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# Legislating for a pandemic: exposing the stateless State

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## Abstract

Initially the subject of widespread consensus, legislative and policy responses to coronavirus are increasingly provoking predictable, albeit understandable, reactions. The right and the left are united by a concern that essential freedoms are being eroded by a State utilising the opportunity of the pandemic to make a power-grab. Focused on the Coronavirus Act 2020, this article takes a more cautious approach, suggesting instead that the law should be understood not as the product of a hierarchical State but rather as a demonstration of the ‘statelessness’ of the contemporary state. The article examines the Act, with particular focus on open justice, adult social care, and Business Improvement Districts. We argue that reading this unique piece of legislation through the lens of the stateless state reveals the complexities, ambiguities and contestations within contemporary policy making. We suggest that dismissing the Act as unnecessarily authoritarian is an insufficiently nuanced response, and furthermore, that this exploration of the law allows us to develop and complicate scholarship on the stateless state.

## Introduction

Imagine the call that went out across Government in mid-March 2020. What urgently needs to be done in your area of responsibility to buy time, slow the spread of covid-19, and sustain services? In that moment, Whitehall produced a prodigious body of guidance, policy papers and drafts of primary and secondary legislation. It represented (for this generation of political leaders) an unimaginable range of interventions. The context is important; this was done in a few short weeks when the intense debate about the appropriate response to the virus resolved into a near-consensus on the need for ‘lockdown’. For those developing the details of policies, in departments still deeply entangled with the administrative complexities of Brexit, this urgent work was combined with a sudden shift to home working, with all its complexities. In these circumstances, the volume and range of regulatory materials produced is a testament to the resourcefulness, expertise and flexibility of the civil service.

This article focuses on one major product of all this work – the Coronavirus Act 2020 (the Act). Criticism of the Act has focused on the (dis)proportionality of police powers,<sup>1</sup> and absence of accountability for – and Parliamentary oversight of – much of the Government’s agenda.<sup>2</sup> In a high profile intervention, for example, Baroness Hale has argued that Parliament ‘surrender[ed] control to the government at a crucial time.’<sup>3</sup> In the context of this special edition, in honour of the work of Professor Phil Thomas, we suggest two aspects of this are important. Firstly, these comments chime closely with Professor Thomas’ longstanding concern for civil liberties and the rule of law, and a concern that when emergency legislation is passed, ‘it is incumbent upon the parliamentarians that their decisions be measured, appropriate, and considered, and that both process and content accord with the basic principles of the Rule of Law.’<sup>4</sup> Secondly, Baroness Hale’s comments form part of the introduction of *Justice Matters: essays from the pandemic*, a collection published by Legal Action Group (LAG) and including reflections from practitioners and academics. Phil Thomas was a founder

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<sup>1</sup> J. Pugh, ‘The United Kingdom’s Coronavirus Act, Deprivations of Liberty, and The Right to Liberty and Security of the Person’ (2020) 7(1) *J. of Law and the Biosciences*, <https://doi.org/10.1093/jlb/ljaa011>.

<sup>2</sup> K.D. Ewing, ‘Covid-19: Government by Decree’ (2020) *King’s Law J.* 1.

<sup>3</sup> B. Hale, ‘Introduction’ *Justice Matters*, 2020.

<sup>4</sup> P. Thomas, ‘Emergency Terrorist Legislation’ (1998) 3(3) *J. of Civil Liberties* 240.

member of LAG, and has been a leading member of the socio-legal community for many years. As authors with longstanding connections to LAG, to socio-legal studies and legal education, we are indebted to Phil Thomas' work, and in particular his commitment to socio-legal studies, civil liberties, and access to justice, and it is a great honour to take part in this special edition.

While we share concerns about the actions of Government, including the risks of disregarding the rule of law (which we return to in our conclusion), our objective in this article is not to set out a critique of the choices made by government, nor the dramatic extension of powers of the State. Instead we have two aims with this article.

Firstly, we provide nuance to the growing opposition to the Act. In particular, we dispute interpretations that suggest that the legislation is best explained as a power grab by an overbearing executive determined to outlaw freedoms.<sup>5</sup> Instead, we argue that a close analysis of the response to coronavirus through the lens of the stateless state reveals significant contestations, complexities and ambiguities.<sup>6</sup>

Secondly, we add to scholarship on the contemporary state, drawing on Bevir's account of the stateless state, and developing this scholarship in one aspect. In Bevir's account, law plays two roles: governing contestation, and as the consequence of that contestation, producing new quandaries.<sup>7</sup> For us, law plays a third role, revealing those ambiguities and interconnections. Here, the analysis of the Act itself is of value, as contestations and complexities appear starkly on the face of the legislation. We highlight the critical importance of unpicking technical legal devices to reveal the political contestations as well as the need to avoid a single diagnostic approach to legislation.

Our analysis is in four main parts. We open by outlining Bevir's concept of the stateless state, before moving to make three arguments. Firstly, we suggest that the stateless state is a productive tool for analysis of the 2020 Act, revealing the absence of a coherent authoritarian agenda, by utilising the provisions on public justice. Secondly, through detailed analysis of the provisions on adult social care, we argue that the techniques of analysis in stateless state scholarship enable the development of a nuanced, complex analysis of the State's response to coronavirus. Thirdly, drawing on the provisions concerning Business Improvement Districts, we suggest that BIDs complicate, challenge and develop aspects of current stateless state scholarship.

### Post-foundationalism and the 'stateless state'

In Bevir's analysis, the stateless state is the latest development of postfoundationalist accounts of the state, which conceive of public policies as 'contingent constructions of actors inspired by competing beliefs or discourses themselves rooted in different traditions or epistemes.'<sup>8</sup> The stateless state conceptualises the state as 'inherently made up of different and competing actors

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<sup>5</sup> See Liberty 'The Coronavirus Act is the greatest limitation on our civil liberties in a generation and harms our most basic human rights' available at <<https://liberty.e-activist.com/page/63721/petition/1?ea.tracking.id=Website>> and the remarks of Conservative MP Steve Baker on BBC Radio 4 10th September 2020 who described the new restrictions limiting meetings to 6 people as 'madness'. What is significant is his perspective on the law, that 'this is not a fit legal environment for the British people'.

<sup>6</sup> M. Bevir, 'What is the decentered state?' (2020) Public Policy and Administration, <<https://doi.org/10.1177/0952076720904993>>

<sup>7</sup> Id. p. 7.

<sup>8</sup> Id. p. 5.

inspired by different beliefs and traditions'.<sup>9</sup> This contrasts with traditional approaches which identify 'essential properties and necessary logics of social and political life'.<sup>10</sup>

It is an approach which argues for the need for analysis of expertise and policy networks. This emphasis appears to be vindicated in the context of coronavirus, as the pandemic has resulted in vastly increased public scrutiny of the impact of medical and scientific expertise on Government decisions, as well as increased media attention on the previously widely disregarded roles of policy making networks which draw together competing forms of expertise, including SAGE and NERVTAG. Built on empirical examination of policy networks like these,<sup>11</sup> what is distinctive about the post-foundationalist account is the attention given to questions of identifying agency and the motivations, beliefs, and knowledges of the actors in such roles. Post-foundationalists argue that this approach provides far clearer explanations of the development of policy than a focus on institutions, an argument which Bevir suggests 'would surely have triumphed already were it not for the modernist desire to impose scholarly order on a messy world.'<sup>12</sup>

Developing this analysis, our suggestion is that an account of the disordered state, which cannot be tied definitively to structures or markets, can be brought fruitfully into conversation with detailed interrogation of legislation. In relation to the Act, we suggest this enables analysis of the ways in which, in a moment of crisis, the state can be seen as 'just an aggregate description for a vast array of meaningful actions that coalesce into contingent, shifting and contested practices' rather than an opportunistic authoritarian and coherent actor.<sup>13</sup> Our contention is that we can draw productively on post-foundationalist attention to the exercise of power and authority as part of governance<sup>14</sup> and the choices made, as well as the limitations imposed on the potential range of choices.<sup>15</sup>

Bevir calls for attention to three particular aspects: the narratives used by elites to make sense of the world, the clashing rationalities which seek to govern conduct, and resistance to official narratives. In relation to this last, Bevir notes that 'Central governments often have relatively consistent stories to tell about the policies they favor'<sup>16</sup>, while resistance can be identified in conflicts between strategic elites and others, who 'can resist the intentions and policies of elites by consuming them in ways that draw on their local traditions and local reasoning.'<sup>17</sup>

Drawing on these themes, we turn in the next section to analyse the Act as a putative authoritarian device. We suggest that what is compelling is the unusual absence of any consistent story; instead the Act is a text which reveals competing narratives and rationalities. In the sections which follow this discussion of the Act, we develop analysis of the stateless state, and examine two arguments by Bevir. Firstly, we claim that Bevir makes an underpinning normative claim that empirical research needs to emphasise contingency and expose the ambiguities and contestations in governance, and

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<sup>9</sup> Id. p. 6.

<sup>10</sup> Id. p. 5.

<sup>11</sup> See, for example, B. Clifford, 'British local authority planners, planning reform and everyday practices within the state' (2020) *Public Policy and Administration*, <<https://doi.org/10.1177/0952076720904995>>; J. Waring, A. Crompton, C. Overton & B. Roe, 'Decentering health research networks: Framing collaboration in the context of narrative incompatibility and regional geo-politics' (2020) *Public Policy and Administration*, <<https://doi.org/10.1177/0952076720911686>>.

<sup>12</sup> Bevir, op. cit. n. 6, p. 12.

<sup>13</sup> Id. p. 9.

<sup>14</sup> P. G. Peters, 'Governance is where you find it' (2016) 24(3) *Asian J. of Political Science* 309.

<sup>15</sup> P. Cairney, 'The myth of 'evidence-based policymaking' in a decentred state' (2020) *Public Policy and Administration*, <<https://doi.org/10.1177/0952076720905016>>.

<sup>16</sup> Bevir, op. cit. n. 6, p. 15.

<sup>17</sup> Id.

to analyse narratives, rationalities and resistance, and we pick this up through analysis of the way the Act and associated guidance seek to govern adult social care in the pandemic. Secondly, we explore Bevir's suggestion that empirical analysis of the contemporary state, which emphasises 'meaning in action', reveals the central role of policy networks. We seek to complicate this claim through analysis of the place of Business Improvement Districts.

### The Coronavirus Act 2020: an authoritarian act?

In his introduction to the Second Reading of the Act, Lord Bethell indicated it was one piece of wider Government responses to the pandemic, noting it was 'not everything that we are doing, but it is essential for what we are doing.'<sup>18</sup> The 'incredibly technical'<sup>19</sup> Act comprises 102 sections and 29 Schedules had three days substantive consideration in Parliament with less than 14 hours debate, before Royal Assent was granted on Wednesday 25 March 2020.<sup>20</sup> Astonishingly, given this speed and illustrating the broad consensus around the need for restrictions, the legislation was passed in accordance with the Sewel convention and was approved by the three devolved administrations.

Glancing over its 350 pages, the absence of Parts and chapters as part of an overall structure is striking. To pick a comparative example at random for illustrative purposes, the 120 sections in the Digital Economy Act 2017 are divided into seven Parts, some which are further subdivided into chapters. These legislative drafting protocols normally work to give the impression of policy coherence, retrospective or otherwise, and it is not surprising to discover that it was 'drafted on the hoof'.<sup>21</sup> It is unmediated by the usual signposts; while the Explanatory Notes to the 2020 Act seek to impose coherence and a set of – broad and general – aims, the Act itself has two Parts; Main Provisions, and Final Provisions (dealing with interpretation, commencement and other procedural matters). Most of the Act is a slew of provisions across a broad range of areas, including for example, provisions to postpone elections,<sup>22</sup> protect food supplies,<sup>23</sup> change systems regulating deaths,<sup>24</sup> steps to protect citizens (including sick pay),<sup>25</sup> and extending notice periods for evictions for residential tenancies in England and Wales.<sup>26</sup> It also gives extensive powers to manage the population – including, for example, powers to shut schools, ports, and public gatherings.<sup>27</sup>

Our suggestion is that the lack of divisions is in itself indicative of the fact that these provisions are not the product of a single strategic approach, and furthermore that the emergency nature of this response enables analysis of choices made about where urgent action was needed and what needed doing. Importantly, our argument is that these choices were not a simple power grab but were circumscribed by the traditions of thought of groups of policy makers and the range of what was imaginable and manageable, as extended by circumstances of extreme urgency.

An example is the approach taken to public justice, which we highlight to complicate suggestions that the Act is an example of an authoritarian seizure of power. For the justice system, one key question faced by Government was how to enable an instant pivot to online courts. In that context,

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<sup>18</sup> Lord Bethell, 24 March 2020, House of Lords, Hansard, Vol. 802, Col. 1649.

<sup>19</sup> Lord Bethell, 24 March 2020, House of Lords, Hansard, Vol. 802, Col. 1732.

<sup>20</sup> But it should be noted that Lord Bethell emphasises discussions outside the Chamber, and this figure only refers to debate in public.

<sup>21</sup> Op. cit. n. 19

<sup>22</sup> ss.59-70.

<sup>23</sup> Ss.25-29.

<sup>24</sup> ss.30-31 and ss.18-21.

<sup>25</sup> Ss.39-44.

<sup>26</sup> S.81.

<sup>27</sup> Ss.37, 50 & 52.

for us, it is extraordinary that this included consideration of how to facilitate the ‘ancient common law right’<sup>28</sup> to be able to scrutinise judicial proceedings.

While video links are increasingly common to enable parties to take part, transmissions of proceedings to the public have been subject to a nearly 100 year old ‘very wide’<sup>29</sup> prohibition on photographs and sketches.<sup>30</sup> There are limited exceptions,<sup>31,32</sup> but in general, until March 2020, if a member of the public wanted to watch proceedings they had to be sitting in the courtroom (or, at the very least, in an overflow room watching an official feed).

It is section 55 CA 2020, and Schedule 25, both entitled “Public participation in proceedings conducted by video or audio” which change this. They insert new temporary provisions into the Courts Act 2003,<sup>33</sup> which give powers to the court to direct that video or audio of the hearing can be broadcasted or recorded, “for the purpose of enabling members of the public to see and hear the proceedings”. The court controls this broadcast and it is an offence to make or attempt to make unauthorised recordings or transmissions. The provisions bring someone watching electronically into the ambit of the court, so much so that an additional offence is created if an individual is watching or listening to a hearing, and someone else records or transmits their reactions to what they are watching.

Accompanied by a Protocol regarding Remote Hearings<sup>34</sup> and Practice Direction 51Y<sup>35</sup>, s.55 overturns a century- long rule while simultaneously reinscribing the fundamental balance between judicial authority and control on one hand, and transparency and accountability of legal proceedings on the other. In doing so, it emphasises a liberal democratic devotion to public justice, ‘[f]undamental to the recodifications of political power that established the modern state’<sup>36</sup>, and regularly restated in judicial and academic reflections on the role of the courts.<sup>37</sup> Such an approach can be criticised for failing to engage more substantively with ways in which courts can exclude,<sup>38</sup>

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<sup>28</sup> *Regina (O'Connor and another) v Aldershot Magistrates' Court* [2016] EWHC 2792 (Admin), para. 28.

<sup>29</sup> See *R. v Loveridge, Lee & Loveridge* [2001] 2 Cr. App. R. 29 at para. 25, holding that it extended to video recordings, and extended to audio recordings by s.9 Contempt of Court Act 1981.

<sup>30</sup> for discussion of the context in which the ban was introduced, see G. Rubin, ‘Seddon, Dell and rock n' roll: investigating alleged breaches of the ban on publishing photographs taken within courts or their precincts, 1925-1967’ (2008) 11 *Crim. L.R.* 874.

<sup>31</sup> See s.47 Constitutional Reform Act 2005.

<sup>32</sup> Enabled by virtue of s.32 of the Crime and Courts Act 2013.

<sup>33</sup> Courts Act 2003, ss 85A-85D. Identical provision is made for the First and Upper Tier Tribunals, see Tribunals, Courts and Enforcement Act 2007 ss.29ZA-29ZD.

<sup>34</sup> Available at <<https://www.civillitigationbrief.com/wp-content/uploads/2020/03/Civil-court-guidance-on-how-to-conduct-remote-hearings.pdf>>.

<sup>35</sup> Available at <<https://www.judiciary.uk/wp-content/uploads/2020/03/CPR-116th-PD-Update-video-or-audio-hearings-for-coronavirus-period-1.pdf>>.

<sup>36</sup> A. Duff, L. Farmer, S. Marshall & V. Tadros, *the trial on trial, volume 3: towards a normative theory of the criminal trial* (2007) 260.

<sup>37</sup> See *R. (Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2013] QB 618; *Dring (on behalf of the Asbestos Victims Support Groups Forum UK) v Cape Intermediate Holdings Ltd (Media Lawyers Association intervening)* [2019] UKSC 38; contributions to B. Hess and A.K. Harvey (eds), *Open Justice: The Role of Courts in a Democratic Society* (2019), and for a critique (which does not place weight on liberal democracy), see J. Jaconelli, *Open Justice: a critique of the public trial* (2002).

<sup>38</sup> See, for examples, J. Hynes, N. Gill & J. Tomlinson ‘In defence of the hearing? Emerging geographies of publicness, materiality, access and communication in court hearings’ *Geography Compass*, <<https://doi.org/10.1111/gec3.12499>>; N.G. Fielding, ‘Lay people in court: the experience of defendants, eyewitnesses and victims’ (2013) 64(2) *The Brit. J. of Sociology* 287; J. Simonson, ‘The Criminal Court Audience in a Post-Trial World’ (2013) 127 *Harvard Law Rev.* 2173.

and the possibilities presented by new technologies,<sup>39</sup> including the possibilities of opening up access for disabled people,<sup>40</sup> as well as for a courtroom focus, oddly disconnected from lockdown rules which provided few legitimate reasons to leave home. The operation in practice has also been criticised.<sup>41</sup> It is now increasingly clear that normal has shifted to a blend of online and physical courts so ongoing critical engagement with what the substance of open justice might look like in a post-covid world is necessary. However, in that initial moment of emergency, what s.55 CA 2020 highlights is a tradition of thought somewhere in government which foregrounds the rule of law and liberal democracy, as well as judicial independence in relation to decisions relating to these fundamental principles.

Our suggestion is therefore that a nuanced account of the foundations of the Act are required, that a dismissal of the Act as entirely authoritarian is misplaced, and that the law itself can provide a productive basis for analysis of the state. We turn in the next section to analyse the ways in which the approaches of stateless state scholarship can be productively deployed in analysis of this unusually inconsistent legislation and the surrounding policy.

## Narratives, Rationalities, Resistance: protecting adults

### Background

Legislation governing state intervention aimed at protecting vulnerable adults has had a complex trajectory. Immediately after the Second World War, the focus was on dismantling the discredited Poor Laws and developing the bureaucratic infrastructure for a national welfare state, which included the National Assistance Act 1948 (NAA). The NAA set out the state's responsibilities for those adults who could not be provided for within the family. It established a national system for the oversight of local provision, championed a particularly Fabian brand of expertise, and responded to scandals of the past – primarily the cruelties of the workhouse system. Any problems with state provision were to be sorted by increasing the professionalism of social workers and extending the reach of the state.<sup>42</sup>

The always uneasy coalition of interests which underpinned this consensus fell apart in the 1970s and 1980s as confidence in state provision was undermined by scandals and the growth of rights activism.<sup>43</sup> The legislative response, the National Health Service and Community Care Act 1990, transformed provision for adult services. In Peck and Tickell's terms the Act 'rolled back' the state,<sup>44</sup> introducing a market in accommodation and social services which gradually transformed the role of local authorities from provider to procurer. New Labour retained a commitment to markets and to managerialism, rejecting ideology in favour of 'what works',<sup>45</sup> including the introduction of new

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<sup>39</sup> See for example, discussion by Thomas De le Mare QC at <https://coronavirus.blackstonechambers.com/coronavirus-and-public-civil-hearings/> and see the collected reflections on <https://remotecourts.org/>

<sup>40</sup> On which see <https://www.theguardian.com/world/2020/apr/20/covid-lockdown-opening-up-world-for-people-with-disabilities>.

<sup>41</sup> Joint Committee on Human Rights The Government's response to COVID-19: human rights implications 21<sup>st</sup> September 2020 <<https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/265/26502.htm>>, at para 185-187.

<sup>42</sup> See for example the *Report of the Committee on Local Authority and Allied Personal Social Services* the Seebohm Report (1968) - and the establishment of the British Association of Social Work in 1970.

<sup>43</sup> H.Carr and C.Hunter 'Are Judicial Approaches to Adult Social Care at a Dead-End?' (2012) 21(1) *Social and Legal Studies* 73.

<sup>44</sup> J. Peck and A. Tickell 'Neoliberalizing Space' (2002) 34(3) *Antipode* 380

<sup>45</sup> A.Giddens, *The Third Way. The Renewal of Social Democracy* (1998). See for a social care example, H. Carr (2005) 'Someone to watch over me: Making Supported Housing Work' 14(3) *Social & Legal Studies* 387.

assessment tools to improve social work decision making, increased regulation of the social work profession and increasing oversight of service provision.

However, as Phil Thomas noted in 1990, the progress from welfarism to a Thatcherite enterprise culture was not a 'steady, uneventful programme'<sup>46</sup> and it would be misleading to describe the decades from the 1970s to 2010 as a straightforward and uncontested shift from a 'cradle to grave' welfare system to a welfare safety net run on market/managerial principles. What we see is 'co-social governmentalities'<sup>47</sup> and the pluralisation of 'social' technologies<sup>48</sup> – social aspirations and techniques co-existing alongside more individual and entrepreneurial interventions. For instance, social provision for adults during this period was rather haphazardly extended via private members Bills; scandals erupted which required political interventions; social activism, particularly around carers and disabled people's rights had effects; and, perhaps most significantly, international obligations, human rights and equality increasingly began to inform social provision.

The years since 2010 have been increasingly politically chaotic, and austerity and intensification of workfare<sup>49</sup> have had consequential impacts on adult social care. Nonetheless, there have been some relevant legislative initiatives during this period, in particular the Care Act 2014. This Act, heralded as the most important piece of adult social care legislation since 1948, replaced a multitude of overlapping and complex statutes, and updated and consolidated the law. There was an important shift towards a narrative of person-centred care embodied within the statute, including a general duty to promote individual well-being and emphasis on personal provision over standardized services. It also entrenched a market rationality, imposing a duty on local authorities to promote a market in services.<sup>50</sup> However it was not designed to address critical problems – chronic underfunding, the scale of unmet need, and the increasingly limited access to social care services. Whilst the Act included provisions to resolve the dilemma of the funding of adult social care based on the Dilnot Report<sup>51</sup> neither this approach nor any other solution has been implemented. There are also unresolved infrastructural weaknesses in the care system, including difficulties for those transitioning from children to adult services and a problematic interface between health and adult social care. It is fair to conclude that adult social services entered 2020 in crisis, particularly ill-prepared to respond to the challenges posed by Covid 19.<sup>52</sup>

### Easing duties towards vulnerable adults

The CA 2020 changes enable local authorities to prioritise service provision without being constrained by statutory duties in the event of a significantly depleted workforce and/or a rapid acceleration in demand for services. The Care Act 2014 structures provision around duties imposed upon local authorities to assess and meet the eligible needs of service users. Section 15 and schedule 12 of CA disapply those core duties in what is characterised as Care Act easements. Government guidance which accompanies the legislation is extensive, pointing out the continuing

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<sup>46</sup> P. Thomas (1990), 'Access to Justice: the Thatcher Legacy' 10 *Windsor YB Access Justice* 521.

<sup>47</sup> G. Pavlich *Governing Paradoxes of Restorative Justice* (2001).

<sup>48</sup> P. O'Malley, 'Risk, Crime and Prudentialism revisited' in *Crime, Risk and Justice: The politics of crime control in liberal democracies* ed K. Stenson and R.R. Sullivan (2001).

<sup>49</sup> J. MacLeavy, 'A 'new politics' of austerity, workfare and gender? The UK coalition government's welfare reform proposals' (2011) 4(3) *Cambridge J of Regions, Economy and Society* 355.

<sup>50</sup> Care Act 2014, s.5.

<sup>51</sup> *Fairer Care Funding* The Report of the Commission on Funding of Care and Support July 2011 (the Dilnot report) available

<<https://webarchive.nationalarchives.gov.uk/20130221121529/https://www.wp.dh.gov.uk/carecommission/files/2011/07/Fairer-Care-Funding-Report.pdf>>.

<sup>52</sup> Age UK Care in crisis <<https://www.ageuk.org.uk/our-impact/campaigning/care-in-crisis/>>.

constraints on local authority actions – human rights and equality act obligations remain in force as do safeguarding adults at risk requirements.<sup>53</sup>

These are provisions of last resort. The statutory guidance makes clear that the easements are time-limited and to be used as narrowly as possible. Their use is to be guided by an ethical framework for social care practice under the pandemic, a document developed first by the Committee on Ethical Aspects of Pandemic Influenza in 2007 and revised by the Department of Health and Social Care (DHSC) in 2017.<sup>54</sup> The guidance suggests that there are four stages of local authorities' response to the demands of the pandemic – business as usual (Stage 1), working within the flexibility in the 2014 Act (Stage 2), adoption of specific (proportionate) easements (Stage 3), and, finally, whole systems based rationing (Stage 4) – but does not anticipate a sequential process. Instead it envisages local authorities moving in and out of different stages as local circumstances require.

The guidance prioritises clear decision-making, informed by discussions with local partners, in particular NHS leadership, and the evidence and thought processes are to be recorded. The Principal Social Worker, the Assistant Director and the Director of Adult Social Services are primary decision makers from Stage 2 onwards, and decisions to move to stage 3 and 4 are to be notified to DHSC. Nor does utilising the easements mean that there are no requirements to assess and plan for social care and support needs and to record decision making professionally. There is extensive guidance in Annex B to the guidance on what is required, particularly informed by Human Rights obligations.

The Care Quality Commission provides up-to-date information on which local authorities are utilizing easements. Its webpage makes clear that it does not have a role in monitoring local authorities use of the easements. This is an interesting opportunity missed by the legislation, to ensure proper compliance with guidelines. It will, however, speak to local authorities to understand their reasoning. 'We will ask them what impact they expect on adult social care services in their area. We will use this information to help us prioritise our monitoring of providers' (CQC 2020). The Local Government and Social Care Ombudsman has already received complaints about adult social care during the pandemic. 'We will consider what was sensible and appropriate to expect from a council or care provider in all the circumstances of the matter complained about. We will ask what should have happened, given the context of the complaint, and the law and guidance in place at that time'.<sup>55</sup> Its role in assessing human rights compliance of local authority restrictions will be critical.<sup>56</sup>

It appears that eight local authorities triggered the easements in the month following their introduction on 31st March 2020, but they have done so differently, with only two considering (but not activating) the reduction of services to meet needs (Stage 4). By June 2020 only Solihull and Derbyshire were still using them and by July 2020 no authority was utilising the easements.

## Discussion

It is possible to imagine a world in which state provision of adult social care services would be ramped up during a pandemic. Local authorities with strong connections to local communities and

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<sup>53</sup> DHSC *Care Act easements: guidance for local authorities* 2020(1) available at <<https://www.gov.uk/government/publications/coronavirus-covid-19-changes-to-the-care-act-2014/care-act-easements-guidance-for-local-authorities>>.

<sup>54</sup> DHSC *Responding to Covid-19: the ethical framework for adult social care* 2020(2) available at <<https://www.gov.uk/government/publications/covid-19-ethical-framework-for-adult-social-care/responding-to-covid-19-the-ethical-framework-for-adult-social-care>>.

<sup>55</sup> Local Government and Social Care Ombudsman, June 2020 <<https://www.lgo.org.uk/make-a-complaint/fact-sheets/other-topics/complaints-involving-covid-19>>.

<sup>56</sup> Op. cit. n. 41, at paragraph 88

quality service provision would be well placed to recognise and respond to new needs and extend provision. But that would require a responsive infrastructure and access to resources that has never existed within adult social care in the UK. It would also require an imagination that prioritised social care alongside the NHS, recognising its pivotal position in protecting individuals and families from the collateral damage inflicted by Covid-19. Instead adult social care's status as a Cinderella service has persisted and is even further entrenched by the government's response.<sup>57</sup> There are no finalised figures available yet for the increased recruitment provided for in the Act, but social care workforce statistics indicate the vulnerability of the sector, with 25% of the workforce aged over 55, 25% of staff unavailable to work due to Covid-19 related reasons, and 34% of providers reporting they urgently need more staff.<sup>58</sup>

The Care Act easements, in this context, can be understood as a further concession to the minimal state. The legislation facilitates the rationing of services only to those who meet the highest threshold of need and an intensification of the role of the state, as it can decide when services are rationed. Liberty argue, for instance, that the Act has 'suspended vital social care requirements for local authorities –leaving some older and disabled people without even basic support in a pandemic'.<sup>59</sup>

But, drawing on Bevir, we would suggest that something more complex – and more contradictory – is going on. One striking feature is the ambivalence of the government's intervention.

Belinda Schwehr, a long-standing expert commentator on adult social care, points to the ambivalence of government guidance,

it's chosen to say to councils 'you can act on the basis of these reduced functions, but we don't actually want you to. So although it's the law already, we're asking you to ignore all that - unless and until it's really not possible for you to operate the full Care Act, given what the situation is on the ground in your area, regarding staffing, access to services, logistics, specific issues etc.<sup>60</sup>

The publication of the ethical framework as a part of the overall guidance provides a powerful reminder of the social values that underpin adult social care. It emphasises values and principles (such as respect, reasonableness, the minimisation of harm, inclusiveness and accountability), as well as stressing that the response to the outbreak must be collective.

A further point is that, after decades of mistrust of social workers' judgement, the easements operate to reinstate professional discretion. There is an emphasis on the professionalism of social care staff and on local knowledge. As the ethical framework makes clear,

Social care is a locally led and delivered service built on a detailed understanding of individuals and their families, communities and cultures. Social workers, occupational

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<sup>57</sup> A. Charlesworth, 'Even on its 70th birthday, social care remains a Cinderella service' *The Guardian* 3<sup>rd</sup> July 2018 available here <<https://www.theguardian.com/society/2018/jul/03/social-care-70-cinderella-service-funding>>.

<sup>58</sup> <<https://www.skillsforcare.org.uk/adult-social-care-workforce-data/Workforce-intelligence/publications/Topics/COVID-19/COVID-19.aspx>>.

<sup>59</sup> See <<https://www.libertyhumanrights.org.uk/fundamental/coronavirus/>>.

<sup>60</sup> B. Schwehr, FAQs on Care Act Easements, transcript available here <[https://www.cascaidr.org.uk/2020/04/30/cascaidrs-qa-session-live-with-coproduce-care-30-04-2020/transcript-of-the-talk-on-the-care-act-easements/30th\\_April\\_2020](https://www.cascaidr.org.uk/2020/04/30/cascaidrs-qa-session-live-with-coproduce-care-30-04-2020/transcript-of-the-talk-on-the-care-act-easements/30th_April_2020)>.

therapists and nurses form the core professional group and have clear responsibilities and accountabilities to their own professional codes and guidelines.<sup>61</sup>

This is not to say that the easements do not present serious dangers to service provision. The Joint Committee on Human Rights report<sup>62</sup> suggested that local authorities had reduced provision even in areas where the easement provisions have not been used. A service user in Derbyshire threatened to judicially review its decision to operate under the easements and downgrade a wide range of Care Act duties on the basis that there was no evidence that the threshold for invoking the easements had been met, that the decision was not taken in accordance with the guidance and that the authority had failed to communicate the decision appropriately to service users. Following concessions by the local authority court action was avoided.<sup>63</sup> The case provides a salient reminder of the dangers that poor-quality decision making presents to service users, and the fact that the Care Act easements remain social provision, if and only as long as, they operate only in the exceptional circumstances envisioned by the guidance, protecting service users from the greater harm of non-responsive social care provision. They rely however on an understanding and commitment to human rights law and there is a need for further guidance and support for this from policy makers including guidance on the content required in human rights assessment.<sup>64</sup> Taken together, the law and guidance demonstrate a continuing, albeit limited and equivocal commitment to narratives of welfare state values, human rights and the protection of human dignity, competing with narratives of the overwhelming nature of the public health emergency. Similarly, they indicate a clash between a rationality founded on consumerism as opposed to professional discretion, the downplaying of choice, and the re-emergence of local expertise.

Our analysis of the legislation and guidance points to the need for detailed empirical work to identify resistance, in Bevir's terms to track the ways in which local actors vary central strategies. At this point we note firstly the potential additional complexity of unpicking resistance where the centre has competing narratives and rationalities instead of a consistent policy position. Secondly, we suggest that one form of resistance can be potentially identified - resistance characterised by failure to follow the rules because of a lack of proper resourcing and problems which follow from the complexity of law. This is perhaps most starkly demonstrated by suggestions about the ways in which Deprivations of Liberty Safeguards (DoLS), have been applied in the pandemic.

Critically, the Act does not do anything to change the DoLS regime, and Human Rights provides insight into why the DoLS were not included in the Act. DoLS provide procedural protections for those who lack capacity and who as a result of additional restrictions placed upon them because of their mental disorder are not free to leave their accommodation, and are under continuous supervision and control.<sup>65</sup> They were implemented following protracted human rights litigation which focused on Article 5 and incapacity and which culminated in a decision of the ECHR.<sup>66</sup> DoLS place heavy operational burdens upon local authorities, are difficult to understand and implement and, following Law Commission review, are to be replaced by the Liberty Protection Standards (LPS). Rather than expediting the implementation of the more streamlined protections of LPS, LPS has been delayed until at least April 2022 and emergency guidance has been produced by the DHSC for the operation of DoLS during the pandemic. Interestingly the guidance emphasises that in most circumstances, for instance where there is a pre-existing DoLS authorisation but the restrictions change, or where life-saving treatment is being provided to a mentally incapacitated patient, no or

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<sup>61</sup> Op. cit., n. 71.

<sup>62</sup> Op. cit. n. 41.

<sup>63</sup> See Community Care 5<sup>th</sup> June 2020 <https://www.communitycare.co.uk/2020/06/05/council-says-learned-lessons-care-act-legal-challenge-dropped/>

<sup>64</sup> Op. cit. n. 41, para 90.

<sup>65</sup> See *Cheshire West and Chester Council v P* [2014] UKSC 19.

<sup>66</sup> The litigation is often described as the Bournemouth gap litigation. The decision in the ECHR is *HL v UK* 45508/99 [2004] ECHR 471.

no new authorisation will be required. The guidance was clearly designed to prevent an excessive number of DoLS applications during the pandemic. It appears to have been too successful – the CQC has reported a sharp fall in the number of applications for DoLS during the pandemic.<sup>67</sup> The concern is that people may be being deprived of their liberty without the necessary legal authorisation. We therefore see potentially serious human rights breaches in an area not covered by the legislation, demonstrating that the consequences of legal complexity and limited resources are the factors that may be forming the basis of resistance to the policies of the centre and exacerbating the human consequences of the pandemic, rather than the narratives and strategies in the Act itself.

### Complicating the stateless state: Business Improvement Districts

The Act also contains provisions which provide a basis for a critical appraisal of the approach of stateless state scholarship to policy networks in the contemporary state, here examined through the stance taken towards Business Improvement Districts.

In the context of a raft of detailed, interventionist measures that place the state and its resources firmly at the forefront of the response to COVID 19, the reference to BIDs in section 79 of the Coronavirus Act appears relatively fleeting and mundane, temporarily extending those BID arrangements in England that would otherwise end during 2020 until 31 March 2021.<sup>68</sup> The effect is to avoid the need for BID ballots to take place during this period, mirroring the delay to local government elections.<sup>69</sup> The measure also appears designed to ensure the stability of the arrangements that currently exist between BIDs and local authorities regarding the provision of local services, thereby enabling a co-ordinated local response to the national crisis.<sup>70</sup> At first glance then, BIDs appear to have been simply swept up as part of the ‘catch-all’ approach of the Coronavirus Act. However, we argue that understood as a conduit for the engagement of the private sector the inclusion of BIDs reveals not only an ideological preference but also a pragmatic recognition of BIDs as an alternative site of governance at the local level.

BIDs arise from a longstanding governmental concern with the vitality of town and city centres in the face of the combined challenges of globalisation, the growth of online retail and the development of out of town shopping malls. Economic decline, leading to the proliferation of ‘unattractive, dingy, often unfriendly and even unsafe’ town and city centres<sup>71</sup> has spawned several Government-commissioned reports, which have consistently advocated a locally-led response as well as the need to ‘reimagine’ the high street to take account of changing consumer preferences.<sup>72</sup> The common vision that emerges is one of strong local leadership and the need to reframe urban centres as communities in which people live and socialise, as well as shop. Introduced to England and Wales by

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<sup>67</sup> The Care Quality Commission Covid-19 Insight Issue No.3 July 2020 <<https://www.cqc.org.uk/sites/default/files/20200715%20COVID%20IV%20Insight%20number%203%20slides%20final.pdf>>.

<sup>68</sup> Section 80 of the Coronavirus Act 2020 makes similar provisions for BIDs in Northern Ireland. Scotland’s BIDs are extended to March 2021 by the Coronavirus (Scotland) Act 2020, Schedule 7. No provision to suspend BID ballots appears to have been made by the Welsh Government.

<sup>69</sup> Under the terms of s.54 of the Local Government Act 2003 the operation of a BID beyond five years without a ballot to renew would place that BID at legal risk.

<sup>70</sup> BIDs provide various services that otherwise would be delivered by the local authority e.g. street cleaning, removal of graffiti, street marshals.

<sup>71</sup> Lord Jenkin of Roding’s remarks during the second reading of the Business Improvement Districts Bill. HL Deb vol 583 col 1061 26 November 1997.

<sup>72</sup> See, for example, <<https://www.gov.uk/government/publications/the-portas-review-the-future-of-our-high-streets>> and <<https://www.gov.uk/government/publications/the-high-street-report>>.

the Local Government Act in 2003,<sup>73</sup> BIDs were designed to support the notion of ‘councils and businesses in their areas working together to improve local conditions.’<sup>74</sup> BIDs are therefore positioned as an alternative, albeit complementary, site of leadership in the local arena. While the remit of BIDs is focused on invigorating the trading environment for the benefit of local businesses, the benefits of doing so are intended to extend to all those within the BID area. The precise scope and nature of BID activity is deliberately left undefined in the 2003 Act, allowing each BID to be tailored to the needs of its locality. BIDs are able to finance their activities through the generation of a separate source of local funding, derived from a surtax on non-domestic rate payers; in 2019, English BIDs raised a total levy in excess of £106.7 million.<sup>75</sup> BIDs have therefore been empowered by the state to supplement the work of local authorities, and even to assume some of their responsibilities with respect to the services provided to the BID area. The flexibility of their remit allows them to become involved in a wide range of activities that impact on the management of place, creating a new arena of governance in town and city centres. As the current government has recently stated, ‘[BIDs] institutionalise a new layer of local leadership at the very heart of communities.’<sup>76</sup>

The presence of BIDs in the Act is not simply a matter of comprehensiveness or convenience. Rather it evidences a political preference for how aspects of the Coronavirus Act are best implemented. BIDs are a ready-made vehicle to engage businesses effectively in the coronavirus response locally, as well as a conduit for information and advice. Their role is made more explicit in the explanatory notes accompanying the legislation where it is recognised that BIDs form a key element of the Government’s package of measures to safeguard the economy during lockdown and, perhaps more significantly, to assist in dealing with its aftermath over the coming months and years.<sup>77</sup> The BIDs regenerative purpose combined with their organisational capacity and key role as part of the local government infrastructure place BIDs at the centre of efforts, not only to boost the ability of local businesses to respond to the crisis but also to manage the environmental changes required to make high streets COVID secure. Indeed, to protect the viability of BIDs the Government announced a £6.1m operational support fund in May 2020. In doing so the Government acknowledged the ‘crucial role’ being played by BIDs during the lockdown.<sup>78</sup> Their work is described as ‘vital’ and the BIDs themselves as ‘uniquely placed’ to drive forward the renewal of town and city centres.<sup>79</sup>

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<sup>73</sup> Local Government Act 2003, Part 4. Also see the Planning etc (Scotland) Act 2006, Part 9 and the Business Improvement Districts Act (Northern Ireland) 2013.

<sup>74</sup> Department of the Environment, Transport and the Regions, *Strong Local Leadership: Quality Public Services*, Cm 5237 (2001) at 20. There are currently 322 BIDs operating in Great Britain and Northern Ireland, 260 in England. The majority are in town/city centres. See <<https://britishbids.info/services/bid-index?keywords=England&bidType=Town+Centre>>.

<sup>75</sup> <<https://www.legislation.gov.uk/ukpga/2020/7/notes/division/33/index.htm>> note 128. Last visited 22.7.20

<sup>76</sup> Ministry of Housing, Communities and Local Government, ‘Government Response to the British-Irish Parliamentary Assembly Report on the Revitalisation of the High Street’ (2020) at 9.

<sup>77</sup> See explanatory note 128 <<https://www.legislation.gov.uk/ukpga/2020/7/notes/division/33/index.htm>>.

<sup>78</sup> The nature of BID activity during lockdown is explored in a research report by C. Turner et al ‘Business Improvement Districts and the ‘New Normal’: Their Response to the COVID-19 Pandemic of 2020’ (2020) <<https://britishbids.info/publications/business-improvement-districts-and-the-new-normal-their-response-to-the-covid-19-pandemic-of-2020>>.

<sup>79</sup> <<https://www.gov.uk/government/news/6-1-million-funding-boost-to-help-high-streets-and-town-centres-through-pandemic>>. The Welsh Government followed suit on 6 May with a commitment to support the running costs of BIDs for up to three months. In Scotland, a £1m COVID 19 BIDs resilience fund was launched on 31 March, tied directly to the BIDs participation in assisting councils and local businesses to respond to the COVID 19 crisis. A further fund of £700,000 will be made available from September 2020.

## Discussion

BIDs are part of a narrative that undermines, if not disparages, local government, promoting instead the private sector as best able to respond with the necessary entrepreneurial zeal to the challenges of the contemporary world.<sup>80</sup> However, while their purpose may be to promote the needs and interests of business their functions are framed in terms of a wider understanding of the interests of the local community. Although this understanding may remain partial it nevertheless suggests that BIDs are not easily categorised simply as an instance of neoliberalism. Indeed, BIDs are atypical of the groups and networks that are usually said to characterise governance in the decentred state. Specifically, they do not have the same scope for informality and flexibility that is noted in other commentaries on this form of state governance.<sup>81</sup> In contrast, BIDs are a creation of the state, restricted by the requirements of legislation, their responsibility to their stakeholders, their time-limited nature,<sup>82</sup> and the boundaries of the space in which they operate. Their inclusion in the Coronavirus Act is as a tool that enables the state to engage local business communities directly in the response to COVID-19, effectively co-opting a key political constituency while also mobilising BIDs as a site of governance for the implementation of coronavirus measures mandated elsewhere in the legislation. While section 79 of the Act preserves BIDs as a technology that enables the outsourcing of sovereign power and responsibility, other parts of the legislation simultaneously authorise an extraordinary consolidation of power in the state. This double move neatly exemplifies that the ‘hollowing out’ of the state is not necessarily an inevitable or permanent feature of neoliberalism. Indeed, the example of BIDs suggests that some form of the state as traditionally understood remains necessary to create the political framework that enables neoliberalism to flourish. Furthermore, BIDs demand a more complex analysis than a neoliberal framing allows. BIDs may also be understood as an instance of localism, a political ideology that not only invokes the devolution of power to ‘the community’, but is frequently reified as the most virtuous site of governance, based on its implicit promise as a site of democratic power and renewal.<sup>83</sup> Thus, localism conveys not only a notion of substituting for the state but also a new imagining of citizenship. While neoliberalism and localism both promote the dispersal of power from the state, localism as a means to generate economic growth is ‘by no means intrinsic to the neoclassical and monetarist theories that gave rise to neoliberalism’.<sup>84</sup> The possibilities of localism, and therefore the BIDs themselves, extend beyond the economic sphere.

## Conclusion

A simple diagnosis of the Coronavirus Act 2020 as an authoritarian power grab by the state is misleading. Instead we suggest that the Act demonstrates the contradictions, complexities and instabilities of a state without a fixed character hoping to further particular agendas while scrambling to respond, within standard liberal constraints, to an unprecedented crisis. Responding to calls to justify sites of analysis,<sup>85</sup> our suggestion is that our approach – focused on particular aspects of the Act and the Act as a whole – demonstrates the flaws in essentialist analyses which

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<sup>80</sup> See C. de Magalhães, ‘Business Improvement Districts in England and the (Private?) Governance of Urban Spaces’ (2014) 32 *Environment and Planning C: Government and Policy* 916.

<sup>81</sup> See, for example, S. Ayres, ‘A Decentred Assessment of the Impact of ‘Informal Governance’ on Democratic Legitimacy’ (2020) *Public Policy and Administration* Special Issue on the Decentred State.

<sup>82</sup> BIDs are limited to a five-year term (renewable for a further 5 years).

<sup>83</sup> See e.g. M. Buser, ‘Tracing the Democratic Narrative: Big Society, Localism and Civic Engagement’ (2013) 39 *Local Government Studies* 3.

<sup>84</sup> *Op. cit.*, n. 6, p. 14.

<sup>85</sup> J. C. Raadschelders, ‘Can we satisfactorily gauge the socio-political trends of our own age? Mark Bevir’s views on governance and changing democracy’ (2016) 24(3) *Asian J. of Political Science* 319-329, at 323.

identify necessary logics in state action. Where the justice system doubles down on liberal democratic principles, the approach to social care moves away from a focus on the individual. Where the response in social care builds on trust in local government, on public sector values and of professional discretion, the decision to protect the smooth running of BIDs highlights a continued focus on a very different form of localism and a fundamentally different set of values about the relationship of the state and the market. And unusually, these tensions are laid bare on the face of the Act, making clear the ways in which the law, and – given the essential nature of this particular law to the operation of the covid state – the state itself, is little more than an accumulation of meaningful actions taken within institutions and cultures which structure possible choices. Our contention is that the Act demonstrates the value of law and legislation as a site of analysis in this context, and further, that analysis of this legislation – in the context of approaches to the BID – highlights the need to pay careful attention to the ways in which governance networks are constituted.

Finally, and particularly appropriately in the context of Phil Thomas' work, we want to highlight the ways in which our analysis reinforces the critical role of lawyers and the rule of law in the contestation over the permanence of the current arrangements. What the legal action threatened in Derbyshire makes clear is that, if Care Act easements or any other of the powers within the Act are to be anything other than a capitulation of the state in the face of an overwhelming health and social care crisis, it is critical that public law oversight of state provision is robust. We would suggest that this is an example of public law enabling effective government, and enabling the maintenance of liberal democratic values at a time of crisis. Judicial review and other systems of oversight – despite their numerous flaws, not least the restrictions on availability of legal aid – are critically important in an emergency when hasty legislation is required despite recent government action suggesting that such review is wasteful and needs to be 'rebalanced.'<sup>86</sup>

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<sup>86</sup> The independent review of administrative law terms of reference are available here <https://assets.publishing.service.gov.uk/media/5f27d3128fa8f57ac14f693e/independent-review-of-administrative-law-tor.pdf>