

Some Remarks on Book Critical Constitutionalism: Ideas for Constitutional Transition in the Post-COVID-19 Era by Diego Valadés¹

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Abstract: *The present paper is a review essay focused on the book – scientific monograph Critical Constitutionalism: Ideas for Constitutional Transition in the Post-COVID-19 Era written by Mexican legal scholar Diego Valadés in year 2021. The book is a brief but incisive analysis of how Mexico (mis)managed the global COVID-19 pandemics. The author showed that many actions and measures taken by the Mexican State during the state of emergency declared due to the COVID-19 pandemics were problematic for various reasons, both constitutional/legal and extraconstitutional/extra-legal ones, and resulted from long-term, serious and complex shortcomings of the Mexican political system, primarily based on the Mexican Federal Constitution of 1917 and related federal legislation. However, the author’s criticism of the Mexican constitutional/political system is constructive, as he makes useful suggestions to overcome (or, at least, to reduce) its shortcomings throughout the book.*

Key Words: *Constitutional Law; Critical Constitutionalism; Constitutional Transition; Global COVID-19 Pandemics; Diego Valadés; Book Critical Constitutionalism: Ideas for Constitutional Transition in the Post-COVID-19 Era; Mexico.*

Introduction

In many countries of the world economy, the social and political crisis caused by the COVID-19 pandemics has revealed deficiencies in their constitutions as main legal frameworks for overcoming such an extraordinary, complicated and complex situation. Special constitutional (and other legal) norms and procedures to be applied in a state of emergency,

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declared due to the pandemics, were insufficiently used, or circumvented or violated precisely because of these shortcomings. No doubt, effective coping with the pandemics has objectively required, *inter alia*, certain strengthening of the executive (state administration), restrictions on some rights and freedoms of citizens, personal decisions and improvisations of the head of the state, government and other executive/administrative bodies and measures burdening the economy or worsening the social situation of population. However, in numerous countries, the aforementioned was carried out in a more or less problematic way, as well as to an excessively large extent. These countries included Mexico (officially the United Mexican States), as Diego Valadés² has shown in the book – scientific monograph *Critical Constitutionalism: Ideas for Constitutional Transition in the Post-COVID-19 Era*,³ which we briefly discuss in the present paper.

The contents of the book

The book under our analytic review is written in elegant Spanish, clearly, comprehensibly and concisely. It is divided into an Introduction (in Spanish *Primeras palabras*), 10 internally subdivided chapters⁴ and a Bibliography that contains numerous primary and secondary sources. Since the

² Dr. Diego Valadés is one of the most prominent Mexican legal scholars. He deals mainly with the constitutional law, both the Mexican and comparative. He is currently an emeritus researcher at the Institute of Legal Research of the National Autonomous University of Mexico (in Spanish “Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México”) in Mexico City (in the past, he was also the director of this prestigious academic institution). He is also the president of the international Ibero-American Institute of Constitutional Law (in Spanish “Instituto Iberoamericano de Derecho Constitucional”).

³ See VALADÉS, D. *Constitucionalismo crítico: Ideas para la transición constitucional en la era post Covid-19*. 1^ª ed. Ciudad de México: Siglo XXI Editores, 2021. 150 p. ISBN 978-607-03-1130-7.

⁴ The list of the chapters of the analysed scientific monograph: Constitutional Considerations in Connection with COVID-19 (in Spanish “Reflexiones constitucionales a propósito de la Covid-19”); Normative Force of Crisis (in Spanish “La fuerza normativa de la crisis”); Constitutional Problems of States of Emergency (in Spanish “Problemas constitucionales de los estados de emergencia”); State of Emergency Based on *acuerdo* (in Spanish “Estado de emergencia por *acuerdo*”); Unipersonal Nature of Government (in Spanish “Naturaleza unipersonal del gobierno”); Dysfunctional State (in Spanish “Estado disfuncional”); Authoritarianism and *Verticalism* (in Spanish “Autoritarismo y *verticalismo*”); Constitutional State (in Spanish “El Estado de la constitución”); Structural Inequality (in Spanish “Desigualdad estructural”); Critical Constitutionalism (in Spanish “Constitucionalismo crítico”).

earlier versions of five of the book's chapters were created as separate texts,⁵ the text of the book is somewhat incoherent in a few places.

In the analysed book, Diego Valadés, based upon a concise yet thorough examination of the (mis)management of the state of (sanitary) emergency declared in Mexico due to the global COVID-19 pandemics,⁶ revealed various long-term, serious and complex deficiencies of the Mexican constitutional/political system. At the same time, he made certain suggestions to overcome (or, at least, to reduce) them. Thus, the book is an excellent example of the so-called critical constitutionalism. Currently, there is no universal or exhaustive definition of this approach to the investigation in the field of constitutional law, nor a more detailed description of the corresponding research methodology.⁷ It follows from the last (tenth) chapter of the reviewed book entitled *Critical Constitutionalism* (in Spanish *Constitucionalismo crítico*),⁸ as well as from its other parts that, for the author, critical constitutionalism is a systematic, rigorous and complex method of the science of constitutional law, the application of which is determined by a serious general crisis of the society and a urgent need to overcome it. Such method rests upon a constructive criticism of a constitutional/political system, not only of its ideational, axiological, principal, normative and institutional foundations, but also of the multiple forms and consequences (positives and negatives) of its practical functioning. In other words, critical constitutionalism does not only examine constitutional texts, but also various dimensions of their actual

⁵ See VALADÉS, D. *Constitucionalismo crítico: Ideas para la transición constitucional en la era post Covid-19*. 1^ª ed. Ciudad de México: Siglo XXI Editores, 2021, p. 12. ISBN 978-607-03-1130-7.

⁶ In Mexico, the state of sanitary emergency lasted from 24 March 2020 to 9 May 2023.

⁷ For more on critical constitutionalism, see e.g. De CABO MARTÍN, C. *Pensamiento crítico, constitucionalismo crítico*. 1^ª ed. Madrid: Trotta, 2014. 119 p. ISBN 978-84-9879-524-0; LOUGHLIN, M. The Contemporary Crisis of Constitutional Democracy. *Oxford Journal of Legal Studies* [online]. 2019, vol. 39, no. 2, pp. 435-454 [cit. 2023-08-04]. ISSN 1464-3820. Available at: <https://doi.org/10.1093/ojls/gqz005>; SAAVEDRA, G. A. Traditional and Critical Theory of Constitution. In: Ch. LAZZERI and S. NOUR, dir. *Reconnaissance, identité et intégration sociale* [online]. 1^ª éd. Nanterre: Presses universitaires de Paris Nanterre, 2009, pp. 309-324 [cit. 2023-08-04]. ISBN 978-2-8218-2690-8. Available at: <https://doi.org/10.4000/books.pupo.763>; and TURGUT, C. Critical Constitutionalism: An Inquiry into the Past, Present, and Future. *Jindal Global Law Review* [online]. 2023, vol. 14, no. 1, pp. 29-48 [cit. 2023-08-04]. ISSN 2364-4869. Available at: <https://doi.org/10.1007/s41020-023-00196-x>.

⁸ See VALADÉS, D. *Constitucionalismo crítico: Ideas para la transición constitucional en la era post Covid-19*. 1^ª ed. Ciudad de México: Siglo XXI Editores, 2021, pp. 125-142. ISBN 978-607-03-1130-7.

operation in a society, in order to identify both normative and factual shortcomings of its constitutional/political system and to offer solid solutions for their elimination (or, at least, reduction).

The central thesis of the book is that the problematic handling of the general crisis of the Mexican society caused by the COVID-19 pandemics resulted from the fact that the state of emergency was not declared in a standard way, and the standard rules and procedures to be applied in such a state were not correctly and/or sufficiently applied on a large scale, which, in turn, pointed out certain deficiencies of the Mexican constitutional/political system, primarily based on the Mexican Federal Constitution of 1917, officially called Political Constitution of the United Mexican States (in Spanish *Constitución Política de los Estados Unidos Mexicanos*),⁹ and related federal legislation. Throughout the book, Diego Valadés researched and tested this thesis in the context of the crisis situation in Mexico caused by the pandemics, the Mexican constitutional/political system, conditions in other contemporary states and historical examples related to the book's topic.

The declaration of a state of emergency in Mexico and the introduction of rules by which the administrative, legislative and judicial institutions of the Mexican Federation and its constituent states, as well as various sectors of the economy, education, working life and private life of citizens, etc., were to be governed until the state of emergency ended, were carried out to a significant degree by circumvention, or even violation of the Mexican Federal Constitution; with a certain simplification, it can be stated that the life of the Mexican population during the pandemics was regulated by the Mexican President (in Spanish *Presidente de los Estados Unidos Mexicanos*) in cooperation with the Federal Ministry of Health (in Spanish *Secretaría de Salud*) to a significantly greater extent than it is possible under the Mexican Federal Constitution and other federal legislation, as well as without effective control by the Federal Parliament – Congress of the Union (in Spanish *Congreso de la Unión*) or the courts. Diego Valadés considers the above-mentioned to be another manifestation of a long-standing problem of the Mexican constitutional/political system, which is a clear power predominance of the executive over legislation and justice, existing both at the federal level (strong position of the

⁹ See Constitución Política de los Estados Unidos Mexicanos [Political Constitution of the United Mexican States] [1917]. In: *Instituto de Investigaciones Jurídicas – UNAM* [online]. 2023 [cit. 2023-08-04]. Available at: <https://www.juridicas.unam.mx/legislacion>.

president) and in the states of the federation (strong position of the governors of these states).

On the one hand, the strong position of the Mexican President is a normal consequence of the fact that Mexico has a presidential form of government. On the other hand, since the adoption of the Federal Constitution in 1917, this position has been continuously strengthened, *de facto*, to the extent that the president also exercises powers that do not have (sufficient) support in the constitutional text. The exercise of such powers, along with some others, explicitly enshrined in the Mexican Federal Constitution, is also not subject to approval by the Federal Parliament, i.e. Congress of the Union. The president's position is also strengthened by his creative independence from the Congress of the Union (the president is elected directly by the citizens), the fact that the Federal Government is not an independent body, but an administrative apparatus subordinate to him and authoritatively managed by him, which, moreover, does not answer to the Congress of the Union, etc. Thus, in Mexico, according to Diego Valadés, the democratic nature of the state is weakened and the so-called verticalism as a special kind of political regime persists. It is a typical feature of verticalism that, according to Diego Valadés, "certain elements of authoritarianism coexist, such as the concentration of power in the hands of the president or the political irresponsibility of those who help him in governing, and certain elements of democracy, such as free elections or broad pluralism." As Diego Valadés goes on to state, "although such a mode of governance has existed within the Mexican political system for decades, the sanitation crisis of 2020 has accentuated it even more... Verticalism exists where political power is legitimized by free and pluralistic elections and there are independent courts, but where exercise of power is too extensively concentrated [in the hands of the executive or its representative – the president] and is practiced in a patrimonial way. Because of this last reason, the incompetence of the highest administrative bodies deepens, because hierarchical subordination distances the best prepared persons from the performance of public functions held by those who merely mechanically obey, lacking their own judgment. Occupying power bodies in an insufficiently democratic environment and preventing or postponing state reform produce negative

impacts on the quality of the collective and individual lives of the governed, which can lead to corruption, insecurity and poverty.”¹⁰

Diego Valadés believes that the predominance of the executive over the legislation and justice is already so significant that it vastly disturbs the balance as well as the effective cooperation of these three state powers; moreover, it is contrary to the sovereignty of the people and the representative democracy and, consequently, to the spirit of the Mexican Federal Constitution. He sees the solution to this problem primarily in the parliamentarization of the Mexican presidential form of government, including the creation of a federal government in the sense of an independent (not subordinate to the president) executive body that would be responsible to the Mexican Parliament. However, it is questionable whether such solution would be effective enough. For example, in Slovakia, a country with parliamentary form of government, during the state of emergency declared due to the COVID-19 pandemics, the powers of the government and its head, the Prime Minister, were disproportionately strengthened, since, at that time, the government had a constitutional majority in the Parliament, legislation was adopted in an accelerated manner, neither the President nor the Constitutional Court opposed this development, etc.

Diego Valadés also recommends paying attention to more rigorous observance of the Constitution, restoring the balance and improving the cooperation of the executive, legislation and justice, strengthening political pluralism, collective decision-making and public debates and involving wide sections of the population in them, significantly increasing the level of control of the executive by the Parliament, creating conditions for the development of a real parliamentary opposition, which would qualifiedly criticize the Federal Government and the President, and the like.

Another serious problem of the Mexican constitutional/political system, which has been highlighted during the pandemics, is the insufficient quality of the activity of the administration, both federal and that of the federal states. In this context, Diego Valadés points out that in a state of emergency, but also outside of this state, it is of the utmost importance that the administration makes decisions and implements measures that are not only in accordance with the Constitution and the legal order, but

¹⁰ See VALADÉS, D. *Constitucionalismo crítico: Ideas para la transición constitucional en la era post Covid-19*. 1^a ed. Ciudad de México: Siglo XXI Editores, 2021, pp. 92-93. ISBN 978-607-03-1130-7.

also rational (those that can achieve what is needed), which is greatly aided by the secular character of the Mexican State which must be preserved. These decisions and measures should also be taken and implemented more collectively than by individuals and should be based on sufficient and correct information, as not only in a normal state, but also in the state of emergency it should apply – to the institutions of the state, but also to the citizens – the right to the truth, which Diego Valadés – and this is certainly interesting for the Slovak or Czech readers – considers to be a concept created by Václav Havel.¹¹

Last but not least, the shortcoming of the Mexican political system is populism, which not only manipulates the opinion and will of citizens, thereby weakening the principle of popular sovereignty and the importance of elections, but is often associated with attractive at the first glance, but, in reality, arbitrary and irrational (and possibly also unconstitutional or illegal) decisions that are especially dangerous in the state of emergency, when e.g. they can have negative effects on the economy or can lead to the deterioration of the social conditions of the population. According to Diego Valadés, the solution to populism is the improvement of the conditions for the competition of political parties, the reduction of governance by individuals, and the like.

Conclusions

The book under our analytical review introduces the critical constitutionalism on an empirical level (constructive criticism of the Mexican constitutional/political system, based on systematic analysis of problematic social, economic and political development during the state of emergency declared in Mexico due to the global COVID-19 pandemics), while pointing out great potential and utility of this legal scientific concept and research method that has recently come into use in the field of constitutional law. Critical constitutionalism goes beyond mere examination of constitutional texts; it includes investigation about factual (social, economic, political, cultural) dimensions of their application in the society, thus identifying the positives and negatives of both normative contents and actual operation of constitutions. However, such complexity of the constitutional research is not yet the most important feature of critical constitutionalism. Concrete solutions to problems related to the exam-

¹¹ Václav Havel was a well-known Czechoslovak politician and the first President of the Czech and Slovak Federative Republic, and subsequently also the first President of the Czech Republic.


ined constitutional systems, proposed by critical constitutionalists, are even more important.

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