

**INFORME****DEFEATING BRAVEHEART:  
THE TRIALS AND TRIBULATIONS OF THE 2014 SCOTTISH  
INDEPENDENCE REFERENDUM IN A UNION-ORIENTED BRITAIN AND  
THE CURRENT IMPLICATIONS FOR SCOTTISH DEVOLUTION**por **Eleonora Harris**

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**ABSTRACT**

This paper draws upon the recent events that have transpired in relation to the proposed 2014 referendum on Scottish independence in order to ascertain the main concerns that have arisen, whether these concerns are actually well-founded and, finally, whether there are other causes for concern that have not been taken into adequate consideration. By retracing, albeit briefly, the momentous historical events which gave way to a debate on the issue of Scottish independence, this paper also focuses on the new elements that devolution brought to the traditionally conflict-ridden relationship between the UK and Scottish political establishments and the impact that they are bound to have on the result of the 2014 referendum.

**RESUMEN**

En este documento se analizan los recientes acontecimientos en relación con la propuesta de referendum sobre la independencia escocesa en 2014, con el fin de detectar los principales debates que han surgido, determinar si la creciente inquietud está realmente bien fundada y si además hay otros motivos de preocupación que no se han tenido en consideración. En un primer lugar el texto presenta de manera concisa los acontecimientos históricos que dieron lugar al debate actual. Posteriormente el autor se centra en los nuevos elementos introducidos por la “devolution” en las tradicionalmente conflictivas relaciones entre el Reino Unido y Escocia, así como el impacto que podrían tener en el resultado del referéndum de 2014.

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**I. INTRODUCTION****I.1. Scotland and Independence: A Brief History**

The issue of Scottish independence from England dates back centuries and it has always given cause for conflict within the lands of Albion. Very few people are unfamiliar with the tale of William Wallace and the rebellion he led against Edward I, especially since Hollywood made it into a blockbuster, or with the unfortunate events that

occurred during the reign of Queen Elizabeth I and the consequent death of Mary, Queen of Scots, but perhaps the 1707 Act of Settlement, which marked the beginning of a never-before-seen legislative framework for Scotland and is still in force, is less known, despite its fundamental importance. The 1328 Treaty of Northampton had acknowledged Scotland's independence from the English Crown, but in 1603, after the death of Queen Elizabeth I, James VI of Scotland became King James I of England and, even though the personal union of the Crowns did not contemplate a union between legislatures, the prolonged friction between the English and Scottish legislative bodies was apparent. In 1688, when those who had led the bloodless revolution envisioned a monarchy that would be constitutionally responsible to a Parliament, they also realized that the monarchy could not be concurrently responsible to both an English and Scottish legislative body, each pursuing distinct policies. Therefore, it became necessary to negotiate a treaty of union. During the first decade of the XVIII century, after thorough negotiations, it was settled that both countries would merge their legislatures and the result was a full political and economic union. An associated Act provided for the specific manner of electing representatives for Scotland to the House of Commons and the House of Lords. The new arrangement was entrenched by the 1707 Act of Settlement, which quickly became very unpopular both in England, where it was opposed by strict Presbyterians, and in Scotland, where it was strenuously opposed by Jacobites, but, given that Scotland enjoyed a degree of autonomy that other parts of Britain wouldn't even dream of<sup>1</sup>, the thirst for independence was more or less quenched until 1974. One must also consider that by the end of the XIX century Scotland had been attributed a form of administrative and financial devolution as a by-product of attempts to keep Ireland in the Union, which sat well and ensured a rather generous public spending, never successfully opposed for fear of imperiling the Union.

## **1.2. Devolution as a Counter-Measure against Scottish Independence**

The Scottish National Party, a.k.a. the protagonist of the quest for the 2014 referendum on Scottish independence, dates back to 1928, but it didn't become electorally competitive until the mid-Sixties. It did however become rather threatening to the Wilson Labour government during the Seventies, when the discovery of North Sea oil off the coast of Scotland propelled its widely publicized slogan "It's Scotland oil" and mounted fears that Scottish nationalism fuelled by economic reasons, rather than the mere cultural ones that SNP had championed until then, could prove to be successful, especially after the general election held in October 1974 put SNP ahead of the Conservatives with 30 per cent of the Scottish vote. Had the SNP reached the 35 per cent mark, it would have won a majority of seats in Scotland and it would have been in a position to start a debate on independence, so, at that point, Labour had no choice but to make devolution for Scotland (and Wales) its prominent policy, in order to dissipate talks of independence. What happened in the following years is a well-known part of British history: even though in Scotland the 1978 referendum on devolution passed, Labour was unable to implement its proposed policies and lost out to the Conservatives in the general election that ensued after the Government was defeated on a vote of confidence. An essential part of the Thatcher agenda was to abandon the idea of devolution all together and the new Government made it immediately clear that there were not going to be any more talks of devolution. The widely unpopular policies implemented over the course of the following decade in Scotland gave new fuel to cultural nationalists, whose manifesto was significantly called "A Claim of Right for Scotland" and published in 1988, but the Scottish Constitutional Convention, a fundamentally important pressure group that was

1. B. P. Levack (Himsworth and Munro, 2000) observed that there was no interest in creating a united British nation and therefore the Scots retained their own national identity within the Union.

established on the basis of that document and paved the way for the current devolution arrangement, did not include SNP members, since the option of independence would not be pursued, given that the Convention would proceed by consensus. Therefore, the arrangement resulting from the 1998 Scotland Act was originally conceived on the theoretical basis that Scotland would remain in the Union and, in a way, it was also designed to that effect<sup>2</sup>. However, that arrangement had a major flaw, since it relied on the strong electoral support that Labour counted on in Scotland and it did not take into adequate consideration the possibility that at some point a parliamentary majority would be gained by a party that supported Scottish independence. And that is exactly what happened in May 2011.

## II. THE DEBATE ON A REFERENDUM FOR SCOTTISH INDEPENDENCE

### II.1. The Current Political Debate on Scottish Independence

After the May 5, 2011 parliamentary election, when SNP gained a clear majority with 69 of the 129 seats at Holyrood, it was apparent that a formal debate on a referendum for Scottish independence would take place. Given the unicameral nature of the Scottish system, SNP's dominant position made it possible for the party's proposed policies, thus the Government's proposals, to take effect, despite objections from the opposing benches, and its traditional commitment to independence was not at all diminished by the 2012 Scotland Act, which granted Scotland increased powers over taxation and a wider range of competences. Notwithstanding claims that independence in an uncertain economic climate would be counterproductive and a lack of agreement as to what independence should amount to, the new Scottish Government, led by Alex Salmond, decided upon taking a course of action that would result in a referendum on independence, insisting that Scotland could afford to leave the United Kingdom, since it received less in public spending than it paid in taxes<sup>3</sup>. Obviously, such course could not be undertaken without involving the UK Government, since matters concerning the "Union of the Kingdoms of Scotland and England" are reserved for Westminster by the 1998 Scotland Act<sup>4</sup>. Not surprisingly, no one expected that the UK Government would force the pace to the extent that it has so far, and Alex Salmond's hopes for a diluted, wide-ranging debate were soon discouraged. In January 2012, David Cameron made it clear that the only way Scotland was going to be able to decide on its independence would be by setting the definitive terms of the referendum on a fairly short-term basis. In addition, the two-question scheme proposed by Salmond, whereby there would be two questions in the referendum ballot paper, one consisting of a straightforward yes/no question on independence and the other pertaining to the so-called "devo max" option, i.e. an extremely advanced form of financial devolution which would turn over to the Scottish Parliament all powers over taxation and revenues, was rejected by the UK Government during negotiations. Before delving into the serious implications of not having a second question in the ballot paper, it is necessary to take a look at the public debate that has taken place since the final terms of the referendum started emerging. Conservatives, both in England and in Scotland, have stuck with their long-standing,

2. As a matter of fact, the 1998 Scotland Act is structured according to a peculiar form of dualism which entails, on the one hand, a concurrency of legislative powers between Westminster and Holyrood and, on the other hand, a list reserved competences, equipped with some very incisive checks, in favor of Westminster.

3. This particular statement clearly dismissed what had been pointed out over the years, and is still being pointed out, by some MPs at Westminster, who claimed that the reason Scotland could afford a welfare system which was quite distinct from those in other parts of the UK was that it received a block grant which amounted to more than Scotland actually needed.

4. SA 1998, Sch 5, para 1(b).

traditional support of the Union, also suggesting that the referendum could be detrimental to other business that needs to be attended to more urgently, since the lapse of time between the signing of the final Agreement and the referendum would inevitably create a climate of uncertainty. Liberal Democrats are also committed to the Union, but for very different reasons: in their view, the handling of the referendum has been left to extreme nationalists, whereas, since the consequences of a “yes” majority would involve the whole of the United Kingdom and not just Scotland, they believe it is necessary that the decision not be left to the Scots. This view is echoed by those who believe that, if there is a “yes” majority, another referendum shall have to take place and it shall have to allow all British citizens to vote on independence. Lib Dems are also concerned with the impact that Scottish independence might have on the United Kingdom’s EU membership and, distinctly, whether an independent Scotland would be perceived as a successor to the United Kingdom or as a seceded part of it. In other words, its newfound status in relation to the rest of the UK would undoubtedly affect, one way or the other, both the terms of its EU membership and the United Kingdom’s standing within the European Union, not to mention the many problems that would arise as far as NATO and UN memberships are concerned. As for the issue of independence itself, the party has always been committed to “devo max” and, therefore, the fact that the option of a two-question referendum became out of the question very soon during negotiations makes it even more adamant to speak up for the Union. Rather than focusing on international affairs, Labour’s stance on the referendum mainly has to do with the impact that independence would have on Scotland’s welfare state and, in particular, on the employment front. The uncertainty of Scotland’s future has made some significant industrial branches very cautious about future investments and there is no telling for sure how both domestic and international companies would react to an independent Scotland<sup>5</sup>. Even though Labour has not openly opposed Scottish independence, and even though it supports the referendum as the Scottish people’s right to have their say, it has criticized Salmond’s timetable for distracting the Government’s attention from the current social issues that need to be dealt with less than two years from now. As for the SNP, its political strategy over the course of the next few years was outlined during its latest annual conference, which took place in Perth between October 18 and October 21, 2012. On the issue of independence itself, the case for it was argued by following a triple track<sup>6</sup>: firstly, it was argued that independence is Scotland’s natural state. To that effect, Blair Jenkins, leader of the “Yes Scotland” cross-party campaign, made a very interesting point: what if Scotland were already independent from the Union and it had to vote to join it? He argued that it would probably vote “no”, since the big decisions would be made hundreds of miles away, oil and gas revenues would be handed over to the London Treasury and nuclear weapons would be built 30 miles from Scotland’s largest city. From a cultural standpoint, Fiona Hyslop, the Scottish culture secretary, seemed to suggest that an independent Scotland would be able to protect its culture and traditions from the deep and quick cuts from Westminster. The second track consisted of removing obstacles that forestall support for the “yes” vote and the pivotal question was whether SNP, who had traditionally been anti-NATO, would, in light of its new status and in light of the fact that it might control the largest nuclear arsenal in Western Europe, accept to take on a NATO membership. The debate was very conclusive in this regard, since it managed to shift SNP’s traditional anti-NATO position to mere skepticism, since it was agreed that an independent Scotland would consider two options: a full NATO membership, provided that NATO agrees to endorse the dismantlement of nuclear weapons on Scottish soil, or a partnership which would leave

5. An example of this is the Glasgow shipyard situation. The City Council’s view is that an estimate of 4,000 jobs would be lost if Scotland became independent, since BAE Systems and other significant employers would probably depart.

6. The idea of a triple track can be found in Taylor, 21 October 2012.

Scotland out of NATO but, at the same time, allow it to cooperate as part of the Partnership for Peace programme. As for obstacles pertaining to domestic issues, both Nicola Sturgeon, the Deputy First Minister of Scotland, and Alex Salmond observed how, in the view of the Scottish People, SNP has led the best devolved government that Scotland has ever had, in the sense that its policies have focused on Scotland's needs to a degree that the previous administration had not even ventured into, and the fact that voters renewed SNP's electoral mandate was regarded as a confirmation. Therefore, there should be no doubt that SNP would be able to lead an independent Scotland. Personally, I find this theory rather short-sighted: just as Labour had not taken into adequate consideration the possibility that a party like SNP would lead Scotland, it seems to me that Salmond is convinced that SNP is destined to govern Scotland for years and years to come, even though some important members of Scottish society, such as Scottish Financial Enterprise<sup>7</sup>, have little faith in the validity of its strategy. The third and final track consisted of grouping political opponents into a single force. As I have previously discussed, the major parties' stances on the referendum are quite diverse, but, from Salmond referring to the current UK coalition Government as "Lord Snootys" to suggestions that objections to 16 and 17 year-olds participating in the referendum were conjured by those who did not want Scots to choose their own future, it seems apparent that, by dividing the whole of UK politics into two big factions, those for and those against independence, SNP hopes to encourage voters who are still on the fence to opt for a "yes" vote, based on the assumption that those who oppose independence do so in order to keep Scotland in a position of minority, despite the fact that, according to Salmond, if the country stopped financing expensive projects like the Trident nuclear-weapons programme and were able to manage in full the tax revenue it never got back from London. Whether this is enough to convince those who support more powers for Scotland but are not convinced that the best way to achieve that is a clean cut from the UK is yet to be seen.

## II.2. The Final Agreement: Not So "Historic" After All

On October 15, 2012, David Cameron and Alex Salmond signed what was described as a final agreement on the terms of the 2014 referendum, which goes by the name of "The Edinburgh Agreement". Even though the wording of the document is quite simple, its implications are complex and involve a variety of aspects, both political and legal, that must be taken into account. The opening formula is anything but merely ceremonial: it is stated that the UK Government and the Scottish Government have agreed "to work together to ensure that a referendum on Scottish independence can take place". In other words, even though the Agreement transfers all legal powers to legislate on when and how the referendum should be held to the Scottish Parliament, Westminster's role in the matter does not end there. The Edinburgh Agreement may have been marked as "historic" by its political and media endorsers, in the sense that it finally allows Scotland to manage on its own a fundamental decision concerning its future but, truthfully, this doesn't shift London's privileged position one bit, if and when it will come to drafting the necessary legislation. Should the occasion arise, i.e. should the referendum result in a "yes" majority, the Scottish Government will not in any case be able to legally declare Scotland's independence without London's approval and without negotiating the terms of its new status with the UK Government, which will then decide whether to introduce

7. SFE represents the country's top banking and insurance giants and on October 24, 2012, its chief executive, Owen Kelly, stated that SNP was so focused on winning the referendum that it had not considered some fundamental issues concerning EU membership, such as whether an independent Scotland would inherit the Euro opt-out. He argued that the Scottish Government failed to provide conclusive evidence one way or the other and that Scotland would probably have to continue relying on the UK to solve at least some of these prickly issues.

legislation based on those same terms and whether to hold a UK-based referendum before the legislation takes effect<sup>8</sup>. As a matter of fact, Westminster has not given up its supremacy, it has merely declined interest in taking matters into its own hands as far as the referendum is concerned, and while at first glance it might seem “historic” that it has not invoked its Constitutional right to determine the terms of a potentially groundbreaking referendum, it must also be taken into consideration that it has its own political reasons for doing so and that what happens after the referendum from a strictly legal viewpoint is entirely up to Westminster. It should not come as a surprise then, that on several occasions Cameron underlined the fact that the referendum was merely “consultive”, when one reads the exact wording of the Agreement, especially the following passage (the italics are solely for the purpose of this analysis): “The governments have agreed to promote an Order in Council under Section 30 of the Scotland Act 1998 in the United Kingdom and Scottish Parliaments<sup>9</sup> to allow *a single question referendum on Scottish independence* to be held before the end of 2014. The Order will put beyond doubt that the Scottish Parliament *can legislate for the referendum*.”

It will then be for the Scottish Government *to promote legislation in the Scottish Parliament for a referendum on independence*”.

While some may perceive the fact that the UK Government has bound itself to promote an Order which transfers legislative powers to the Scottish Parliament as a historically significant event, I believe that, in this case, the devil is in the details. The words that I have marked in italics are very revealing as to the true intentions of the UK Government. First of all, it is made crystal clear that the transfer of powers to the Scottish Parliament is conditional upon the approval of legislation which has to do with a referendum on Scottish independence, in accordance with the terms that have been set for that very same referendum in the Agreement. Ergo, legislation that dealt with the terms of Scotland’s secession from the United Kingdom or that pushed the date of the referendum back to 2015 would be *ultra vires*. Where devolution is concerned, the UK Government has always sought referenda as statutory instruments, in the sense that it has made use of them to introduce or implement its policies concerning the devolved administrations, and, if anything, this transfer of powers to legislate for the Scottish independence referendum is less of a guarantee for the Scots than a referendum legislated for by Westminster, since the UK Government’s obligation to Scotland ends with the referendum and any further developments will be to its discretion and contingent on bilateral agreements negotiated with the Scottish Government at an informal level. What may tip the scale in favor of the Scottish Government is a strong “yes” majority, coupled with both Governments insistence on the value of transparency<sup>10</sup>.

Secondly, there is an even heavier limitation on the Scottish Parliament’s power to legislate for the referendum: I am of course referring to the single question on independence, stated clearly in the main text and stated in more detailed way in the annexed Memorandum. The reason for which the single question on independence became a non-negotiable condition for the Agreement on the UK Government’s part was that, initially, an idea had been put forward, whereby the ballot would include two

8. Given the undoubtedly Constitutional status of such legislation, it is highly unlikely that, after almost two decades since the referenda that put devolution in motion, the UK Government would proceed without consulting the whole of the United Kingdom on the issue. I previously argued this theory in Harris, Eleonora, (2012): “Redefining Parliamentary Sovereignty: The Example of the Devolution Referenda”, in [www.on-federalism.eu](http://www.on-federalism.eu) (31 March 2012).

9. News that legal Orders had been laid before Westminster and Holyrood broke out on October 22, 2012.

10. This particular element must not be taken lightly, if one considers that the last fifteen years of devolution have been mostly managed through bilateral agreements that have been approved unbeknownst to the public and, in many cases, to the legislative bodies, both devolved and at Westminster.

alternative questions, the first on independence and the second, in case independence did not gain a “yes” majority, on “devo max”. The first thing that must be noted is that these two options are based on a radically different Constitutional scenarios: while independence entails that Scotland become a sovereign state, “devo max” entails just the opposite of that, i.e. that Scotland remain a part of the United Kingdom. From a strictly legal standpoint, the decision not to ask both questions in the same ballot is correct. However, from a political viewpoint, this decision could bring about the end of SNP’s quest for independence in a very abrupt way. Several polls have shown that, given the option, a majority of Scots would choose “devo max” over independence and the pro-Union “Better Together” campaign has suggested that as little as 16% of Scots would vote for independence. What does the absence of “devo max” from the ballots mean, both for the Scottish and UK Government? Despite SNP being absolutely confident that it will be able to win over those who are not happy with the *status quo* but do not want independence before the referendum is held, one cannot avoid the possibility that the “yes” vote might suffer a defeat. What then? Personally, I believe that, unlike the Scottish Government, the UK Government has thought the issue through, because if SNP should suffer a defeat (and right now it looks that way), not only would independence be off the agenda for years to come, but it would also allow the UK Government to push back demands for “devo max” and to renegotiate the terms of Scottish devolution in a more pro-Union way. Once Scots, given the chance to secede, decide in unequivocal terms that they want to remain a part of the Union, the Union will not be afraid to lose them and they will be asked to play by the Union’s rules<sup>11</sup>. As if to confirm the UK Government’s strategy, the newly appointed Secretary of State for Northern Ireland, Theresa Villiers, stated during the latest British-Irish Parliamentary Assembly meeting in Glasgow that Scotland will not be granted further devolution until the referendum takes place. While devolution was originally designed to silence calls for independence, a “no” majority on independence might prove to be a step back for Scotland. SNP should have pushed for a referendum on “devo max”, so as to allow, if that be the case, a more natural, bump-free transition to the creation of an independent Scotland. If, on the other hand, SNP succeeds in its goal, the hurdles will not end there, since it seems rather out of the question that such a fundamental Constitutional change would take place without involving not only the rest of the United Kingdom, but also the European Union and international organizations that have a vested interest in Scotland, such as NATO. Therefore, I believe that it wouldn’t be entirely ridiculous to suggest that SNP’s defeat might not necessarily, nor exclusively, lie in the result of the 2014 referendum.

### III. CONCLUSION: BRAVEHEART DEFEATED BEFORE THE BATTLE?

The degree of support for the 2014 referendum is still unclear. The latest polls suggest that, even though 31% of people do not object to independence, only 16% strongly support it, whereas out of the 56% who are against independence, 37% strongly oppose it. There is no telling whether these percentages will shift over the course of the next two years, but if SNP does not tackle fundamental issues, such as EU membership or monetary regulation, it is likely that those who are not entirely convinced that Scotland should become independent will vote “no”. Of course, it will be very interesting to see how many Scottish 16 and 17 year-olds, who have been given the chance to participate in the referendum, actually turn up at the polling stations and how their vote influences the final result, but the Scottish Government will also have to decide on other thresholds, such as the minimum percentage in order for the referendum to be legally valid. More

11. A recent example of the boomerang effect that a referendum can have on a party’s flagship policy is the May 2011 referendum on Alternative Vote.

often than not, the end result of a referendum is defined by whether a sufficient number of people actually voted, and considering that nothing specific was agreed upon in that regard other than a general criterion of “fairness”, it is in the Scottish Government’s interest to keep thresholds as low as possible, but not so low as to incite accusations from London that it is not keeping to the terms set out in the Agreement, which specifies that the referendum must “deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect”. Clearly, that “everyone” includes the UK Government and Parliament, and it is not difficult to imagine that if the rules concerning the conduct of the referendum were to be perceived as favorable towards supporters of independence, the final result would not “command the confidence of parliaments, governments and people”, as the Agreement cares to point out. There is of course one question that stands tall above all: what would actually change for the Scottish People if their country became independent? A recent LA Times Editorial<sup>12</sup> suggested that independence wouldn’t make a big difference to Scots, certainly not as much as it would to the Labour party, which would see its Scottish representatives depart from Westminster and thus be weakened. The article notes that Scotland already enjoys significant autonomy with distinct legal and educational systems, as well as its own established church, not to mention that Scotland would probably keep the Queen as Head of State. The big change would of course be that Scotland would have total control over its economy and natural resources, for example the revenues from North Sea oil. As for the EU, the article points out that, aside from being a society unto itself, Scotland is part of an interdependent European Union in which national independence means something new and, therefore, a formal declaration of independence wouldn’t change much. Personally, I think that Scotland’s current position within the EU cannot be fully appreciated by disregarding the United Kingdom’s foreign policy: Scotland may have its own voice within the EU, as many other regional or devolved realities do, but it cannot make decisions that contrast with the UK’s stances on matters that are not devolved to the Scottish Parliament, just as the EU cannot deal with Scotland on reserved matters without causing a fallout. An independent Scotland would definitely have to redefine its position within the EU. This is just one of the problems arising from the fact that voters are not being asked to vote for a constitutional settlement, as they were in 1997, but rather to agree or disagree with a general constitutional principle (Winetrobe, 2012). Independence, at least in the current circumstances, is not just the final slope of devolution: Scotland would be a sovereign state and it would become a player on the international stage, it would not leave the UK as a former part of it, it would leave the UK by a “disunion” between sovereign states, just as in 1707 it had joined England as a sovereign state. Clearly, the significance of this possibility has not been given sufficient thought. On a final note, a very interesting consequence of the signing of the Edinburgh Agreement is that those who support independence for other sub-national identities, such as Catalonia, now believe that the Agreement is an example to be followed: Catalonia in particular has been faced with a continued, harsh lack of negotiation over independence and it has been paying more in taxes to the central government than it has been receiving in public spending. After the September 2012 street riots, which saw Catalans calling for independence and the president of the Catalan Parliament, Artur Mas, promising a referendum of independence, even though the Scottish Constitution forbids a direct vote on independence, the Agreement between the UK and the Scottish Governments must have truly seemed “historic”. And while it is certainly true that both governments, UK and Scottish, have managed to avoid conflict and negotiate openly and respectfully, unlike what is happening in Spain, I don’t believe that the Agreement is a desirable example for other sub-national identities seeking independence: apart from being consistent with Westminster’s supremacy, it is a deal concerning the technicalities



of the referendum, not its end result. But who knows, perhaps SNP will succeed after all in making the rest of Europe believe that the UK Government has agreed to Scottish independence, rather than to a referendum on independence. Right now, the cards are on the table and, hopefully, the real debate on the actual significance of Scottish independence can begin.

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