Towards an Accountability Framework for the Exercise of Prosecutorial Discretion in Plea Bargaining

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I. PREFATORY

The powers and prerogatives of prosecutors are among the most potent yet unrestricted in government. It has been observed that "[f]ew officials can so affect the lives of others as prosecutors. *Yet few operate in a vacuum so devoid of externally enforceable constraints.*"[1] While official actions of other executive, legislative, and judicial officers are more or less subject to oversight, appeal, or other checks-and-balances, few of these same forces "meaningfully

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1. Steven A. Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1365 (1987) (emphasis supplied).

constrain prosecutors."[2] In investigating cases, deciding what charges to file against whom, and handling the various incidents of trial including, among others, entering into plea bargains with the accused, prosecutors rely almost exclusively on their own appreciation of what "justice" demands in a particular situation.[3]

Even the Supreme Court has consistently acknowledged the autonomy of prosecutors.[4] Their decisions as to whether a case goes to a full-blown and protracted trial are given much respect and not disturbed,[5] except only when there is clear evidence that grave abuse of discretion intervened in such decisions.[6] The rationale of this principle is that, as the sole representatives of the State in criminal prosecutions, prosecutors are in the best position to determine whether a case is worth pursuing. They are deemed to be gatekeepers of the criminal justice system tasked to protect the State from useless and expensive trials, if such are unwarranted.[7]

Theoretically, the exercise of prosecutorial discretion should not entail much of a problem, considering that there are various legal principles, rules, and guidelines that prosecutors may apply in coming up with their decisions.[8] For example, penal laws spell out a fixed enumeration of "elements" (much like a checklist of requirements) that need to be satisfied in order for prosecutors to conclude that a crime has been committed.[9] The Revised Penal Code also determines whether a person should be charged as a principal, accomplice, accessory, or totally exonerated.[10] Guidelines also

2. Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009).

3. *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52-55 (2001).

4. *See* People v. Peralta, 387 SCRA 45, 64 (2002).

5. *See* Alejandro v. Bernas, 657 SCRA 255, 268-69 (2011).

6. *See* Yu v. Lim, 631 SCRA 172, 182 (2010).

7. *See* Ilusorio v. Ilusorio, 540 SCRA 182, 190 (2007).

8. *See* People v. Pantaleon, Jr., 581 SCRA 140, 160-61 (2009).

9. *Id.* For instance, the crime of Malversation of Public Funds, defined and punished under Article 217 of the Revised Penal Code, has the following elements: (a) that the offender be a public officer; (b) that he had the custody or control of funds or property by reason of the duties of his office; (c) that those funds or property were public funds or property for which he was accountable; and (d) that he appropriated, took, misappropriated, or consented or, through abandonment or negligence, permitted another person to take them. *See* An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 217 (1932).

10. *See* REVISED PENAL CODE, arts. 16-20.

exist to signal when a prosecutor is justified in discharging an accused to be a state witness[11] or negotiating with the accused for a plea bargain.[12]

In an imperfect world, however, the humanity of prosecutors and the realities of the criminal justice system operate to dilute the predictability supposed to be engendered by laws and rules. As humans, prosecutors are vulnerable to internal and external pressures and a host of other influences, including the desire to secure high conviction and low loss rates, secure a good relationship with private lawyers, or enhance the prosecution office's political stature.[13] When these externalities figure in the equation, the discretion being exercised by prosecutors becomes less predictable and uniform.[14]

Moreover, in some instances, the guidance given by laws and rules is not always sufficient to cover the wide array of cases being handled by prosecutors. This is only to be expected, since the laws and rules could not possibly predict the entire range of issues that can crop up in the context of the criminal justice process. Also, even in cases where standards are prescribed, they can be too vague or abstract as to provide any concrete and meaningful guidance — like the frequently used standard "*in the interest of justice*." Thus, at some point, rules will inevitably fail to prescribe how a particular peculiarity should be addressed. At this point, prosecutors are left to fall back on their own discretion in order to resolve the issue.

When explicit rules have fallen silent, the door is thrown wide open, and prosecutors are left to unilaterally determine what factors to consider in their decision-making — morality, legalism, pragmatics, politics, or any combination thereof — or what the Court has termed the "smorgasbord of factors which are best appreciated by prosecutors."[15] Given the autonomy of discretion given to prosecutors, resort to *any* of these in the "smorgasbord" of factors can result in an ostensibly valid and legally defensible ruling. However, this begs the question — *is there no better framework for action that prosecutors can follow, in default of rules*?

From the point of view of public accountability, any official act that can be done completely arbitrarily *and still be passed off as valid* is worth scrutinizing closely. A public officer, who can pursue *any* course of official action and, most of the time, not be held answerable for it, is an anomaly in

11. *See* 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 119, § 17.

12. *Id.* rule 116, § 2.

13. *See* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987 (1992).

14. Bibas, *supra* note 2, at 962.

15. Quarto v. Marcelo, 658 SCRA 580, 602 (2011).

a democratic government. In the words of Herman Finer, "the servants of the public are not to decide their own course."[16]

II. PURPOSE AND SCOPE OF THE STUDY

This Article is an attempt to propose an accountability framework for prosecutors in the exercise of their administrative discretion. Considering the prevailing context where prosecutors operate in a more or less autonomous environment, frequently without the benefit of any *a priori* rule of conduct or *a posteriori* review, it is worthy to consider the possibility of creating a decision-making framework that will temper their arbitrariness and unbridled discretion. The central proposition of this Article is that, while prosecutors can and should enjoy a wide latitude of discretion to perform their functions, such discretion should, at some point, end where the demands of public accountability begin. How public accountability can be manifested, concretized, and operationalized to meaningfully delineate the outer limits of prosecutorial discretion is the main concern of this inquiry.

Given the many official discretionary acts that prosecutors engage in, however (e.g., preliminary investigation, inquest, reviews or appeals, trial proper, etc.), this Article will only focus on one aspect of prosecutors' work — *plea bargaining*.

Under Section 2, Rule 116 of the 2000 Revised Rules of Criminal Procedure,[17] plea bargaining can be defined as the process by which the State, represented by the prosecutor, negotiates with an accused for the latter to plead "guilty" to a lesser offense that is "necessarily included" in the offense charged (e.g., pleading guilty to homicide in lieu of murder).[18] A plea bargaining agreement is entered into by the prosecutor and the accused, with the conformity of the victim (private complainant), and submitted to the judge for approval.

When the State enters into a plea bargain, it saves time and resources because the trial is abbreviated. There is no longer any need to proceed to a full-blown and protracted trial.[19] In exchange for such convenience, the State will concede to giving the accused a relatively lighter penalty.[20] At the same time, plea bargaining is also favorable to the accused because he or she no longer needs to go through trial, and the penalty that will be served is

16. Herman Finer, *Administrative Responsibility in Democratic Government*, 1 PUB. ADMIN. REV. 335, 336 (1941).

17. REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

18. *Id.*

19. *See* Alschuler, *supra* note 3, at 104.

20. *See* People v. Villarama, Jr., 210 SCRA 246, 251-52 (1992).

relatively less severe. The only downside is that the accused will concede to having a criminal record, forgoing the possibility that he or she will be able to completely exonerate himself or herself in the future, if trial were to be conducted.

This narrow focus of this Article is justified by the fact that plea bargaining is one aspect of prosecution work that is subject to one of the least, if not the least, number of rules and guidelines.[21] Albert W. Alschuler has also observed that it is when prosecutors engage in plea bargaining that they perform any or all of several different roles — administrator, advocate, judge, or legislator.[22] Thus, considering the absence of clear guidelines and the concurrence of various frames of reference on the part of the prosecutor, plea bargaining represents an arena of prosecution work that would benefit from the accountability framework proposed in this Article.

It also bears emphasis that in the Philippines, there are two classes of prosecutors: (1) the prosecutors of the National Prosecution Service under the Department of Justice, who have general criminal jurisdiction; and (2) the prosecutors of the Office of the Ombudsman, who have special jurisdiction over cases of graft and corruption and other crimes committed by public officers and employees in the exercise of their public functions.

While references to prosecutors in this Article will be general in treatment, unless otherwise indicated, the predicament to be addressed is better illustrated in the case of Ombudsman prosecutors. Because this particular class of prosecutors exclusively handle graft and corruption cases, their work is conducted literally under the spotlight of constant and intense public scrutiny. Corruption cases are considered high-profile, high-value cases heavily imbued with public interest. In deciding to file cases against particular powerful and influential personalities, Ombudsman prosecutors are inevitably affected by the political consequences of their actions. In deciding

21. *Id.* There are separate sections in the 2000 Revised Rules of Criminal Procedure devoted specifically to Prosecution of Offenses (Rule 110), Prosecution of Civil Actions (Rule 111), Preliminary Investigation (Rule 112), Arrest (Rule 113), Bail (Rule 114), Pre-Trial (Rule 118), and Trial (Rule 119). However, there is only one provision governing plea bargaining (Rule 116, Section 2). Also, the Manual for Prosecutors provides guidelines on Prosecution of Offenses (Part I), Inquest (Part II), Summary Investigation (Part III), Preliminary Investigation (Part IV), Pre-Trial (Part VI), Bail (Part VII), Arrest (Part VIII), Trial (Part IX), and Appeal or Petition for Review (Part X), but contains no section specifically devoted to plea bargaining; the said subject is treated only in passing, consisting of six paragraphs under the general part on Arraignment and Plea. *See* DEPARTMENT OF JUSTICE NATIONAL PROSECUTION SERVICE, MANUAL FOR PROSECUTORS 46 (May 28, 1996).

22. *See* Alschuler, *supra* note 3, at 52-53.

whether to pursue trial or aggressively advocate for conviction, Ombudsman prosecutors work under intense pressure, calculating whether their actions will be looked upon kindly by the ruling powers, or the greater public.

This is best exemplified by the infamous plea bargain deal brokered by Ombudsman prosecutors with General Carlos F. Garcia, a former military comptroller accused of plunder before the Sandiganbayan.[23] General Garcia was regarded as a personification of the regime of corruption and excesses that characterized the administration of former President Gloria Macapagal-Arroyo. When he was charged, the public considered it a triumph against corruption.[24]

However, before President Arroyo's term ended, Ombudsman prosecutors entered into a plea bargain with him, reasoning that, based on their candid appraisal of the strength of the government's evidence, the case was bound to lose.[25] Thus, they negotiated for General Garcia to plead to a less grave offense and to surrender a portion of the ill-gotten wealth that the government would have gotten if it won.[26] For these Ombudsman prosecutors, the plea bargain was a straightforward and strategic move based on their personal appreciation of the quality of the government's case.

This, however, spawned public outcry. [27] Ombudsman prosecutors were investigated in Congress. When President Benigno S. Aquino III came to power, he ordered the new Ombudsman and the new Solicitor General to rescind the plea bargain deal.[28] Complaints were filed against the Justices of the Sandiganbayan who approved the deal (and these complaints remain

23. *See* Edu Punay, *Dismissal of prosecutor in Garcia plea bargain affirmed*, PHIL. STAR, July 24, 2014, *available at* http://www.philstar.com/headlines/2014/07/24/1349661/dismissal-prosecutor-garcia-plea-bargain-affirmed (last accessed Sep. 30, 2014).

24. *See* Rappler, Prosecutor in Maj Gen Garcia plunder case officially dismissed, *available at* http://www.rappler.com/nation/47424-prosecutor-garcia-plunder-case-dismissed (last accessed Sep. 30, 2014).

25. *See* Aries Rufo, Gen Garcia: How the big fish got away, *available at* http://www.rappler.com/newsbreak/26027-garcia-military-corruption-deal (last accessed Sep. 30, 2014).

26. *See* Rappler, SC stops Garcia plea bargain deal, *available at* http://www.rappler.com/nation/32791-sc-garcia-plea-bargain-deal (last accessed Sep. 30, 2014).

27. Rufo, *supra* note 25.

28. Leila Salaverria, et al., *Rage rises vs Garcia plea bargain deal*, PHIL. DAILY INQ., Dec. 22, 2010, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20101222-310294/Rage-rises-vs-Garcia-plea-bargain-deal (last accessed Sep. 30, 2014).

pending).[29] The presumably honest and candid findings of the Ombudsman prosecutors involved in the case, who should have been in the best position to judge the merits of the government's case, were lambasted.[30] Accusations of corruption, bias, and of "lawyering for the accused" were made.[31] Ultimately, the Court issued a temporary restraining order against the implementation of the Plea Bargain Deal; and Chief Special Prosecutor Wendell B. Sulit was dismissed from the service by President Aquino.[32]

Thus, while this Article can generally be applied to all prosecutors, it is written with Ombudsman prosecutors specifically in mind, in the hope that another fallout similar to that which arose from the Garcia plea bargain deal will be prevented in the future.

This Article will begin by providing the prevailing context of plea bargaining in the Philippines — with focus on the implications of the existing guidelines (or the absence or insufficiency thereof) to the prosecutors' exercise of discretion. This will provide the justification for proposing an accountability framework to be used by prosecutors in entering into plea bargains. The Article will then go on to examine the current plea bargaining regime through accountability perspectives, determining the gaps or weaknesses which need to be addressed, in light of the demands of democratic governance. Ultimately, this Article will propose an accountability framework for plea bargaining that will guide prosecutors in rendering plea bargaining decisions, in order to reduce arbitrariness in their exercise of discretion.

III. STATEMENT OF THE PROBLEM

The dilemma to be addressed in this Article can be expressed in the following queries:

(1) In the absence or insufficiency of rules, should plea bargaining decisions be rendered based solely on prosecutors' unilateral appreciation of what they believe to be relevant factors?; or

(2) Should plea bargaining decisions take into account certain immutable factors that are external to prosecutors' personal discretion? If the latter is the more ideal scenario, what are these

29. Rufo, *supra* note 25.

30. *Id.*

31. *Id.*

32. Delon Porcalla, *Prosecutor in Garcia plea deal sacked*, PHIL. STAR, July 22, 2013, *available at* http://www.philstar.com/headlines/2013/07/22/997021/prosecutor-garcia-plea-deal-sacked (last accessed Sep. 30, 2014).

immutable, external factors, and how can they be appreciated by prosecutors?

Resolving this dilemma carries significant implications for the system of accountability governing prosecutors. If, in the absence of rules, prosecutors are supposed to rely only on their own good faith assessment of relevant factors, their accountability is focused on their individual consciences and they should stand by their decisions even if unpopular to other stakeholders, including the public. As evidenced by the experience of Ombudsman prosecutors in the Garcia case, however, this is a problematic proposition. At some point, public expectation, pressure, and influence inevitably figure into the decision whether to plea bargain a case or to proceed with trial. If the Garcia case was any indication, it can be hypothesized that plea bargaining, at some level, inescapably carries with it a *public accountability* dimension.

On the other hand, if prosecutors enter into plea bargains, taking into account external factors apart from their own discretion, there remains the need to determine what these factors are, and how each of them should be treated by prosecutors. The objective is to come up with a structure to the plea bargaining regime that will enhance public accountability, in line with the imperatives of democratic governance.

IV. FRAMEWORK

Since this Article is concerned with resolving a decision-making dilemma involving the exercise of prosecutorial discretion in plea bargaining, it will adopt, primarily, the theoretical framework of public service ethics developed by Kathryn G. Denhardt.[33]

In her ground-breaking work, *The Ethics of Public Service: Resolving Moral Dilemmas in Public Organizations*, Denhardt traced the development of the concept of public service ethics in the public administration literature from the 1940s to the 1980s and came up with a theoretical framework that can be used as a "model of ethical action."[34] Denhardt's framework is a restatement of the various principles of public service ethics enunciated in the works of scholars such as Wayne A.R. Leys, Hurst R. Anderson, Robert T. Golembiewski, John A. Rohr, and Terry L. Cooper.[35]

To highlight the accountability dimension in Denhardt's public service ethics framework, this Article will likewise use the Politico-Administrative

33. KATHRYN G. DENHARDT, THE ETHICS OF PUBLIC SERVICE: RESOLVING MORAL DILEMMAS IN PUBLIC ORGANIZATIONS 1-4 (1988).

34. *Id.* at 26.

35. *Id.* at 4-27.

Accountability Continuum of Ma. Concepcion P. Alfiler,[36] the Administrative Accountability Typology of Ledevina V. Cariño,[37] and the Compliance-Integrity Continuum proposed by Stuart C. Gilman.[38]

V. DISCUSSION

A. The Current Plea Bargaining Regime

Plea bargaining has been defined by the Supreme Court as

> a process whereby the accused and the prosecution work out a mutually satisfactory disposition of the case subject to court approval[.] It usually involves the defendant's pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that for the graver charge[.][39]

Strictly speaking, plea bargaining is formally conducted during the pre-trial conference,[40] but, in practice, prosecutors can negotiate with the accused even prior to this and simply disclose to the court the result of plea bargaining negotiations during the pre-trial conference. The accused is also permitted to negotiate for a plea even after pre-trial.

It should also be noted that, even if the prosecutor, victim, and accused failed to reach a plea bargain during the pre-trial conference, the judge, during pre-trial, can still consider brokering a plea bargaining arrangement.[41] Thus, it can be seen that under the present regime, plea bargaining is very

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36. *See* Ma. Concepcion P. Alfiler, *The Politico-Administrative Accountability Continuum in Philippine Public Service*, *in* CONQUERING POLITICO ADMINISTRATIVE FRONTIERS: ESSAYS IN HONOR OF DR. RAUL P. DE GUZMAN 398 (Ledevina V. Cariño et al. ed., 1995).

37. *See* Ledevina V. Cariño, *Administrative Accountability: A Review of the Evolution, Meaning and Operationalization of a Key Concept in Public Administration*, *in* INTRODUCTION TO PUBLIC ADMINISTRATION IN THE PHILIPPINES: A READER (Victoria Bautista ed., 1983).

38. *See* Stuart C. Gilman, *Public Sector Ethics and Government Reinvention: Realigning Systems to Meet Organizational Change*, 1 PUB. INTEGRITY 175 (1999).

39. *Villarama, Jr.*, 210 SCRA at 251-52.

40. *See* An Act to Ensure a Speedy Trial of All Criminal Cases Before the Sandiganbayan, Regional Trial Court, Metropolitan Trial Court, Municipal Trial Court, and Municipal Circuit Trial Court, Appropriating Funds Therefor, and for Other Purposes [Speedy Trial Act of 1998], Republic Act No. 8493, § 2 (1998).

41. *See* GUIDELINES TO BE OBSERVED BY TRIAL COURT JUDGES AND CLERKS OF COURTS IN THE CONDUCT OF PRE-TRIAL AND USE OF DEPOSITION-DISCOVERY MEASURES, A.M. No. 03-1-09-SC, Aug. 16, 2004.

much encouraged because it is regarded as a legitimate mode for expediting the settlement of legal disputes.

In the prevailing plea bargaining regime, prosecutors are constrained by very few rules and guidelines in rendering decisions.

Under Section 2, Rule 116 of the 2000 Revised Rules of Criminal Procedure,[42] prosecutors are allowed to negotiate with the accused for the latter to enter, during arraignment, a plea of "guilty."[43] The rule only requires that: (1) the plea of "guilty" must be for a lesser offense which is necessarily included in the offense charged; (2) the consent of the victim or private offended party must be secured; and (3) the trial court judge must approve the plea bargain.[44] Apart from the foregoing rules, no other substantive constraint exists to limit the prosecutor's discretion in deciding whether to plea bargain.[45]

It is only in very specific cases that additional rules operate to limit prosecutorial discretion in plea bargaining: (1) in cases involving illegal drugs, where plea bargaining is not allowed under all circumstances;[46] (2) in cases involving children in conflict with the law (juvenile delinquents), where plea bargaining "shall be resorted to only as a last measure when it shall serve the best interest of the child and the demands of truth and restorative justice;"[47] and (3) in cases where local prosecutors are deputized by the Office of the Ombudsman to try cases on its behalf, where the following rules should be observed:[48]

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42. REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

43. It is the Office of the Special Prosecutor which has the power to enter into plea bargaining agreements. The Office of the Special Prosecutor is the unit of the Office of the Ombudsman that tries cases against public officers and employees before the Sandiganbayan. *See* An Act Providing for the Functional and Structural Organizational of the Office of the Ombudsman, and for Other Purposes [The Ombudsman Act of 1989], Republic Act No. 6770, § 11 (4) (b) (2000).

44. *See* REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

45. *Id.*

46. *See* An Act Instituting the Comprehensive Dangerous Drugs Act of 2002, Repealing Republic Act No. 6425, Otherwise Known as the Dangerous Drugs Act of 1972, as Amended, Providing Funds Therefor, and for Other Purposes [Comprehensive Dangerous Drugs Act of 2002], Republic Act No. 9165, § 23.

47. *See* RULES ON JUVENILES IN CONFLICT WITH THE LAW, A.M. No. 02-1-18-SC, Nov. 24, 2009.

48. Office of the Ombudsman, Guidelines in the Handling and Prosecution of Ombudsman Cases Filed with or Pending Before Regular Courts Pursuant to the Provisions of Republic Act No. 7975 [A.O. No. 13-96] (Feb. 7, 1996).

[A]. Plea Bargaining

1. City or Provincial Prosecutors are authorized to approve plea bargaining agreements entered into, concurred in, or consented to by the prosecutors under them in all cases where the penalty to be imposed on the accused as a result of the plea bargaining is lower by not more than one degree than that prescribed by law for the offense charged in the complaint or information.

2. No plea bargaining agreement entailing:

   (a) The imposition of a penalty lower by more than one degree from that prescribed by law for the offense charged in the complaint or information; [ ]

   (b) The imposition of a penalty different in nature from that prescribed by law for the offense charged in the complaint or information; or

   (c) The dismissal of other charges filed or pending in court against the same accused shall be entered into, concurred in, or consented to by the city/provincial prosecutors and their assistants without the prior written approval of the Ombudsman or his Deputies.

[B]. Procedural Matters

1. In cases falling under the provisions of paragraph A-3 hereinabove, the following documents shall be transmitted to the Office of the Ombudsman or his Deputies:

   (a) The records of the reinvestigation proceedings;

   (b) The original and a copy of the resolution or recommendation of the reinvestigating prosecutor; and

   (c) The original and a copy of the motion for dismissal, withdrawal, or amendment, as the case may be, of the original complaint or information, duly signed by the reinvestigating prosecutor.

2. In cases falling under the provisions of paragraph B-2 hereinabove, the following documents shall be transmitted to the Office of the Ombudsman or his Deputies:

   (a) The written offer of the accused to enter into a plea bargaining agreement;

   (b) The recommendation of the trial prosecutor stating, among others, the reason(s) justifying the acceptance of the offer of the accused; and

   (c) The original and a copy of the manifestation of consent to the plea bargaining offer of the accused, duly signed by the trial

> prosecutor and the offended party and the latter's counsel, if any.[49]

The choice of whether a case will be plea bargained is left almost entirely in the hands of the prosecutor.[50] The victim cannot initiate it; while he or she may be involved in the negotiation, his or her conformity is secured only at the end thereof.[51] Thus, if the prosecutor does not decide to plea bargain a case to begin with, the plea bargaining will not even commence.[52] Likewise, while the judge can persuade the parties to plea bargain during pre-trial, he or she cannot force the prosecutor to enter into a plea bargain if the prosecutor does not want to.[53] Lastly, the accused does not have a right to demand a plea bargain.[54] If the prosecutor does not conform to a plea bargain, the accused cannot object. In fact, even if the accused has secured a plea bargain with the prosecutor, the Court has categorically ruled that the approval thereof is dependent on the discretion of the trial court judge.[55] The accused cannot demand approval thereof as a matter of right.[56]

It can therefore be clearly seen that the plea bargaining regime currently existing has a strong and dominant bias towards prosecutorial discretion. The foregoing rules do not provide unambiguous standards that the prosecutor can take into account in deciding whether to plea bargain a case or not. The existing rules can only provide *how* plea bargaining may be conducted, and what its limits are. It cannot explicitly say *why or whether* a plea bargain should be considered to begin with.

If one turns to jurisprudence for guidance, one will find it still vague and practically unhelpful. In *Daan v. Sandiganbayan (Fourth Division)*,[57] the Court mentioned a standard used by the anti-graft court in rejecting a plea bargain — whether it will "redound to the benefit of the public."[58] Since the plea bargain deal did not satisfy this requirement, the Sandiganbayan rejected it.[59]

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49. *Id.*

50. *See* Alschuler, *supra* note 3, at 111–12.

51. Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 37 U. ILL. L. REV. 37, 38 (1983).

52. *See Villarama, Jr.*, 210 SCRA at 254.

53. *Id.* at 252.

54. *Id.*

55. *Id.*

56. *Id.*

57. Daan v. Sandiganbayan (Fourth Division), 550 SCRA 233, 244 (2008).

58. *Id.*

59. *Id.*

In reversing the Sandiganbayan's ruling, the Court used equally amorphous standards — "higher interests of justice," "fair play," and "equity."[60] According to the Supreme Court, taking into account these factors, the plea bargain should be accepted.[61] From this case alone, a prosecutor in the cusp of a dilemma on whether to plea bargain or not will undoubtedly be perplexed as to how, considering the "benefit of the public" on one hand, a plea bargain deal was rejected; but, considering "higher interests of justice," "fair play," and "equity" on the other hand, it was approved. Seen from any angle, these abstract concepts are so similar as to be practically interchangeable.

The case of *Gonzales III v. Office of the President of the Philippines*,[62] which involves the Garcia plea bargain deal, provides a more workable standard. In this case, the Supreme Court ruled that "[p]lea bargaining is allowable when *the prosecution does not have sufficient evidence to establish the guilt of the accused* of the crime charged."[63]

This pronouncement of the Supreme Court is a welcome addition to the very sparse body of rules that prosecutors can look to when resolving plea bargaining dilemmas. Using the doctrine in *Gonzales*, prosecutors can now be guided by their appreciation of the "sufficiency of evidence to establish guilt" in deciding whether a case should be plea bargained.

In sum, the entire field of prosecutorial discretion in plea bargaining decisions may be summarized as thus:

1. Scope

    (1) The prosecutor has the sole power to initiate and conduct plea bargaining;

    (2) While other actors or actresses in the criminal justice process can be involved in the negotiation, no plea bargaining can prosper without the prosecutor's conformity (even a judge cannot direct a prosecutor to negotiate a plea);

    (3) The prosecutor is free to take into consideration any factor in plea bargaining including, but not limited to, public interest, justice, equity, and the sufficiency of the evidence

60. *Id.* at 244-45.

61. *Id.*

62. Gonzales III v. Office of the President of the Philippines, 679 SCRA 614 (2012).

63. *Id.* at 671 (emphasis supplied).

to establish guilt. No rule defines what factors can be legitimately considered;

(4) All cases can be plea bargained in principle (except drug cases). No rule prescribes any quantitative or qualitative criteria for plea bargaining; and

(5) Other than invocations of public interest, the prosecutor is not required to render an accounting of all the details behind a plea bargain and his or her reasons or motivations for entering into one.

2. Limitations

(1) An accused can only plea to an offense necessarily included in the offense charged, and to no other offense; and the prosecutor has no liberty to negotiate any penalty other than the one attached to the lesser offense, as provided by law;

(2) If the victim attends the arraignment, the prosecutor must secure his or her conformity to the plea bargain;[64] otherwise, the plea bargain is void;

(3) The decision of the prosecutor can be impugned by his or her superior (in the usual course of office procedures) or by a higher court, through appeal;

(4) The prosecutor cannot plea bargain a drug case; he or she cannot also plea bargain a case involving a juvenile unless it is established that doing so is the last recourse; and

(5) Plea bargains are subject to court approval.

B. Accountability in Plea Bargaining

It can be seen from the foregoing discussion that the current plea bargaining regime is very open-ended and limited by very few rules. Laws, rules, and jurisprudence do not provide substantive guidelines that may be used to inform plea bargaining decisions of prosecutors. The plea bargaining field is heavily skewed in favor of autonomous prosecutorial discretion.

Currently, no substantive guidelines or even policy statement have been adopted by either the Department of Justice or the Office of the Ombudsman to govern plea bargaining decisions of prosecutors. All plea bargaining decisions are made by the prosecutor and approved by higher

64. The court may approve a plea bargain with the conformity of the prosecutor alone if the victim fails to appear during arraignment. *See* RULES OF CRIMINAL PROCEDURE, rule 116, § 1 (f).

authorities in accordance with usual office procedures. In the absence of any coherent and over-arching standard, all such decisions are made on an individual, case-to-case basis. If a particular plea bargaining decision is assailed as erroneous or unjust, the remedy is to impugn it in court.[65] The focal question is — where does one situate *public accountability* in this set-up?

1. Definition of Accountability; the Friedrich or Finer Debate, Revisited

Accountability has been described as "a condition in which individuals who exercise power are constrained by external means and by internal norms."[66] While the term has been described as "complex" or "chameleon-like" because of its ever-expanding definition,[67] it is posited that its "original" or "core" sense is that which is associated with "the process of being called 'to account' to some authority for one's actions."[68] According to Richard G. Mulgan, accountability in this core sense necessarily has the following features —

> [I]t is *external*, in that the account is given to some other person or body outside the person or body being held accountable; it involves *social interaction and exchange*, in that one side, that calling for the account, seeks answers and rectification while the other side, that being held accountable, responds and accepts sanctions; it implies *rights of authority*, in that those calling for an account are asserting rights of superior authority over those who are accountable, including the rights to demand answers and to impose sanctions.[69]

From the foregoing definitions of accountability, it can be seen that the common thread is the duty to account to an *external* authority that has the duty to compel an accounting of one's work.

While this notion of accountability appears undisputed in current public administration literature, it bears to note that in the 1940s, this view was not

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65. At this juncture, it bears clarification that Philippine prosecutors are permanent civil servants appointed by the President or the Ombudsman. In contrast, some of their counterparts in the United States (e.g., the District Attorneys, who are equivalent to our Provincial and City Prosecutors) are *elected* by direct popular vote. This fact is significant when one considers how *insulated from the public* Philippine prosecutors are, and how their decisions are more or less not affected by popular expectation or sentiment. *See* The Ombudsman Act of 1989, § 4 & Bibas, *supra* note 2, at 988.

66. Alfiler, *supra* note 36, at 401.

67. *See* Richard G. Mulgan, *Accountability: An Ever-Expanding Concept?*, 78 PUB. ADMIN. 555, 555 (2000).

68. *Id.*

69. *Id.* at 555-56.

universally accepted.[70] In fact, a treatise by Carl J. Friedrich,[71] which essentially argues for an *internal* rather than an *external* locus of accountability for public servants, has started "one of [the] core debates that set the intellectual agenda for American public administration during the Cold War era"[72] — the Friedrich or Finer debate.

Friedrich's proposition arose from his view that public policy is a continuous process, and that the realities and complexities of the bureaucracy preclude a simple and straightforward execution of such policy.[73] Thus, the administrator should not be expected to hew to public sentiment. Possessed of technical knowledge not accessible to the general public, the administrator should instead subject himself or herself to the scrutiny of colleagues in the "fellowship of science"[74] — in short, to the standards of the profession to which he or she belongs. Conformity to professional standards — which entails an inward-looking locus of accountability — is sufficient because "the traditional means (e.g., oversight and control) for holding administrators accountable were ineffective and unnecessary. It was reasonable, [Friedrich] contended, to defer to the judgment of administrators whose sense of professional responsibility and loyalty could be trusted when they carried out public policy in the national interest."[75]

This "inward-looking" view of public accountability was refuted by Herman Finer in his critique of Friedrich's treatise.[76] Finer emphasizes the fact that, in a democratic government, the "responsibility of politicians and officeholders to the people" should be secured.[77] He goes on to state that all democratic governments "have founded themselves broadly upon the recognition of three doctrines,"[78] which are —

> *First*, the mastership of the public, in the sense that politicians and employees are working not for the good of the public in the sense of what

70. *See* Wassim I. Al-Habil, *The Administrative Ethics Between Professionalism and Individual Conscience*, 1 BUS. & MANAGEMENT REV. 43, 44 (2011).

71. *See* Carl J. Friedrich, *Public Policy and the Nature of Administrative Responsibility*, *in* COMBATING CORRUPTION, ENCOURAGING ETHICS: A PRACTICAL GUIDE TO MANAGEMENT ETHIC 35-37 (William L. Richter & Frances Burke eds., 2007).

72. Melvin Dubnick, *Accountability and Ethics: Reconsidering the Relationships*, 6 INT'L J. ORGAN. THEOR. BEHAV. 405, 405 (2003).

73. *See* Debra W. Stewart, *Professionalism vs. Democracy: Friedrich vs. Finer Revisited*, 9 PUB. ADMIN. 13, 14 (1985).

74. *Id.*

75. Dubnick, *supra* note 72, at 405-06.

76. Finer, *supra* note 16, at 335-36.

77. *Id.* at 337.

78. *Id.*

> the public needs, but of the wants of the public as expressed by the public. *Second*, recognition that this mastership needs institutions [ ] and[,] particularly the centrality of an elected organ, for its expression and the exertion of its authority. More important than these two is the *third* notion, namely, that *the function of the public and of its elected institutions is not merely the exhibition of its mastership by informing governments and officials of what it wants, but the authority and power to exercise an effect upon the course which the latter are to pursue* [—] *the power to exact obedience to orders*.[79]

Thus, Finer is not convinced of Friedrich's argument in favor of a professional and competent public servant. Regardless of technical expertise or capacity, public servants cannot divorce themselves from the ultimate goal of "public welfare" — not as perceived by them, in all their technical expertise and ethical virtuosity — but as "defined by the public and its authorized representatives."[80] What Finer cautions against is the advent of "official conceit,"[81] or the scenario where public servants, believing that they are acting for the public good, impose their "zealotry" upon the public and end up giving them what they do not want, even if they sincerely believe that they mean well.[82] In the final analysis, Finer believes that public servants

> are not to decide their own course; they are to be responsible to the elected representatives of the public, and these are to determine the course of action of the public servants to the most minute degree that is technically feasible. Both of these propositions are important [—] the main proposition of responsibility, as well as the limitation and auxiliary institutions implied in the phrase, 'that is technically feasible.' This kind of responsibility is what democracy means[.][83]

2. Merging the Internal or External Dimensions of Public Accountability

Finer's emphasis on the public accountability imperatives of democratic governments is an important contribution to the discourse. Cariño, for example, maintains that "the publicness of [civil servants'] employment and goals thus prescribes their behavior and circumscribes their choices."[84] Contrary to Friedrich's proposition, it cannot be debated that public servants, by virtue of their public positions, necessarily carry out the public will; their individual ethics and professionalism aside, they cannot entirely divorce themselves from their constituent public.

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79. *Id.* (emphasis supplied).

80. *Id.* at 338.

81. *Id.* at 340.

82. Finer, *supra* note 16, at 338.

83. *Id.* at 336.

84. Cariño, *supra* note 37, at 805.

The gradual, outward movement of the locus of public accountability from internal ethics and professionalism to external authorities (including the public) coincides to a large extent to the development of public administration paradigms. Cariño explains that, while the "congruence" between the streams of public administration and public accountability thoughts may not be "total," the two share largely similar core principles.[85]

In the accountability typology discussed by Cariño, "Traditional Public Administration" is similar to the notions of "Traditional Accountability," with emphasis on compliance with internal rules and regulations.[86] "Development Administration," on the other hand, shifted its focus from strict compliance and legalisms to economy and efficiency, which corresponds with "Managerial Accountability."[87] When "New Public Administration" came about, which extended the "economy-and-efficiency" model of administration to the "3Es" (by including the criterion of "effectiveness"), there also arose the concept of "Program Accountability" which lays emphasis on the comprehensive evaluations and measurements of programs.[88] Lastly, "Development Public Administration," which reorients the bureaucracy to "include participation of client and recipients in the process of administration, and the decentralization of decision-making to local areas," shares the principles of "Process Accountability" — "a political, rather than an administrative tool in that responsibility sharing and even the definition of goals may emerge from the negotiations."[89]

The notion of accountability has indeed evolved to incorporate a strong "public" dimension, one that puts emphasis on discerning and responding to public needs instead of focusing solely on compliance with internal rules.

However, as Alfiler's definition indicates, the discourse on public accountability, while gradually embracing the notion of *external* answerability, did not totally disregard its *internal* dimension.[90] Thus, what stands in current literature is a fusion or amalgamation of both aspects of accountability. While public servants seek to comply with internal rules and professional ethics, they must also be cognizant of the fact that, beyond these "internal norms," they must likewise respond to "external means," or the mechanisms that the public can employ to hold them answerable for their official actions.

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85. *Id.*

86. *Id.* at 818.

87. *Id.* at 818.

88. *Id.* at 819-20.

89. *Id.* at 820.

90. Alfiler, *supra* note 36, at 401.

This is exemplified by two models of administrative accountability.

First, in the Compliance-Integrity Continuum envisioned by Gilman,[91] *compliance*, which consists of "external controls on the behavior of public servants,"[92] is seen as one end of a continuum, with the other end containing approaches on *integrity*, which consists of the individual public servant's "moral judgment capacity" and "moral character."[93] It bears to note that these two approaches correspond to the two sides of the Friedrich or Finer debate. However, various scholars have emphasized that "these two approaches do not constitute a simple dichotomy but should be seen as the opposite ends of a continuum, and in practice they should always be combined and considered complementary[.]"[94] Hence, the fusion of internal and external means of accountability, with both dimensions — not one or the other — seen as proper methods to circumscribe bureaucratic conduct.

Second, the Politico-Administrative Accountability Continuum of Alfiler[95] does not see administrators as mere executors of public policy, which the people can only *indirectly* hold accountable through the administrators' principals, i.e., elected political leaders, who in turn are *directly* accountable to the people.[96] Alfiler correctly observes that the flow of accountability need not be linear — from the people, to elected officials, to administrative officials.[97] The entire process operates in a continuum because administrative officials do not answer to elected leaders alone.[98] By their direct interactions with the public through goods and service delivery, they necessarily assume *direct* accountability to their client public for the quality of the services they provide.[99] Therefore, Alfiler's model concretizes the fusion of the internal and external means of accountability of public servants. While looking "inward" through compliance with internal norms and professional ethics, as enforced by their political principals in the organization, they must also look "outward" to directly answer for their actions to the public, with whom they directly interact.

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91. Gilman, *supra* note 38, at 22.

92. *Id.*

93. *Id.*

94. *See* Jeroen Maesschalck, *Approaches to Ethics Management in the Public Sector: A Proposed Extension of the Compliance-Integrity Continuum*, 7 PUB. INTEGRITY 21, 22 (2004).

95. Alfiler, *supra* note 36, at 402.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

3. Plea Bargaining through Denhardt's Framework of Public Service Ethics

In light of the foregoing discussions, it becomes clear that the notions of public accountability must have both internal and external dimensions. This is made evident in the formulation by Denhardt of a framework of public service ethics — while pertaining to "ethics," such framework necessarily includes an element of public accountability.[100] The framework is thus stated —

> To be ethical requires that [the] administrator [ ] be able to independently engage in the process of reasonably examining and questioning the standards by which administrative decisions are made, at least to the extent that the decisions are legitimately made at the level of the organization. *The content of the standards may change over time as social values are better understood, or new social concerns are expressed. An administrator should be ready to adapt decision standards to these changes, always reflecting a commitment to the core values of our society and recognizing the goals of the organization.* The administrator will be held accountable personally, professionally, and within the organization for the decisions made and for the ethical standards which inform those decisions.[101]

The above framework incorporates both *organizational* and *societal* constraints on a public servant's behavior, along with his or her duty of *independent engagement in the process of examining and questioning standards*, which indubitably takes on a more "inward" and personal character. As Denhardt explains —

> One major advantage of this model is that *those who are affected by the administrative decisions have some control over the process* in that there are lines of authority and systems of accountability which can serve as a check on administrative behavior, *while still allowing necessary individual discretion for ethical conduct*.[102]

When the current plea bargaining regime is examined through the lenses of Denhardt's framework, it cannot be denied that such regime gravely falls short. As explained from the foregoing, the plea bargaining decisions made by the prosecutor inevitably takes into account purely subjective and unilateral factors.[103] Whether a plea bargain will be struck down depends entirely on the prosecutor, with the victim, the accused, and even the judge playing only complementary but not determinative roles.[104] Once prosecutors decide to plea bargain, such decision is not subject to close

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100. DENHARDT, *supra* note 33, at 26.

101. *Id.* (emphasis supplied).

102. *Id.* (emphasis supplied).

103. *Id.*

104. *See Villarama, Jr.*, 210 SCRA at 253.

scrutiny. In any event, even if such scrutiny can be had, the blatant and glaring absence of norms and standards for decision-making makes an examination of the propriety of prosecutors' plea bargaining decisions useless.

As Leslie C. Griffin observes, when faced with such broad and amorphous standard as "justice," prosecutors quite simply, and inevitably, fall back on their own personal sense of morality.[105] Also, "the justifications for punishment are so conflicting and indeterminate that, on a case by case basis, a clever prosecutor can argue for almost any disposition within a very broad ballpark."[106] This is a situation fraught with danger and anomaly, because without the effective societal and organizational constraints that Denhardt refers to in her framework, plea bargaining decisions can be as arbitrary and inconsistent as the personal tendencies, idiosyncrasies, and suasions of prosecutors would allow.[107] As Fred C. Zacaharias notes, "[p]rosecutors who act in a purely discretionary manner in each case are likely to develop the philosophy that *any action they take is equally valid*."[108] Donald G. Gifford likewise states that

> [e]mpirical studies of prosecutors' plea bargaining practices confirm that similar cases are handled in inconsistent ways by individual prosecutors. Typically, the concessions offered by a prosecutor will be affected by a wide variety of factors unrelated to the nature of the offense, the culpability of the offender, or other legitimate law enforcement criteria. *From one day to the next, an individual prosecutor's decisions about what concessions to offer may vary. If a prosecutor is busier than usual, he may offer a concession that he would not otherwise make so that his workload is reduced and he may devote his time and energy to other cases.* A prosecutor's guilty plea concessions [may also] be affected by his perception of how the case disposition will affect his career or by *his level of enthusiasm to try a particular case*.[109]

Unpredictable and arbitrary results that arise from such whimsical exercise of administrative discretion as described above are unacceptable by Denhardt's framework. Unquestionably, this arrangement is anathema to a democratic government, which, at its core, relies on the people's trust for its legitimacy. If an institution always produces the "wrong results" — "those

105. Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 286-87 (2001).

106. Bibas, *supra* note 2, at 974.

107. *See* DENHARDT, *supra* note 33.

108. Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1188 (1998) (emphasis supplied).

109. Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 37 U. ILL. L. REV. 37, 62 (1983) (emphasis supplied).

which consistently run counter to public values, interests[,] and feelings" — its legitimacy will eventually be compromised.[110]

It does not take much analysis to conclude that rampant and unbridled arbitrariness in the exercise of official functions — by any public servant — cannot serve the public interest. By any logic or reason, prosecutors have no basis to claim that they are exempt from this principle.

Given the over-emphasis of, and over-reliance on unilateral prosecutorial discretion in plea bargaining, the challenge is to locate the standards by which prosecutors can discern the "social concerns" and "core values of society" that, according to Denhardt, must inform administrative decisions.[111] In order to temper the arbitrariness and inconsistency of the individual moral values and standards of prosecutors, mechanisms should be employed to integrate and incorporate public views into their decisions. Only in doing so can prosecutors be said to be truly accountable. The current regime of plea bargaining should therefore be remodeled.

4. Locating the "Core Values of Society:" Towards Plea Bargaining in the Public Interest

Over the years, many scholars have expressed concern over the singular centrality of the prosecutor's discretion in administrative decision-making. For example, Gifford argues that given the "unregulated monopoly" of the prosecutor over plea bargaining, it may not even be correct to use the term "bargaining" — which connotes some "give-and-take" — because the prosecutor can practically dictate the "going rate" for any plea, and then afterwards deviate from it at will.[112]

The proposed solutions, however, do not involve taking individual discretion and consideration entirely out of the picture. After all, prosecutors, like other public servants, are employed by the government precisely to undertake the kind of technical functions that their special competencies address, including their capacity for discernment and decision-making. What is merely being urged is that, in cases where plea bargaining decisions can go either way, instead of taking an "inward" look and unilaterally determining what factors to consider, prosecutors should take

110. *See* Gregory Foster, *Law, Morality and the Public Servant*, 51 PUB. ADMIN. REV. 29, 31 (1981).

111. *See* DENHARDT, *supra* note 33, at 26.

112. Gifford, *supra* note 109, at 45.

steps to look "outward" and allow public interest to figure in the equation. Richard Uviller[113] captured it best —

> I do not suggest that the honorable prosecutor be the slave of his electorate. Indeed, in many matters, his duty clearly lies in the defiance of community pressures. *But, within the confines of the law, I would rather see his discretion guided by an honest effort to discern public needs and community concerns than by personal pique or moralistic impertinence.*[114]

Without awareness of the public interest or the "core values of society," as Denhardt used in her framework, prosecutors will not be *accountable*, in its complete sense. As Stephanos Bibas explains "[i]f prosecutors are not simply to foist their own priorities upon everybody, they must heed and aggregate the sense of justice of various groups whom they supposedly serve."[115] This does not mean, however, that prosecutors are to subject their plea bargaining decisions to a literal gauging of public opinion, as in a survey or popular vote. Discerning public needs, concerns, and interests may be done in more practicable and feasible ways, as some scholars propose.

a. Gauging of Public Sentiment

This may not be applicable in all cases, and is inherently unreliable, but in cases where a clear public sentiment exists in favor of or against a plea bargaining decision, this may be taken into account by the prosecutor. For example, if a clear public sentiment against a particular crime is evident, there should be a conscious effort to incorporate this into the plea bargaining decision, unless other more objective parameters (like violations of rights or clear insufficiency of evidence) should be given more weight.[116]

b. Formulation of Rules and Policies

Such rules and policies should not only refer to office procedures, but to clear, workable standards that *reflect community sentiment.* These would include the community's priorities regarding criminal prosecutions, the types of criminal behavior that it has an interest in deterring, or its preference for a full-blown trial in certain instances. Following Process Accountability, these rules and policies should be formulated by prosecution offices with input from stakeholders, and be updated regularly to reflect changing norms, or as Denhardt puts it, "as social values are better understood or new social concerns are expressed."[117] Further, the mere adoption of written guidelines

113. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1152–53 (1973).

114. *Id.* (emphasis supplied).

115. Bibas, *supra* note 2, at 981–82.

116. Uviller, *supra* note 113, at 1154–55.

117. DENHARDT, *supra* note 33, at 26.

to inform plea bargaining decisions (which are non-existent under the present regime) already achieves the purposes of reducing arbitrariness on the part of the prosecutor, giving the accused fair notice of the factors that may affect his plea and informing the public of the prosecution office's standards of performance.[118]

c. Articulation of Plea Bargaining Decisions' Rationales

Gifford wisely suggests that prosecutors should be required to "state in detail and in open court" how they arrived at their plea bargaining decisions.[119] Currently, the details of plea bargaining negotiations are not disclosed to the court, or, at most, disclosed only to the extent necessary to satisfy a vague "public interest" or "justice" standard. By putting on record the *details* of plea bargaining decisions, and publicizing the same in open court, there arises the greater tendency that subsequent plea bargaining decisions will be more or less predictable, especially in similar cases. Otherwise, prosecutors will find it difficult to defend themselves against accusations of arbitrariness — including against a vigilant public who has access to court records or who may freely attend public trials.

The articulation of rationales also increases the tendency that, at some point, relative uniformity of plea bargaining decisions can be achieved because the rationales can more easily converge when publicized and articulated. Once convergence is achieved, reasons evolve into factors, and factors evolve into rules.[120] In this manner, the prosecution establishment can eventually speak *in one voice*, and not in an arbitrary and case-to-case manner. This unified voice of the establishment will, with time, come to reflect the input of judges and the community, because plea bargaining decisions, once publicized, will continuously be subjected to critique.

d. Taking the Victim's Voice into Account

Current plea bargaining rules merely require that the victim consent to a plea bargaining agreement, and that said victim should be present during arraignment to manifest such conformity. The rules do not explicitly provide that even before arraignment, the victim's views and sentiments should be considered while plea bargaining decisions are being made out of court. It is axiomatic in criminal law that every crime is not an assault against the victim per se but an assault against the State.[121] Hence, the use of the caption

118. Gifford, *supra* note 109, at 77-78.

119. *Id.* at 85-86.

120. *See* Richard Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 292-96 (1980).

121. *See* Alonte v. Savellano, Jr., 287 SCRA 245, 297 (1998).

"*People of the Philippines versus* _____" instead of the name of the victim. However, although prosecutions are done at the behest of the State, it is undeniable that the voice of the victim should at least be given weight in making prosecutorial decisions, especially if it will entail plea bargaining a case and letting an accused be punished for a lesser offense. As Stephano Bibas observes, victims know their cases intimately and will act as a counter-balancing force against prosecutorial discretion in plea bargaining.[122] By involving the victim in plea bargaining, prosecutors will be forced to account for their actions and be constrained to invoke legitimate grounds for plea bargaining a case, instead of glossing over the rationale for their conduct because nobody will question them anyway.[123] In a sense, the victim can play the surrogate role of the public who acts as the prosecutors' conscience as far as community sentiments are concerned.

e. Strengthening the Oversight Powers of Chief Prosecutors

Bibas also makes an interesting point regarding the difference in the motivations of line prosecutors — i.e., those in the frontlines, or, in the Philippines, the trial prosecutors at the local level, and their superiors. According to him —

> Line prosecutors ... also serve their own strong self-interests in racking up marketable win-loss records, making names for themselves, and lightening their own workloads. *Head prosecutors do not share these interests to the same extent. They care more about broader, systemic values such as equal treatment and general deterrence.* Thus, *head prosecutors must do more to check line prosecutors' self-interests and bring them into line with stakeholders' values and interests.*[124]

This is an astute observation. The burdens of prosecuting a case fall more heavily on line prosecutors. Chief prosecutors, while mostly from the ranks, have gravitated more and more towards administrative and policy-making work. From the point of view of the line prosecutor, a plea bargain may be a cop-out from a case that is difficult to pursue, or simply an escape from an otherwise already-clogged docket of cases. Chief prosecutors have a clearer and firmer grasp of the macro view. As a policy-maker, the chief prosecutor is more in touch with the general criminological objectives of public prosecution, and may have insights on the consequences of plea bargaining in particular cases that the handling prosecutor on the ground may not have. The chief prosecutor, with his or her orientation towards broader criminal law policies, can be a good gauge of community sentiments.

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122. *See* Bibas, *supra* note 2, at 992–94.

123. *Id.*

124. *Id.* at 138 (emphasis supplied).

Thus, the presumably pragmatic considerations of line prosecutors should be tempered by the presumably policy-grounded and macro-oriented insights of chief prosecutors. Internal governance mechanisms should be strengthened, particularly focusing on enhancing the administrative oversight powers of chief prosecutors over the plea bargaining decisions of line prosecutors. At this level, it is also helpful if the articulation of plea bargaining decisions' rationales, in relation to prosecutors explaining themselves before the judge, be also undertaken so that the chief prosecutor may be able to review the details of plea bargaining decisions and be able to evolve a common set of norms applicable to his prosecution staff.

In sum, "the core values of society" that Denhardt refers to in her ethical framework, which operates to incorporate an *external* accountability dimension to the ethical conduct of public servants, can be discerned in a myriad of ways. Taking heed of community standards, needs, sentiments, priorities, or values does not require a popularity vote. Prosecutors, in breaking plea bargaining dilemmas, should refrain from retreating into their personal subjective moralities and instead endeavor to move outward and locate the "core values of society" that may tip the decision-making balance in favor of one course of action. They can find these in widespread public sentiment, democratically-adopted rules and guidelines, articulated plea bargaining rationales in past cases, the voice of the victims, and the views of the chief prosecutors. Compared to operating with nothing but subjective and arbitrary discretion, relying on the foregoing factors renders prosecutors more sensitive and responsive to the needs of the community and the greater public interest.

VII. RESPONSES

A. *Response from Stakeholders*

The problem inherent in unbridled prosecutorial discretion in plea bargaining, while dangerous and problematic as seen from the detailed discussion, does not receive much attention in the Philippine setting. Indeed, as can be seen from procedural rules, plea bargaining is emphasized, if not strongly encouraged, because the topmost priority in all reform agenda in the criminal justice system is, currently, the declogging of court dockets. Among the ranks of prosecutors, the primary areas for reform have been the improvement of human and material resources in order to lighten perennially heavy caseloads.[125]

125. A diagnostic report of the justice system places emphasis on personnel development issues and facilities as urgent areas of reform. Considering the clogging of dockets in all levels of the criminal justice system (the law enforcement, prosecution, courts, and corrections sectors), the focus of

Thus, the accountability issue arising from prosecutorial discretion in plea bargaining does not rank high in the order of priority. Indeed, aside from the Garcia plea bargain case, no other plea bargaining issues in recent times have generated the same level of interest; and the Garcia case only became sensational because the issue was highly political. In short, plea bargaining remains an activity conducted "under the radar" on a regular basis at the frontlines of the prosecution system.

Given this fact, stakeholders will most likely respond to the issue of prosecutorial discretion in plea bargaining via the same route — by invoking the competence and autonomy of prosecutors in determining which cases deserve to be heard in court. Given the strains on the justice system's resources, it becomes almost absurd to insist that plea bargained cases be scrutinized closely. A negotiated plea is one less case in the clogged dockets, and this is more appealing.

In case a controversial or questionable plea bargaining decision crops up, it may warrant a congressional inquiry, as in the Garcia case, but, apart from direct political intervention, such decision will likely be relegated to the usual remedies: (1) if there is suspicion that the prosecutor was corrupted or acted abusively, file an administrative or criminal case against him or her; (2) admonish superiors to exercise closer supervision in subsequent cases; and (3) leave the courts to determine the validity of the plea bargain because, in any case, a bad or disadvantageous plea bargain will have little chance of being approved by the judge.

This lukewarm reaction of stakeholders to a possible plea bargaining controversy is not mere conjecture. It bears to note that, after the Garcia plea bargain controversy, no substantial reform was undertaken at any front to prevent repetition of the issue. The congressional hearing did not bear any legislation geared towards curbing prosecutorial discretion. The President appears to have no further interest in the case after former Ombudsman Merceditas N. Gutierrez resigned and Special Prosecutor Sulit was dismissed from the service. It would seem that the scandal was appreciated only in terms of the *ethics and professionalism* of those involved, and not in terms of the *public accountability deficits* that made it possible to begin with.

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interventions appear to be the sheer numerical easing of chronically congested caseloads, before addressing qualitative issues such as arbitrary plea bargaining decisions. *See* Supreme Court of the Philippines, Department of Justice, and United Nations Development Programme, The Other Pillars of Justice Through Reforms in the Department of Justice (An Unpublished Diagnostic Report Developed by the Supreme Court of the Philippines) 4–26, *available at* http://apjr.judiciary.gov.ph/pubreports/DOJ%20Diagnostic%20Report.pdf (last accessed Sep. 30, 2014).

The Office of the Ombudsman likewise did not adopt any rule or policy seeking to address the root cause of the infamous Garcia plea bargain agreement. The Department of Justice has also not acted on the issue. The "default rule" has therefore been restored in the plea bargaining regime after the Garcia case — leave it to the discretion of the prosecutors to plea bargain or not, and trust that their subjective notions of "justice" and "public interest" would coincide with the community's sentiments.

B. Personal Insights

This Author, when faced with a plea bargaining decision dilemma, would most likely decide in favor of proceeding to trial. The arguments of Uviller are worth subscribing to, especially the notion that *the prosecutor does not have the monopoly of the duty to seek justice*.[126] This is, for this Author, an insightful way of thinking about the role of the prosecutor in society, with a view to enhancing public accountability. As Uviller correctly states —

> *Thus, when the issue stands in equipoise in his own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury*. He need not vouch for his cause implicitly, as he may not explicitly. Nor should he lose sleep over his reliance upon the device that the system has constructed for the task of truth-seeking, inexact though he knows it to be. *Although the prosecutor's discretionary powers may be important, and his detached and honorable presence vital, he is not, after all, the sole repository of justice*. Thus, I do not believe that the system is served by canons which overplay the prosecutor's 'quasi-judicial' role. He is, let us remember, an advocate as well as a minister of public justice, and the due discharge of his many obligations of fair and detached judgment should not inhibit his participation in what is, for better or worse, essentially a dialectic process. In our well-guided efforts to imbue the system with flexibility and personal qualities of sympathy, we need not sacrifice the values which may yet inhere in the design of controlled contention.[127]

The import of the quoted passage above is that the prosecutor should not see himself or herself as the singular, let alone central figure in the pursuit of justice. The prosecutor is as much embedded in *a complex of democratic institutions* as any other public servant, and the exercise of prosecutorial discretion should be circumscribed by the same democratic pressures that inhere in any other public office. By plea bargaining a case, prosecutors should be able to appreciate that they are, in effect, venturing into, if not subverting, the democratic mandates of other public officers and offices as reposed by the people. In plea bargaining a case, prosecutors decide

126. Uviller, *supra* note 113, at 1159.

127. *Id.* (emphasis supplied).

that a case should not be heard in court, thereby *depriving the judge of the opportunity to apply his or her own discretion* on the guilt of the accused.

Likewise, plea bargaining a case indirectly countermands the *discretion* of fact-finding investigators and investigating prosecutors who, following their own procedures before filing a case in court, have determined that there is "probable cause" that a crime has been committed and that the accused is probably guilty thereof and should stand trial. Notably, when the Ombudsman prosecutors in the Garcia case plea bargained it due to "weak evidence," it was vigorously objected to by, among others, former Ombudsman Simeon V. Marcelo, who approved the preliminary investigation resolution that essentially says the State had a strong case against Garcia.[128] Such is the friction created by the exercise of unbridled prosecutorial discretion in plea bargaining. Prosecutors, therefore, while not bound by the conduct of other officers, should consciously take into consideration the fact that the others before them have determined that there is enough bases to prosecute. This should at least be given due weight and consideration.

There is also merit in Gifford's statement that

> [t]he trial process itself has value to the community aside from determining which members of society should be labeled as criminals and punished. Trial and conviction, as well as the subsequent punishment, help to restore the sense of equilibrium to the community defaced by the criminal act, to reaffirm the temporarily lost feeling of security[,] and perhaps to satisfy the latent public desires to condemn and to punish.[129]

The conduct of a public trial serves a prophylactic effect in society, because it publicizes the circumstances of a crime, gives the victim an opportunity for vindication, and allows the accused an opportunity to reconcile with the community. Trials conducted in the open also serve to educate society and deter the commission of similar crimes in the future.

This is not to say that the advantages of the conduct of trial far outweigh the advantages of plea bargaining. There may indeed be circumstances (e.g., in minor or non-violent crimes, in crimes involving small values of money, or in crimes where there is clearly insufficient evidence to prove the guilt of the accused) where plea bargaining is the most advantageous route for all concerned parties.

However, as Uviller said, in a state of "equipoise" — i.e., when all "pro" and "con" factors are in seeming equal balance, when a plea bargaining decision could go either way, the tendency of the prosecutor

128. Salaverria, et al., *supra* note 28.

129. Gifford, *supra* note 109, at 70.

should not be to retreat into subjective discretion (knowing that his or her actions will always be valid anyway), but to yield to the mandates of other actors or actresses who have equal duties to seek justice.[130] If the merits of a case are not clear-cut, or if the amount of evidence available can equally justify both a conviction and an acquittal, the prosecutor should do well to look outward and allow the collective discretion of investigators, investigating prosecutors, judges, and the general public to play themselves out in the democratic space. This line of thinking is more in line with the notions of public accountability than the urge to enter into a plea bargain using selfish, self-centered, and unilateral decision-making criteria.

VIII. RECOMMENDATIONS

In line with the foregoing discussions, the following multi-tiered accountability framework for the exercise of prosecutorial discretion in plea bargaining is proposed:

(1) *Tier One.* No factor, consideration, or circumstance extraneous to the merits of the case should be taken into account (e.g., heavy workload, desire for prestige, improvement of conviction records, etc.).

This should be the first level of analysis because prosecutors cannot take an "instrumentalist" view of plea bargaining. The primary purpose of plea bargaining is to serve the interests of the State, the accused, and the community by abbreviating trial. The individual interests of the prosecutor should not be factored into the equation.

(2) *Tier Two.* Is there patent insufficiency of evidence that will establish guilt, such that plea bargaining is the most advantageous option for the State? If this is the case, *proceed to Tier Five.*

This is currently where the default plea bargaining regime lies. If there is a clear indication that plea bargaining is the most advantageous course of action for the State because it will be difficult to secure a conviction,, otherwise, plea bargaining should be availed of.

(3) *Tier Three.* Is it unclear whether the evidence is sufficient to secure a conviction?

(a) If there is no compelling public interest that will be served by abbreviating the proceedings, proceed with trial and *do not plea bargain.*

130. Uviller, *supra* note 113, at 1159.

At this "equipoise" level, the decision not to plea bargain in the absence of any compelling factor is in deference to the community's intention to proceed with trial, as expressed through the exercise of discretion of the investigators, investigating prosecutors, and judges. It is also a recognition of the fact that the conduct of public trials serve a public interest, as intended by the people according to the tenets of a democratic republican state. Therefore, in case of doubt, prosecutors should resolve the dilemma in favor of continuing with trial.

(b) If there is a compelling public interest that will be served by abbreviating the proceedings, plea bargaining should be considered, *proceed to Tier Four*.

As discussed above, there may be instances where, due to the nature, gravity, or circumstances of the crime or the amount involved, the State will be better off not pursuing the prosecution and settle with a plea of guilt to a lesser offense.

(4) *Tier Four*. Is there no strong public sentiment opposing a plea bargain, as far as such can be reasonably discerned? If this is the case, *proceed to Tier Five*.

Is there no strong and reasonable opposition from the victim? If this is the case, *proceed to Tier Five*.

Is there no prior decision or ruling in a similar case where plea bargaining was disallowed? If this is the case, *proceed to Tier Five*.

Is there no rule or policy adopted by the organization that will be violated if the case is plea bargained? If this is the case, *proceed to Tier Five*.

All factors discussed represent the *loci* of the "core values of society" that prosecutors can use to discern public interest. The last question, of course, presupposes that rules and policies have actually been adopted by the prosecution office, and it is highly recommended that it does so.

(5) *Tier Five*. Is the recommendation to plea bargain favorably received by the chief prosecutor? If so, *proceed to plea bargain, and prepare a detailed explanation of the rationale for the decision, to be filed in court and in the chief prosecutor's office*.

As explained, the chief prosecutor is presumed to have a clearer visibility of the community's criminal justice needs, concerns, and interests. Therefore, by consulting closely with the chief prosecutor, the line prosecutor's "frontline or trench" interests

> in plea bargaining a case will be infused with the broader and more policy-oriented insights of the head of the institution. Close consultation with the chief prosecutor (in other cases, with other interested stakeholders, if the case calls for it) should be recommended especially in non-routine or high-profile cases, where peculiar public interest needs can potentially recalibrate the landscape of the plea bargaining field.
>
> Similarly, a detailed account of the rationale behind the plea bargaining decision, made publicly available, will engender accountability, predictability, and uniformity not only in the individual prosecutor's plea bargaining decisions but in the plea bargaining decisions of other prosecutors at the institutional level.

The above framework represents a modest first step in reforming the existing plea bargaining regime, which is heavily centered on prosecutorial discretion. By providing a more structured approach to plea bargaining, which integrates input culled from external and societal interests, the prosecutor is expected to be in a better position to render non-arbitrary, predictable, and, most importantly, *accountable* plea bargaining decisions. Given the aftermath of the Garcia plea bargain case, it is imperative that reform measures be instituted in the Office of the Ombudsman and in the Department of Justice to reorient the thinking of prosecutors — from a model where their discretion is autonomous, central, and supreme, to one where their discretion is complementary to, and can be harmonized with, the discretion of other institutions tasked to seek justice under the rubric of democratic governance. This Article's hope is that stakeholders can see the urgency in the need to reform the plea bargaining regime, and frame the issue of abuse of prosecutorial discretion not only in terms of *individual ethics and morality*, but also in terms of the larger context that govern and constrain bureaucratic conduct.

IX. CONCLUSION

Ultimately, any public administration dilemma involving a question of administrative discretion will bear down on the *context* of decision-making. In the context of a democratic government, it is submitted that unbridled, unchecked, and untrammeled discretion cannot be tolerated. This applies to prosecutors as much as to all other public servants. At some point, and in some manner, the public, from whom all sovereignty emanates, must be able to define the bounds of prosecutorial discretion and hold prosecutors to account, in a meaningful and effective way, for their plea bargaining decisions. This is a simple and unquestionable democratic imperative.