution was financed, the spending on those policies was financed by a block grant calculated according to the so-called Barnett Formula. And that led to a number of issues concerning financial autonomy, which I’m sure many here are familiar with, since that is a major problem now in the Catalan question.

Block grants tend to be quite inefficient ways of financing devolved spending or spending by so-called sub-national or intermediate governments because, normally, there is no relationship between spending and taxation. This normally means that the devolved government will spend what it receives, regardless of its real needs, or whether the spending is economically or socially efficient. It will simply spend it. And of course because it is not having to raise the money directly by its own taxes, that encourages it to be profligate and encourages it to simply spend whatever it can. And that is widely regarded as being inefficient both politically, because the lines of accountability between the electorate and the government are not complete, and of course economically, because you may be spending in areas where the returns are not significant or indeed could be negative.

At the centre of the Scotland legislation devolution scheme was an agreement that there would be intergovernmental relationships forged between the new Scottish Government and the UK Government. Now the UK as most of you will know does not have a constitution as such. Sovereignty, the Westminster Parliament truly is sovereign in the sense there is no external court, with the exception of the European Court of Justice and to an extent the European Court of Human Rights, but there is no domestic constitutional court that places a limit on the powers of the UK Parliament. And even as regards those two European Courts, it is Parliament that has consented to place those limits, and could decide to remove them if it so wished. Parliament remains sovereign.

And precisely because the UK Parliament is sovereign and remains sovereign after devolution, it could also in principle, conceivably pass an act to dissolve the Scottish Parliament, precisely because it is sovereign. This is why the Scottish and the UK Parliaments had to establish and sort out their mutual relations relations, and these relations were forged by a series of memorandums and what were called concordats. These were just understandings based on trust and they have worked fairly well, but they are not legal documents.

So the dialogue between Edinburgh and London was rich, it was regular. But ultimately, to say it again, the UK Government retains sovereignty. There was an agreement that the UK Government would desist from legislating in any area that was devolved to Scotland. They would not legislate for Scotland. That was called the Sewel Convention and in the last Scotland Act which has just been enacted, in 2016, that has now been confirmed as to be the case that the UK Government will not legislate for Scotland over matters which are devolved. But in principle they could, because the UK parliament is sovereign.

So this is an interesting constitutional muddle in the UK and it has some implications on the European side.

The Scottish Parliament convened in 1999 for the first time as a proportionally elected parliament, a novelty in the UK parliamentary history. It was almost designed in order that an overall majority government was not expected to emerge and it was probably expected that the Scottish National Party, which of course is the independence party of Scotland, would be and remain as an opposition party in this kind of configuration, given the percentage of the votes at the time it was designed and the seemingly eternal lead of the Labour party in Scottish politics. But in 2007 the Scottish National Party won the Scottish Parliament elections and formed a minority government. A very courageous move, to form a minority government and that worked relatively successfully till 2011.

In response to the rise of the SNP as early as 2007, the unionist parties – and I use that term to gather together the Labour Party, the Conservative Party and the Liberal Democrat Party in Scotland who support Union in the UK – had decided to mount a kind of response to the rise of the pro-independence SNP by trying to give more powers to Scotland and that became what we could call ‘Devolution 2.0’. That was channeled through a special ad-hoc parliamentary commission which was named the Calman Commission, and which proposed new powers, particularly increased powers over taxation should come to the Scottish Parliament. The main idea was to secure financial support for Scotland to be able to carry out its policies and design its budget more efficiently and sustainably. In many views that was too little too late, and the dynamic of the SNP continued to grow.

Then in May 2011 there was this astonishing result in Scottish politics whereby the Scottish National Party won an absolute majority of the seats in the Scottish Parliament elections with an electoral ticket and a mandate to hold the independence referendum. That was extraordinary for a number of reasons, not least politically. As argued above, if the system was designed to avoid absolute majorities, how could such a result have been possible? Clearly, the system’s design could cope with any type of result and majority, it now seemed. But the result also reflected a transformation in the nature of Scottish politics, away from traditional voting patterns, which, as stated above, had been for the Labour Party in Scotland since time began, this is the traditional left-wing or socialist party. Now the Scottish National Party had emerged as a social democratic party, a liberal party in the philosophical sense, defending individual rights and independence from the UK but

remaining in the European Union. The SNP is not an ethnic party but a *civic* party, and it has become the dominant force in Scottish politics.

We thus come to the most extraordinary period in Scottish politics, certainly in my lifetime and I suspect in most people's lifetime in Scotland, which was the independence referendum. When the SNP won an absolute majority in the Scottish Parliament the referendum was inevitable. In every electoral manifesto the SNP had run on a ticket that called for a referendum on independence. So when they won an astonishing majority, a majority which was a surprise to them as much as anybody else, they had no choice. It was in a sense a political *force majeure*. They had to have a referendum on independence and in October 2012 an agreement was signed between the Scottish Executive and the UK Government that would temporarily transfer sovereignty over the constitution to the Scottish Government. As we mentioned above, the "constitution" is a reserved matter for Westminster (UK Parliament), and the only way a referendum could be held, in constitutionally valid and accepted terms, was for the power to call the referendum to be transferred to Holyrood (Scottish Parliament), at least in an ad-hoc way. That allowed the Scottish Government to call, to finance and to manage a referendum. The conditions that the UK Government placed on that referendum were twofold: it should take place before the end of 2014 and it must be a single Yes/No question. The possibility of introducing a third option, a 'Devo Max' option as we talked about was ruled out. There could not be a third option: it had to be yes or no to independence.

So between October 2012 and the referendum date on 18 September 2014 we saw how the campaign began and it was a fascinating campaign. And, as the chair said, I spent the whole campaign inside the Scottish government because my interest was European policy and we'd had some rather unfortunate, in my view, and in some people's views who are better placed legally than me, "illegal" comments made by the then President of the European Commission, José Manuel Durao Barroso who had implied,, who had implied that should Scotland vote for independence then she would have to leave the European Union. I know that Joxerramon Bengoetxea is going to pick this up later on today, so I will not deal with that in length. So my job for two years was really unpicking that and developing a strategy around that particular problem of a forced exit from the EU in case of independence, which personally I still do not believe would have happened. But that's a different story.

What we had between 2012 and 2014 was this extraordinary campaign, extraordinary in many different ways. First of all we included 16 and 17 year olds in the electoral mandate, so they could vote for the first time not only in Scottish politics, but for the first time in British politics. And I can promise you that our current First Minister, Nicola Sturgeon, who was Deputy First Minister during the campaign will tell you quite frankly, the most terrifying moment in their campaign was when she was confronted with three thousand 16 and 17 year olds. They asked the questions that were impolite, they were direct and were incredibly astute politically although they were 16 and 17 year olds. And that really energised the campaign in a way that no political campaign had been energised before.

A second thing that was fascinating about it were the papers produced by both sides. The Scottish Government produced papers on the benefits and implications of independence. They were very upbeat. The question was: 'Do you want to be an independent country?' To which the answer was, 'Yes', as far as the Scottish government is concerned, and the lesson we learned from that referendum was that when the question, when one of the answers is 'Yes', that is really the side you want to be on because that is a very uplifting answer. 'No', is a very negative answer and actually the 'Better Together' union campaign suffered because it was a 'No' campaign. Now what we are seeing in the current UK Europe referendum is a question about 'Remain' or 'Leave', not about Yes and No. That's quite deliberately been designed in the shadow of the Scottish campaign where the 'No' side had a very, very difficult fight and it became a very negative campaign, in many ways a negative campaign.

The Scottish Government's main shot was a White Paper which set out its view of an independent Scotland. It was a very aspirational paper, incredibly well-written in my view, setting out the opportunities that would come to Scotland if the Scottish Parliament and Government had competencies over the entire range of economic and welfare policies. And this was a referendum fought on the economy. It was not fought on culture, even though culture was there. It was not fought on welfare, although welfare was there. It was actually fought on the economy and that was the biggest mistake, in some ways, because the economy from 2008 was tanking and contracting. It was a very difficult economic environment and I think that made winning a referendum in that economic context, when the economy was front and centre of the debate, very difficult.

But the white paper predicated on what we could call the 'soft exit'. In other words Scotland would become independent within a consensus process after which the governments of the UK and Scotland would work together in the best interest of both populations. There would be a common shared interest in making this work easily, a common and shared interest in minimising the disruption. That was the second profound error that the SNP made. They believed a soft exit was possible. Certainly from an economic perspective it is desirable because if you don't work together in a coordinated way you will make mistakes. But politically of course, a soft exit was reducing the costs of separatism as far as the UK were concerned, so they came in with a very hard exit strategy during the campaign, a sort of scare tactics that worked. That was a surprise, particularly over the currency.

So we had this major political difference between the soft exit strategy predicated by the Scottish Government and its white paper and the hard exit strategy of the UK government and the unionist parties. That was represented in fifteen highly technical UK Treasury papers that appeared over the course of 18 months. And as you can imagine these papers were incredibly well-written, very well argued if sometimes in my view, exaggerating the difficulties, or just being plain wrong. One of the examples where they were plain wrong, in my view, was the Eurozone crisis. Again that was used to demonstrate why a single currency arrangement would not work. Well the Eurozone tells us many things about single currency arrange-

ments, but as regards the pound sterling one just cannot see why two countries who have more or less the same productivity, same standard of living, same rate of economic growth, same structure of economy, cannot live within a single currency area, but this was denied by the No campaign. So then the key debates were the currency and the economy and as I have said, the Scottish Government's view was that Scotland should share the pound with the UK, retain the currency, retain the internal market of the UK, and all of this was particularly important for the financial services, which is a very strong economic sector also in Scotland. But the No campaign pictured different economic scenarios where disruption dominated over continuity.

As regards membership in the European Union, there was also a big debate over whether independence would imply exiting the European Union, the UK Government assuring us that Scotland would be evicted from the EU, and it was quite clear at the time that no national government was prepared to talk to the Scottish Government because the UK had carried out a diplomatic campaign, we believe, persuading the capitals that they should not talk to the Scottish Government, and repeating the mantra that Scotland would be evicted from the EU in the event of independence. That was very disruptive, true or false; it would be very disruptive...if it was true that such a diplomatic campaign took place.

And the final area of campaign debate was fiscal policy and public spending. The question here was basically: Could Scotland afford to be independent? Would it generate the necessary revenue to finance its policies? The price of oil was beginning to go down on the international market. Now you can imagine the impact of the oil price collapse immediately after the referendum and there was great concern that had Scotland become independent, at the end of the eighteen month negotiation timetable that the former First Minister had defined, the price of petrol could go down, as it has done. Then yes it would have been a tough position to be in, fiscally, because petroleum represents a significant 12 % of the Scottish income from tax. So that would have been a tough one. How that would have been managed is a story for a different day.

So we had this result, 55% against independence, and 45% for it, which was astonishing because in all my lifetime, independence had scored 30%. It scored 45 %. Be careful with referendums, they throw up very extraordinary results. Beware of the Brexit referendum in June as well.

The response to the referendum was 'devolution 3.0'. This was a consequence of the Smith Commission, set up immediately after the independence referendum. On the week before the referendum when one of the polls had put independence at 52% and the Union at 48%, Gordon Brown, former Prime Minister, who is a very strong Scottish Labour MP, together with the main leaders of the other unionist parties, David Cameron for the Conservative Party and Nick Clegg for the Liberal Democrats, made this vow that in the event of a 'No' vote, there would be a new round of devolution. So after the referendum, the Smith Commission was set up, which delivered a significant shift in tax autonomy for the Scottish Parliament. Now all income tax will attribute to the Scottish Parliament and the Scot-

tish Government will have the power to set all rates of income tax. They can't affect tax allowances and so on but they can set the rate of income tax, all bands, when this becomes law next year, when it enters implementing next year.

Constitutionally the interesting point made by David Cameron, the morning after the independence result was that there would be English votes for English laws, a very controversial proposal that says that Scottish members of Parliament in Westminster cannot vote on an issue declared to be 'England only' by the speaker. We can talk about that very difficult issue. The Scottish National Party, a civic national party, lost the referendum battle but by December 2014 the Scottish National Party membership had soared from 15,000 to 100,000. Now that was some way to lose a referendum! It was an astonishing result and it now sits at about 115,000 members. Labour voters have deserted the Labour Party in hoards because the Labour Party supported the 'Better Together' campaign and they are now being 'punished' in political terms for that support with the conservatives. So we had this extraordinary shift in Scottish politics, such that in two weeks time when we have a Scottish parliamentary election, the SNP are expected to form another majority government. Again this is a system of proportional representation.

As regards the future of independence, what can we say? The First Minister, Nicola Sturgeon said we will have a second referendum. But everybody remembers Quebec, you get two referendums, you don't get three. But the second referendum will only take place where public opinion is consistently supporting independence and demanding a referendum and when the question about the currency, the question about the European Union and the question about public spending receive a clear answer from the SNP government. So these are issues which are still outstanding, which have to be addressed and the First Minister has also said, in the summertime of 2015 that the Scottish National Party will start to look again at these questions. So there's more or less an implicit acceptance that the SNP did not address these questions sufficiently well.

Will there be a second referendum? Almost certainly yes. The window opportunity will turn up again within a lapse of probably five years. The Tory Government in London will keep that agitation going, after its spectacular result in the 2015 elections. The Labour party in the UK is not likely to win even the 2020 UK election. So as long as there is a Tory Government in London with its conservative, neoliberal politics that will feed the Scottish debate because the Tory Government in London is a shrinking-state government. It is redressing, it is reducing welfare payments and so on. It goes against the social democratic instinct of Scotland, and this sense of being stuck with policies nobody wants will generate frustration leading to a second referendum.

As regards the EU question, which was one of the main issues in the Independence referendum campaign, this question might come up again relatively soon because the UK is holding a referendum on its membership of the EU, the Brexit referendum, in June this year. If the UK voted Brexit but Scotland had a clear majority to remain and if this meant that Scotland would have to leave the EU against its will, then one of the issues for calling a second independence referendum would

be revived. But perhaps if the other issues – the currency and the financial and fiscal sustainability – are not resolved, at least a special status within the EU could be sought, with a constitutional result that could look just like independence. The relationship between Scotland and Europe will be raised again, the exercise in the share of sovereignty where the Scottish government has a voice but it has to go through Whitehall, provided the UK remains a Member State of the EU, but if Brexit wins... all scenarios are open again. Will the UK become a federal state? I do not think it will. There is no serious demand for self-government in England, and unless and until there was you cannot have such an imbalanced federal state because England has over 50 million people, and Scotland has five million. This does not really work as a federal state. We will probably continue with an “uneven” devolution.

Very finally, what do we learn from this process? First of all, Scotland is prepared to share sovereignty. That much was clear even in the proposal for independence, retaining the Queen as the head of state, but also in its pro-EU stance. It has always been clear but it was certainly clear in the independence referendum. Scotland was prepared to share its sovereignty also over the currency, being aware of the implications that would have for fiscal policy. But the Scottish National Party is not inward-looking and isolationist. They look around, and they look to the Basque Country here again, the type of economic partnership agreements, the Covenant, Convenio or Concierto that you sign with the Spanish government. These are interesting models for a fully devolved, if not independent state within a larger entity.

I'll conclude my remarks there and I'm happy to pick up any questions later on.

Thanks.