# WHERE THE SHADOWS LIE
# AN INSTITUTIONAL CRITIQUE OF THE SUPREME COURT AND A BOOK REVIEW*

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In the middle of election season this year,[1] Marites Danguilan-Vitug published *Shadow of Doubt: Probing the Supreme Court*,[2] an outsider's—that is, a non-lawyer's—investigative work on the Philippine Supreme Court, the justices themselves, and the various processes that make up the institution. The book is at once explosive and informative, novel and intriguing for citizens who seek to understand the judiciary and the Supreme Court in general, whether they are insiders to the business of law (who may or may not be out to confirm what they suspect, have heard or already know) or outsiders to it (who want to understand the various intersections among law, people, and power). Already, it has become, if a bit painfully, the standard account on the current Supreme Court and the baggage of culture its previous members have created, and one that will be talked

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* The phrase is half of J.R.R. Tolkien's famous last line describing the rings of power in *The Lord of the Rings*—"In the land of Mordor where the Shadows lie." *Cite as* Florin Hilbay, *Where the Shadows Lie,* 85 PHIL. L.J. 104 (page cited) (2010).

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[1] *Shadow of Doubt* was published in the heat of the battle between Associate Justices Antonio Carpio and Renato Corona for the position of Chief Justice of the Supreme Court. At that time, Gloria Macapagal-Arroyo was still President and there was a question whether she had the authority to appoint the replacement of then Chief Justice Reynato Puno. In *De Castro v. Judicial and Bar Council,* G.R. No. 191002, 17 March 2010, the Court held that the President could still appoint the next Chief Justice despite the ban imposed by Article VII, §15. As anyone who has read *Shadow of Doubt* will notice, the book portrays Carpio in very good, if not glowing, light and questions the credibility and leadership skills of Corona. Carpio belongs to the Sigma Rho fraternity, a law-based organization in the University of the Philippines. Its sister organization is the Delta Lambda Sorority, of which Danguilan-Vitug is a member. The readers should decide whether such association, which was not disclosed in the book, may have colored Danguilan-Vitug's account.

[2] (Newsbreak, 2010). For the controversies surrounding its publication and distribution, see http://www.abs-cbnnews.com/nation/03/12/10/rare-book-supreme-court-snubbed-national-book-store (last visited 12 October 2010.) Vitug has also earned the ire of a sitting member of the Supreme Court, Associated Justice Presbitero Velasco, who has filed libel charges against her. See http://newsinfo.inquirer.net/breakingnews/nation/view/20100314-258614/SC-justice-sues-online-news-editor-for-libel (last visited 12 October 2010.)

about in classrooms and coffee shops for quite some time. Beyond the narration of juicy details suitable for works of this nature, the type that provides readers with a set of notable characters—antagonists and protagonists bound to a narrative of power play masked as a morality tale for the soul of a nation—Danguilan-Vitug's work should provide us with nearly-stable grounds from which to begin an institutional critique.

This is a matter that needs emphasis, for the public appeal of the book in terms of its ability to unmask hypocrisy, expose corruption and incompetence, reveal inconvenient truths, and pierce the veil of tradition are themselves important for discussion among citizens hungry for knowledge about a public institution that is structurally and historically non-transparent and still unwilling to be scrutinized. But the fascinating and controversial details in *Shadow of Doubt* can also serve as an invitation to reflect on (1) the quality of present-day democracy in the Philippines, (2) the relationship between law and legal reasoning as it is practiced here, and (3) the political role of the Supreme Court in maintaining the present configuration of power in Philippine society.

**Law and Politics**

Scholars outside this country, from the legal realists[3] to the critical legal scholars,[4] have always highlighted the relationship between law and ideology, and therefore, law and politics. The claim that law is political, or that law *is* politics is, for the most part, a subset of a more general argument that the legal system is not an abstract system of rules powered by reason (that is equally abstract) but is in fact a rhetorical machine for the rationalization of the distribution of entitlements in a particular society. In other words, law functions as the ultimate apologist for the powerful who themselves are able to influence the legal system's details in order to protect themselves. Law, therefore, is not an autonomous system where reason reigns supreme, but a fictional regime that only pretends to be autonomous, where reason is deployed not as a means towards the attainment of justice but as a tool for the validation of the kind of politics embraced by society's elite. Law then is an institution situated in a political culture whose core assumptions are outside the domain of law itself and whose influence pervades its various discourses and

[3] *See* AMERICAN LEGAL REALISM (Fisher III, Horwitz, Reed, eds., 1993).
[4] *See* Roberto Mangabeira Unger, *The Critical Legal Studies Movement,* 96 HARV. L. REV. 561 (1983).

categories. That the role played by politics is at the level of assumptions means that it is operationally invisible and thus inaccessible to the uninitiated, the uncritical, and the powerless.

Thinking this way necessarily affects one's perspective about the Supreme Court which is often viewed and portrayed in law schools as an institution that is independent, impartial, and objective. Following the logic of these arguments, if the goal of the courts is to "apply" the law, then this role is nothing more than the operationalization of the type of politics played by the political departments, institutions that are held captive by the economically powerful. Judges, it turns out, are the peons of a system that requires the kind of rational justification that cannot be offered by the politicians themselves, lest they be charged with self-promotion. Because judges dangle the rhetoric of impartiality and articulate their decisions for everyone's evaluation, judicial declarations have special value—they have the air of sanctity of the kind that masks an underlying sanctimoniousness. This is the reason why for those who do not subscribe to the system or do not agree with the politics of the politicians, resort to another forum—the forum of law—is the functional equivalent of complaining before the co-conspirators of the politicians and is therefore useless. The remedy is to oust the system and replace it with a more just State architecture.

What I have narrated above is what one would call the standard critique of the legal system from the position of the critical scholar who is out to claim that law embeds powerful ideological biases that creep into all the institutions of the State, including, if not especially, the courts. We are, of course, talking about a form of discourse that has attained mainstream status in theoretical debates in law outside the Philippines. Which now brings us to the question: how do we theorize the phenomenon of law in this country and the role of the courts, specifically the Supreme Court? What tools of analysis should we bring to this effort? What particularizing facts about the practice of politics in the Philippines should be made salient in this process of evaluating law? What wisdom can we derive from *Shadow of Doubt* that can be translated into a useful account of how law operates in the Philippines?

One specific detail that stands out in Danguilan-Vitug's account is the stunning extent to which the purely ideological debate about the nature of adjudication, so prevalent in academic discussions on the role of constitutional

courts, is absent or overpowered by the politics of personality among the justices and their patrons. It is not unusual for people to be ambitious or self-interested or thankful, but one would think that judges as a class would have, well, class or that pride and self-respect would temper debt of gratitude and ambition and constrain judges who, of all public officials, should be most familiar with the virtue of constraint But apparently this is not the case in this country. The appointing authority, friends, classmates, desire for promotion—these are the determinants of one's decision to decide one way and not the other. The politics of personality overshadows the politics of principle in the adjudication of those issues that impact our lives as members of a body politic, as citizens, and as human beings. If, from the selection of presidents[5] to the determination of the existence and scope of our rights[6] what matters most are the personal interests of people the judges know or the grudges the judges hold against each other, then the system of adjudication is exposed as nothing but a sham.

The various accounts in *Shadow of Doubt* are corrosive to our democratic system not simply because the decisions of the members of the highest court of the land are revealed as an exercise of naked preference, but more importantly because these decisions do not even rise to the level of the ideological—they are stuck at the level of purely personal interests. This phenomenon is what we might call the privation of ideological discourse—the blindness of the current mode of legal adjudication to the philosophical assumptions about the nature of judging and the transcendent effects of the Court's decisions in particular cases. What we simply have is a politics of power, of persons, and of partial interests, expressed through law as just and rational arrangements. Citizens therefore experience law not as an arena of rights and principles, but as a marketplace where rights are determined on the basis of who you are, who you know and what you have. This situation presents a problem of naked preference of the worst kind.

The traditional formulation of the problem of naked preference is presented as follows: choices made by adjudicators are not driven by reason (or that reason will never be enough as a decisional tool) or that texts and jurisprudence cannot constrain decision-making; thus, instead of text, history or

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[5] *See Estrada v. Sandiganbayan,* G.R. Nos. 146710-15, 356 SCRA 108, April 3, 2001.

[6] *See Tecson v. Commission on Elections,* G.R. No. 161434, 424 SCRA 277, March 3, 2004; *Neri v. Senate Committee on Accountability of Public Officers and Investigations,* G.R. No. 180643, 564 SCRA 152, September 4, 2008; *David v. Gloria Macapagal-Arroyo,* G.R. No. 171396, 489 SCRA, May 3, 2006.

constitutional structure, choices are propelled by philosophical assumptions about human nature, or how the world works or how resources should be distributed. In other words, beyond the reasoning process is a choice unsupported by nothing except a preference for a political viewpoint. Adjudication, from this perspective, is nothing but the articulation of ideology hiding behind an apparently neutral process of decision-making. This is why contests about the philosophical assumptions about the worldview of judges are easy enough to understand once it is accepted that the entire political system rests on a foundation that is itself political and not merely a consequence of the natural order of things or of the application of pure logic.

Given that law is an expression of power which, for the most part, translates into the wishes of the powerful, law can be viewed as the coercive device by which the status quo is preserved. This is a reasonable position to make and perhaps even a good platform for developing normative positions about the relationship between human beings and the State; but it is just as easy to formulate alternative views about how the world works that are, at some level, rationally defensible. And because it is impossible to formulate a scheme of social organization that is acceptable in all its details to everyone, those who reflect about society have come to welcome ideological contests as a fact of life and itself part of the game of politics. Liberal-conservatives, liberal-democrats, leftists, rightists, anarchists—these are categories of human beings shaped by the kinds of beliefs they hold about how politics should be practiced, and the discourses produced by their conversations provide us with a wealth of materials for enriching our understanding of policy choices.

The problems raised by *Shadow of Doubt*, on the other hand, are remarkably distinct from conversations about philosophy and politics. What we have here is a situation in which the institutions and processes of Philippine law are compliant with the demands of a rationally justifiable democratic structure, but are nonetheless unable to promote a politics of principle powered by reason or compassion or both, not because the members of the highest court of the land have philosophical disagreements among one another but because they have different patrons and conflicting ambitions and interests. Apparently, what distinguishes the Supreme Court from the other departments of government is simply that the former is so non-transparent and its ways so deliberately hidden from public view that the people did not realize until the book's publication that it

is an institution that can be, and is corrupted by, the very same motives that have destroyed the credibility of the other departments. Even just the possibility that this is indeed the case should leave those who have read this book with a very bitter aftertaste, with the sense that the stench of the artificiality of the whole enterprise will stay long after the final pages are read.

Perhaps a less painful way to describe the decision-making environment portrayed by Danguilan-Vitug is one where the business model for making policy choices at the level of the Supreme Court suffers from a problem of fit. Institutions that are structurally built to play traditional politics are understood to employ what one may call a people-centered business model. Because the kind of politics played by elected officials relies heavily on the power of numbers, the proposition that politicians are but agents of those who gave them power and should thus act as their principals' trolls can be accepted and reasonably defended. On the other hand, institutions such as the courts, especially the Supreme Court, are structurally built for independence and can even be argued to have been constructed for the purpose of putting a break on the possible excesses of the democratic system. The normal processes of democracy seek to promote the interests of the majority, whereas the work of institutions such as the judiciary follows a principle-centered business model which seeks to promote not merely the people's or the majority's concern, but rights and principles; and because constitutional norms in the form of rights know no majorities and can even be used against them, a people-centered orientation in the decision-making process undermines the goal of constitutional politics or the game of weighing norms and principles, as opposed to balancing the influence of powerful people or interest groups. We can describe the present Supreme Court as packed by people who apply an inappropriate business model for performing their job which in essence requires the difficult ability to transcend personal interests and decide not on the basis of who the parties are but what sort of rights such parties bear and what kinds of principles are implicated.

**The Problem of Constitutional Structure**

An important question that we may derive from the damaging narrations in the book is whether this problem of fit between our expectation of how the members of the Supreme Court are supposed to perform their duties and how they have so far conducted themselves is determined by the Constitution's

structure, that is, whether the Constitution is partly, if not significantly, to blame for the presence of scoundrels and intellectual cheats in the Court. While raising the problem of constitutional structure does not absolve the members of the Court from the charge that they have not acted consistently with their job description, it directs the conversation from one involving the accountability of the specific occupants of the position to one that encompasses the responsibility—lack of foresight or failure of imagination or both—of those who had the courage, if not the gall, to have themselves appointed to the commission that drafted the Constitution in 1986.

The constitutional structure has a powerful effect on how judges eventually act because the appointments process provides incentives and disincentives to the action of those who seek to be appointed to the Court and of the players responsible for the decision to select the members of the judiciary. This incentive system, in turn, influences the kinds of persons who apply to positions in the judiciary and ultimately the quality of those who are eventually selected. The structure weighs in on the play and on the players as well, its details producing a filter that effectively narrows down the number of those who get selected by the process, and increasing or decreasing the chances of particular applicants depending on whether the qualities that they possess jibe neatly with the biases of the constitutional structure.

By now it should be obvious that the creation of the Judicial and Bar Council has not improved the selection process for members of the judiciary, who used to pass through the scrutiny of the Commission on Appointments. If *Shadow of Doubt* were to be the standard for making an assessment of the Council, then certainly the book is a testament to the institution's unmistakable failure to assist in the normative goal of packing the judiciary, specifically the Supreme Court, with a large stable of people who possess, in the language of the Constitution, competence, integrity, probity and independence.[7]

To be sure, it is not as if all of those who have been appointed to the Court have had issues with the Constitution's four-fold normative goals. Just the same, Danguilan-Vitug's allegations name a significant number of magistrates who

[7]CONST. art. VIII, §7(3).

should not even have been appointed to the lowest levels of the judiciary considering their qualifications and reputation prior to their joining the Court and their actions after they became members of it. Even those who, at least according to the author, play the role of the good guys cannot entirely be spared from the charges that their actions were quite unbecoming of judges, given their propensity to play games reserved only for traditional politicians.

In light of this disappointing reality, it is natural to pass some responsibility to the Council for its failure to properly filter the nominees to ensure that the President does not get blindsided and that, once the nominees are submitted to him, he can be sure that anyone among the list would be compliant with the Constitution's highest standards. But how can this be possible when the President can tamper with the selection process for the judiciary through his multiple nominees in the Council?[8] That the Constitution grants the President the power to appoint members of the Council, apart from giving him a representative in the name of the Secretary of Justice who sits ex-officio, ensures *first,* that his power will be felt by the other members of the Council, and *second,* that proceedings in the Council can never be kept confidential from him. This system is a very good formula for undermining the independence of the Council, as the President is given the chance to significantly participate in the proceedings that will nominate his ultimate appointee. The 1987 Constitution is generally considered reactionary in the sense that most of its provisions were crafted with the view of preventing the return of another Marcos persona. In the case of the system created for the Judicial and Bar Council, its provisions counter this generally held view of the Constitution, for it virtually empowers the President to constitutionally pack the Court with his favorites.

The lack of independence of the Judicial and Bar Council stemming from its flawed composition is evident in the provisions of the Constitution, and the conclusion that such is the case can be reached by anyone with a passing familiarity

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[8]CONST. art. VIII, §8. (1) A Judicial and Bar Council is hereby created under the supervision of the Supreme Court composed of the Chief Justice as *ex officio* Chairman, the Secretary of Justice, and a representative of the Congress as *ex officio* Members, a representative of the Integrated Bar, a professor of law, a retired Member of the Supreme Court, and a representative of the private sector.

(2) The regular Members of the Council shall be appointed by the President for a term of four years with the consent of the Commission on Appointments. Of the Members first appointed, the representative of the Integrated Bar shall serve for four years, the professor of law for three years, the retired Justice for two years, and the representative of the private sector for one year.

with the operations of the Council. This problem has resulted in proposals for a return to the old system, where the power to appoint was shared between the President and the members of Congress, which arrangement[9] created the possibility of tempering the influence of the President on the judiciary. But while this solution addresses the effective monopoly of the President over appointments to the judiciary, it only brings us back to the concern that triggered the desire to create the Judicial and Bar Council in the first place—the politicization of appointments to the judiciary by the Commission on Appointments, where prospective appointees are made to kowtow to the members of the Commission, most of whom have little idea of how the judiciary works and whose only interest is in maximizing the political mileage provided by the committee membership. This problem is exacerbated in the case of lower court judges who find it very difficult to get appointed to municipal or regional trial courts without seeking the support of the district representatives of the area where they wish to be appointed. This makes a return to the old system just as unresponsive to the ultimate goal of looking for a system that can effectively promote the normative goals of appointing judges with competence, independence, integrity, and probity.

The real fault of the Constitutional Commission has little to do with the creation of the Judicial and Bar Council; it has everything to do with the decision to retain the power of the President to appoint members of the judiciary after the proceedings in the Council have been terminated. There are various reasons why the President should have no part in the selection of judges: *first,* he might be implicated in cases filed before the courts and thus would be personally interested in their outcome; *second,* he will naturally have an interest in appointing those members of the judiciary who are likely to agree with him on issues of policy; *third,* the mere fact that the President gets to appoint members of the judiciary will mean that such appointees will have an immense debt of gratitude to the appointing authority which might cloud their judgment in certain cases, whether or not the President's interests are involved; and *fourth,* because the President's sphere of influence casts a wide net and his social network immense, judges can easily fall

[9]1935 CONST. art VII, §10(3). The President shall nominate and with the consent of the Commission on Appointments, shall appoint the heads of the executive departments and bureaus, officers of the Army from the rank of colonel, of the Navy and Air Forces from the rank of captain or commander, and all other officers of the Government whose appointments are not herein otherwise provided for, and those whom he may be authorized by law to appoint; but the Congress may by law vest the appointment of inferior officers, in the President alone, in the courts, or in the heads of departments.

prey to the influence of not just the President but also of his associates and friends who can take advantage of such proximity to power.

The decision to retain the power of the President to appoint members of the judiciary, even when it is obvious that one of the most important imperatives of a sound policy on judicial appointments is the need to insulate judges from political influence, rests on a fixation with a limited concept of what constitutes a democratic structure and the failure to totally break away from the American model of judicial appointments. The governing concept of democracy relies on the principle of agency, with the people as principals investing their representatives with the power to act in their stead. Following this foundational belief, the President should have the power to appoint because those who inhabit our bureaucracies exercise important prerogatives that need to have, at least ultimately, some nexus with the people's representatives so that in the end the citizens can be held responsible for the actions of such bureaucrats, however distant their relationship may be with them. This theory finds expression in the constitutional doctrine that holds the power to appoint as essentially an executive prerogative.[10] We should take a pause, however, on the usefulness of the doctrine and its underlying theory when it comes to its application to the appointments process in the judiciary considering the uniqueness of the function of judges. When we realize that constitutionalism in the late 20th century has evolved into a tradition that can potentially check majorities through the enforcement of rights that effectively serve to bypass the force of the ballot, we may begin to wonder whether electoral politics should have any substantial role at all in the selection of our judges. Should judges be appointed by elected leaders when part of their modern job description includes exercising powers that are counter-majoritarian and enforcing norms that may be opposed to the wishes of the political departments and the multiple publics they represent? Can we expect political leaders to appoint judges who will have the courage to enforce the Constitution, even when doing so may be quite unpopular?

It should be noted that these concerns are even benign when we think about the possibility that appointing authorities may want to have a say in the selection of magistrates so that the judges will become *their* agents and act as such

[10]*Guevara v. Inocentes*, G.R. No. 25577, 16 SCRA 379, March 15, 1966; *Cabiling v. Pabulaan*, G.R. No. 21764, 14 SCRA 274, May 31, 1965; *Manalang v. Quitoriano*, G.R. No. 6898, 94 PHIL 903, April 30, 1954.

even in those instances when it is no longer the public interest that is being pursued by such authorities but their own purely personal agenda—avoiding impeachments, criminal prosecution, political rebuke, or any other embarrassing litigation. This possibility, if *Shadow of Doubt* were to be taken for what it declares, is apparently a reality; it is a phenomenon that has powerful implications on the nature and quality of adjudication (and by extension, democracy) in this country. Indeed, the persistence of rumors that the courts are not halls of justice but a marketplace for rent-seeking and influence peddling, now encapsulated in accessible book-form, should make us wonder whether our so-called founding parents in 1986 saw this as a potential concern. Given the provisions of the Constitution, it is arguable that they did anticipate such a concern by not authorizing the President to appoint all the members of the council and giving the permanent members four-year terms. Nonetheless, *Shadow of Doubt* indicates that they grossly underestimated the possibility that a President might not be so interested in the rule of law and would actually use the judiciary as a tool to immunize him from efforts to make him accountable to the people he is bound to serve.

How then should the Judicial and Bar Council be structured so that it may be able to respond to the practical problems engendered by Philippine political culture? We are free to speculate on some options:

1) removing the power to appoint members of the judiciary from the President, reducing the near-certainty that the President and the appointee will be under a conflict of interest in the exercise of their power as to matters regarding the other;

2) removing the power of the President to appoint members of the Judicial and Bar Council, but retaining the Secretary of Justice as an ex-officio member;

3) giving the power to appoint the members of the Judicial and Bar Council to various interested communities—the academe, retired judges and justices, the integrated bar—thereby decentralizing the power to select members of the Judicial and Bar Council which, in turn, will make it

difficult for just one group to dominate the selection process; and

4) giving the ultimate power to appoint members of the judiciary to a supermajority of the members of the Judicial and Bar Council.

These are reform measures that directly respond to the concern—so palpable during the Marcos era and which made an inglorious return during Macapagal-Arroyo's incumbency—over the domineering presence of the President in the selection *and* appointments process in the judiciary.

**Democracy in the Shadows**

To the extent that the constitutional structure encourages the politicization of the appointments process in the judiciary, it produces the unfortunate result of simultaneously incentivizing those who wish to get appointed to engage in crass politicking and disincentivizing those who are either not well-connected or uninterested in exerting such efforts (which others might consider unbecoming, if not unethical, of judges,) from applying to the judiciary or seeking promotion. The net effect is the creation of a tension between the constitutional process and the substantive values it seeks to promote. The hortatory constitutional norms seek important values that are severely undermined by a process that is satisfied by minimum compliance with paper qualifications, and is driven by politics and not merit. *Shadow of Doubt* confirms this theory by highlighting the deeply problematic relationship between most appointees to the Supreme Court and their patrons who happen to be the President himself or those close to him because of their immense wealth, political capital, or some other quality that has little to do with the aptitude for selecting good judges and much to do with the desire to entrench their business or political interests. The constitutional structure, therefore, quite independently of the ideal values sought to be possessed by judges, ends up selecting the type of ideal judge who would be able to obtain the Council's and the President's nod: well-connected or eager to pursue the tiresome task of building a political network (in other words, a person who will be well-versed in the sophisticated task of sucking-up); will not be too controversial ideologically and will be careful not to ruffle influential people's feathers; will be able to use the language of principle while engaging in self-

promotion; and will be a loyal servant of the appointing authority. These are the qualities that define a good number of our justices today, as extensively narrated in *Shadow of Doubt.*

These observations bring us to an even more interesting insight into the kind of democracy we have in the Philippines, with the use of the principle of separation of powers as a conversation platform. Following the U.S. model, we have three independent departments of government that cater to the various services offered by the State, from creation of law to its execution and application. This model diversifies the powers of the State, resulting in a trade-off between efficiency and prevention of authoritarianism. For more than two hundred years now, this model has kept the U.S. from disintegrating notwithstanding the various changes in society brought about by the industrial revolution, the Great Depression, two world wars, and the Cold War. We can therefore consider the American constitutional structure of separated powers a resounding success.

The reality that the U.S. President derives his authority from the people themselves, and not from the Congress (the members of which get their mandate separately from the people), and that the U.S. Supreme Court can exercise checking authority over both departments through its power of judicial review, has resulted in a noisy, but nonetheless politically stable, democratic environment. This identical theory applies with full force to the Philippine Constitution; and yet, our political history provides ample empirical evidence for the rejection of the belief that separation of powers alone prevents political concentration, if not authoritarianism.

It is not difficult to accept the reality that those in the executive and the legislative branches of government would actively and publicly confer with one another as well as use back channels to get things done. This is, after all, the stuff of politics and the kind of game we love to read about in biographies, history books, and political gossip pages. We consider these activities normal and justifiable, if not essential. But *Shadow of Doubt* adds the Supreme Court to the list of institutions that engage in the rough and tumble of "normal" politics and paints a picture of such institution as composed of people actively engaged in the trading of significant cases for political capital, if not material gain. Indeed, even those who are portrayed as acting on principle seem quite unable to keep their peace and their mouths shut and end up either publicizing the intimate details of decision-

making in the Court or tapping political forces to bring about the judicial or political result they want. Many might consider these actions necessary for the promotion of the greater good or to defeat the forces of evil, but regardless of whether one agrees, the cost of such activities is the institutionalization of access between the political branches of government and the Supreme Court.

The normalization of pathways between the judiciary and the other departments of government poses deep problems for the judiciary: *first,* it undermines the institution's decision-making processes which heavily rely on confidentiality; *second,* it relegates the Court's capacity to deploy reason to the level of the purely instrumental use of rhetorical devices; *third,* it places a premium on the use of skills that are clearly non-judicial in character; and *fourth,* it entangles the Court in the game of politics, for which the institution is not well-suited. The cumulative effect of these problems is the diminution of the credibility of the Supreme Court to adjudicate and dispense justice; they make it difficult for those who have read *Shadow of Doubt* to believe that results reached by the Court are driven by an honest desire to articulate the issues presented by the parties, subject them to the crucible of reason, and reach a fair settlement.

The larger effect of these observations is the rejection of separation of powers as a governing mechanism in Philippine constitutional governance. Apparently, in the case of the Philippines, culture trumps constitutional structure. *Shadow of Doubt* shows that given enough motivation and gall, the President can breach the lines of separation drawn by the Constitution and effectively create a government with branches that cooperate with one another on the crucial issues of the day. In theory, this can be used by the Chief Executive to create an efficient machinery of governance—he can co-opt the legislature by dangling funds and control the judiciary through the appointments process (with the occasional follow-up calls in the tradition of the "Hello Garci" scandal). But theories will have to yield to reality, which means that this power of the President to overcome constitutional barriers will most likely be used by him not to promote a vision of society that rests on some philosophical position about the relationship between citizens and the government, but to protect his personal interests and the favored "policy" choices of his friends.

The power of the President to dictate the extent of separation among the various departments goes back to the colonial era under the United States which

created democratic structures for colonial rule and eventual independence, but under an authoritarian regime. This meant that while the institutions were separated, the Americans who ruled the country were colonialists who served, for obvious reasons, the interest of their country through a unified front. Since the colonial bureaucracy served not the various peoples they governed but the wishes of those in Washington (and thus were not accountable to them), separation of powers became simply a façade for an undemocratic regime with democratic pretensions. This arrangement initiated a culture that the Filipino elite simply followed once the reigns of power were transferred to them. *Shadow of Doubt* is a disappointing attestation to the continuation of this culture today and to its extended success over principled politics.

## CONCLUSION

In the ultimate analysis, the greatest casualty in the failure of the Supreme Court to promote a politics of principle is rational discourse, the best platform of conversation in the public sphere that allows policy to be reasonably justified before honestly disagreeing communicants. This is no small failure, given the structure of the Supreme Court, its role in a democracy, and its constitutional mandate. We can forgive members of the political departments for their irrationality and penchant for theatrics; they do follow the ballot, and those who control the ballot—the people—are not always the paragons of reason and sound judgment. But the Supreme Court is a special institution immunized by the Constitution from the influence of the hooting throng and those who represent (or are supposed to represent) them, and its greatest tool against the *demos* is reason, its ability to articulate and defend its decisions regardless of the outcome of elections. Modern-day democracies are now constitutional democracies, which means that the people rule themselves by using the franchise and by recognizing certain constitutional limits to their powers. Through the former the will of the majority is expressed as policy; through the latter the rights of minorities are considered and respected. The role of the Supreme Court in this social arrangement is crucial—it acts as the supreme arbiter of disputes in a diverse society, with the ability to dictate what is just and the authority to calibrate the balance of power among the various publics that constitute the body politic. The only means by which the Court can effectively perform this role is by being credible, an emergent institutional character that arises only when *first,* its decisions exhibit a standard of

reasoning that can withstand scrutiny by independent observers or even by those who disagree with their results, and *second,* its members have a reputation for honesty and integrity.

Without these qualities, democracy in this country will continue to lurk in the shadows, invisible to the people who are left with nothing but doubt.

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