

## **Problematizing ‘Performance Contracting’: An Onto-Epistemological Perspective**

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### **ABSTRACT**

*This article seeks to, conceptually, broach the boundaries of normative doctrinal analysis by exploring the extant constructs of performance, drawing onto epistemological resources. As such, it aims to commence an engagement with alternative legal perspectives, such as socio-legal theory and practice, to open up new contracting approaches that could be resourceful in fragile-cum-complex infrastructure recovery and post-disaster contexts.*

**Key Words: Social Development Goals, Socio-Legal, Performance Contracting**

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## Introduction

It is argued that there is *social embeddedness*<sup>1</sup> within the development contexts, goals, and their concomitant governance. Consequently, social embeddedness, along with generally normative artifacts of performance<sup>2</sup> often perturbs *performance gaps*<sup>3</sup>. As such, it is proffered that development programs are exposed to commercial risks that arise from social embeddedness expressed – contractually – as performance gaps.

With over ninety-two percent of the Social Development Goals (SDGs) linked to infrastructure development<sup>4</sup> and the increasing use of *performance contracting*, this article seeks to animate a dialogic praxis in the mediation of competing expectation *performatives*<sup>5</sup>. It is contended removal of that this would aid a reduction in transaction costs, governance demands and mitigate legal risks.

Conclusively instead, the cultivation of innovative responses to the socially complex transformational challenges embedded in programs would be more conducive to supporting the objectives of the Social Development Goals (SDGs).

## Context

Generally, programs and projects are instrumentalized through *temporary organizations* (comprising of secondary and tertiary agents) that carry out the day-to-day activities of contracts. At the same time, it is posited that *contract law* is ideally suited for *social-legal* perspectives and explorations.<sup>6</sup> Along with these concurring factors, my powerful management and consulting experience in the humanitarian and development sectors lends itself to an onto-epistemological perspective in dialoguing with the assumed merits of *socio-legal theory*. Arguably, any resulting claim is limited to the context of *lived experience*, which, incidentally, some commentators advocate is pertinent to contextual

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<sup>1</sup> A Maurer, “*Social Embeddedness*” Viewed from an Institutional Perspective, *Revision of a Core Principle of New Economic Sociology with Special Regard to Max Weber*, 2012 Polish Sociological Review 180 p 475; and also, <https://understandingsociety.blogspot.qa/2012/07/social-embeddedness.html> (Accessed 17 October 2020).

<sup>2</sup> This paper draws on the view of ‘performance’ as a construct, is both a *behavior* and an *outcome*. See: S Sonnentag and M Frese, *Performance Concepts and Performance Theory*, 2005 Psychological Management of Individual Performance, p 1; this includes the assumption that to *perform* produces a *valued output/outcome*, see: D Elger, *Theory of Performance*, which also includes a measurable expectation “to perform” [https://www.webpages.uidaho.edu/ele/scholars/Results/Workshops/Facilitators\\_Institute/Theory%20of%20Performance.pdf](https://www.webpages.uidaho.edu/ele/scholars/Results/Workshops/Facilitators_Institute/Theory%20of%20Performance.pdf) (Accessed 17 October 2020); also the extension of the concept to firm-level ‘measures’ in Operations Management. See: G Vastag, *The theory of Performance frontiers*, 2000 Journal of Operations Management 18 p 353. <https://pdfs.semanticscholar.org/214c/dd2755dfa35eda66b59ec4095885c3f330d3.pdf> (Accessed 15 October 2020).

<sup>3</sup> R Staughton and R Johnston, *Operational Performance gaps in business relationships*, 2005 International Journal of Operations & Production Management 25 (4) p 330.

<sup>4</sup> UNOPS, *Infrastructure for Peacebuilding*, (2020); [https://content.unops.org/publications/Infrastructure\\_Peacebuilding\\_EN\\_Web.pdf](https://content.unops.org/publications/Infrastructure_Peacebuilding_EN_Web.pdf) (Accessed 17 October 2020).

<sup>5</sup> R Cotterrell, *Rethinking ‘Embeddedness’: Law, Economy, Community*, 2013 Journal of Law and Society 40 (1) p 49.

<sup>6</sup> L Mulcahy and S Wheeler, *Contract Law: Socio-Legal Account of the Lived World*, in Palgrave Macmillan Socio-Legal Studies book Series (2012).

policy praxis.<sup>7</sup> Therefore, the adduced insights and understandings inhere the potential of contributing to a *praxis of performance* while noting that, empirically, normative modes are limited by the *fragility-cum-complexity* of the local institutional contexts.<sup>8</sup>

With this in mind, this article locates *performance* in-between “the intention” and “the actual” versus simply, related measures of intention. In doing so, *performance* is (re)conceptualized as an ‘observable phenomenon’ that is articulated by - and through - the inter-animation of competing discourse of expectations during the implementation of program objectives. As such, the *conflicts* that often arise, framed here as *performance gaps*, can be theorized as the ‘interpersonal conflicts’ between actants and stakeholders. Relatedly Honneth theorized, “...all interpersonal conflicts are the result of a struggle for recognition...”<sup>9</sup>. This ‘struggle for recognition’ or its correlate, *lack of recognition*, provides a valuable means to innovate normative artifacts of performance. That is, pierce the veil of agnotology (induced ignorance) to recognize the discursive dynamics of *expectation-performativity*<sup>10</sup>. In doing so, opportunities for the development of innovations in performance contracting can be realized.<sup>11</sup>

Consequently, I argue that removal of by employing *socio-legal* resources to engage the constructs of ‘performance’ and ‘performativity’ in *fragile-cum-complex* contexts - for *performance-based contracting* and *administrative governance* – could provide contractual stability through the cognizance of *performance elasticity* within agreed expectation variables to remediate the effects of performance- paradox.

In practice, ‘performance’ is an artefact as *measures* – which Henman asserts to be “mismeasures” of performance that, among other things, consequences social dissonance<sup>12</sup>. However, these (*mis*)*measures* populate contracting-for-performance practice and provide the basis for, or against which, payments are disbursed to *firms* and as *progress indicators*. Subsequently, also, these (*mis*)*measures* often vitiate the expected *SDG performance*. Consequently, *performance gaps* and legal risks arise.

## Deconstructing ‘Performance’

Arguably, contracting in fragile-cum-complex contexts should entail recognition removal of any of the discursive expectations embedded in the context. This blog seeks to - conceptually - extend a *post-normal science*<sup>13</sup> view to infrastructure contracting in

<sup>7</sup> Ritu, *Living with and responding to risk in the Uttarakhand Himalayas: A call for prioritizing lived experiences in research policy praxis*, (2020) International Journal of Disaster Risk Reduction.

<sup>8</sup> <http://www.ihp.earth/which-problem-is-ihp-addressing/> (Accessed 7 August 2020).

<sup>9</sup> A Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, MIT Press (1996).

<sup>10</sup> Please see the empirical research on the performative of expectation: M. Rosengarten and M. Michael, *The performative function of expectations in translating treatment to prevention: The case of HIV pre-exposure prophylaxis, or PrEP*, 2009 Social Science & Medicine 69 (7) P 1049-1055.

<sup>11</sup> R Sumo, W van der Valk, G Duysters and A van Weele, *Using Performance-based contracts to foster innovation in outsourcing service*, 2016 Industrial Market Management <http://www.arjanvanweele.com/42/records/86/Sumo.IMM.FINAL%20PAPER%20PUBLISHED%201-s2.0-S0019850116301067-main.pdf> (Accessed 15 October 2020).

<sup>12</sup> Ibid p 606.

<sup>13</sup> Here I am employing the notion of *destabilized facts*. That is, engaging a dialogical approach to account for the recognition of extant and emergent uncertainties and competing expectation performatives. See for example: <http://isecoeco.org/pdf/pstnormsc.pdf> (Accessed 17 October 2020), and [https://www.uu.nl/wetfilos/wetfil10/sprekers/Funtowicz\\_Ravetz\\_Futures\\_1993.pdf](https://www.uu.nl/wetfilos/wetfil10/sprekers/Funtowicz_Ravetz_Futures_1993.pdf); Accessed 17 October 2020.

post-disaster recovery and humanitarian contexts where conditions of uncertainty abound. In these complex contexts, both ‘blame avoidance and ‘risk avoidance’ are often actants that consequence commercial risks for programs. This is especially so when actors employ ‘performance measurement’ – as teleological mechanisms – which tends to veer away from the sustainability objectives (social and economic) in the local context<sup>14</sup> and, given the removal of such the evolving use of *performance-based contracts*, cultivating an alternative contracting lens is urgent– a *socio-legal* lens<sup>15</sup>.

Initiating from the point of view of *performance* as a discursive construct, a dialogic space arises to negotiate and mediate expectations.<sup>16</sup> Further, employing a *socio-legal* framework to performance-based contracting to implement infrastructure programs offers alternative options to extant transaction-based models. Such an alternative approach is helpful in post-disaster recovery and humanitarian contexts where weak institutions and emergent complexities abound.<sup>17</sup> That is, a purposive mediation of the *performance-performative paradox*<sup>18</sup> can be realized in contextually ambiguous conditions.<sup>19</sup> A *de-risking* effect is thus adduced, which contributes to the discourse on managing commercial risk by focusing on the ‘ecology of the inter-animations’ embedded in contracting.<sup>20</sup>

Chynoweth (2008) questioned the normative term of ‘methodology’ in legal research removal of by positing that empirical analysis cum persuasive engagement with theoretical innovations hold a substantive place in legal praxis.<sup>21</sup> While Banakar and Travers (2005) assert that there are methodological opportunities for discussion with the legal research community that would animate innovative methods in *socio-legal* research praxis in its empirical studies of law.<sup>22</sup>

‘Performance’ Henman (2016) posits, inheres an implicit ontological construct of *measurement*<sup>23</sup>. As such, ‘performance-measurement’ induces a performative effect on ‘performance’.<sup>24</sup> That is, what is likely to be measured is a *(re-)presentation* of performance. “Authentic performance” – as he characterizes it - remains elusive to performance measurement capture.<sup>25</sup> Public Management Scholar Christopher Hood (2007) argues that ‘blame avoidance is the normative institutional tool to manage

<sup>14</sup> P Le Gales, *Performance measurement as a policy instruments*, 2016 Policy Studies 37 (6) p 508.

<sup>15</sup> D Schiff, *Socio-Legal Theory: Social Structure and Law*, 1976 The Modern Law Review 39(3) p 287.

<sup>16</sup> Ibid.

<sup>17</sup> C Hunter, *Integrating Social-Legal Studies into The Law Curriculum* Ed. Palgrave Macmillan (2012); and also, R Banakar and M Tavers, *Introduction to Theory and Method in Socio-Legal Research*, Eds Hart Publications (2005).

<sup>18</sup> D Eicher-Catt, *Non-custodial Mothering: A Cultural Paradox of competent Performance – Performative Competence*, 2004 The Journal of Contemporary Ethnography 33 (1) p 72.

<sup>19</sup> E Krahmann, *Legitimizing Private Actors in Global Governance: From Performance to Performativity*, (2017). [https://www.ssoar.info/ssoar/bitstream/handle/document/55269/ssoar-politicsgovernance-2017-1-krahmann-Legitimizing\\_Private\\_Actors\\_in\\_Global.pdf?sequence=1](https://www.ssoar.info/ssoar/bitstream/handle/document/55269/ssoar-politicsgovernance-2017-1-krahmann-Legitimizing_Private_Actors_in_Global.pdf?sequence=1) (Accessed 16 October 2020).

<sup>20</sup> R Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 1990 The Journal of Legal Studies 19 (S2) p 597.

<sup>21</sup> P. Chynoweth, *Legal research in the built environment: a methodological framework* (2008) [http://usir.salford.ac.uk/id/eprint/12467/1/legal\\_research.pdf](http://usir.salford.ac.uk/id/eprint/12467/1/legal_research.pdf); Accessed 12 October 2020.

[http://www.dphu.org/uploads/attachements/books/books\\_3805\\_0.pdf](http://www.dphu.org/uploads/attachements/books/books_3805_0.pdf); Accessed 18 April 2018.

<sup>22</sup> R. Banakar and M. Travers, eds, *Theory and Method in Social-Legal Research* (2005).

<sup>23</sup> P Henman, *Techniques and paradoxes in performing performance*, 2016 Policy Studies 37 p 597.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

*political risk*.<sup>26</sup> At the same time, Hood appears to animate 'performance' in a public institution as 'governance' - and deploys *transparency* as a *performative* of blame-avoidance.<sup>27</sup> *Prima facie*, both scholars (Henman and Hood) recognize the inherent *social embeddedness* in the construct of 'performance'.<sup>28</sup>

Reasonably, 'performance contracting' can be logically construed as a *social phenomenon*.<sup>29</sup> As such, the interdisciplinary nature of a *socio-legal* framework enables a legal praxis beyond doctrinal analysis to include contracting phenomenon as inter-animating social relationships.<sup>30</sup> Consequently, an interplay of theoretical and empirical resources can provide a discursive means for enact 'contextually-attuned Performance contracting'.

This onto-epistemological treatment of *performance* is supported by some International Financial Institutions (IFIs) in their suggestion that *de-risking* should be managed through dialogic engagements which include banks, regulators, policy actors and stakeholders to engender the desired effect of *inclusion* - versus exclusions by restrictions and exiting from existing relationships to achieve broader systematic regulatory-compliance performance.<sup>31</sup> As such, mere client-avoidance or restriction as a *de-risking* governance strategy in the financial sector is deemed unsupportive of the broader social objectives of SDGs.

### Engaging Socio-Legal Resources

*Ex-ante* evaluations are often replete with the evaluations of *performance gaps*.<sup>32</sup> This, in general, is taken to convey that stakeholder *performance* expectations have not been *fully met*.<sup>33</sup> The 'measure' of these unmet expectations often lies between the *intentions* and the *actual outcomes* of the program or contract implementation. However, what is often ignored is the fluid, contextual realities along with competing polysemic (re)presentations of *performance* inter-animate during the implementation. This *inter-animation*, I argue, produces dynamic possibilities for unmet expectations.

<sup>26</sup> C Hood, *What happens when transparency meets blame-avoidance?* 2007 Public Management Review 9 (2) p 192.

<sup>27</sup> Ibid

<sup>28</sup> Supra 7

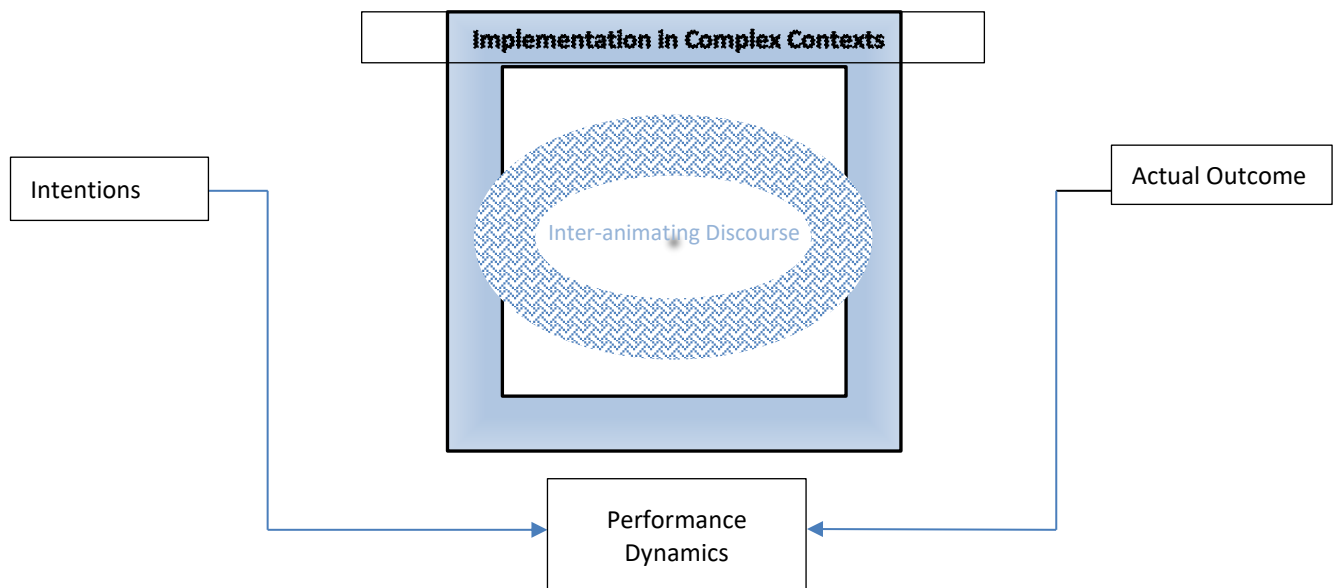
<sup>29</sup> See, for example, N. Richard's Doctoral Thesis *Performance Contracting, Measurement and Public Service Delivery in Kenya* (2016) [http://erepository.uonbi.ac.ke/bitstream/handle/11295/97860/Ndubai%20Richard\\_Performance%20Contracting,%20Measurement%20and%20Public%20Service%20Delivery%20in%20Kenya.pdf?sequence=1&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/97860/Ndubai%20Richard_Performance%20Contracting,%20Measurement%20and%20Public%20Service%20Delivery%20in%20Kenya.pdf?sequence=1&isAllowed=y) (Accessed 23 October 2020); and, J. Dias and D. Elesh, *Structuring Performance: performance Contracts, Organizational Logics, and Leadership in Welfare-to-Work Programs*, (2012) Social Service Review (86) 1 p 143-168.

<sup>30</sup> R Banakar and M Travers, *Theory and Method in Socio-Legal Research*, Hart Publishing (2005).

<sup>31</sup> <http://live.worldbank.org/financial-inclusion-not-exclusion-managing-derisking> (Accessed 18 October 2020).

<sup>32</sup> For example, a conflation between evaluating for *compliance* or *performance*. See S. Smismans, *Policy Evaluation in the EU: The Challenges of Linking Ex Ante and Ex Post Appraisal* (2015) 6 European Journal of Risk Regulation 6.

<sup>33</sup> J. Anderson, S Lowe and P. Reckers, *Evaluation of audit decisions: Hindsight bias effects and the expectation gap* (1993) 14 Journal of Economic Psychology 4 p 711-737.



Dias and Elesh (2012) empirical study concluded that the dynamics of competing organizational logic have a material effect on the outcome of program/implementation performance.<sup>34</sup> That is, conceptually, what I have characterized as an *inter-animating discourse*. In other words, performance contracts can both *constrain* and *opportune* actual outcomes.<sup>35</sup>

*Socio-Legal Theory* encapsulates the potential to concomitantly engage both doctrinal and contextual variables towards optimal outcomes given, among other things, its empirical stance.<sup>36</sup> Consequently, as some commentators posit, *socio-legal approaches* bode well for the context of contract law.<sup>37</sup> This dialogic space – that is, *performance contracting* - will be explored in subsequent blogs through the discursive lens of socio-legal resources. As such, formulations of contract *de-risking* are likely to emerge.

## Conclusion

The scope of this article is limited to a conceptual framework of *performance* and how *socio-legal* resources on the empiricism in and around contract law might influence constructs of *performance* - in a dialogic manner - during negotiations, contracting, implementation and disputes-mediation. As a resource, contextually appropriate approaches might then be engaged to adduce and enhance de-risking effects for infrastructure contracting in post-disaster and humanitarian contexts.

<sup>34</sup> Ibid 29.

<sup>35</sup> Ibid.

<sup>36</sup> C. Hunter, “Integrating Socio-Legal Studies into The Law Curriculum” (Edit) Palgrave Macmillan, (2012).

<sup>37</sup> Ibid.



