

**PERFORMANCE CONTRACTS IN KENYA: AN EVALUATION OF THE  
LEGAL FRAMEWORK IN PUBLIC UNIVERSITIES.**

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THE DEGREE OF MASTERS OF LAWS (LLM)**

**THE UNIVERSITY OF NAIROBI**

## DECLARATION

I Petrolina Chepkwony do hereby declare this thesis to be my original work and that it has not been submitted elsewhere or is not due for submission for a degree in any other University.

Signature..... Date .....

This thesis has been submitted with my approval as the University supervisor.

Professor Albert Muma

Signature... Date .....

## **DEDICATION**

I am dedicating this thesis to my beloved parents: My father Mr. Mathew Chepkwony for being my strongest supporter and my late mother Esther (R.I.P) for believing in me.

## **ACKNOWLEDGEMENTS**

It is my pleasure to thank those who made this thesis possible. This thesis would not have been complete without the expert advice and exceptional patience that I got from my supervisors, Prof. O. Mutungi (R.I.P) and Prof. A. Muma.

My deepest gratitude to my family: my husband Mark Antony and my lovely children Fidel and Cedric for their understanding and endless love. Special Thanks to my sisters Patricia and Balqis Chepkwony. My wonderful friends: Beatrice, Hellen, Wasonga, Eva, Mugo, Koech, and Bett who tirelessly encouraged me when I needed it most.

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## **LIST OF ABBREVIATIONS**

CEO - Chief Executive Officer

CUE- Commission for University Education

GOK- Government of Kenya

J.K.U.A.T – Jomo Kenyatta University of Agricultural Technology

K.U – Kenyatta University

MOU-Memorandum of Understanding

MTP II-Medium Term Plan II

OECD- The Organization for Economic Co-operation and Development

PC - Performance Contracts

SPS-Sector Performance Standards

SWOT- Strengths, Weakness, Opportunities, and Threats

T.U.K – Technical University of Kenya

U.O.N – University of Nairobi

V.C–Vice Chancellor

# CHAPTER ONE

## THE INTRODUCTION

### 1.1 Background to the Study

Higher education is an essential component of national economic investment strategy in that without higher education, a nation will substantially deteriorate in the coming years. Higher education determines a society's evolutionary potential and affects international competitiveness and choice of industrial location.<sup>1</sup> Consequently governments have to find mechanisms of achieving this and as such the concept of performance contracts has been adopted by many countries. A World Bank study carried out in Kenya acknowledges that performance contracts have long been used in many countries as a tool for enhancing performance in public agencies for example in France, New Zealand, United States of America and the United Kingdom.<sup>2</sup>

In Kenya, the performance contract is defined as a *“freely negotiated performance agreement between Government, organization and individuals on one hand and the agency itself”*.<sup>3</sup> One notes that the performance contract is a tool used by government to maintain and improve standards of service delivery in public institutions in its oversight role.

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<sup>1</sup>F.K. Alexander, 'The Changing Face of Accountability: Monitoring and Assessing Institutional Performance in Higher Education', 2005. Vol 71(4) p411-431

<sup>2</sup>Prajapati Trivedi, 'PC in Kenya, Instruments for Operationalizing Good Governance.' (World Bank, 2006) < [www.performance.gov.in/sites/all/.../files/.../operationalizing\\_good.pdf](http://www.performance.gov.in/sites/all/.../files/.../operationalizing_good.pdf) > Accessed 15<sup>th</sup> July 2016

<sup>3</sup> GoK, Performance Contracts Steering Committee, Kenya, Sensitization/Training Manual on Performance Contracts in the Public Service, (Government Printers,2005) p4

It is important to have it clear that the performance contract as applied in Kenya is a quasi-contractual arrangement that the government of Kenya has expressly used as a management tool, but whose results have prompted this study into ways of improving its efficacy. The Kenyan government in ceding autonomy for management of public institutions (universities included) adopted the use of performance contracts to monitor, evaluate and reward performance <sup>4</sup> As will be seen in the text of this thesis, the performance contract is impeded in its implementation and enforcement through a lack of detail in drafting and in structural adequacy to ensure compliance by the members of staff it is imposed upon.

This paper is based on the premise that performance contracting is, “a management tool that is used by public sector executives and policy makers to define and enforce responsibilities and expectations between the contracting parties to achieve common mutually agreed goals”. With that context in mind it follows that a definition of performance contracting be, “...a range of management instruments used to define responsibility and expectations between parties to achieve mutually agreeable results”.<sup>5</sup>

Trivedi acknowledges that one of the major and outstanding impacts of PCs in Kenya is that many public agencies in Kenya have become ISO certified. This is an indication of the level of improved services and procedures that the public agencies have been able to attain as a result of implementing performance contracts.

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<sup>4</sup> Prajapati Trivedi ‘PC in Kenya, Instruments for Operationalizing Good overnance.’2007 [http://www.performance.gov.in/sites/all/document/files/inter-exp/operationalizing\\_good.pdf](http://www.performance.gov.in/sites/all/document/files/inter-exp/operationalizing_good.pdf) accessed on 4th June 2015

<sup>5</sup> Lane, Jan Erik. *Public and Private Leadership*, (1987) IN J. Kooiman and K.A. Eliassen (eds.) *Managing public organizations*. (London, Sage Publishers,2004) pp. 47-64

This goes further to emphasize the importance of PCs in any economy and why the need to be enhanced through a legal framework.

While acknowledging that incentives play an important role in enhancing the performance contracts, Trivedi, however, reiterates the importance of putting in measures that would allow the incentive system to thrive. He warns that if not well calculated an incentive can turn out to be too costly to implement thus negating the gains made with the improved performance.<sup>6</sup> It is important to note here that there are various ways of rewarding good performance which are through salaries, secondary benefits and intangible rewards or recognition.<sup>7</sup>

More so, there is evidence that performance contracts have had a radical improvement in the management of the public sector.<sup>8</sup> Additionally PCs have provided an avenue for comparing and ranking public agencies through reliable benchmarks and have also increased accountability and transparency in performance setting thus encouraging healthy competition among state corporations. However, the study found that there were challenges experienced in the implementation of the PCs which include lack of adequate resources and a reward system for performers.

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<sup>6</sup>Prajapati Trivedi 'PC in Kenya, Instruments for Operationalizing GoodGovernance.'2007  
[http://www.performance.gov.in/sites/all/document/files/inter-exp/operationalizing\\_good.pdf](http://www.performance.gov.in/sites/all/document/files/inter-exp/operationalizing_good.pdf) accessed on 4th June 2015

<sup>7</sup> Thomas Theisohn & Tony Land, 'Incentives Systems: Incentives, Motivation and Development Performance' Capacity Development Group, Bureau for Development Policy, (United Nations Development Program Capacity Building Conference , 2006)

<sup>8</sup>Kobia, M. and Mohammed, 'The Kenyan Experience with Performance Contracting', (Discussion paper, 28<sup>th</sup> AAPAM Annual Roundtable Conference, Arusha, 2006). p14

In Public Universities in Kenya, Lecturers have often gone on strike because of inadequate remuneration and this negatively affects the quality of education in Universities.<sup>9</sup> Kiganda argues that the low level of staff motivation has resulted in high staff turnover while the remaining has been forced into income generating activities to supplement their low incomes.<sup>10</sup> How then will the government enforce the performance contracts where there are no incentives to the university staff to perform their obligations? This is a serious issue which the government needs to address in order to ensure the success of the performance contracts. Lutomia claims that incentives influence behaviour both in terms of eliciting and sustaining it.<sup>11</sup> The general perception of academics is that, the incentives are weak and do not encourage the maximization of the University's research goals. Given the weak nature of the incentives for research, academics at the University of Nairobi seem to respond more favorably to the non-research incentives.

The paper explores the legal framework of the performance contracts in the Public Universities with a view of assessing the challenges encountered by those universities in implementing the PCs and to determine the influence of incentives on implementation of PCs specifically in the area of teaching and research in the Universities.

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<sup>9</sup>Gudo and others, Role of Institutional Managers in Quality Assurance: Reflections on Kenya's University Education. Australian Journal of Business and Management Research (2012).

<sup>10</sup>Lane, Jan Erik. *'Public and Private Leadership'*, (1987) IN J. Kooiman and K.A. Eliassen (eds.) *Managing public organizations*. (London, Sage Publishers, 2004) pp. 47-64

<sup>11</sup> Lutomia, Agnes, Examining the incentives for knowledge production : the case of the University of Nairobi in Kenya, (Masters, Univ. Western Cape, 2014) 1

## 1.2 Statement of the Problem

The Government of Kenya initiated performance contracts with the aim of improving service delivery to the public by ensuring that holders of public office are held accountable for results and also link reward for work to measurable performance. However, despite the introduction of performance contracts in the past decade, most public universities are suffering from lack of resources, deteriorating quality of teaching and poor research infrastructure, deteriorating physical facilities, and which has resulted in congestion in the hostels and classrooms.<sup>12</sup>

These observations have led to an inquiry into the effectiveness of the performance contracts in maintaining the quality standards set in the quality charters of the universities. The latest parameters being those laid out by the Strategic Performance Contracting Guidelines 2013-2014<sup>13</sup>.

In Public Universities the objectives of performance contracting are drawn from the strategic plans of the public institutions. As such, The performance contracts should be anchored on the Medium Term Plan (MTP) and the Sector Performance Standards (SPS).

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<sup>12</sup>Otieno-Omutoko 'Transforming higher education; rethinking the management of higher education institutions.' [www.kim.ac.ke/conference/documents/2009/papers](http://www.kim.ac.ke/conference/documents/2009/papers) (accessed on 9<sup>th</sup> September 2012) p4-9; Ogum, R.O. Tertiary Education and Development in Sub-Saharan Africa at the Dawn of the Twenty first century: A lost hope, or present opportunity? National Social Science Journal((2007),p108-120

<sup>13</sup> Ministry of Devolution and Planning: 'Division of Performance Contracting Guidelines' 10<sup>th</sup>ed, [www.devolutionplanning.go.ke](http://www.devolutionplanning.go.ke). Accessed on 4<sup>th</sup> June 2012

Empirical literature reveal that performance contracts have played a major role in the public sector by providing an environment that is effective and efficient in terms of enabling the public agencies to put in place annual work plans adequately supported by budgetary provisions and improved management of public resources.

However, these studies focused on state owned enterprises in general and there scant literature on performance contracts in public universities, in addition, past studies have not addressed the legal and regulatory environment to find out the extent to which it facilitates or inhibits implementation of performance contracts. Finally past studies point out the inexistence of a clear link between the results of performance contracts and a reward system. These studies did not provide a holistic view on how incentives influences implementation of performance contracts in public universities consequently scant information is available. Therefore the present study sought to fill this gap.

### **1.3 Theoretical Framework**

The general concept of a performance contract is amorphous; its meaning varies from one author to the next. The median form though involves a contract between the legal owners of the venture on the one hand and the management of that institution on the other for the achievement of time constrained targets. As a rule, the performance contract lays out targets that are to be the mutual responsibilities of both parties for the duration of that agreement. However, a rose is that which by any other name would smell just as sweet, by this Shakespearean standard the French call it the ‘Contract de Performance’ other

commonwealth nations a ‘memorandum of understanding’<sup>14</sup>. By virtue of its very name, performance contracting can be conceived as a precursor to the evaluation of performance whose enforcement primarily involves annual statements that can be referred to as objectives. In this way therefore, the achievements of the institution within a specific time frame are made quantifiable.

The theory of performance contracting as a system can be said to have begun evolving in the sixties through Simon Nora-a French social scientist whose experimental model sought to boost the efficiency of public organizations. Initially, it was known as the ‘contra plan’. However, in its underdeveloped state, it was fraught with complex technical inabilities to evaluate real performance and therefore impose sanctions on non-compliance.

It thus follows that the concept of the performance contract revolves around the specific enumeration of a preferred set of objectives which the proprietor (the government in this case) would like the institution to achieve. In the same vein, the multiplicity of principals is remedied by having one agency-usually the head of that institution- sign on behalf of the whole institution<sup>15</sup>.

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<sup>14</sup> Prajapati Trivedi. PC In Kenya Instruments for Operationalizing Good Governance, 2007

<sup>15</sup> This acceptance of obligations on the behalf of other persons borrows from agency, an understanding of which is crucial to validating performance contracting in public institutions.



Various theories are used in the research. The first is the cognitive behavioral and the goal-setting theory. The joint theoretical framework is crucial to achieving the objectives of the study. Performance contracting is a way of controlling and motivating the performance of individuals that work in an organization.

A theory that helps to discern how to motivate the employees in a company is useful. The growth of an individual's productivity depends on how to manage the stress of development is channeled using the cognitive behavioral theory. The innovative ways that the capacities of a professional can be improved must be directed towards a particular goal. That is how the goal-setting theory is relevant to this discussion.

### **1.3.1 Cognitive Behavioral Theory in Performance Contracting**

This theory was developed in order to maintain and even improve the performance of employees working under stressful conditions. Basically, it entails the use of cognitive approaches to teaching employees to self-talk as they prepare or engage in high stress tasks. In so doing, they may understand the problems that they confront and come up with innovative ways to surmount the obstacles.<sup>16</sup>

Improved problem solving skills in the workforce helps them cope with increased workloads and complexity of tasks.<sup>17</sup> When introducing performance contracting in stressful environments, Dobson avers that progressive relaxation strategies that are self-

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<sup>16</sup> Arthur Nezu & Christine Maguth, 'Problem Solving Therapy', American Psychological Association, video series 1.(4310852) (2009)

<sup>17</sup> Dobson, K. S. 'Handbook of cognitive behavioral therapies'. (3<sup>rd</sup> ed.). New York: The Guilford Press. (2010)

instructed help the employee adapt to situations as they arise. The exercises help the individual work towards increased productivity that usually involves doing similar task more strenuously or tackling new tasks as a whole.

### **1.3.2 The Goal-Setting Theory in Performance Contracting**

Latham and Locke in their 1979 work first brought up the theory of goal setting in performance contracting.<sup>18</sup> They held that the performance of professional obligations was achieved when goals are specific, stringent and there is a system that ensured feedback on that performance. <sup>19</sup>The importance of goal setting as an informant to performance contracting is that it makes the targeted parameters clear to its enforcers.

Difficult specific goals have been shown to result in significantly higher performance even when contrasted with easy goals.<sup>20</sup> The reason advanced by Latham and Locke in their 2009 work is that higher goals lead to higher rewards hence sustained increased performance. Such expectations must be discussed by the employees and their employers as the exact goals, and time period within which they are to be achieved must be laid down before the commencement of any work-related performance.<sup>21</sup> Armstrong for one holds that participation of all relevant parties is essential as a means of agreeing to set higher goals; as it sets the stage for accomplishing even higher goals in the next cycle.

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<sup>18</sup> Latham, G. P. & Locke, E. A. 'New developments in and directions for goal-setting. *European Psychologist*', 12, (2007). p 290-300.

<sup>19</sup> Armstrong, M., 'A handbook of human resource management practice', ch 1, (9<sup>th</sup> ed). (London: Kogan Page, 2005)

<sup>20</sup> Armstrong, M., 'A handbook of human resource management practice', ch 1, (9<sup>th</sup> ed). (London: Kogan Page, 2005)

<sup>21</sup> *Ibid*

In the same breath, the author further holds that the theory is best applied in large organizations when representative leaders in an organization negotiate and set the parameters of performance before cascading the performance parameters to all cadres of staff.

Goal-setting distinctly and primarily motivates the employee. Marsden<sup>22</sup> for one found that employees thought that performance related pay led managers to set their targets more clearly because the specificity of the targets created a clear justification for input. Its effectiveness relies on the ease in understanding it and its alignment with current legal frameworks.<sup>23</sup>

The application of the theory however has its limits. For instance there is still no empirical evidence to show that performance contracting as per the goal theory was effective when the employees demonstrably felt that they are working at maximum capacity.<sup>24</sup> Furthermore, lack of persistence in altering the performance parameters as per the feedback could cripple the whole process as achievement is hampered when negative feedback is not taken into account.<sup>25</sup>

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<sup>22</sup> Marsden, D, 'The role of performance-related pay in renegotiating the effort bargain: The case of the British public service', *Industrial and Labour Relations Review*, 57, p350-370.

<sup>23</sup> Kubr, M- International Labour Office, 'Management consulting: A Guide to the profession', (4<sup>th</sup> ed.). (Geneva: 2002)

<sup>24</sup> Mullins L, 'Management and organizational behaviour'. (5<sup>th</sup> ed.). (London: Financial Times-Prentice, Hall-1999) ch2

<sup>25</sup> William, L. C., John, W. S. Jr., Don, V. W., & Frank, Q. F, 'The role of goal orientation on negative emotions and goal setting when initial performance falls short of one's performance goal.' ( *Human Performance*-2005), 18, p55-80.

### 1.3.3 The Expectancy Theory in Performance Contracting

The expectancy theory: the propensity of an individual to act in a certain manner depends on the strength of the expectation that the input will result in an outcome that is attractive to the individual.<sup>26</sup>This theory is hinged on effort-performance expectancy (that increased effort will coincide with increased performance), performance-outcome expectancy<sup>27</sup> and the valence<sup>28</sup> of the individual employee.

The expectations of the employee in this instance may include: accomplishment, increased self esteem and the development of new skills. Extrinsic outcomes, such as bonuses, praise or promotion are provided by an outside agent such as the supervisor or work group.<sup>29</sup>

Expectancy affords managers the ability to define what constitutes performance, the attitude to work and how the employees should work in order to achieve acceptable performance. These goals, however, are to be reasonably set so as to maintain the employees' interest. Robbins and Judge put it thus, "The key to expectancy theory is the understanding of an individual's goal and the linkage between effort and performance,

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<sup>26</sup> Robbins, S. P., & Judge, T. A., 'Organizational behavior'. (12<sup>th</sup> ed.).Upper Saddle River, NJ: Prentice Hall.(2007)

<sup>27</sup>The performance-outcome aspect of expectancy can be said to be a person's expectation that his remuneration is closely tied to his level of performance in the tasks of the professional endeavour . Sloof Randolph & Mirjam VanPraag, 'Performance Measurement, Expectancy and Agency Theory: An Experimental Study, (Tinbergen Institute Discussion Paper No. 2005-026/1) (2005).

<sup>28</sup> *Ibid* ,"Can be understood as a measure of the degree of which an individual values a particular reward. The higher the valence is the more motivated the individual will be. The outcome of a particular behavior has a specific valence, that is, a specific motivating power or value for each specific individual. It is determined by the individual and is not a characteristic of the outcome itself for a given situation"

<sup>29</sup> Marsden, D, 'The role of performance-related pay in renegotiating the effort bargain: The case of the British public service', Industrial and Labour Relations Review, 57, p350-370.

between performance and rewards. If employees feel that the goal they are asked to pursue is too difficult or impossible their motivation will be low.”<sup>30</sup>

#### **1.3.4 Agency Theory**

An Agency relationship is defined as a “contract under which one or more persons (the principal(s) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent”.<sup>31</sup> In the case of government –university agency relationship it is argued there has to be three elements that can make this relationship complete; The first being tasks which the government allocates to a university for accomplishing; time frame agreed by the university for accomplishing the task; the tools used in sanctioning the accomplishment of the tasks”.<sup>32</sup>

In this case the University Council (agent) is appointed by the government (principal) to act on its behalf. The task of the university here will be to follow the government directives, these are set out in the MTP and actualized through the annually reviewed PCs and actualized in a systematic way. Performing the tasks allocated to them with the supplied resources which is teaching and research.

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<sup>30</sup>Mullins L, ‘Management and organizational behaviour’. (5<sup>th</sup> ed.). (London: Financial Times-Prentice, Hall-1999).

<sup>31</sup> Jensen Michael and Meckling William, ‘*Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure*’, (Harvard University Press, 1976) p.86

<sup>32</sup>KivistoJussi, ‘Agency Theory as a Framework for the Government-University Relationship,’(Dissert, University of Tampere, 2007) p178

The agency theory merely creates a forum for the setting up of rules and incentives to align the behavior of managers (university CEO's) to the desires of owners (the government). According to this theory it is argued that people are self-interested rather than altruistic and cannot be trusted to act in the best interests of others.<sup>33</sup>

This therefore implies that the actions of the agents in this case the members of the university who are acting on behalf of government must be monitored to ensure that they perform their roles in the best of interest of the government.

To achieve this, the theory states that the principal has to incur agency cost for monitoring, control and evaluation of the agent and one of the tools that can be used is the use of performance contracts. It also advocates for the setting up of rules and incentives to align the behavior of managers to the desires of owners.<sup>34</sup> However it must be acknowledged that it might not be possible to set up rules for every situation but rules that are aligned to the general goal of the institution can be set up while others can be implied.

In Public Universities the governing board is commonly referred to as "University Council" which on behalf of the government is charged with the responsibility of formulating the institution's strategic direction, approving internal statutes, confirming budgets and accounting for use for funds, setting terms and conditions of employment of

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<sup>33</sup> Benjamin Mwanzia ,Corporate Governance Practices in Developing Countries: The case of Kenya',(2011) (International Journal of Business Administration) Vol 2, no 1 p225

<sup>34</sup>*ibid* . p228

staff and endorsing the employment of senior officers, managing the institution's property and financial assets and safeguarding the institution's interests.<sup>35</sup>

To ensure that the council performs these responsibilities effectively on behalf of the government, the council signs PC with the Cabinet Secretary in charge of Education covering their terms of service.

### **1.3.5 The Motivational Theory**

Latham and Locke in their 1979 work first brought up motivating employees through goal setting in performance contracting.<sup>36</sup> They held that the performance of professional obligations was motivated when goals are specific, stringent and there is a system that ensured feedback on that performance.<sup>37</sup>

Difficult specific goals have been shown to result in significantly higher motivation levels and resultant performance even when contrasted with easy goals. The reason advanced by Latham and Locke in their 2009 work is that higher goals lead to higher rewards hence sustained increased motivation to achieve those goals. Such expectations must be discussed by the employees and their employers as the exact goals, and time period within which they are to be achieved must be laid down before the commencement of any work-related performance.

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<sup>35</sup> Universities Act, No 42 of 2012, part v

<sup>36</sup>Latham, G. P. & Locke, E. A. 'New developments in and directions for goal-setting. *European Psychologist*', 12,(2007),p290-300.

<sup>37</sup>Armstrong, M.,'A handbook of human resource management practice',ch 1, (9<sup>th</sup>ed). (London: Kogan Page, 2005)

Armstrong for one holds that participation of all relevant parties is essential as a means of agreeing to set higher goals; as it sets the stage for accomplishing even higher goals in the next cycle. In the same breath, the author further holds that the theory is best applied in large organizations when representative leaders in an organization negotiate and set the parameters of performance before cascading the performance parameters to all cadres of staff.

Motivation through setting goals distinctly and primarily increases the productivity of the employee. Marsden<sup>38</sup> for one found that employees thought that performance related pay led managers to set their targets more clearly because the specificity of the targets created a clear justification for input. Its effectiveness relies on the ease in understanding it and its alignment with current legal frameworks.<sup>39</sup>

The application of the theory however has its limits. For instance there is still no empirical evidence to show that performance contracting as per the goal theory was effective when the employees demonstrably felt that they are working at maximum capacity.<sup>40</sup>

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<sup>38</sup> Marsden David, 'The role of performance-related pay in renegotiating the effort bargain: The case of the British public service', *Industrial and Labour Relations Review*, 57, p350-370.

<sup>39</sup>Kubr, M-International Labour Office, 'Management consulting: A Guide to the profession', (4<sup>th</sup>ed.). (Geneva: 2002)p1-15

<sup>40</sup> Mullins Laurie, 'Management and organizational behaviour'. (5<sup>th</sup>ed.). (London: Financial Times-Prentice, Hall-1999)ch2



Furthermore, lack of persistence in altering the performance parameters as per the feedback could cripple the whole process as achievement is hampered when negative feedback is not taken into account.<sup>41</sup>

## **1.4 Literature Review**

### **A Review of Performance Contracting Literature**

This section will review the performance contracting measures that have been implemented in other jurisdictions in order to show the gaps this research will fill in the Kenyan context.

A research carried out on performance contracts in Chinese state owned enterprises found that there was empirical evidence that PCs had a positive impact on Chinese enterprises. However, the impact was minimal due to a number of reasons<sup>42</sup> the contracts lacked incentives that could motivate the managers. Few companies had a pre-determined framework to deal with underperformance. This highlights the importance of having to put in a legal framework that would not only ensure that the workers and managers are motivated enough to improve their performance.<sup>43</sup>

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<sup>41</sup>William, L. C., John, W. S. Jr., Don, V. W., & Frank, Q. F, 'The role of goal orientation on negative emotions and goal setting when initial performance falls short of one's performance goal.' ( Human Performance-2005), 18, p55-80.

<sup>42</sup> Mary Shirley , 'Why PC for State-owned Enterprises Haven't Worked,' (World Bank,1998) p1-14

Further, without a neutral third-party enforcement mechanism there was no way of forcing either party to perform their part of the contracts especially if one party was the state. This proposal is relevant to the current study as the need for enforcement mechanisms that can ensure that both parties meet their obligations as stipulated in the contract is crucial to their success.

It would go a long way in improving the level of service delivery and the quality of education that will be provided in the public universities as the research concludes that PCs can improve efficiency by 10%; a conclusion which the researcher concurs with and will be advocating for the legislation of these issues to enhance the PCs in Kenya.

McLaughlin and others,<sup>44</sup> holds that South Africa adopted Performance contracting with the aim of gaining control of the Public budgets, through negotiations between Ministers and the Director Generals of Government Ministries on agreed targets and eventual lobbying for resources by the Minister from the Cabinet and Parliament.

The Director Generals were informed of their roles and responsibilities with incentives to efficiently and effectively perform their roles. Performance evaluation were to be carried out at the end of every five years, and Director Generals who were found not to have met their agreed targets were fired especially if they failed to show measurable outputs for prudent utilization of public funds at the end of every fiscal year.

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<sup>44</sup>McLaughlin and others, *The Impact of the New Public Management: Challenges for Coordination and Cohesion in European Public Sectors*, Hertie School of Governance, (2010) p200

This was aimed at building a performance culture where incentives that focus individuals on performance were introduced.

The South African model indicates that PCs needs to define the roles and expectations of each manager. In this respect it means that training of the managers is important where the managers are well informed of their roles and how they would implement their duties and obligations as indicated in the contracts.

Secondly the importance of a proper incentive system stands out where managers are held accountable for their actions. The success of the contracts will depend on the importance both sides attach to delivering on major commitments than on the degree of the detail.

More so, there is evidence that PCs had a radical improvement in the management of the public sector.<sup>45</sup> Additionally PCs have provided an avenue for comparing and ranking public agencies through reliable benchmarks and have also increased accountability and transparency in performance setting thus encouraging healthy competition among state corporations.<sup>46</sup> However, the study found that there were challenges experienced in the implementation of the PCs which include lack of adequate resources and a reward system for performers. The study however did not address the legal and regulatory environment to find out the extent to which it facilitates or inhibits implementation of PCs in Kenya.

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<sup>45</sup>Kobia, M. and Mohammed, 'The Kenyan Experience with Performance Contracting', (Discussion paper, 28<sup>th</sup> AAPAM Annual Roundtable Conference, Arusha, 2006). p14

<sup>46</sup>*ibid* .

The current study sought to fill this gap by exploring the potential of PCs in enhancing the management of public universities and further goes to explore ways and means of dealing with the legal issues and challenges that impact on the successful implementation of the performance contracts. Mbunde<sup>47</sup> examined the concept of performance appraisal discussing the objectives and requirements for its effectiveness from a sample of one hundred and thirty eight respondents in University of Nairobi.

The study revealed that a lack of clarity on the purpose of the performance appraisal system led to ineffectiveness in implementation in the first place. It also showed that there was a lack of communication on the areas requiring improvement hence a lack of positive impact even when legal action was taken against ineffective members of staff. Therefore, in instances where negative sanctions were imposed on members of staff by the office of the University CEO's; the specific grounds of those sanctions were not made known explicitly and in detail to the body of staff in order to act as reference points. This resulted in a cyclic repetition of the same malpractices thus stunting net gains in service delivery.

The futility in the situation is further compounded by the fact that an increased number of interdictions by the office of the university CEO has come to be associated with increased adherence to the letter of the institutions' MTP's and annual performance contracts. Thirdly, the study pointed out the inexistence of a clear link between the results of performance contracts and a reward system.

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<sup>47</sup>Lumiti Grace Mbunde , 'Employees' Perception of appraisal in Public Organizations, (MA University of Nairobi, 2013) ch2

Lutomia claims that incentives influence behaviour both in terms of eliciting and sustaining it.<sup>48</sup> The study examined the link between incentives and knowledge production at the University of Nairobi.

A case study approach using interviews and secondary data, the study found that there are several incentives related to research at the University of Nairobi. The general perception of academics is that, the incentives are weak and do not encourage the maximization of the University's research goals.

In addition, academics are also confronted with other principals who reinforce non-research behaviour. These principals offer significant rewards for consultancies, and incentives for teaching on the full-fee-paying stream by providing additional payments, over and above regular salaries, to academics that teach on these programmes. Given the weak nature of the incentives for research, academics at the University of Nairobi seem to respond more favourably to the non-research incentives. These studies did not provide a holistic view on how incentives influences implementation of performance contracts in public universities in addition there is scant information available therefore the present study sought to fill this gap.

Further, Ombogo determined factors that influence performance contracting on delivery of public projects with consideration to conservation projects in Lamu County<sup>49</sup>.

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<sup>48</sup> *Supra* n15 p1

<sup>49</sup> Ombogo Moses, Factors influencing performance contracting on delivery of conservation projects in Lamu county, Kenya, (Thesis, University of Nairobi, 2014) 1

The study focused on how involvement of employees in performance contract formulation influences service delivery in public projects, whether management procedures and practices influence performance contracts in the delivery of services in public projects, how implementation of performance contract influence staff performance in delivery of public projects and finally to establish whether performance contract contributes to the achievement of customer demands from public projects.

The study also sought to analyze the influence of government policy on implementation of performance contracts.

Descriptive research design has been used on a population of 13 parastatals in Lamu County that are not only under performance contract but also implementing or have implemented public projects.

Stratified random sampling was used in administering questionnaires to 26 heads of departments and 39 employees who are on performance contract for the year 2013/2014. Therefore, the ideal sample size of the research was 65 respondents. 50 questionnaires were returned giving an average response rate of 76.9% for all respondents. Out of the four variables studied, all agreed to the research hypotheses. The study found out that involvement of employees in performance contract formulation, management procedures and practices, influence of implementation of PCS on staff performance and contribution of PCS on customer demands had tremendous influence on delivery of conservation projects. The data collection instruments used in the research were semi structured and structured questionnaires.

Empirical literature reveal that performance contracts have played a major role in the public sector by providing an environment that is effective and efficient in terms of enabling the public agencies to put in place annual work plans adequately supported by budgetary provisions and improved management of public resources.

However, these studies however focused on state owned enterprises in general and there scant literature on performance contracts in public universities, therefore the present study examined the effectiveness of performance contracts in public universities in Kenya.

### **1.5 Objectives of the Research**

The objectives of the study are to:

1. To assess the effectiveness of the legal framework of implementation of performance contracts in Public Universities in Kenya.
2. To discuss the challenges facing the implementation of performance contracts in public universities in Kenya.
3. To analyze the state of incentives in the implementation of performance contracts in public universities in Kenya.

### **1.6 Hypotheses**

The PC has caused the improvement of performance of universities in terms of research and course delivery in Public Universities. However, in its current state it is hampered from achieving set goals due to the fact that the terms are not enforceable at contract law, hence have no binding force of law.

The PC can be rendered effective as a management tool if it has an in built incentive mechanism to motivate the university staff to reach and/or surpass the set targets in the performance contracts.

### **1.7 Research Questions**

1. How adequate is the policy and legal framework of PC in public universities in Kenya?
2. What challenges impede the implementation of performance contracting in public universities?
3. What incentives can be applied in the implementation of performance contracts in public universities in Kenya?

### **1.8 Research Methodology**

The research used a mixed approach that used both qualitative and quantitative sources of information. Questionnaires were used to get the most informative responses from key informants that give perspective to the discussion. In addition to that, the research also relied on publications from verifiable sources. These include government reports, research papers and publications. The methodology is preferred because it helps to give a clear picture of what currently exists with the general body of information on the subject.

#### **1.8.1 Qualitative Research Methods**

A doctrinal analytical approach was taken in the paper. There was direct reference to literature that presented pertinent information to the objectives of this thesis.



The substrate of the analysis begins with the literature that other individuals and institutions have published and then evolves to the extent of conducting a comparative study of Kenyan and other jurisdictions.

The main utility of conducting a comparative study is to show the areas in which there can be improvement in the Kenyan context. The comparative study takes into consideration the positive steps that have been taken in other jurisdictions. The analysis that ensues determines what may well be the best way of contextualizing the lessons that are learnt from the study.

The articles were important in addressing any current trends on the research questions. Government Reports and Statutes which included official government publications that was relevant to this study. This was important in examining the policy efforts of the government to enable this study propose necessary reform proposals. Further the use of Internet Material was used to provide current and historical information on various aspects of this study.

In addition, primary information was gathered by administering questionnaires to key informants from some of the established public universities in Kenya: Jomo Kenyatta University of Agriculture and Technology, Kenyatta University, Technical University of Kenya and The University of Nairobi.<sup>50</sup> The rationale for this is to show a consistency in how the PC is approached in the leading universities; hence to provide further face validity to this study.

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<sup>50</sup> A sample of questionnaires is to be found attached as appendix 1.

The questionnaires enabled the researcher to obtain primary information on the challenges facing PC implementation in universities with especial regard to the academic aspects of the university's charter.

In this case, data related to objective one was collected from secondary sources, while data for objective two and three were obtained from both primary and secondary sources.

The study was restricted to public universities due to the heterogeneity of private universities objectives in Kenya. *Prima facie*, all universities are required to provide higher education to their students. However, leading private universities in Kenya are different because their charters show that they operate with other parameters such as religious<sup>51</sup> and international<sup>52</sup> benchmarks that are not under the direct purview of the government's policies. Thus, improved performance of their quality assurances, financial stewardship and academic targets are intrinsically different from public universities even though they satisfy the statutory conditions required to operate as a university in Kenya.

### **1.8.2 Data Collection Procedure**

The research undertook a desk-based review which relied on secondary sources which involves the summary, collation and/or synthesis of existing research. The study further made use of questionnaires to elicit responses from the selected sample of Vice Chancellor offices in order to give a 'face' to the largely corporeal University entity.

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<sup>51</sup>Catholic University of Eastern Africa, Strathmore University, Africa, African Nazarene University, Kenya Methodist University.

<sup>52</sup> United States University, Kampala International University

The questionnaires were self-administered and had both structured and non- structured questions. Accessibility of the universities in question was a key factor. In that it was only possible to follow up on the filled questionnaires for those public universities that are based within and around Nairobi during the conduct of this research.

### **1.8.3 Data Analysis**

The raw data collected from the responses was edited to eliminate typographical errors. The collected data was then analyzed using qualitative approach. Specifically, thematic analysis method was adopted to identify, analyze, and report patterns (themes) within data. It minimally organizes and describes the data set in (rich) detail. However, it also often goes further than this, and interprets various aspects of the research topic<sup>53</sup>. The research questions therefore form the thematic concerns of this thesis as it tackles the objectives, all the while seeking to answer the hypotheses. In this case, a theme captures something important about the data in relation to the research question and represents some level of patterned response or meaning within the data set.

### **1.9 Significance of the Study**

Performance contracting has gained currency as an important tool in improving the performance of public institutions. The study therefore, will be of significance to various stakeholders in the higher education which includes universities, technical institutions, the government and any other academic and research institutions.

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<sup>53</sup>For a more detailed discussion on the use of qualitative information **See also** Boyatzis, Ruse. *Transforming qualitative information: thematic analysis and code development.*(Thousand Oaks: Sage, 1998)

The findings will enable the government adjust the terms it imposes on the institution of the university so as to achieve the optimal outcomes during discharge of duties as per the negotiated PC and also adopt some of the suggested recommendations to enhance the successful implementation of the contracts.

### **1.10 Limitation of the Study**

The research however has been limited by the inability of the researcher to get direct access to the university CEO's. This was occasioned by the performance contracting division being delegated from the office of the Vice Chancellor. In the Technical University of Kenya the DVC-Administration Planning and Infrastructure was interviewed; as was the director of performance contracting in Kenyatta University. In Jomo Kenyatta University of Agriculture and Technology the Director of Performance Contracting was interviewed. While in the University of Nairobi, responses were elicited from the Senior Assistant Registrar-Transformation, Performance Management and Reforms Unit (TPMRU) who is in charge of performance contracts.

## **CHAPTER BREAKDOWN**

### **Chapter One: The Proposal, an Introduction to the thesis.**

This chapter sets out a background of framework surrounding the subject matter of the thesis. The chapter states the problem to be tackled in the course of the thesis; justifies the study and also makes hypotheses that will guide the discussion of the legal framework of performance contracts. It carries out a literature review of the implementation of PC in other jurisdictions, from that position of knowledge the chapter elaborates on the theory of a performance contract in Kenya.

In so doing the chapter sets a foundation from which the subsequent chapters reveals the intricacies of PC with a view of positively contributing to the knowledge of PC in the public domain.

### **Chapter Two: The Framework of PCs In Public Kenyan Universities**

This chapter examines parties that are central to the PC policy framework in public universities. Chapter two shows to the reader the framework of the performance contract in relation to the employment contract in Kenya so as to acquaint the reader with the challenges facing the performance contract as will be elaborated on in chapter three.

### **Chapter Three: Performance Contracts as a Management Tool in Public Universities**

In addition to illustrating the implementation process of the performance contracts in Public Universities, this chapter presents the findings of the study as they relate to the hypotheses.

The chapter analyses the challenges that the Vice Chancellor face in the implementation performance contract in Kenya with specific regards to parities in negotiation and the efficacy of the performance contract to the staff it is imposed upon using the Legal framework currently in currency.

### **Chapter Four: Performance Contracting Incentive Mechanisms in Public Universities**

This chapter reveals the incentives drawing from examples in other jurisdiction in implementing the performance contract. More specifically, it analyses the practices in place in the European Union. This helps to ascertain which lessons can be learnt and contextualized to the Kenyan circumstance

### **Chapter Five: Conclusion and Recommendations**

This chapter draws conclusions to the key findings made in the study based on the hypotheses. It also sets out possible recommendations that may help reduce the challenges encountered in implementing PC in public universities.

## CHAPTER TWO

### A FRAMEWORK OF THE PC IN PUBLIC KENYAN

#### UNIVERSITIES

This chapter examines the parties that are central to the performance contracts and what the law dictates on implementing the PC as it relates to the contract of employment. It dwells on the framework within which the PC operates as an administrative tool that is both sanctioned and created by the law. This chapter shall discuss the creation of the performance contract; the parties that create it, the performance contract themselves and a discourse on how they are cascaded.

#### 2.0 Background of Performance Contracts in Public Universities

The contemporary public university in Kenya can be said, in the very least, to be accountable to the society at large as an educator. This is a broad assertion as public universities are accountable for the Kenyan public's education<sup>54</sup> while the private ones are singularly responsible for that niche of the public that opts to acquire education there in addition to the publicly mandated duty of universities set out by the law.<sup>55</sup>

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<sup>54</sup> More and more, the performance of the universities was graded through the ability of the labour markets to absorb the alumni. As the Kenyan economy grows, there is an increased scrutiny of how public universities account for the public resources they use to provide education. **See also** Paradeise, Catherine, Emanuela Reale, and Gaële Goastellec 2009. 'A Comparative Approach to Higher Education Reforms in Western European Countries' In Paradeise, C.; Reale, E.; Bleiklie, I.; Ferlie, E. (eds.) *University Governance: Western European Comparative Perspectives*. Higher Education Dynamics No. 25. pp. 199 – 227.

<sup>55</sup> Universities have transitioned from an "old accountability" in which they were answerable mainly to their own members, to a "new accountability" in which they became broadly responsible to society at large. Muthaura Frans. *PC in Kenya: Restoring trust in government through innovations to promote quality of public service*, (Government Printer. 2007) at p9-12.

In the Kenyan public sector, the PC emanates from the Economic Recovery Strategy of 2004, which coincided with the Results Based Management (RBM) system in the public service as a deliberate policy aimed at improving performance, service delivery and governance in the quality of education being provided in universities.<sup>56</sup> The institutional framework of the PC is entrenched in the guidelines issued by the Ministry of Devolution and Planning as a policy paper pursuant to the legal notice of 2004, the aims of the PC are negotiated and signed by the executive arm of government and the university council.<sup>57</sup> From that premise a clear understanding of the parties in question-namely Government of Kenya (GoK) and the leadership of the universities arises.

The time-bound targets that are to be achieved within the institutions are accomplished using governance structures from the Act establishing the universities, which is the Universities' Act of 2012. Therefore, the University and government are primarily responsible for coming up with the research and teaching terms of performance contracts. From deduction, these terms are not central to the contract of employment of teaching staff; since the terms of the employment are set out by the University Council.<sup>58</sup> This is the initial point in which the unenforceability of the performance contract arises, the fact that the terms that are set in it are not central to the employment contract.

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<sup>56</sup> Government of Kenya, Economic Recovery Strategy for Wealth and Employment Creation Government Press, 2003 p1

<sup>57</sup> State Corporations (Performance Contracting) Regulations Legal Notice. NO. 93 of 2004.

<sup>58</sup> Universities Act, (No 49 of 2012), Sec 60



The strategic goals of the University of Nairobi's Medium Term Plan (MTP) will be elaborated on. They indicate how the University comes up with the terms and accountability measures of PCs for its teaching staff and research targets.

These institutional goals that lay the foundation for the specifics contained in the cascaded performance contract. These Strategic goals will act as a template for this paper's discussion. A good example of the means through which the strategic goals are contextualized is through cascading. A good example is seen in the University of Nairobi response. The rationale is that performance measurement is crucial to the delivery of improved services as part of public management. An emphasis on performance management for delivery of results is influenced by the ability to unite the attention of institution members on a common objective and galvanize them towards the attainment of that objective.

One must understand that governmental performance contracting measures managerial performance not individual performance. The individual contribution thereof can only be measured through other supporting framework – staff performance appraisal after cascading the effects into personal performance contracts. The administration of the University of Nairobi grasped that implementing a proper staff performance appraisal staff contributes immensely to the process of performance contracting.

The PC system is adopted primarily to ensure that the performance of a public enterprise is judged, not merely with reference to the performance of the employees' job

descriptions, but also having regards to all the social objectives that are assigned to the enterprise.

What this can then be construed to mean is that the performance contract is itself tied to the social contract of that particular society with the mutual intentions of the signatories being attested to by the document. The objectives of these institutions of higher learning should reflect the short term, medium term and long term benefits that are expected by both government and the citizenry. On close inspection, they do. However, reviewing that literature will show the reader that the sociological objectives have no calibration. It means that quantifying and contracting individuals on the basis of their performance; even when there is obvious progress, is difficult.

The purpose of the performance contract therefore is to quantify those objectives as a step by step mechanism as compared to the one-off arrangement of the ordinary contract.

In the case where the targeted benefit is unquantifiable through the initial contract of service between the employee and the government, the performance contract then provides measurable surrogates for the achievement of these objectives/ expectations.

The expectations are communicated once set, similarly to the precedence set in contracts, whereby acceptance is only valid once communicated<sup>59</sup>. The employees are informed of these standards that will serve as a basis of performance for the duration of the annual PC.

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<sup>59</sup>[\*Entorres v Miles Far East\*](#) [1955] 2 QB p327

When we talk of university teaching staff in this light the letter of the law governing the performance of their contracts of service is brought into focus as being grounded in the university's Strategic goals and not the employees' contract of service.

As per the latest governing performance contracting guidelines the parameters are clearly set out. For performance to have been deemed adequate the staff is required to almost triple the number of academic publications by their various faculties. Similarly, a quantified increase in participation in academic fora is spelt out.

### Strategic Plan for the Research, Consultancy and Development Goals in the UoN

<b>Strategies</b>					
<ol style="list-style-type: none"> <li>1. Enhance the capacity of researchers to develop proposals</li> <li>2. Develop and implement appropriate research programmes</li> <li>3. Enhance dissemination of research outputs</li> <li>4. Promote relevant consultancy services</li> </ol>					
<b>EXPECTED OUTCOME</b>	<b>PERFORMANCE INDICATOR</b>	<b>BASELINE</b>	<b>TARGETS</b>	<b>TIME FRAME</b>	<b>RESPONSIBILITY</b>
Enhanced research output	No. of academic publications	418	1000	2013-2018	Principal, Deans/Directors, HoDs
	No. of funded research projects	20	40	2013-2018	Principal, Deans/Directors, HoDs
	No. of staff attending conferences and other academic fora	350	1000	2013-2018	Principal, Deans/Directors, HoDs
	No. of papers presented in conferences and other academic fora	100	500	2013-2018	Principal, Deans/Directors, HoDs
	No. of outreach activities annually resulting from research per year	-	50	2013 - 2018	Principal, Deans/Directors, HoDs
	No. of public policy briefs produced from research and presented to policy makers per year	-	30	2013 - 2018	Principal, Deans/Directors, HoDs
	Number of college journals	8	12	2013 - 2018	Principal, Deans/Directors, HoDs
Increased consultancies	No. of Consultancies	175	180	2013 - 2018	Principal, Deans/Directors, HoDs

\*Ministry of Planning and Devolution, Division of Performance Contracting, 10<sup>th</sup> PC Cycle Guidelines

[Year 2013-2014] (7<sup>th</sup> August 2013)

The principle objective of performance contracting is therefore to ensure that performance of the institution is measured with reference to international best practices with a view of placing the institution in question at par with others on the global front<sup>60</sup>.

This is achieved through benchmarking the institution's operations with national laws: the constitution<sup>61</sup>, the Universities Act 2012, policy papers as well as current international best practices.

## **2.1 Parties to the Performance Contract**

The parties involved in the creation of the performance contract are the university and the government. The government is represented by the Cabinet Secretary or Permanent Secretary and Stake holder Institutions; the public university by the Chairperson of the University Council and the various Deans of Faculties and Heads of Departments.<sup>62</sup>

The performance contracting guidelines in current effect hold that the parties to the negotiation of the annually reviewed performance contracts on the government's part are the executive<sup>63</sup> and various stakeholder institutions<sup>64</sup>.

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<sup>60</sup>F.K. Alexander, "The Changing Face of Accountability: Monitoring and Assessing Institutional Performance in Higher Education"(2005). Journal of Higher Education Vol 71 NO. 4 <http://www.umich.edu/~psycours/561/account2.htm> accessed on 4th June 2012.

<sup>61</sup> As evidenced by the report of the Ministry of Education's Task Force On The Re-Alignment Of The Education Sector To The Constitution Of Kenya 2010 of December 2012 [http://www.vision2030.go.ke/cms/vds/Task\\_Force\\_Final\\_Report\\_Feb\\_20123.pdf](http://www.vision2030.go.ke/cms/vds/Task_Force_Final_Report_Feb_20123.pdf) Accessed on 12<sup>th</sup> August 2014

<sup>62</sup> GoK,10<sup>th</sup> Cycle PC Guidelines ,(2013-2014) pp13

<sup>63</sup> The Cabinet Secretary or Principal Secretary of the parent ministry, the Ministry of Education represents the executive arm of government in this instance. Ministry of Planning and Devolution, Division of

When identifying the parties to the resultant performance contract, the PC guidelines delegate responsibility in three tiers. The first tier of responsibility provides for presidential direction, the second the university Council and the third the Vice Chancellor as indicated in the table below.

**The parties to the performance contract as set out in the 10<sup>th</sup> PC Guidelines for the year 2013/2014**

<b>Public University</b>	
<b>Government</b>	<b>Public University</b>
1 <sup>st</sup> Level - PS in charge of parent Ministry/State Dept	- Chairman, University Council - Independent Council Member
2 <sup>nd</sup> Level - University Council	Vice-Chancellor
3 <sup>rd</sup> level - Vice-Chancellor	Deans of Faculties and Heads of Institutes
<b>Cabinet Secretary, National Treasury counter-signs the PCs</b>	

\*Ministry of Planning and Devolution, Division of Performance Contracting, 10<sup>th</sup> PC Cycle Guidelines

[Year 2013-2014] (7<sup>th</sup> August 2013)

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Performance Contracting, 10<sup>th</sup> PC Cycle Guidelines [Year 2013-2014] (7<sup>th</sup> August 2013). p6 More specifically, the actual PC in the year 2013-2014 holds that it is the Principal Secretary is the signatory and is counter-signed by the Principal Secretary from the National Treasury.

<sup>64</sup> The Council of University Education aptly fulfills the criterion of being a relevant stakeholder institution in the provision of university education in Kenya..

What this can be construed to mean is that the prioritizing and actual performance aspects of the whole process is negotiable as between the government and the principal with heads of every school in the college.

Therefore, the legal framework surrounding the performance contracting system in Kenya can be hinged on three parties: the government, the leadership of the public universities and lastly, the staffers in those universities.

## **2.2 Understanding the Employment Contract as it Relates to the PC**

We look at the employment contract in order to have a clearer picture of the contractual relationship which gives rise to the performance contract. This section attempts to show the reader what the employment contract entails in connection with the research. That is, it brings to the fore the fundamental characteristics of the employment contract that set it apart from the PC. For the intents and purposes of this thesis, these shall form a crucial part of understanding the PC in public Kenyan universities and achieve the objectives of this research.

At common law, the modern foundation of individual performance labour law is the contract of employment.<sup>65</sup> The employment contract has been given a special status in law, in that it is founded on the distinctive right of one party to exercise authority over another. Therefore, the presumption emerged that the employment contract was...in a large part a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion.”

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<sup>65</sup> s1, The Employment Act, Kenya

In the course of ordinary contracting there must be an offer made and the contract accepted in the case of a bilateral contract.<sup>66</sup> In this case, the employment contract has an offer made by the University Council as the employer and the prospective academic staffer on the other hand. The law of contract underpins the contract of service, which makes a limited commitment employment through the assumption that the putative employer and employee are freely contracting individuals to each other through that same contract<sup>67</sup>.

This raises the question of whether the performance is freely contracted between the government and the implementers of the PC and whether there is an option of rejecting the terms of the PC. In terms of the strict contractual offer and acceptance the negotiation phase lends some legitimacy to the PC. Drawing up the parameters of the PC is done by the universities themselves; ostensibly so as to paint a clear picture of the responsibilities on the universities' part. The targets are made and put down in medium term plans they shield the universities from political adventurism that most commonly happens when governments change<sup>68</sup>.

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<sup>66</sup> *Locus classicus* such as *Carlill V Carbolic Smoke Ball Ltd* [1893] 1 QB 256, show that offer and acceptance is crucial in creating a legal contract.

<sup>67</sup> "This assumption of freely contracting individuals though masks an asymmetry of the employment contract in a situation where the asymmetry in position is a critical defining feature of the employment relationship." Margaret Gardner, Gill, 'The employment relationship', Macmillan Education AU, p157-162. (Melbourne-1997)

<sup>68</sup> "High levels of state involvement in the management of higher education, or political intervention in institutional decision-making, can suppress innovation and politicize the education system."

Kapur, Devesh and Megan Crowley.. 'Beyond the ABCs: Higher Education and Developing Countries'. Center for Global Development. Working Paper No. 139, (Washington, 2008)

What the research investigated through its questions was whether indeed the PC usurped the position previously occupied by the 'corporate' contract of employment that was signed by the staffers at the time of commencing employment. Across the board, the answer has been a no. In the analytical discussion from the University of Nairobi, it came to light that the performance contract is a sectoral reform. Performance contracting itself has been a subject of considerable debate among the implementers.

It has been viewed as a freely negotiated performance agreement between Government, organization and individuals on one hand and the agency itself. Being part of the overall reforms by Government then it becomes very difficult to opt out of.

What then prevails is that only the negotiation phase of the performance contract is voluntary. The targets are set by the office of the CEO and then negotiated with the government especially when the targets involve academic or research matters. The government on the other hand does bring its expectations to the table with matters regarding gender mainstreaming, public accountability, customer (student) satisfaction that are in line with the current government's policies. These goals are then the subject of a discussion that is aimed at reaching mutually agreeable and internationally acceptable standards of benchmarking the performance of the university. This includes the specific performance indicators of the MTP as crystallized into the goals of each department. These The motion of setting up the other aspects of the whole process such as the duration of each plan, alteration of each successive annual PC are mandatory as the policy directives of the parent ministry act with the authority of subsidiary legislation



What this *voir dire*-so to speak- then shows us is that the answer to the question of whether consent is required in performance contracts is in the negative. Performance contracts are intended to fulfill the public's and government's expectations in university education; therefore it presumably defeats the purpose to give an option of refusal. For in the event of a refusal to abide by the parameters of the PC it would be impossible to achieve the objects of the foundational employment contract in the first place.

In contract law an offer to provide services not specifically agreed on before is deemed to be a counter offer. The fact that the performance contract were signed and cascaded down the departments can be interpreted as a rejection of the initial contract of service<sup>69</sup> between the university and its members of staff. This confusion is addressed in the Commonwealth Secretariat's jurisprudence on the question of the positions of PC's in terms of consent.

The PC system is adopted primarily to ensure that the performance of a public enterprise is judged, not merely with reference to the performance of the employees' job descriptions, but also having regards to all the social objectives that are assigned to the enterprise. What this can then be construed to mean that the performance contract is itself tied to the social contract of that particular society with the mutual intentions of the signatories being attested to by the document. The objective of all public universities is to give a holistic education to all those who attend its lectures.

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<sup>69</sup> *Hyde V Wrench*, [1840] EWHC 3 Bea 334, [1840] 49 ER 132

The objectives of these institutions of higher learning should reflect the short term, medium term and long term benefits that are expected by both government and the citizenry.

The purpose of the performance contract therefore is to quantify those objectives as a step by step mechanism as compared to the one-off arrangement of the ordinary contract.

In the case where the targeted benefit is unquantifiable through the initial contract of service between the employee and the government, the performance contract then provides measurable surrogates for the achievement of these objectives/ expectations.<sup>70</sup>

The expectations are communicated once set, similarly to the precedence set in contracts, whereby acceptance is only valid once communicated<sup>71</sup>. The employees are informed of these standards that will serve as a basis of performance for the duration of the annual PC. When we talk of university teaching staff in this light the letter of the law governing the performance of their contracts of service is brought into focus as being grounded in the university's MTP and not the employees' contract of service. As per the latest governing performance contracting guidelines the parameters are clearly set out. For performance to have been deemed adequate the staff is required to almost triple the number of academic publications by their various faculties. Similarly, a quantified increase in participation in academic fora is spelt out.

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<sup>70</sup> Kapur, Devesh and Megan Crowley.. 'Beyond the ABCs: Higher Education and Developing Countries'. Center for Global Development. Working Paper No. 139, (Washington, 2008)

<sup>71</sup> [\*Entorres v Miles Far East\*](#) [1955] 2 QB 327

In order to achieve the institution's strategic objectives the employees are also informed of their obligation to increase the number of policy briefs and consultations held in the university's official capacity.

The special nature of the employment contract is further seen whereby the rights and duties of the parties are often implied rather than explicitly stated; since defining satisfactory service from the employer is too complex to be homogenized into a single code when the engagement covers a long period in time while the essence of the PC is to explicitly define performance. However, this has been noted to be a rather abstract standard for identifying where a contract of employment hence the common law dicta by McKenna J that evolved standards by which a contract of employment subsists. He did so by evolving three questions:

**Did the worker perform certain duties in order to get remuneration?**

Remuneration is consideration in contract law parlance. It brings out the economic realities of a contract of employment. Determining whether one is indeed an employee requires assessing what risks one would face in the event of a termination. The case of *Market Investigations V Ministry of Social Security*<sup>72</sup> illustrates this; the court held that an employer risks losing capital or profits while these reality is never visited on the employee; who at best only risks losing a future source of income.

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<sup>72</sup> [1969] 2 QB 173

Taking this concept and putting it in direct contrast with the PCs availed in this study, we see that there are also certain duties that the university undertakes to perform with the financial support of the government. For instance, the 2013/2014 PC between the council of the test institution, UoN and GoK, the university-in part two<sup>73</sup>-is put under the obligation to ensure that all its services are delivered in accordance with national laws, regulations and policies. These duties are illustrated in the University Charter and AOP establishing the Institution. On the other hand, the GoK undertakes to “disburse capital development receipts as per the printed estimates upon presentation”<sup>74</sup>.

As a further measure of consideration the GoK does undertake to provide the resources required for the achievement of the agreed performance targets<sup>75</sup>.

From the structure of the two arrangements, the master-servant relationship is clearly seen that the PC does not meet the minor threshold of having remuneration. What is conceivable is that the remuneration in an employment is explicitly mentioned to follow the performance. While on the other hand the consideration in a PC is not a reward for performing certain duties, rather, it is the estimated cost of administration in achieving set targets that are set in line with the Medium Term Plan. The MTPs show the need for increased injection of finances in order to meet the targets, thus the question of whether these performance indicators are backed by any financial facilitative measures.

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<sup>73</sup> Performance contract between the Government of Kenya and University of Nairobi pt 2 2(1) p3

<sup>74</sup> Performance contract between the Government of Kenya and University of Nairobi pt 2 2(1) p5

<sup>75</sup> Performance contract between the Government of Kenya and University of Nairobi pt 3(3.2)

**Was there sufficient control on one party so as to qualify the relationship to be one of a servant and master?**

The irreducible minimum regarding the establishment of a contract of service/employment is that there must be a modicum of control by one party.

This means that the employer should at least retain the ultimate authority to determine what constitutes performance by the employer.<sup>76</sup>Control in the employment relationship arises from the employer on the employee. It creates mutual obligations that create the need for consideration for the performance of one party.

Mr. Justice Longstaff spoke of mutual obligations as being necessary for there to be a contract of employment at all.<sup>77</sup> In recent jurisprudence, this mutuality has come to be a most significant factor of the contract of employment.

The mutuality of control creates justification for remuneration and for mutual promises for future performances. This exchange of promises is what gives stability and continuity to the relationship thus making it an existing contract of employment.<sup>78</sup>

Having this knowledge of the mutuality involved in the contract of employment puts the research in a position to identify beforehand the uniqueness of the PC. For in the PC, the mutuality is demonstrated in an entirely different way.

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<sup>76</sup>Montgomery V Johnson Underwood Ltd [2001] IRLR p 299

<sup>77</sup> [2006] IRLR p 181; Carmichael V National Power plc [2000] IRLR 43

<sup>78</sup> The logic of continuing and mutual promises informed the court's decision in McLeod V Hellyer Brothers Ltd [1987] IRLR232.

Looking at the PC, it is seen that the parties to the PC<sup>79</sup> exercise mutuality on an equal basis since it is the university council<sup>80</sup> that gets to determine what constitutes performance, what enough is and what should be measured in conjunction with the government. The question that immediately arises is how the performance indicators can be enforced by the CEO to ensure that they are achieved. For instance, how will the VC exercise control to increase staff attendance to conferences within the stipulated period and secondly that the academic staff increase their number of research publications as indicated in the MTP'S.?

In conclusion therefore, the deduction of the existence of an employment contract is essential to understanding where exactly the PC comes in with regards to its implementation alongside the employment contract. This section has shed light on the employment contract and lays a foundation on the ensuing elaboration of the structure of the PC.

It is important to point it out that annually reviewed performance contract is a short term criterion that serves to measure progress towards the university's MTP, every annual performance contract being a staggered medium term plan. In extension, the achievement of the set MTP's is a step towards achieving the long term policy aspirations of Kenya's

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<sup>79</sup> The GoK through the Ministry of Education, Science and Technology and the Council of the UoN. Similarly, the same party on the government's part enters the PC with the council of TUK.

<sup>80</sup> "The UoN Council is responsible for setting comprehensive performance targets and ensuring their achievement." This principle is repeated verbatim in the PC from TUK showing a trend in giving all control over performance to the university. This goes in contradistinction with the employer-employee relationship where the employer has the exclusive right to determine the parameters of performance for which consideration is justified.

Vision 2030<sup>81</sup> and the edicts of the Constitution of Kenya 2010<sup>82</sup>. The targets encompass financial stewardship, non-financial operations, service delivery and qualitative infrastructural gains.

Having these facts in perspective, one then notices the fundamental difference between performance contracts and ordinary contracts of service.

The objective of the performance contract is to fulfill the social obligations of the university as a social enterprise. In other words, it is an understanding between its signatories to quantify the objectives of the education institutions within timeframes. Conversely, the contract of service creates a sanctioned understanding as to the performance of duties which have nothing to do with the social contract to society; they are merely a means to ensure the sustained provision of services needed by the university.

The College of Humanities and Social Sciences lists an annex which shows all the objectives to be implemented within the specified term (2013-2018 MTP). The specificity of the targets set in the annexing documents gives the impression that the performance contract does pay heed to the rule in *Raffles V Wichelhaus*<sup>83</sup>; where the court ruled that contracts' terms must be certain for the contract to be valid.

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<sup>81</sup> Government of Kenya, Vision 2030, 4( Government Press)

<sup>82</sup> Constitution of Kenya Fourth Schedule, pt 1, 15

<sup>83</sup> [1864] EWHC Exch J19

### **2.3 The process of creating the Performance Contract in Public Universities**

The process of creating performance contracts is provided in the Performance contracts guidelines which are issued every financial year<sup>84</sup>. According to the 10<sup>th</sup> cycle guidelines the process commences by the identification of performance targets which is carried out after the national budget process has been completed and institutions informed about their resource allocation.

This ensures that targets are realistic and achievable within the available resources. The targets emanate from the institutions Strategic goals as discussed above and are freely negotiated and not imposed arbitrarily by the government.<sup>85</sup>

The researcher however is of the view that the process of identifying the performance targets should commence before the budget process and not vice versa. This would ensure that the budgetary allocation is linked to specific projects according to priority. This would make it possible to hold someone in authority responsible for non-performance where funds were allocated and disbursed.

The second phase in the negotiation process is where all issues agreed upon are factored into the performance contract. The draft contract is then submitted to the performance contracting secretariat for vetting. The vetting process ensures among other things that the contracts comply with the guidelines and that they are linked to the strategic

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<sup>84</sup> GoK, 10<sup>th</sup> Cycle PC Guidelines ,(2013-2014) pp13

<sup>85</sup> Ministry of Devolution and Planning: 'Division of Performance Contracting Guidelines' 10<sup>th</sup>ed, [www.devolutionplanning.go.ke](http://www.devolutionplanning.go.ke). As accessed on 4<sup>th</sup> June 2012



objectives of the institutions, anchored on the strategic plans, growth oriented and relevant to the mandate of the institution.<sup>86</sup>

The contract is then signed between the Permanent Secretary in charge of Education, representing the Government on the one side and the Chairman, University Council representing the University council on the other side.

The Council subsequently signs a performance contract with the Vice Chancellor to transfer the responsibility of achieving the targets to the Deans of Faculties and Heads of Institutes. This guarantees operational autonomy given that council are not executives and are not therefore involved in the day-to-day management of the institution.<sup>87</sup>

The form and guidelines of how the performance contracts should be implemented in the public institutions is provided for by the performance contracts guidelines 2013-2014 and shall be discussed herein in full details. The section will give an overview of the Strategic goals of the University of Nairobi as foundational basis for discussion.

The guidelines give an outline of what the performance targets should encase; The targets set should be comprehensive. That is, they cover all significant performance areas as set out by the constitution, the University's Act 2012 and international best practices. They are be relevant and be drawn from the university's strategic plan.

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<sup>86</sup> GoK, 10<sup>th</sup> Cycle PC Guidelines ,(2013-2014) at p8

<sup>87</sup> Universities Act, (No 49 of 2012), Section 39

The University of Nairobi-in keeping with the targets of the performance contract-took into consideration the contents of its Medium Term Plans to be the basis of their obligations. For instance; its first strategic objective inculcates the need to review academic programs in line with the governing Council of University Education. The university moved towards internationally benchmarking its academic programs; in the process improving the delivery of distance learning. Expanding the resource and infrastructural capacity of the College of Humanities and Social Sciences is its second MTP strategic plan (forthwith the 'strategy').

In actualizing this, the institution seeks to diversify its revenue base while at the same time optimizing the use of college resources and facilities as a means of creating the institutional capacity to enter into performance contracts with its teaching staff. A fitting example of the push to actualize accredited programmes can be seen in the First Quarterly report of the School of Literature, where a total of six new programmes were developed in that quarter in the face of the ten new programmes required over the five year target duration as indicated in the table below which indicates figuratively the targets achieved during the period 2013-2014 financial year.

## Report showing progress as per marked parameters of performance contracting

EXPECTED OUTCOME	PERFORMANCE INDICATOR	BASELINE	TARGETS	TIME FRAME	RESPONSIBILITY
More satisfied stakeholders	Increased employment rate of graduates	-	60%	2013-2018	Principal, Deans/Directors, HoDs
	Programme completion rates	-	100%	2013-2018	Principal, Deans/Directors, HoDs
	Increased rate of enrollment	29,821	10%	2013-2018	Principal, Deans/Directors, HoDs
	Positive feedback from employers	53.5%	70%	2013-2018	Principal, Deans/Directors, HoDs
	No. of accredited programmes	66	76	2013-2018	Principal, Deans/Directors, HoDs
	No. of sports facilities available to students	15	18	2013-2018	Principal, Deans/Directors, HoDs
	No. of established students professional associations	41	45	2013-2018	Principal, Deans/Directors, HoDs Ass. Dean of students
	Proportion of seminars, public lectures and related activities with student participation	-	100%	2013-2018	Principal, Deans/Directors, HoDs
	No. of students participating in exchange programmes	-	200	2008-2013	Principal, Deans/Directors, HoDs
Increased enrollment in open and distance learning programmes	No. of students on ODeL	400	800	2013-2018	Principal, Deans/Directors, HoDs

\*First quarterly report from the University of Nairobi College of Humanities and Social Sciences, School of Literature on the PC (Annual review, (2013-2014)

The performance indicators for increased and diversified financial resources are set in percentages for proper quantifying. As set out in the strategic goals, the optimization of asset use is to occur through the development of audit facilities and mechanisms.

This shows the university's commitment to create capacity to performance contract by both keeping the added programmes relevant to the strategic goal and linking their performance to the existing and available budget of human resource-lecturers.

In order to manage the college of Humanities and Social Science more effectively and efficiently, the university strategized to review its governance and management structure. In addition the college seeks to promote a performance culture. The parameters of actualizing this objective are constitutionalized as per Article 10 of the Constitution on good governance as being those that promote the good governance of the University of Nairobi as a public entity.

In order to improve the efficiency in management, the strategy sets out the general performance indicators to include full compliance to the service charter and a two hundred percent reduction in non-compliance with the internationally recognized ISO 9001:2008 standards. More specifically, the institution's managers are charged with ensuring an enhanced sense of commitment to the college through enforcing at least eighty percent attendance of meetings and reducing staff turnover rates by two percent in the five year term of the MTP. Annually therefore, these objectives are staggered in a logical sequence.

Therefore, this results in greater productivity and quantifiable improvement in service delivery within the broad MTP mandate. The performance in this instance is the presence of lecturers in active contact with the studentship throughout the academic year.

The College of Humanities and Social Sciences has itemized performance of delivering the service of research to the public through enhanced research output by increasing the number of publications from forty eight to one thousand and staff attending conferences from three hundred and fifty to one thousand.

The contents of the summary in the table are mirrored in the highly prioritized service delivery item in the national performance contracting guidelines. This is assigned the value of twenty as compared to the financial stewardship which is valued at ten; corruption eradication valued at five.

The performance indicators therefore create a benchmark for publications, funded research projects, paper presentations, public policy briefs, consultancies and number of active college journals. In keeping with the structured delivery of performance, it is important that the prioritization of performance objectives be done. Taking an example from the College of Humanities and Social Sciences in Nairobi University, one sees that the itemized performance of delivering the service of research to the public through enhanced research output.

The figure below shows the targets set by the College of Humanities and Social Sciences in Nairobi University and their quantified achievement.

Strategies					
<ol style="list-style-type: none"> <li>1. Enhance the capacity of researchers to develop proposals</li> <li>2. Develop and implement appropriate research programmes</li> <li>3. Enhance dissemination of research outputs</li> <li>4. Promote relevant consultancy services</li> </ol>					
EXPECTED OUTCOME	PERFORMANCE INDICATOR	BASELINE	TARGETS	TIME FRAME	RESPONSIBILITY
Enhanced research output	No. of academic publications	418	1000	2013-2018	Principal, Deans/Directors, HoDs
	No. of funded research projects	20	40	2013-2018	Principal, Deans/Directors, HoDs
	No. of staff attending conferences and other academic fora	350	1000	2013-2018	Principal, Deans/Directors, HoDs
	No. of papers presented in conferences and other academic fora	100	500	2013-2018	Principal, Deans/Directors, HoDs
	No. of outreach activities annually resulting from research per year	-	50	2013 - 2018	Principal, Deans/Directors, HoDs
	No. of public policy briefs produced from research and presented to policy makers per year	-	30	2013 - 2018	Principal, Deans/Directors, HoDs
	Number of college journals	8	12	2013 - 2018	Principal, Deans/Directors, HoDs
Increased consultancies	No. of Consultancies	175	180	2013 - 2018	Principal, Deans/Directors, HoDs

\*First quarterly report from the University of Nairobi College of Humanities and Social Sciences, School of Literature on the PC (Annual review, (2013-2014).

## **Conclusion**

From the above description of the performance contract process it is evident that the contracts are aimed at encouraging Transparency in the target setting, accountability in the management of public funds and result orientation. As a result of implementing performance contracts the government aims to convert the public institutions into result oriented institutions. Secondly, the goals of both parties are aligned more closely because clear objectives and targets are set and negotiated.

It is clear that the contract does require an increase in performance progressively but the question which this paper will seek to answer is whether these increased obligations are part of the contract signed by the University staff who are required to perform these duties and whether there is an increase in remuneration to be in tandem with the increased obligation.

While the process of PC negotiation and implementation is rigorous, it however does not provide an incentive mechanism that would ensure that the PC is implemented by the Vice Chancellor as provided by the PC guidelines.

# **CHAPTER 3**

## **THE PC AS A MANAGEMENT TOOL FOR PUBLIC UNIVERSITIES**

### **3.0 Introduction**

Chapter two outlined the framework within which the performance contract exists in Kenya. By dwelling on the legal framework within which the performance contract operates in Kenya, the previous chapter attempted to show the reader the present legal limitations that necessitate this study. These limitations presented themselves as questions primarily pertaining to a perceived theoretical incompatibility of the structure of the performance contract and the terms of service in the employment contract. How the performance contracts are structured around five-year PC guidelines while the terms of service of a vast majority of the lecturers are on permanent and pensionable terms. It is important to note here that there are other members of academic staff who are not on permanent basis but on contractual terms for example Tutorial fellows and Graduate Assistants. However this thesis will be based on the lectures on permanent terms.

What is in question, however, and more importantly what this chapter will seek to shed light on; is the role that the university in question plays in order to adhere to the performance indicators set out in the annually reviewed guidelines.



The discussion in this chapter will be based on the responses collected from the respondents in the sampled Universities.<sup>88</sup>

In so doing the challenges that the university faces in using legal framework available to enforce the performance contract can be brought to the surface from the interviews and possible solutions explored. This is in relation to the authority in implementing the terms of the contract.

### **3.1 PC accountability: the role of the Vice Chancellor (CEO) in Implementing PCs**

The Universities Act 2012 provides for the office of the Vice-Chancellor and also provides for his duties in that capacity.<sup>89</sup> Section 39 (1): The Vice-Chancellor of a university is appointed competitively by the Cabinet Secretary for Education on the recommendation of the University council. Section 2 holds that he shall be the chief executive of the university in charge of all academic and administrative functions of the university. In the same vein, the Vice-Chancellor shall have the overall responsibility for administering all the programmes in the university.<sup>90</sup>

In the exercise of his duties, the Vice-Chancellor is both an appointee of the government and a member of the delegation from the university that bears responsibility for the enforcement of the performance contract. This is the double role that the office of the Vice Chancellor plays in implementation.

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<sup>88</sup> The University of Nairobi, Kenyatta University, The Jomo Kenyatta University of Agriculture and Technology and the Technical University of Kenya.

<sup>89</sup> Universities Act 2012.

<sup>90</sup>Universities Act 2012 s39 (2)

In what the Ministry of Devolution and Planning has annexed as a model performance contract<sup>91</sup>, the vice-chancellor's role as chair of the University Management Board that commits itself to actualizing the performance contract is seen. His office is charged with ensuring that the board through the Deputy Vice Chancellors cascade the performance contract to all lower cadres of staff in addition to developing a Performance Appraisal System (PAS) by which compliance may be easily measured. An obvious enforcement mechanism is the threat of contract termination upon consistent non-compliance. However, if indeed the PC is a contract then it is well within the employees' rights to plead duress in an attempt to vitiate their responsibilities in the face of a government without distinct parties to the PC.

In the face of the permanent nature of lecturers' employment it would seem futile to impose annual targets on a cadre of employees whose employment stands secure as proven by the Mbunde study.<sup>92</sup> Without other incentives it then means that the office of the VC is left to implement the progressive targets of the performance contracts without tools of motivation. The situation is further complicated by the fact that the office of the Vice Chancellor is a supervisory one, with the actual cascading and implementation of the performance contracts being done through the various DVC's in charge of the various

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<sup>91</sup>Ministry of Devolution and Planning: 'Division of Performance Contracting Guidelines' 10<sup>th</sup>ed, [www.devolutionplanning.go.ke](http://www.devolutionplanning.go.ke). As accessed on 4<sup>th</sup> June 2012at p64

<sup>92</sup> Lumiti Grace Mbunde , MA University of Nairobi, (Master's Thesis, 2013)

dockets in the University, for example the DVC in charge of finance and another in charge of academics in the University of Nairobi.<sup>93</sup>

### **3.2 The Cascading Process of the PCs**

The performance contracting process as discussed earlier in the previous section is backed up by a Legal Notice (2004) signed by the then President Mwai Kibaki<sup>94</sup>. This provides for the framework of how the Government through its Ministries cascade its priorities. However, the implementation of the PCs has been achieved by the test universities differently and with varying success. In some instances, the PC was conceived as a tool for managerial benchmarking and not for quantifying the individual's performance. The fact was echoed in the initial interview in the University of Naitobi. "On 15th January 2004, the Government, vide Cabinet Memo No.CAB (03) 115, directed that all Permanent Secretaries/Accounting Officers of Ministries/Departments and Chief Executive Officers of State Corporations be placed on Performance Contracts by June,2004. In 2005/2006 the UoN signed its first performance contract."

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<sup>93</sup> Government of Kenya, Policy Framework for Education, Training and Research. 2005, Sessional paper No. 1 of 2005. Ch 1

<sup>94</sup> State Corporations (Performance Contracting) Regulations Legal Notice. NO. 93 of 2004. The implementation of this edict was detailed by the Interview with the Senior Assistant Registrar-Transformation, Performance Management And Reforms Unit (TPMRU) (Nairobi, 6<sup>th</sup> Oct. 2014). On 15th January 2004, the Government, vide Cabinet Memo No.CAB (03) 115, directed that all Permanent Secretaries/Accounting Officers of Ministries/Departments and Chief Executive Officers of State Corporations be placed on Performance Contracts by June,2004. In 2005/2006 the UoN signed its first performance contract.

In the Technical University of Kenya, the specific parameters were cascaded down to specific members of staff who are tasked with achieving the targets. In yet another means of actualizing the PCs, the university presented and cascaded them as clarifications of the ‘corporate’ contracts. That is, the Technical University of Kenya struck a balance between the employment contract and the PC by making the PC an extension of the Employment Contract by breaking down the indicators into tasks that are deemed as performance for the Employment Contract.<sup>95</sup>

As noted in Jomo Kenyatta University of Agriculture and Technology (JKUAT) after the corporate contract is signed, cascading is done throughout.

Ultimately individuals sign the PCs that are aligned to the corporate contracts (of employment) and are part of the appraisal system. The PC carries 50% of the score in annual appraisals; there are no direct sanctions for non compliance while at Kenyatta University (KU) the University management detaches the PC indicators (now goals) into specific parameters that are passed to schools and finally to the academic staff.<sup>96</sup> Here generally the process is administrative. The same applies in University of Nairobi’s administration of Legal Notice (2004). This provides for the framework of how the Government through its Ministries cascade its priorities. The interview showed that performance contracting measures managerial performance not individual performance.

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<sup>95</sup> Response from the Deputy Vice Chancellor-Administration, Planning and Infrastructure (Nairobi, 30th Sept 2014) sets out the questionnaire from the Technical University of Kenya.

<sup>96</sup> Response from the Director of Performance Contracting, (Nairobi, 7<sup>th</sup> Oct, 2014).

The individual contribution thereof can only be measured through other supporting framework – staff performance appraisal. Thus, by implementing a proper staff performance appraisal staff contributes immensely to the process of performance contracting. What is, and therefore becomes the common thread between the legal contracts of employment and PCs is the relationship between the two; most importantly how and to what extent the rewards and the sanctions available in contract law are available in PCs.

From the responses gathered from the interviews, the cascading process in the university therefore is wholly dependent on the conception of the PC in that particular institution. With the university CEO acting as the watershed of the PC after signing it.

### **3.3 Challenges Facing PC Implementation in Public Universities**

Seeing as the original relationship between the academic staff and the university is the employment contract. The researcher sought to find out the challenges that the University CEO's face in the implementation of the performance contracts.

The research revealed that there was some resistance from the academic staff owing to the perceived conflict between the employment contract and the performance.<sup>97</sup> This as discussed by the interviewees at KU and UoN was a result of the staff: low awareness and rigidity to the changes of the PCs targets and performance indicators.

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<sup>97</sup> This was a common sentiment across the research questionnaire responses from the PC implementing officers in the interviewed universities.

In other jurisdictions such as Finland, the resistance is more defined since it is the unions that actually fuss about the performance contracts.<sup>98</sup> The situation is further compounded by the fact that none of the sitting CEOs concerned with performance contracting was in place when the policy of performance contracting was crystallizing into the PC guidelines and ultimately the PCs.

Similarly, the lack of the will of the university management towards implementing the targets of the PCs in those instances where the PC is a managerial parameter-unlike individual responsibility in other universities- is a factor challenging their success.<sup>99</sup>

The PC elicits a demonstrable resistance from the staffers in the universities since the duties in the PCs were progressions of the *grundnorm* sort of performance required by the contract of employment offered by the universities.<sup>100</sup> These questions demanded an increase in the all the indicative categories: financial, academic as shown in the Strategic plans. Just like in other jurisdictions such as China where the unions highlighted the unfairness of unincentivized performance contracting, the PC brings about additional duties.<sup>101</sup> The PC as discussed in the KU interview and TUK acts as a tool of placing more specific duties on the university academic staff arising from the employment contract.

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<sup>98</sup> Harry De Boer and others., 'Performance-based Funding and performance agreements in fourteen higher education systems', (Report for the Ministry of Education, Culture and Science) 2015 <http://doc.utwente.nl/93619/7/jongbloed%20ea%20performance-based-funding-and-performance-agreements-in-fourteen-higher-education-systems.pdf> Accessed on 20<sup>th</sup> July 2016 p62

<sup>99</sup> A view arising from the discussion at JKUAT unlike in UoN where the parameters were managerial.

<sup>100</sup> *ibid*

<sup>101</sup> Lilian Miles and Zhong Zhang Improving Corporate Governance in State-Owned Corporations in China: Which Way Forward 2006. Journal of Corporate Law Studies Vol 6 Part 1.

In this way it follows up on the performance of the PC without alternative and additional consideration from the employer.

The major challenge that was highlighted at JKUAT was the lack commitment by the government as evidenced by the consistent under-allocation of resources to the various projects.<sup>102</sup> And also allocation of the available funds by University management to projects that are not in the direct scope of the targets set out in the strategic plans of the University. Further the lack of a solid framework for rewards and sanctions also impede the successful implementation of the contracts by the University CEO's. In JKUAT, the interview showed how the lack of an enforcement mechanism was circumvented.

This was achieved by having the targets of the performance contracts ingrained in the performance scorecard of each lecturer. Compliance was then held to directly result in a higher mark that would ensure promotion of the compliant member of staff. This innovation was markedly absent from the other interviews as it was noted that no legally sanctioned enforcement mechanism was present. A lack of clear enforcement mechanism would clearly impede the successful implementation of the contracts.

In other circumstances such as the TUK interview, the PCs were also identified as having a negative impact on the aspirations of the university, stifling the freedom of universities to grow in their academic objectives which develop in longer cycles than political

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<sup>102</sup> Response from the Director of Performance Contracting (Jomo Kenyatta University of Agriculture and Technology, 8<sup>th</sup> Oct. 2014). The gist of the response, however, is captured in the sentiment that the PC is not facilitated by financial incentives.

governments stay in currency.<sup>103</sup> In this way the implementation of the PC as policy papers by successive political governments introduces parameters and indicators that may not align with the core values of the university. For example, the initial MTP of the Kibaki regime was redone with the advent of the Uhuru administration in 2013.<sup>104</sup>

From all the interviews, it emerged that there is a challenge with regards to the staff members and targets of the PCs in the universities.

The occurrence is two-pronged; firstly it was observed that there is a general laxity in enforcement in those institutions where the PC is conceived as a managerial tool in the University of Nairobi and Technical University of Kenya and not one of individual accountability in JKUAT and KU. Secondly, that same ‘Finnish’ laxity prevailed in the form of a resistance by the academic staff to the targets that required input that they have not traditionally associated with performance of their part as per the contract of service under which they became employees of the university.

The lethargy in compliance is not legally anticipated in the policy documents in force hence the lack of an immediate remedy that is guaranteed in law to address it. However, it is been tackled by including some parameters in the job descriptions of the university CEOs who commence a fresh term during the current MTP.<sup>105</sup>

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<sup>103</sup>Response from the DVC-Administration Planning and Infrastructure (Nairobi, 30<sup>th</sup> Sept. 2014).

<sup>104</sup> One notes that the current 2013-2018 MTP structure of public universities is basically a re-working of the initial State Corporations (Performance Contracting) Regulations Legal Notice. NO. 93 of 2004, which came into effect in 2006.

<sup>105</sup> For instance a key ability which will have to be demonstrated by the incoming VC of, say, University of Nairobi, in the year 2015 is resource mobilization. This attribute is integral to the university’s MTPs on increasing research capacities and forming a base for international-level financial stewardship. These goals are elaborated on in the discussions arising from the questionnaires.



The rationale behind this is what informed the first question in the questionnaire, that is whether the implementing the PC was a term of their contract. The overwhelming response was negative; indicative of a perceived legal loophole in the employment contract.

Lack of awareness of the responsibilities that the overall PC places on each individual was identified as a possible reason for the low traction of PC among staff in the University of Nairobi.

The rigidity of the staffers concerned is seemingly ironical since the cornerstone of the employment contract is control of the master over servant in determining what exactly constitutes performance for the employee. Nevertheless, it is a challenge to effective performance contracting in public universities in Kenya.

## **Conclusion**

This section has shed light what role the Vice Chancellor has to play in the scheme of things. The research also established that the PC measures managerial performance not individual performance. The individual contribution thereof can only be measured through other supporting framework – staff performance appraisal. Thus, by implementing a proper staff performance appraisal staff contributes immensely to the process of performance contracting in education provision.

The research has further established that there are a quite a number of challenges facing the successful implementation of the PCs which need to be addressed.

## **CHAPTER FOUR**

### **PERFORMANCE CONTRACTING INCENTIVE MECHANISMS IN PUBLIC UNIVERSITIES**

#### **4.0 Introduction**

As a true contract at law, breaches to the contract of employment are remediable through the common law mechanisms of injunctions, damages or performance. The performance contracts envision a system that measures performance and enables recognition and reward of good performance and sanction for bad performance.<sup>106</sup> However these are not available in the PC, as the field research showed, the remedy most available to the university is the expedient promotion of those managers and members of staffers that match and exceed the expectations set out in the PCs

The motivational theory avers that incentives in the sense that is required in public universities are the monetary awards that follow positive performance evaluation reports.<sup>107</sup> Existing research indicates that incentive systems in the public sector in developing countries are weak because they either lack a legal framework for enforcing the rewards and sanctions and even where they exist they are either too low and are not competitive as compared to the private sector.

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<sup>106</sup>See Government of Kenya Performance Contracts Sensitization Training Manual, (Nairobi,2004) ch2

<sup>107</sup> State Corporation (Performance Contracting) Regulations, 2004

This results in a culture of “absenteeism, alternative employment, rent-seeking and low productivity often compounded by a system of a non-transparent benefits and allowances that discourage rather than encourage performance”.<sup>108</sup>

In Public Universities in Kenya, the lack of incentives has been a key factor that is embodied by the lack of financial resource allocation.<sup>109</sup> The low level is has often resulted in low staff motivation levels. Consequently, the high turnover among teaching and research staff has seen a majority of the resilient remaining staffers forced into income generating activities.<sup>110</sup> This chapter looks at the resource allocation aspect of performance contracting with a view to proposing recommendations on how the entire system may be geared towards encouraging more effective allocation of resources towards actual progress in performance contracting.

#### **4.1 Financial Resource Allocation**

The success of any project or plan requires adequate financial resources; this will involve assigning of available resources in an economic way to achieve goals for the future. In the same way the successful implementation of the performance contracts will require prioritization of financial resources by the government.<sup>111</sup>

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<sup>108</sup> UNDP Practice Note on Public Service Reform 2004 on CD in Transitions draft, November 2008.

<sup>109</sup>Gudo and others, (2012) Role of Institutional Managers in Quality Assurance: Reflections on Kenya’s University Education. Australian Journal of Business and Management Research. Vol 1No. 2 May 2012

<sup>110</sup>Kiganda, C. East Africa Universities Vice Chancellors Urged to shift Roles to Centre and make the Partners and Responsible stakeholders.. (2009)

The challenge in the universities is that the government financial resource allocation has diminished over the years. According to a World Bank report, the funds allocated to public universities have declined over the years.<sup>112</sup> As a result, this low resource allocation, has led to insufficient facilities and stalled infrastructural projects. Further they are of the opinion that the government has continually focused on recurrent expenditure at the expense of issues which would require prioritization like development in terms of infrastructure and research funds.

It is important to note that although performance contracts have been adopted in these institutions the CEO'S and management are unable to turn around this situation due to lack of financial resources. To meet these gaps public universities have tried to venture into income generating projects to supplement the government allocation. Some of the projects include: Introduction of parallel/part time degree program; Renting out facilities like hostels during holidays and conference halls for social functions.<sup>113</sup>

Omutoko suggests that there is need for government to improve on the allocation of resources to public universities and to appoint a steering committee to manage funds generated by the income generating programmes so that they are used to facilitate all

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<sup>112</sup> World Bank (2002). Facilitating Investment in the Global Education Marking. In NickanorAmwataOwuor, Higher Education in Kenya: The Rising Tension between Quantity and Quality in the Post-Massification Period. Higher Education Studies;Vol. 2. No.4; 2012.available at [www.ccsenet.org/hes](http://www.ccsenet.org/hes) accessed on 20th July 2013.

<sup>113</sup> World Bank (2002). Facilitating Investment in the Global Education Marking. In NickanorAmwataOwuor, Higher Education in Kenya: The Rising Tension between Quantity and Quality in the Post-Massification Period. Higher Education Studies;Vol. 2. No.4; 2012.available at [www.ccsenet.org/hes](http://www.ccsenet.org/hes) accessed on 20th July 2013.

operations of individual institution including development of infrastructure, improvement of facilities, remuneration of staff and funding of research activities and rewarding of lecturers for all academic related activities that they engage in including teaching.<sup>114</sup>

#### **4.2 Incentive Systems Comparative Study**

This section of the chapter shall bring out the means through which progressive jurisdictions incentivize performance according to preset parameters with the aim of having a discussion on how they have implemented and overcome the challenges associated with PC and to see if there any lessons learnt which the Kenyan Government can adopt.

The European Union has set rules for funding performance management in a document that will govern the practice from the period starting 2014 to 2020.<sup>115</sup> One sees that the management of performance by individuals is funded by a consolidated European fund. In addition to this, the government of the United Kingdom itself has set aside funds to further subsidize the cost of doing research and give incentives to increased research

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<sup>114</sup> Otieno-Omutoko. Transforming higher education; rethinking the management of higher education institutions. (Thesis, Moi University 2007)p 27-30

<sup>115</sup> Skills Funding Agency, 'Funding and Performance-management Rules 2014 to 2020 European Social Fund (ESF)', Version 2, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/494599/ESF\\_2014-20\\_Funding\\_Rules\\_v2\\_January\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494599/ESF_2014-20_Funding_Rules_v2_January_2016.pdf) Accessed on 20<sup>th</sup> Sept 2016

solutions.<sup>116</sup> This goes to show the centrality of individual performance to the greater industrial picture in continental Europe.

In addition to that, the objectives of the PCs in European setup have evolved through time to be selective mission-based agreements from the initial comprehensive strategic plans.<sup>117</sup>

The first striking proviso in the document is the provision for registering organizations that train the ethics necessary for performance contracting. This is necessary since it institutionalizes progressive performance contracting. Similarly, the registration of institutions that affirm compliance with performance contracts creates an active institutional memory. The register of training organizations is itself qualified through selection processes.<sup>118</sup> Even after the certification of centers to train individuals and corporate entities on performance contraction, monitoring units that in turn maintain quality standards at those institutions are put in place.

Performance contracting in the European Union is individual-centric. Looking at how the funds are cascaded down to the individual lecturer or professor, one sees that grants are applied for and assessed for funding based on their merit and utility to society after

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<sup>116</sup>University of Sheffield, 'Funding of Research in UK Higher Education', [https://www.sheffield.ac.uk/finance/staff-information/howfinanceworks/higher\\_education/funding\\_of\\_research](https://www.sheffield.ac.uk/finance/staff-information/howfinanceworks/higher_education/funding_of_research) Accessed on 6 Nov 2016

<sup>117</sup> *Ibid*

completion. In addition to that, the financial incentives are controlled by the teaching supervisor that is in charge of the project. This both gives autonomy to the professor and motivates the increased research output as the autonomy grants the discretion to go into areas of interest for both the supervisor and students.

The crux of this assertion is that all the measures being put in place by legislation targeting the subject are aimed at improving and maintaining the standards of performance of individuals and not generally institutions.

This estoppes the need for cascading-as in the Kenyan case-by focusing instead on basic principles that each worker should pay attention to in order to be compliant with the regulations. The incentives provided to individual s are directly linked to the governing principle foundation granted

The performance of individuals is tied to grants. In Australia for example, performance contracts are a precursor to every approval of a grant to the University. This is a precondition for all universities in Australia.<sup>119</sup>In addition to the remuneration given to individuals for their work, added financial incentives are given to the individuals for progressively meeting performance targets.

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<sup>119</sup> Harry De Boer and others., 'Performance-based Funding and performance agreements in fourteen higher education systems', (Report for the Ministry of Education, Culture and Science) 2015 <http://doc.utwente.nl/93619/7/jongbloed%20ea%20performance-based-funding-and-performance-agreements-in-fourteen-higher-education-systems.pdf> Accessed on 20<sup>th</sup> July 2016 p35

In Finland for instance, funds are delineated for the monitoring and evaluation of performance agreements (PCs) on the indicators so agreed upon.<sup>120</sup>

The subsequent amounts set aside for each particular institution in order to achieve research and development proposals is determined by the success of those institutions in achieving present performance agreements. These preset agreements dwell on research, other education and science policy objectives.

In such agreements, the government through the Ministry of Education funds up to 75% of the Research and Development in Universities.<sup>121</sup>

The achievement of non-regulated aims is also provided for by the regulations. In this way, the European Union achieves control over the accountability measures of all sectors; including university education through the overarching principles. Seeing as the original relationship between the academic staff and the university is the employment contract. A lack of legal framework that clearly delineates the sanctions and rewards for enforcing the PC affects the framework and its effectiveness.<sup>122</sup>

In Kenya at JKUAT, the interviews showed how the lack of an enforcement sanctions mechanism was circumvented in order to achieve increased performance. This was achieved by having the targets of the performance contracts ingrained in the performance scorecard of each lecturer.

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<sup>120</sup>Harry De Boer and others.,

<sup>121</sup> *ibid* p64

<sup>122</sup> The response from the University of Nairobi highlighted the need for employee-specific performance contract law. The sentiment was also echoed in the responses from the technical University of Kenya.



Compliance was then held to directly result in a higher mark that would ensure promotion of the compliant member of staff. This innovation was markedly absent from the other interviews in the select universities as it was noted that no legally sanctioned enforcement mechanism was present.<sup>123</sup>

Comparing this scenario to the Kenyan context; we see that performance contracting in progressive jurisdictions focuses on the progressive increase or optimization in output of individuals. In Kenyan universities the structure of performance contracting is more dependent on the cumulative quantities of output at a managerial level. The focus on specific individual persists in Australian performance contracting process.

This is seen where the PC cycles are made and funding models established in order to achieve those targets.<sup>124</sup> To successfully effect an incentive system, it is recommended that an appraisal has to be carried out not only on the institution but also on the individual managers based on the performance contract agreement. This should be done through a midyear review on the overall organizational strategic goals, performance indicators, performance targets and accomplishments.<sup>125</sup> The appraisal should be used as a basis for promotion or renewal of the contract terms especially for top managers.

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<sup>123</sup> “After the corporate contract is signed, cascading is done throughout .Ultimately we have individuals signing PCs that are aligned to the corporate contracts (of employment) and are part of the appraisal system. The PC carries 50% of the score in annual appraisals; there are no direct sanctions for non compliance.”

<sup>124</sup>Harry De Boer and others., ‘Performance-based Funding and performance agreements in fourteen higher education systems’, (Report for the Ministry of Education, Culture and Science) 2015 <http://doc.utwente.nl/93619/7/jongbloed%20ea%20performance-based-funding-and-performance-agreements-in-fourteen-higher-education-systems.pdf> Accessed on 20<sup>th</sup> July 2016 p35

<sup>125</sup>Harry De Boer and others.,136.

The appraisal should aim at measuring each employee's annual performance and give feedback to the employee to improve subsequent performance. A successful appraisal system not only requires resources but also the support of top officials, including the government who must publicly commit to the program<sup>126</sup> which could be achieved through a legal framework.

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<sup>126</sup>Berman.E, Bowman, J. West and others. Human Resource Management in Public Service (Thousand Oaks, CA. Sage., 2006) ch5

## **CHAPTER 5**

### **SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION**

#### **5.0 Summary of Findings**

This study has proven beyond doubt that performance contracting is indeed of importance not only to the Kenyan set up but globally. The research has demonstrated that PCs have been successfully implemented in other countries and therefore moving forward there is positive indication that this is a tool that if well implemented is able to bring positive changes in the management of public universities especially if incentives are engrained into the PC system to motivate the public agents.

Reflecting on the whole exercise it has been made clear that the performance contract is not inconsistent with the ordinary employment contract. As per the hypotheses, performance contracting has now become an integral part of the administration of public universities; hence the need for constant revision in order to be responsive to the current educational progression in the world.

Assessing the legal framework of PC in Kenya; the study used research questions geared to test the hypotheses of the research. The end result was that the framework of the PC in Kenya is seen to be inadequate.

Most telling of this position was the fact that PCs are implemented in such a heterogeneous fashion that the little net gains are being made by well performing colleges in public universities are eroded by others hence a negligible net gain in the whole sector.

## **5.1 Conclusions**

In conclusion, the study points out that the PC as we know it today is a progressive means for the universities and policy makers of the country to encourages universities to perform as per international standards.

The interviews brought to the fore the interplay between the PC and the contract of employment.<sup>127</sup> For one, it was made clear that the contract of employment was but a general instrument that acted only as a standard which the universities' staff bear in order to acquire the rights of university employment. Similarly, the attendant contract exists in order to legally delineate where the buck stops with particular regard to the duties that a university should perform in society. Academically therefore, there may seem to be a clash of purpose with the PC being viewed as a counter-contract but on the ground; it is clear that one instrument is used as the actualization of the other

As Obong'o puts it, "Defining performance is therefore enlightening in many public sector organizations. They begin to ask the right questions and realize that they need to do whatever they have defined well and deliver that efficiently.

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<sup>127</sup>Robert Ong'etaKinanga and Samuel KimnyakPartoip (2013),p 5-8 "Linkage between TargetSetting in Performance Contracting and Employee Performance. A Kenyan Perspective," Journal of Human Resources Management Research, Vol. 2013 (2013), Article ID 162613, DOI: 10.5171/2013. 162613

Emphasis in reforming the public sector has therefore been slowly shifting in many developing countries more towards operational effectiveness, which entails doing what one is doing better.

With defined outcomes and appropriate benchmarks to measure the outcomes, the rampant lack of focus is brought into the open. Managers begin to ask the right questions, redefine the problem they are trying to solve and diagnose that problem anew.”<sup>128</sup>

This led the research to the assertion that the PC is a tool used for good practices, but which lacks the force of law to effect for the full realization of the attendant benefits. The PC is very much in its infant stages and it in the best interests of the subject that a barrage of research be kept up in order for the concept to be fully contextualized into the Kenyan system of public university.

The essence of this study on performance contracts demonstrates that at present-that is in their current form- they are unenforceable at law (as compared to employment contracts) since it is not a corporate contract in the strict sense of the word. The study shows the unenforceability of the PC as compared to the employment contract. Since no decisive judicial remedies exist to enforce compliance by the government on one part, as do none that enforce non-compliance by the Vice Chancellor’s office as it runs the day-to-day PC activities of the university. The lack of enforcing mechanism may result in under-performance by either party to the PC.

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<sup>128</sup> Sylvester OnyangoObonyo, International Public Management Review · electronic Journal at <http://www.ipmr.net> Volume 10 · Issue 2 · 2009

## **5.2 Recommendations**

In light of the findings in this study, a review of the Legal framework of the PC is necessary to make it an effective tool to facilitating and creating incentives especially in the academic area of teaching and research in public universities in Kenya. This study therefore recommends the following:

### **1. Supporting the PC with legislation**

Anchoring performance contracting in a Legal framework will ensure stability of the PC even when the government and policies change. National legislation determines governance and management arrangements in virtually all the sectors where legislation has been made on. On the strength of section 3 of the Judicature Act, parliament makes laws that are for all intents and purposes intended to benefit the public and the institutions that serve the public. The recent changes in national approaches to university autonomy, governance<sup>129</sup>, and leadership inevitably trigger a need to formalize these changes in university legislation. The level of detail in creating the performance contract may be up for debate. However, the need for such a law to be in place is irrefutable.

The national legislation may be used to provide a blueprint for what is desired, while in other cases it leaves ample space for institutional leadership to define its own statutes and

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<sup>129</sup> The single most notable change in legislation of universities is the gazetting of the Universities Act, 2012 that superseded all Acts of parliament that setup the various public universities in Kenya.

internal regulations. Nevertheless, reforming institutional governance will change the face of higher education legislation at the national level<sup>130</sup>.

Furthermore, the performance contracts should be made a prerequisite for the award of charters of universities in the country. Due to the rapid expansion of universities in the country the ethics of performance contracts can be used to ensure that the standards are maintained regardless of the locality of the institution within the republic.

Lastly, creating legislation on PCs will give statutory authority to university CEOs to tackle non-compliance.<sup>131</sup>

## **2. Regular (quarterly) feedback on performance of institutions, publicized to create pressure for conformity.**

Having the performance contracting division of the Ministry of Devolution and Planning publish timely quarterly analyses on the performance contracting has the potential of setting progressive targets that continuously push them higher and towards increased performance due to competition.

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<sup>130</sup>Stensaker, Bjørn, Jürgen Enders and Harry de Boer.P29, “Comparative analysis on governance reform in European higher education.” In Center for Higher Education Policy Studies, *The extent and impact of higher education governance reform across Europe*. (2007)Final report to the Directorate-General for Education and Culture of the European Commission.Enschede, Netherlands: Center for Higher Education Policy Studies, University of Twente.

<sup>131</sup> The interview from the University of Nairobi recommends that the framework set up works towards an incentive-based approach in order to change both the cultural rigidity and lack of acceptability involved in non-incentivised organizational culture change. Appendix 2

Maintaining the tempo of increased efficiency in public universities can be achieved by increasing the participation of stakeholders such as alumni associations and employer bodies which are presumed to genuinely press for better quality of graduates.

The reports will increase the involvement of the staff in crafting successive guidelines in a way that increasingly reflects the core aspirations of the university. The benefit of this is that creating the guidelines at a managerial level may resolve the disconnect between the implementing staff and drafters. This is better in comparison to the scenario when the staff may set targets that are easily achievable in seclusion.

This conformity can help to put in place incentive and sanction measures for teaching staff in universities. For instance, progressive institutions link the amount of government budgetary allocation to a particular university-in extension department- to the output in PCs by the staffers. An active institution conducting research and generally fulfilling the criteria in the PC ought to be entitled to a higher budgetary allocation. This may come in the form of grants from the government and/or government partners in specific sub-sectors of the Kenyan economy.

### **3. Detailed ranking of individual schools**

A recommendation put forward from the Technical University of Kenya is that the research parameters should be tailored towards the charters of the specific universities. For instance, schools of finance should have similar criteria for measuring performance across all universities in the country so that a clear standard of the specific discipline is created and maintained.



The benefit of this sort of arrangement is that progress along the desired parameters is easily quantifiable across various universities. More so when the decentralized standards enable the high performing schools in the university to get recognition instead of bringing up other below-par department's lower scores. Well performing schools in lower ranked universities get the same recognition as high performing ones in higher ranked and more established schools.

#### **4. Unify the approach to PC implementation**

The research has noted that there is a discrepancy in the implementation of the PC in various universities. In some the PC is viewed as a managerial tool and in others it places individual duties on each academic member of staff. A unifying review of PC implementation guidelines which reflects exactly where the duties of actualizing the performance indicators are is essential. This will provide a clear platform for evaluation of cross-university data on performance and compliance with the PCs.

The unified approach will enable universities to focus more on those areas of their academic services that increase competitiveness, both regionally and globally.

Through a unified approach to placing the responsibilities of the PC, attainment with universal standards such as ISO certification can be made progressively easier as the responsibilities necessary for such achievements are more clearly delineated.

The way a unified approach to performance contracting in universities has been achieved in other progressive jurisdiction is to create an independent entity to set, monitor and control the controls in performance controls.

This is also important in that the utility of the concept of performance contracting can be transferred too to other sectors in the economy. For instance, in the discussion on the European Social Fund showed that the targets can indeed be crystallized into personal worker targets and principles. Just as the increased performance of individuals is incentivized, so ought the inverse to be possible. Downgrading and possible retrenchment of individual exhibiting retrogressive practices is a possible outcome required to create the push.

### **5. Innovativeness with the incentive mechanisms**

There are mechanisms that universities themselves can use in order to motivate the staff members to increase their performance. A good model can be taken from the United Kingdom. In that jurisdiction, the funding for research projects is channeled through the professors and supervisors. This has the effect of motivating the course facilitators to increase the number of projects that they undertake in order to make more. This would have the effect of causing the lecturers to focus more on their active employment in the university than on side jobs as was illustrated earlier in this paper. Granting professors more autonomy over the financial incentives in research will also increase the amount of research produced because the individuals would research on subjects they are most interested in and also increase the number of students supervised and graduated at postgraduate level.<sup>132</sup>

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<sup>132</sup> The 'dual mechanism' adopted by the government in funding universities is a prime example of how the government shoulders part of the financial incentive burden with private institutions. This not only increases the funds available for research, but also improves the depth of research on the selected subjects. University of Sheffield, 'Funding of Research in UK Higher Education',

### 5.3 Recommendations for Further Research

The study notes that there are still further areas that require research touching on the Executive arm of government that would essentially tackle the question of challenges that the government faces while implementing the performance contracts in Public Universities. Taking the cure from progressive jurisdictions, it is important that research be carried out to find out how to sanction the PC within the current framework. In the case study done earlier in this paper of Finland, it was seen that the European Social Fund is set aside to facilitate performance contracting excellence.<sup>133</sup> Both the economic and political factors that precipitated this legislation may not be present in Kenya. Therefore, a study that will put the capitation of performance contracting in the Kenyan legal and economic sphere into perspective will shed further light on this topic.

There is also need for further research to be carried out on the current PC guideline cycle which should include an in-depth SWOT analysis of the entire PC legal framework in Kenya. One of the main aims of this research would be to determine how to enforce sanctions on non-performing staff. The current labour regulatory structures do not allow for negative alterations to an individual's remuneration.<sup>134</sup> Therefore, research that can point out more clearly the possibilities at financial downgrading of remuneration is also helpful in churning out truths on how to sanction non-performers or under performers.

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[https://www.sheffield.ac.uk/finance/staff-information/howfinanceworks/higher\\_education/funding\\_of\\_research](https://www.sheffield.ac.uk/finance/staff-information/howfinanceworks/higher_education/funding_of_research) Accessed on 6 Nov 2016

<sup>133</sup> Cf *Supra* n84

<sup>134</sup>GoK, Labour Act Cap 226, and Laws of Kenya S19: holds that no employer may deduct any *amounts* payable to the employee outside of the confines of any written law. Looking at the sources of Kenya law as presented in Article 1 of the Constitution and S3 of the Judicature Act, it is clear that the performance contracting agreement is an administrative document.

## APPENDICES

### APPENDIX 1: INTERVIEW QUESTIONNAIRE

Dear Respondent,

**RE: RESEARCH PROJECT**

The above refers.

I am doing my masters of law (LLM) at the University of Nairobi and I am writing my research project on the “The Effectiveness of Performance Contracts in Public Universities: An Evaluation of The Legal Framework of Performance Contracts in Kenya”. As one of the successful implementers of the performance contract, I would be grateful if you could spare a few minutes of your time to provide your input by answering the attached questionnaire.

The purpose of the research is to enable the researcher shed light on the legal challenges that Universities face in the implementation of the Performance contracts. You are hereby assured that this research is purely for academic purposes and your responses will be treated with utmost confidentiality.

Your support in this research shall be appreciated.

Petrolina Chepkwony

**G62/68456/2011**

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