

# Beware the Demogorgon

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Maximilian Steinbeis Sa 6 Jan 2018

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Dear Friends of Verfassungsblog,

If you watch Netflix, you may have come across a very popular show called *Stranger Things*. It is about four boys in a small American town in the 80s who like to play Dungeons & Dragons in the basement until one of them, Will Byers, suddenly gets sucked into a foul counter-world which mirrors exactly the real one but is covered with blackish cobwebby slime and devoid of all people, light, colour and hope.

The show is, for the most part, a pile of bollocks and rather stupid, but this mirroring counter-world, together with the horror evoked by its sheer existence, looks like a metaphor for a whole bunch of phenomena of our political present. The reality of a dreadful, sense- and hopeless mock version of reality is so terrible because it makes both indistinguishable: what is real and what is not, what is real and what is illusion, what is being awake and what a nightmare, what is one and what is its opposite.

In fact, the mock version of a US president in the White House is every bit as real as the flickering madness he exudes over all his surroundings. The promise of the US Constitution and presidential democracy in general to install a heroic leader at the top of the state while a democratic republican constitution excludes the possibility of a madman and/or criminal ascending the throne (something imagined in another highly successful TV show) has already suffered many strains and cracks under Nixon and Bush II and seems to have fully broken apart by the reality of President Trump. Will there ever be an awakening from this nightmare? What if there won't?

The fact that the institutions of the liberal democratic constitutional state turn into mock versions of themselves, into constitutionalist zombies that devour what bore them, is something that can be observed all over the world: in Latin America, India, Poland, Hungary, Turkey and Russia. In the UK, the pragmatic, reasonable British watch their country approach a state of sad, weak isolation mocking the dream of proud sovereignty that set that whole march in motion in the first place. In Spain, the cheerful, self-assured Catalans, much like young Will Byers from *Stranger Things*, find themselves in a very special kind of waking nightmare: They had dreamed of republicanism and self-determination, of being some sort of queen-less Denmark on the Mediterranean, liberal, efficient, European, finally free of those sinister *Guardia Civil* moustaches over in Madrid and their clerical-fascist past (or, dreamed once again: present). What they woke up in, though, was a real-unreal mock version of a stillborn state, a country that has neither declared nor not declared its independence, that has neither confirmed nor voted out its secessionist government, that is neither entirely free nor all that badly oppressed by the Madrid moustaches, and whose prospective president, depending who you root for, sits either in Brussels or in prison.

## Mocking reality

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In Germany, we are, for the time being, fortunate enough to be exposed to nothing worse than the mock version of a conservative statesman that is Alexander Dobrindt, the outgoing minister of transport hitherto known predominantly for his robust disregard of EU law and his ill-advised fashion choices. His latest stunt was an op-ed in which he called for a “conservative revolution” in Germany, a concept which not only has a disturbing Weimar ring to it but, what’s more, calls for the question which regime exactly he wants to see overthrown, if not the one his party CSU has been part of for decades – a question he proved unable to provide even a shred of an answer to when asked in public television. Such buffoonery could be easily dismissed if it weren’t for the fact that it caters to the desires of quite a lot of people in Germany. There are many nowadays who cling to the imagination of a “real people” behind the citizenry of the state, of a “real democracy” behind parliamentary democracy, of a “real public opinion” behind what one can read, hear and see in the media, of a “real law” behind what the parliaments and courts declare or recognize as such. Identitarian students and new-right intellectuals are practicing their mock version of left-wing subversive action with growing success. And if German intelligence services are to be believed, there are no fewer than 15,000 people in Germany who consider the real German *Bundesrepublik* to be a mock version of what they believe is the actually valid constitutional order, i.e. some spectral lingering-on mock version of the German *Reich*.

These so-called *Reichsbürger* are atypical in that they are attached to a very German, grotesquely overstretched mock version of the idea of the primacy of law over politics (thanks to Sophie and Christoph Schönberger, with whom I had a very inspiring conversation this week on this subject). They usually argue and operate – when they aren’t busy shooting at police officers and handcuffing bailiffs – in an almost touchingly weird, quasi-lawyerly and bureaucratic manner; they represent, so to speak, a mock version of good old German legalism, pushed to its ultimate bigot extreme.

This sets them apart to a certain extent from the rest of the right-wing spectrum. The right usually tends to believe in facts, not norms. Legitimacy of power is to them, by and large, a matter of who carries the biggest, very much factual (or, is it?) stick. In the realm of naked facticity they inhabit, life in its brutal, beautiful contradiction brushes aside the weak gestures of normative validity us liberal enlightenment guys hold so dear to our wimpy hearts: because it *can*. That is the habitat in which the Steve Bannons and Götz Kubitscheks feel at home and from where they leave to turn our well-ordered constitutionalist world into a waking nightmare for us.

The indistinguishability between true and false, between real and illusionary, which gives us such a fright, is for them just the right thing. They, unlike us, embrace contradiction. Lone predatory wolf-men as they so desperately want to be, they consider themselves prepared to survive even in the coldest darkest wilderness, especially if there are some weak little Will Byers to feed on. Maybe they really are, maybe they are just dreaming themselves. For the time being, however, they feel a little more strengthened and confirmed with each piece of reality turning into its own mock version.

In *Stranger Things*, by the way – spoiler alert! – Will Byers emerges largely unharmed from

the underworld at the end of Season 1, rescued by his three brave playmates and a girl with supernatural powers. But, as I said, the show isn't very good.

## Memory and Law

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On Verfassungsblog, we have launched an online symposium this week in cooperation with the T.M.C. Asser Institute in The Hague, focusing on the maintenance of collective memory through law. [ULADISLAW BELAVUSAU](#) is the organizer of the debate, [ALEKSANDRA GLISZCZYŃSKA-GRABIAS](#) and [ANNA WÓJCIK](#) show the breadth of this phenomenon, and further contributions are expected from GRAZYNA BARANOWSKA, ERIC HEINZE, NIKOLAY KOPOSOV, MARIA MÄLKSÖÖ, GÁBOR HALMAI, MARINA BÁN, TOMASZ KONCEWICZ, JIRI PRIBAN und IOANNA TOURKOCHORITI.

Since the last editorial before Christmas a lot has happened in **Poland**: [ANNA RAKOWSKA-TRELA](#) describes how the PiS majority takes aim at the electoral law as the next step of their project of consolidating their power. [DIMITRI KOCHENOV](#), [LAURENT PECH](#) and [KIM LANE SCHEPPELE](#) comment on the EU Commission's decision to finally initiate proceedings against Poland under Article 7 of the EU Treaty and wonder why the Commission only sees a threat where the damage to the Union's fundamental values is already very much reality. [MACIEJ TABOROWSKI](#) detects some inconsistencies in the Commission's parallel infringement proceedings against Poland before the ECJ with respect to the recent "judicial reform". [TOMASZ KONCEWICZ](#) ponders how little even the best constitution can do if it is not anchored in the hearts of the citizens. [MARCIN MATCZAK](#) places the events in Poland in a comparative context with those in other regions of the world. And [JAKUB JARACZEWSKI](#) reports on an undaunted Facebook page, which, by means of considerable expertise and a lot of cat memes, makes the confusing processes of current Polish legislation accessible to young Poles.

[JOSÉ LUIS MARTÍ](#) describes the depressing situation in **Catalonia** after the 21 December elections and calls on the EU to finally declare itself responsible for intervening in this debacle – in the form of another Article 7 procedure.

The new government in **Austria** caused a lot of excitement before Christmas with the announcement to give German and Ladin speaking Italians in the region of South Tyrol access to Austrian citizenship. [FRANCESCO PALERMO](#) considers it quite unlikely that this will materialize for a number of legal and practical reasons (in German).

The Republic of **Macedonia** has for years been kept at arm's length by EU and NATO out of consideration for Greece challenging its right to its name. [TONI DESKOSKI](#) and [JULIJA BRSAKOSKA](#) tell the story from a Macedonian perspective and call for the Greek resistance to be finally broken lest the unstable return to democracy in Macedonia be seriously jeopardized.

As [SVENJA BONNECKE](#) reports, the constitutional reform in **Chile** including extensive citizenship participation, initiated by the outgoing President Bachelet, might come to a halt after the presidential elections (in German).

According to NARIN IDRIZ, the **EU-Turkey** deal on refugee policy is outside the control of the European Court of Justice, as it is formally an act of the member states, but the question is whether the European Court of Justice will accept this.

DAVID WERDERMANN examines the discussion in **Germany** about financial incentives for refugees to return and finds that plan in conflict with constitutional law.

## Elsewhere

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In **Norway**, a child can be given up for adoption without the parents' consent, which the Strasbourg Court recently refused to regard as a violation of the Convention on Human Rights. AMY McEWAN STRAND and MARIT SKIVENES comment.

In **France**, the Conseil d' État has given its blessing to the reintroduction of border controls, as ROSELINE LETTERON reports (in French).

EMMA CERVIÑO compares the current situation in Catalonia with game theory's prisoner's dilemma (in Spanish).

RUXANDRA SERBAN compares how 32 parliamentary democracies handle the right of parliament to question the government.

ILYA SOMIN criticizes the announcement of the **US** Attorney General Jeff Sessions to end the federal restraint in prosecuting drug users in states which have legalized cannabis as politically dangerous and legally questionable.

AANKHI GHOSH calls for a reassessment of the **Indian** Supreme Court's seminal *Kesavananda Barati* judgment which introduced the *Basic Structure Doctrine* – protecting certain constitutional norms against amendments by a supermajority – into Indian constitutional law.

So much for this holiday season of 2017/18. I wish all of you a great new year, stay safe and keep well, and beware the Demogorgon!

Max Steinbeis

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