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In recent years, two abrupt decisions have been taken at Westminster regarding abortion provision in the devolved regions of the United Kingdom. In 2017, following the general election and the Conservative-DUP supply and demand agreement, the British government declared that Northern Irish women who sought abortions in England would have their procedures funded on the NHS.¹ In 2015, the Conservative government devolved laws on abortion in Scotland to the Scottish government in Edinburgh.

This article focuses on the second of these decisions – the resolution to devolve abortion laws to Scotland. It explores debates and documents produced at the time, asking why this decision was taken. Two debates on the issue of Scotland and abortion at Westminster are considered, alongside several questions on the issue put in the Scottish Parliament. This article adopts Carol Lee Bacchi's "What's the problem?" approach (1999) to analyse these debates. Bacchi proposes a deconstructionist framework which questions the ways in which policy is portrayed through language. We should not ask, she argues, how do we fix this problem, but rather how has the problem been constructed in political discourse: "what's the problem represented to be?" (1999, 1). According to Bacchi, "we need to shift our analysis from policies as attempted 'solutions' to 'problems', to policies as constituting competing interpretations or representations of political issues" (1999, 2). Debate around abortion and Scotland here is thus considered in this light: What is this issue an issue of? What is the discussion of abortion here a discussion of?

Abortion is rarely a non-controversial topic for political conversation. Abortion is discussed in Presidential debates in the United States; it is subject to extensive transnational campaigning, both for and against it; although rare, any political statements made on it in the United Kingdom are subject to headlines and public discussion; and it struggles to be

recognised in international law or human rights treaties. It has come to symbolise, in many western societies, “a much broader ideological struggle in which the meanings of the family, the state, motherhood and young women’s sexuality are contested”ⁱⁱ. Debate around abortion has thus often become polarised between conservative and liberal thinking, most especially in North America. As a result, the central concern in abortion - women, their lives, health and rights - is often obscured in broader political debate. Discourse analysis is thus important to get beyond the surface level of the debates on abortion to what is implicitly being discussed – what is the discussion of abortion and Scotland here actually a discussion of?

Firstly, however, a brief overview of devolution as it exists within the United Kingdom and the abortion laws of the country are provided.

Devolution and Abortion in the United Kingdom

Devolution in the British context has introduced a very specific form of multi-level governance (MLG) to the United Kingdom. ~~A quasi-federal system replaced the previously dominant Westminster model of strong centralised government. Devolution in the UK has not merely been the result of power devolved from the centre (Westminster) to the regions, with regional legislatures trapped in a hierarchical relation to the centre. British regions now have greater autonomy to forge links with other regions within the EU (Catalonia or other quasi-federal regions for example) and thus to act independently from central government. Furthermore,~~ ~~devolution~~I in the UK framework, devolution has been uneven in the powers it has distributed amongst the regions. The devolution of powers has been, and continues to be in the wake of the 2014 Scottish independence referendum, “ad hoc and reactive to territorially distinct dynamics, and asymmetrical and disjointed in outcomes”ⁱⁱⁱ with little consideration of how reforms in Scotland, Wales and Northern Ireland, and the continuing devolution of powers to Northern English cities, affect governance from the centre. Table 1 below outlines the main

competencies that are retained at Westminster, and those that are devolved to Scotland, Wales and Northern Ireland. Although health legislation is devolved, abortion was kept as a reserved issue (with the exception of Northern Ireland), until the decision to extend the power over the issue to the Scottish Parliament in 2015.

<Table [12](#)-about here>

This long period of uniformity in abortion law is reflected in the fact that ~~abortion~~ the procedure has been addressed in British legislation since 1861. The 1861 Offences against the Person Act made it illegal to procure a miscarriage, or to aid another person in any attempt to do so. Abortion law remained unchanged until the 1937 Bourne Judgement, a ruling on a Doctor who had openly performed a termination on a 14 year-old rape victim, which declared that if “the probable consequences of the continuance of the pregnancy will be to make the woman a physical or mental wreck”^{iv} then an abortion was legal. This legal precedent was compounded by the Abortion Act of 1967, which made abortion legal up to 28 weeks with the permission of two doctors. It has been modified only once (the time limit was lowered to 24 weeks in 1990 via the Human Fertilisation and Embryology Act), and, although law in England, Scotland and Wales, has never been extended to Northern Ireland. In 2017, however, the decision was made at Westminster that abortions for Northern Irish women in England would from now on be paid for by the NHS in England, and not by the women themselves, as had previously been the case.

Compared to other countries (most notably the United States), abortion is not a political issue in the UK. There is very little discussion about it at a formal political level (with the exception of Northern Ireland^v and, following the 2017 General Election, the accession of the socially conservative Northern Irish DUP to the centre stage of Westminster politics) and general consensus across political parties about the state of legislation on the issue. Only a small number of MPs have a history of raising it as an issue at Westminster (among them John Pugh

and Sir Edward Leigh, both mentioned below.) As such, it has a negligible role in both voter attitudes and party preference.

Westminster, Scotland and abortion law

<Table 2 about here>

The issue of devolving abortion law to Scotland was raised in the Smith Commission's report of late 2014. In the wake of the Scottish independence referendum of September 2014, Prime Minister David Cameron established the Smith Commission to

“convene cross-party talks and facilitate an inclusive engagement process across Scotland to produce, by 30 November 2014, Heads of Agreement with recommendations for further devolution of powers to the Scottish Parliament. This process will be informed by a Command Paper, to be published by 31 October [2014] and will result in the publication of draft clauses by 25 January. The recommendations will deliver more financial, welfare and taxation powers, strengthening the Scottish Parliament within the United Kingdom.”^{vi}

The Commission delivered a comprehensive report, looking at what powers and authorities should be further devolved to the Scottish Government. Within the report, the issue of abortion received one brief paragraph:

The parties are strongly of the view to recommend the devolution of abortion and regard it as an anomalous health reservation. They agree that further serious consideration should be given to its devolution and a process should be established immediately to consider the matter further.^{vii} ~~(Smith Commission Report, 2014, 20).~~

Despite the perfunctory treatment, and the reference to all parties being of the same view on the issue, according to newspaper reports at the time abortion received heated discussion in the report's negotiation. As reported in *The Scotsman*,^{viii} devolution of abortion law was supported

by all ~~of the~~ political parties apart from Labour. The same source reported that the two female negotiators (Linda Fabiani of the SNP and Maggie Chapman of the Scottish Greens) were most supportive of the laws being devolved. Again, according to *The Scotsman's* report, the issue resulted in eleventh hour renegotiating, with Labour insisting that the law remain at Westminster in order for their being able to support the report. As a result, the Commission did not advocate for abortion law to be immediately transferred to Scotland. Abortion was thus a small, but critical, point for discussion in the Smith Commission negotiations. The language employed, and the relative silence around the issue beyond the Commission's vague recommendation cited above, suggest that parties again wanted to avoid and bury an issue which had the potential to be difficult and controversial.

The following year, in July 2015, 'pro-life' MPs tabled amendments to devolve jurisdiction over abortion to Scotland as part of the Scotland Bill. Two clauses were proposed regarding abortion, one by Liberal Democrat John Pugh, who has a long history of voting conservatively on abortion, and one by Conservative Sir Edward Leigh, who has a similar voting record of social conservatism on abortion and LGBT issues. Scottish women's organisations were concerned at the proposed changes and released a joint statement against the amendments.^{ix} During the Commons debate, SNP Members, now almost the sole political party representing Scotland in national government,^x distanced themselves from the amendments and the perceived forces behind them. Stewart McDonald, MP for Glasgow South, said that "It is well known that those Members [who proposed the amendments] are from the pro-life side of the debate, and the concern of those organisations is not entirely illegitimate" (HC Deb 6th July 2015 vol598 c109). McDonald went on to assert, however, that "we (Scotland) are not a nation of social conservatives" and that he did in fact wish to see the law devolved, because "we in Scotland have proven that we understand the weight of arguments and can handle them in a sensitive fashion" (HC Deb 6th July 2015 vol598 c110). He wanted to see it devolved, he

argued, not only because it would afford Scotland greater political powers (the *raison d'être* of the SNP) but that it would also allow Scotland to expand and compound a woman's right to choose.

.... I want the power in question to come to Scotland not just because I want all powers to come to Scotland but *because I want to improve and protect a woman's right to choose and to access quality healthcare*. I believe we can do that, and I want to make progress at the earliest opportunity. That is my motivation, as it will be for many other Members of the House. *Progress was never made without taking control and arguing—not always helpfully—on tough and important issues* (HC Deb 6th July 2015 vol598 c110, emphasis added).

McDonald's argument here is quite convoluted. He is simultaneously arguing against the proposers of the amendment, but for the devolution of the issue to Scotland. The difficult twists to this argument suggest that this is not a position the SNP sought to put themselves in, or wish to be in. Again, the discourse suggests a controversial issue that most politicians would rather avoid. Most importantly, in his language, the place of abortion policy is enmeshed with broader attitudes from the SNP towards devolution and independence more generally.

~~In spite of~~Despite their liberal rhetoric, the SNP were also keen to emphasise that there was no immediate plan to change abortion laws. Angela Crawley, MP for Lanark and Hamilton East declared that the party's position

remains absolutely clear: the Scottish Government have no plans to change the legislation, but we will support and welcome the devolution of further powers to the Scottish Parliament under the Bill (HC Deb 6th July 2015 vol598 c111).

Secretary of State for Scotland and Conservative MP for Dumfriesshire, Clydesdale and Tweeddale, David Mundell, also reiterated that the Government's position remained to keep abortion powers as a reserved concern:

The Government do not consider the amendment appropriate at this time. ... the Smith commission did not state that devolution should happen now, through this Bill. It stated that a process should be put in place to consider the matter further. (HC Deb 6th July 2015 vol598 c119).

Yet, in line with the SNP Members' argument, he did acknowledge that "there is no reason why the Scottish Parliament should not be able to decide an issue of this significance" (HC Deb 6th July 2015 vol598 c119). In spite of this, the amendments failed, and there appeared no further push from central government to devolve abortion law to Scotland. The issue, it appeared, had been laid to rest. The discourse in this debate suggested a muddled position across parties, with a particular sense from the SNP that they wished to both emphasise their desire to have control over all issues relating to Scotland, but also to avoid a controversial topic.

By September, however, reports came to light that abortion was indeed set to be devolved to the Scottish parliament. Such revelations appeared sudden, catching women's organisations in Scotland and politicians alike off-guard, and with no clear understanding of what the "process" that Mundell had referred to in the July debate was (or if any such "process" had in fact taken place). Indeed, the explicit reasons for this change remain unclear. This time, the position of the Government had moved from theoretically supporting the Scottish Government's rights to legislate on abortion as it had been in July, to supporting it in practice. A question on the 10th of September in the Scottish Parliament in Edinburgh saw the First Minister, Nicola Sturgeon, keen to stress that there were indeed no plans to change the law from Scotland:

... let me be absolutely clear that the Scottish Government's position on abortion law remains unchanged. We have no plans to change the law on abortion. Indeed, the Cabinet Secretary for Health, Wellbeing and Sport is writing to a number of women's groups this week to confirm that and to offer to meet them if they would find that helpful.

When the issue came to be debated again at Westminster in November, Mundell again argued that the Scottish Parliament was perfectly capable of legislating for abortion: "My starting point is that I believe that the Scottish Parliament has the capacity to deal with this issue. It is in danger of verging on the patronising to suggest that the Scottish Parliament is not capable of dealing with it" (HC Deb 9th November 2015 vol 602 c137). He reiterated this position again further along in the debate, pointing out that "There is no constitutional reason why this amendment should not be made, and the Smith commission did indeed recommend that it be done" (HC Deb 9th November 2015 vol 602 c156).

There was more strongly voiced criticism to the proposed legislative move in this debate, largely from Labour MPs. Yvette Cooper MP wrote a column in the *Guardian* the day before the debate in the Commons, criticising the decision. She argued that the Government's actions would open the door to calls for more restrictive legislation, creating a "new round of intensive, targeted pressure for restrictions both north and south of the border, and the fragmentation of important healthcare rights, which won't be good for women in Scotland or England and Wales."^{xi} In the debate, she questioned David Mundell along similar lines:

Does the Secretary of State not realise that he is setting up two different systems, one for Scotland and one for England and Wales, when we know from other parts of the world that that leads to women having to travel for abortions at a vulnerable time? (HC Deb 9th November 2015 vol 602 c137)

Elsewhere, the only sitting Scottish Labour MP, Ian Murray, reiterated Cooper's points, stressing that Mundell had not followed the process that had been set out in the Smith Commission report. He challenged Mundell's actions on the issue: "I do not think that his frantically calling round women's organisations in Scotland on the day he tables the amendment is satisfactory consultation or that it takes into account the issues that many women in Scotland have contacted me about. ... we [may] end up with abortion tourism" (HC Deb 9th November 2015 vol 602 c154). Murray went further, however, to stress that just because he did not think Scotland should have these powers that this did not mean he did not think it incapable of this decision-making: "nobody in this Chamber is saying that the Scottish Parliament does not have the capacity or indeed the responsibility to deal with abortion. ... I am perfectly confident in the Scottish Parliament, and I take the First Minister's word that she will not change the regulations" (HC Deb 9th November 2015 vol 602 c154).

In spite of Murray giving his support to the Scottish Parliament and its capabilities, Labour's line of argument was roundly attacked by SNP MPs. Contributions from the SNP railed against the perceived negative picture the Labour line of argument presented of the capabilities of the Scottish Parliament. Angela Crawley MP asked of the Secretary of State, "does [he] agree that Labour members undermine their colleagues in the Scottish Parliament by intimating that they cannot legislate on their own matters?" (HC Deb 9th November 2015 vol 602 c138). Deirdre Brock, MP for Edinburgh North and Leith said:

I think it is a very sad reflection of Labour Members' mistrust in their party that they do not trust Kezia Dugdale and her colleagues in the Scottish Parliament with any action that might require some thought and care. Why have Labour Members in Westminster such low opinions of their Scottish colleagues? (HC Deb 9th November 2015 vol 602 c150)

Three competing representations of the issue emerge in the course of the September debate and the question to the First Minister in the Scottish Parliament. For national Government and the Conservative party, this is now presented as a natural move, part of the broader parcel of devolution. The Scottish Parliament is able to legislate on this, they argue, there is no specific constitutional reason why it should not be devolved, and, indeed, the Smith Commission recommended that powers should be transferred to Scotland. For Labour, abortion is an issue of national importance, and one which should not be devolved as it requires uniform standards across the UK. For the SNP, whilst keen to stress that they had no desire to change the law around abortion, argued that it was problematic that Labour think that Scotland was not responsible enough to have this issue devolved. The Scottish Government, they argue, is more than capable of legislating on abortion. Competing representations of the issue thus abound in this debate, emanating from the different political parties' agendas.

Discussion

A consideration of Scotland and abortion laws following the Smith Commission report reiterates that devolution is a movable, or fluctuating point, rather than a solid boundary. This case study reiterates that devolution and reserved powers within the UK are changing, mutable and open to debate. The relationship between Edinburgh and Westminster here appears fluctuating, negotiable and, given the Secretary of State's sharp about-turn on the issue of abortion between July and September, open to whim and inconsistency. The actions detailed here act also as a reminder that the devolved relationships in the UK are all "uneven" and "asymmetric"^{xii}. There is no federal consistency here, with each legal point requiring negotiation. Furthermore, it reinforces the fact that "UK government has the upper hand"^{xiii} (~~Swenden and Meewen, 2014, 505~~) in this complicated multi-level set-up. Although this legislative devolution was encouraged by the Smith Commission report, central government has very much dictated the timing and advent of this change. Indeed, ~~the~~ SNP MPs debating

this in Westminster do not appear overly forceful in their support for the move, or comfortable in making the argument for change. This example acts as a reminder that central government retains the upper hand in the bilateral relationship, and may be an attempt by Westminster to reiterate this point in the devolved body's understanding of their role – or, more explicitly, a signal to the SNP that central government can force upon them difficult policy areas such as abortion.-

An analysis of discourse can help to get to these moments of change better than other methods. Looking at the ideas and language (asking, as Bacchi encourages, “what is the problem *presented* to be?”) helps to get beyond the surface level of the debate and to see the broader issues at play in these debates. For the SNP this is an opportunity to highlight their progressive social attitudes; for Labour, a chance to reiterate the need for strong abortion provision across the UK; and for the Conservatives, a way to reinstate their commitment to devolution. A discursive analysis helps to illustrate how abortion becomes a smoke-screen that symbolises far more than merely reproductive or women's rights. Beyond a discussion of abortion, these debates become a proxy discussion about the Scottish Parliament, Labour's position on the constitutional question and, by extension, the question of Scottish independence itself. When discussed in these debates it is symbolic of constitutional and national issues, not addressed on its own terms.^{xiv} From a normative feminist perspective, this is problematic: women's rights are dragged into a debate which is more truly a discussion of national rights. As such, the central concern of abortion laws (women, their rights, and health care requirements), can fall by the wayside.

Furthermore, apart from the interventions of several Labour MPs, most notably Yvette Cooper, the lack of argument for this issue to remain at the central level is concerning from the point of view of women's human rights. The absence of a national, centralised rights basis for women's ability to access abortion is troubling. This case study produces what appears at first to be a

contradictory situation. In making this decision Westminster continues to exert its central dominance in the UK political system, but does so through a relinquishing of its legal responsibilities. Central government shows its authority by removing some of its own powers. In this way, this decision on abortion is redolent of the broader programme of 'hollowing out the state' in the contemporary United Kingdom. Devolving abortion laws to Scotland becomes a way to relegate responsibility for women's rights away from national government. Devolution thus becomes a means to ensure both that controversial issues are kept at arms' length from central government, whilst simultaneously further diminishing the central state's legal and political authority. Devolved government must now also take responsibility for an issue which is both a fundamental aspect of women's bodily rights, but also one that can excite great controversy. Extra weight is placed on the devolved level, whilst pressure is eased on the central state structure.

Given the SNP's stipulations (and the currently feminised nature of the party and its leadership), there appears little likelihood that the new powers will be acted upon by the Scottish Government in any immediate future, either to create a more liberal or more restricted framework in which women can access terminations. Yet this commitment to a lack of action by the SNP is not necessarily positive. As argued above, women's issues and rights become a symbolic arena in which broader political debate can happen, rather than discussed on their own terms. A useful point of reference here is contemporary Northern Ireland. The devolution of abortion laws to Northern Ireland has meant a complete lack of liberalising movement on the part of formal politics in the province (indeed, a 2015 judgement from the Belfast High Court which declared Northern Irish law on abortion incompatible with the European Convention on Human Rights, shows that the legal system, rather than formal politics, offers far greater hope for change). Furthermore, abortion, along with LGBT issues, have become enmeshed within wider political debate about rights, the law and the constitutional question.^{xv}

As such, the issues become representative of broader political tensions. Indeed, Northern Ireland's situation has been left out entirely in any formal political discussion of the Scottish situation vis-à-vis abortion. This suggests, echoing the literature on inter-governmental relations in the contemporary UK,^{xvi} that bilateral relationships are key in the devolved UK. There is no attempt on the part of the devolved bodies to work together, even rhetorically, to counteract Westminster's decisions on this.

Conclusion

This article has illustrated how discussion about abortion law and Scotland ~~has been in 2015~~ was often a proxy for other issues. Instead of a focus on women's rights, this debate ~~has been hijacked as a debate~~ became a wider conversation around about Edinburgh's relationship to Westminster and the broader remit of the constitutional question itself. This has worrying connotations for women's rights. Firstly, creating a framework for potentially different laws across ~~Great Britain~~ the country as a whole means that there is now a way by which women north and south of the border may see different policy frameworks in which they can access terminations. Secondly, women and their right to bodily autonomy should, from a normative feminist perspective, maintain precedence in debates on the issue of abortion. Instead, this discussion, as it played out at Westminster in the debates cited above, has become a proxy conversation for the question of Scottish independence, and the relationship between ~~Edinburgh and London~~ levels of multi-level governance in the contemporary United Kingdom. With the devolved levels now carrying responsibility for a potentially controversial policy area, it is doubtful whether ~~S~~ such a move is ~~not~~ good for abortion laws, or women's rights.

Table 1 – Central and devolved powers within the UK MLG institutions

Retained at Westminster	Devolved to Scotland, Wales and Northern Ireland
The constitution International relations and defence National security Nationality and immigration Nuclear energy Broadcasting The UK tax system Employment and social security (except Northern Ireland)	Health and social care Education and training Local government and housing Agriculture, forestry and fisheries The environment and planning Tourism, sport and heritage Economic development and internal transport

Adapted from <https://www.gov.uk/guidance/guidance-on-devolution>, accessed 19/01/17. ~~All of t~~The three devolved institutions have different settlements, and thus have slightly differing powers from those outlined above, but this covers their main competencies.

Table 2 – Depiction of abortion across two debates on abortion and Scotland in the House of Commons, Westminster

	July 2015 debate	October 2015 debate
How the ‘problem’ of abortion is depicted	<i>Government (Conservatives)– devolution of powers over abortion not appropriate at this time</i> <i>SNP – would not change law on abortion but welcomes further devolution of any powers or laws</i>	<i>Government (Conservatives) – Scottish government is capable of addressing this issue so it should be within their powers</i> <i>SNP - will not change law on abortion but welcomes further devolution of any powers or laws</i> <i>Labour – this move sets a dangerous precedent allowing for differing rights across the regions; should not happen</i>

ⁱ [The Welsh and Scottish governments shortly followed in bringing about similar provisions for Northern Irish women seeking terminations in Wales or Scotland.](#)

ⁱⁱ Petchesky, 1990, *Abortion and Women’s Choice: The State, Sexuality, and Reproductive Freedom*, Northeastern University Press, xi

ⁱⁱⁱ Mackay, 2010, “Devolution and the Multilevel Politics of Gender in the UK: The case of Scotland” in Haussman, Melissa, Marian Sawyer and Jill Vickers, *Federalism, Feminism and Multilevel Governance*, Ashgate, p. 157.

^{iv} Quoted in Sheldon, 1997, *Beyond Control: Medical Power and Abortion Law*, Pluto Press, London, p. 79.

^v Thomson, Jennifer 2015, “Abortion and same-sex marriage: how are non-sectarian controversial issues discussed in Northern Irish politics?”, *Irish Political Studies*, Volume 31, Issue 4, pp. 483-501, Jennifer Thomson, 2017, “Resisting gendered change: feminist institutionalism and critical actors”, *International Political Science Review*, Online First, DOI: 10.1177/0192512116677844.

^{vi} The Smith Commission website, <http://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/>. Accessed 18/09/17.

^{vii} [Ibid, Smith Commission Report, 2014, 20.](#)

^{viii} ‘Labour forced Smith Commission to drop abortion law’, *The Scotsman*, <http://www.scotsman.com/news/politics/labour-forced-smith-commission-to-drop-abortion-law-1-3620377>. Accessed 28/03/16.

^{ix} <http://www.engender.org.uk/content/publications/Joint-statement-on-Scotland-Bill---NC56---Abortion.pdf>. Accessed 18/09/17.

^x [Following the 2015 General Election In the 2015-2017 Parliament](#), 56 of the 58 Scottish MPs ~~are now~~ were SNP.

^{xi} ‘This threat to abortion law must be fought by MPs of all hues’, Yvette Cooper, *The Guardian*, 8th November 2015, <http://www.theguardian.com/commentisfree/2015/nov/08/abortion-law-mps-commons-devolve-scotland>. Accessed 28/03/15.

^{xii} Scully and Wyn Jones, 2011,– “Territorial Politics in Post-Devolution Britain”, in: Heffernan, R., Cowley, P. and Hay, C. eds. *Developments in British Politics 9 (9th ed.)*, Basingstoke: Palgrave Macmillan, pp. 113-129, p. 113

^{xiii} Swenden and McEwen, 2014, “UK devolution in the shadow of hierarchy? Intergovernmental relations and party politics”, *Comparative European Politics*, Vol. 12, Issue 4/5, pp. 488-509, p. 505

^{xiv} Similarly, this is echoed in tensions between Scotland and Northern Ireland over abortion. In late 2016, Nicola Sturgeon suggested that she would consider legal changes to allow Northern Irish women access to NHS funded terminations in Scotland. This excited much anger from Northern Irish First Minister Arlene Foster. Again, the issue of abortion acted as a proxy regarding tensions between the two nations over concerns around Brexit, and which area should receive more attention from national government in the negotiations and decisions around leaving the European Union.

^{xv} Thomson, 2015.

^{xvi} Swenden and McEwen, 2014,–“UK devolution in the shadow of hierarchy? Intergovernmental relations and party politics”, *Comparative European Politics*, Vol. 12, Issue 4/5, pp. 488-509.