The Nexus of the Study and Practice of Law and Public Administration

A Need for Rediscovery of the Debate and Principles?

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ABSTRACT

There is no doubt that public administrators in their pursuit of efficient public service delivery to the citizens need knowledge of law. Lawyers too need to understand the workings of administrative systems as law is practised in such systems. This position was highly recognised in ancient and classical discourses of public administration and by scholars who formulated the concept of the state and the importance of law in society. Lawyers practise their profession in a public administration context and as such their understanding of how the public sector operates in terms of laws made, the implementation of the laws and the judicial functioning are matters that need not much emphasis. While classical literature of law and public administration recognised the intimate relationship between the two, modern scholarship tends to favour an independent disciplinary focus. Whereas societies have evolved through different stages, each of these stages has had rules for managing the needs and expectations of the citizens. Public administration and law are practised in the three branches of government – executive, legislature and judiciary. Lawyers go to law schools while public administrators go to schools of public administration or public policy. The central question addressed by this article is whether there is a renewed need for the teachers of law and public administration to appreciate and apply the synergy between the two disciplines.
INTRODUCTION

The vitality of law as being at the heart of any development intervention and societal order is uncontestable. There is hardly any contestation among legal and public administration scholars on a need for a civilised society (Adamolekun 2002:2; Funk 1972:269 and Schubert 2012:6). There appears to be a general consensus that such a society is only guaranteed by laws (rule of law) as opposed to a society managed on the whims of those who govern. This position was ably taken by Stone (1966:168) building on earlier works of other scholars like the most elaborate analysis by A Dicey (1885:1) in his classical book entitled ‘Introduction to the study of the law of the constitution’, where he is credited for having introduced the idea of rule of law. Law aspires to create social order and social order is an important prerequisite for development. It is also, however, arguable that attainment of development is a key factor in creating an orderly society. Societies which have prioritised orderly styles in the management of government affairs have produced greater development trajectories; unlike those countries which have opted to be governed under disorder, anarchy and confused systems.

Countries of the Western strand have generally attained higher per capita income levels because of their ardent belief in merit-based administrative systems and functional administrative structures. In Africa, countries which have journeyed this route (Rwanda, Kenya, Ghana, Botswana, South Africa) have made some noticeable progress in development and public service delivery systems compared to countries that appear to have preferred the pot-holed journeys characterised by conflict and disorder (Somalia, South Sudan, Democratic Republic of Congo, Zimbabwe). Some of these examples in each strand may also be contested and as such tend to vary from different commentators’ perspective especially when measured against democratic and constitutional governance benchmarks. Law and public administration have the greatest leverage among other disciplines and fields of study to create rules, systems and structures which can promote or undermine development (Funk 1972:269). Those in charge of public administration and those who practice law, are important actors in the creation of any form of governments (Stillman 2009:567).

Aristotle and Plato in their earliest ideological philosophies as well as the words of the ancient philosopher Socrates had pointed at the importance of law as a foundation for management of society (Basheka 2012:14). Later, the social contract theorists who originated the idea of a government as we know it today had a common consensus on the position of law in the management of societal affairs (Hoff 2015:4; Mukherjee 2010:53). That is why, most classical scholars who were heavily influenced by the ancient world practices, regarded the disciplines and practices of law and public administration to be intimately related (Goodnow 1900; Lee & Rosenbloom 2005:118). A common consensus that development
was championed by sound public administrative systems and respect for rule of law became undisputed. However, whereas some commentaries on the terms politics, law, administration, and society could have casually treated this nexus of law and public administration, thereby at times subjecting the two fields to unimaginable intellectual injustices, the foundation of theoretical and practical relationship was a concluded matter among most classical public administration scholars who envisioned a fair and just society (Cooper 1997:120).

Ladipo Adamolekun (2002:2) reports that rule of law, underpinned by an independent court system, which implies a predictable legal framework; helps to ensure settlement of conflicts between the state and individuals on the one hand and among individuals or groups on the other. That rule of law helps to ensure respect for property rights and contracts. That in a law-based state, the government will not act capriciously. This position by the author confirms why and how administrators armed with legal competences can create checks in the running of government. Basheka (2014:655) asserted that public administrators can either enable effective functioning of government or even lead to the overthrow of government. Legitimate governments are run on institutionally strong, efficient, effective systems, anchored on publicly determined, predictable and increasingly rational rules of behaviour. In such a system, the public service becomes a central pillar of the government as it regulates, administers, executes, mediates, invests and delivers the construction, operations, maintenance and servicing of service delivery infrastructure, and ensures that the public service machinery is oriented to diligently serve the citizens (p. 655). An administrator with sound understanding of law is likely to apply fair and just reasoning in the execution of their mandate compared to those who are only schooled in the specific fields of public administration. This is possibly why some schools of public administration have tended to encourage the teaching of administrative law although the depth and coverage misses the foundational pillars.

Public administration functions like public finance, personnel management, budget management, public procurement, and international affairs are conducted based on legal frameworks (Hughes 2003). Yet, law schools have tended to starve their students from understanding the broad field of public administration. While some attempts are always made through specialised fields of law like constitutional law, the foundational public administration theories which help bring to the fore the synergy between law and public administration are not perfectly extracted; partly because the teachers of law have also suffered from similar starvation in their academic journey. Failure by legal scholars to peep into the jungles and intellectual fields of public administration to discover where legal practice is to be undertaken only produces legal practitioners who lack fundamental basics. In some cases, there has been unhealthy hostility among these two disciplines. Hence, law is not alone in this blame.
Schubert (2012:6) suggests that law exists for resolving disputes and for controlling government officials. Private law includes property, family, tort, probate and corporate law; while public law includes constitutional, civil and administrative law. Most students prepared for positions in public administration complete their programmes without taking a course devoted to the study of law. Public administration articles collections at most include limited material on constitutional law and the foundations of administrative power, if any (Shafritz, Hyde & Parkes 2005:15; Stillman 2009:567). This article advocates for a rediscovery of the need to examine intimately the relationship between law and public administration and calls for a renewed intellectual discourse on how this can be strengthened.

CONCEPTUAL FRAMEWORK

It is imperative to recognise that law impinges on administrative practices in a myriad specific and general ways. The outcome is then to infuse the needed values of lawfulness, fairness, justice and transparency into administrative conduct and decision-making. While describing the major functions of law in society, Funk (1972:269) maintained that functions of law are often defined concerning one type of society and it is inaccurate to say that law may serve exactly the same function in another type of society. Laws are established to regulate the governance of the state and each country’s supreme law (the constitution) sets parameters for the operation of each branch of government. The constitution establishes the executive, judiciary and legislature and allocates powers and responsibilities to each of these organs of state. Public administration takes place in each of the three structures.

Beyond the supreme law of any country, there are other specific statutes and Acts made by the legislature and are to be implemented by the executive while the judiciary retains the adjudicative and interpretation roles of these laws. The laws made regulate how the branches of government execute their functional mandates. Laws, however, not only come from the legislature. There are customary laws, judicial precedent-based laws and international laws and all these provide an effective mechanism by which governments resolve the disputes among citizens (private laws) and citizens against government (public laws) but also between nations (international laws).

Fundamentally, there are function-specific laws. Regarding the institution of the family, a branch of law called family law exists. Regarding matters of land, land law describes not only how land is owned (land tenure) but the various rights that come associated with the different ownership. For those who transgress and need to be punished, tort law and negligence law exists. Yet other branches of law deal with equity and creation of trusts, international law and human rights, taxation matters, minerals and oil matters, and intellectual property ownership,
among others. In the application of each of these laws, public administrators are heavily involved; yet they are rarely allowed in their schooling to have an understanding of how their field relates to law.

Public administrators deliver public services and breathe life into public policy yet they exist in a strange place, suspended between the formal powers of elected officials and the cacophony of millions of voices, each focused on individual concerns. Public administrators are the translators who explain who gets what in real time and real terms. They must make sense out of reams of tortured statutes and occasionally stumble in the process (Verma 2010:3). While the practical orientation of law and public administration seems legitimately clear and easy to understand at an elementary level, the study and teaching of public administration has largely ignored the velocity of these legal foundations. This stand becomes unfair to the final consumers of services delivered by administrators – who are the citizens. While the concepts of government and society offer primarily frameworks for analysing the relationship between law and public administration, different approaches offer different conceptions of how to apply law and public administration to management of society.

Historical accounts on mankind’s deepest concern and appreciation of the relationship between law and public administration does exist (Goodnow 1886:533; Woodrow Wilson 1887). The earliest philosophers in their attempt to understand how society was to be governed better, advocated for sound systems of managing public affairs based on rule of law (Verma 2010:7). The ‘social contract theorists’ like John Locke, Thomas Hobbes and Jean Jacques Rousseau insisted in their analyses that the nature of society and government was one which would function only if there was legal order and rules (Barker 1995:2; Hoff 2015:4). In their view, the development of a more stable society was never going to be possible without the improvement and coordination of political and administrative techniques that fostered social cohesion linked to the importance of law and fair and just dealings.

Hobbes advocated for a government in which there was an absolute leader to make laws, while Locke advocated for a government that was subject to the control of society – a government managed under rule of law (Hoff 2015:4). That the enterprise for managing public affairs-public administration had to be exercised in the system that only recognised law, was an important early recognition of the nexus between law and public administration. Locke’s ideas later birthed the concept of separation of powers. On his part, Jean Jacques Rousseau, another outstanding social contract theorist whose views had significant implications on the importance of law and public administration, advocated for a government that had three branches with one for making laws, another for implementing the laws and another for trying the causes of men (the judicial function). This is what the modern-day branches of government do – the legislative
branch of government, the executive and the judiciary. Rousseau noted that the primary purpose of government was to create conditions that would promote equality among individuals.

At the centre of social contract theorists and early philosophers was equality and social justice (Barker 1995:2; Cooper 1997:120). Indeed, even in contemporary times, equity is viewed as the continuing province of government because government has the responsibility of running a constitution (Verma 2010:7). Lee and Rosenbloom, (2005 :118) who could be described as public administration scholars who have championed the need to have an understanding of the relationship between law and public administration in a contemporary perspective, took a stand that there needed to be a ‘marriage’ between public administration and law. They stated that law was important for preparing public officials to meet their professional responsibilities and law needed to be considered together with public policy; including the need for public servants to understand their legal duties, participate in formulating policy, address legal complications, and meet courts’ expectations. Cooper (1997:118), a notable leading public administration scholar; had earlier cynically reported that the grounding of public administration in law was a “simple truth” and that “the law provides the tools that are used to make the most important, and often the most challenging public decisions”.

The linkage between law and public administration seemed clear at the conception of the discipline of public administration as seen from the great classical works of Woodrow Wilson (1887); Rosenbloom (1983); Goodnow (1900 :10); and White (1926: iv) among other grandfathers of the academic study of public administration. While these authors were trained in different academic disciplines, with Woodrow Wilson being a political scientist and Goodnow being a constitutional lawyer, all did recognise the importance of law to public administration. Public administration, which broadly speaking has been conceived as the study and implementation of policy, is a moral endeavour linked to pursuing the public good through the creation of civil society and social justice. The academic study evolved in the United States from both academic political science and law as a separate study in the 1900s (Verma 2010:1).

During a time when many advocates of new public management (NPM) were clamoring to “free” public administrators to behave entrepreneurially by ridding the field of constraining laws and regulations, Cooper (1997:120) still emphasised the potentially positive relationship between public law and effective programme management; arguing that conscientious managers could actually improve the delivery of public goods to citizens by instrumentally using rulemaking, administrative adjudication, inter jurisdictional agreements, and contracts. While some scholars and implementors of government activities took heed, others simply ignored. In the law field, a group that championed a new field of law
and development, however, were commendable. This movement died in the 1970s but after a revival movement reignited in the 1980s and to date, the debate seems alive. But this was only after the significant failure of most administrative prescriptions.

Due to the increased hostility among competing approaches to the understanding of public administration; with the fiercest competition being among three leading approaches – legal, managerial and comparative approaches; calls for reconciliation have re-emerged. This is why we call for a renewed need to have both an intellectual conversation and a policy discourse around how law and public administration can be used to better societies in modern times. The concept of reconciliation between law and management can be detected in the criticism of new public management by De Leon and Denhardt (2000:96) who explained that the hyped public sector management reforms often brought administrators face-to-face with “aspects of democratic governance they had once been accustomed to rejecting”. Freeman (2000:1289) in the same year argued that a narrow or overly legalistic conception of public law was likely to underestimate the potential noneconomic benefits of privatisation. He thus favoured the use of public law as a facilitator and director of governmental affairs as opposed to their constraining nature to the role of the private sector. Moreover, Beermann (2002) argued that private firms carrying out public purposes were often more heavily regulated than traditional government providers of the same service. What then are the areas of intersection that need to be explained for a better appreciation of the relationship between the two fields? The next section turns to that debate.

RELATIONSHIP BETWEEN LAW AND PUBLIC ADMINISTRATION

This section now examines from a simplistic perspective how and why the intellectual discourses should treat law and public administration as concerned with the same subject matter and ought to be treated as disciplines sharing a common ideology and where possible a common approach in teaching. The section aims at giving the easiest understanding of this debate by one of our expected audiences – the policymakers who have no privilege to engage in intellectual debates of the two fields; yet such information on relational matrices perfectly guides policy formulation and implementation. The nexus between public administration and law has attracted some scholarly debates and neglect in equal measure throughout the evolution of public administration and law. While the debate involves interplay among the three branches of government – the legislature, the executive and the judiciary, there is one avenue that administrators often pursue when they
seek to change the legal environment through litigation that offers perfect areas of linkage. The relationship between judges and managers in the administration of public programmes that some refer to as the “new partnership” (Rosenbloom 1983) also becomes a very necessary undertaking.

According to O’Leary and Wise (1991:306) public managers can interface with the law through litigation to shape their operating context by either resisting legal remedies, capitalising on legal decisions to secure additional budgetary (and other) resources, and mobilising public opinion for or against legal remedies to support or disable their implementation. The author’s thesis was based on a landmark 1990 decision, where the court affirmed a federal district court order in the United States which imposed local property tax increases for Kansas City, Missouri, and residents, as a means of raising funds for desegregation efforts by the local school district; was at the heart of public management and law interface. This led to what scholars termed a new partnership between the judiciary and the administrators. While both law and public administration are disciplines in their independent rights, they should have an intimate relationship especially in their practices. Moreover, both share the same credentials in their evolution – they have both been birthed at the heart of human concerns.

While there has always existed disciplinary tension and neglect of each other’s focus, an urgent need to have a reduced hostility between public administration and law is envisaged to post better intellectual dividends regarding the approaches in teaching and public administration which will have spillover effects on the practices of the two fields and with the ultimate broader outcome touching the common good – better public services. This is an area that ought to appeal to both legal scholars and their public administration counterparts. The questions/reasons below provide the reasons why law and public administration are related and their relationship needs to be taken seriously for academic and practical purposes.

**Deepest concerns of society: The fundamental concern question**

This question concerns itself with what could have been the motivating factor in the establishment of the practice of law and public administration. Law was started as a strategy for creating order and a just society, which has been the concern of humanity as seen from earliest philosophers who advocated for the establishment of a democratic government. Public administration on the other hand was started as a field to address the deepest needs of citizens. The field started as an avenue for better management of public services for the benefit of the citizens. This implies that both law and public administration were started to address the deepest concerns of mankind. That is why the codes of conduct for lawyers as prescribed in the standard professional rules for those in legal practice direct themselves to a large measure to this goal. Public service codes of conduct
on the other hand also are directed at this greatest concern. The public sector is expected to service the citizens as their ultimate goal.

**Historical origins: The evolutionary question**

As partly themed in the preceding and subsequent sections of this article, law and public administration largely share the same history and one wonders why they should then be treated as fundamentally independent entities. The history or evolution of the two has been classed around the different stages of human civilization. Law and public administration did exist in the ancient world, they had a huge presence in the medieval and industrial revolution period and they still exist in the contemporary period. The types and origin of law as chronicled in the philosophies of jurisprudence are indicative of the human stages of development. The natural school of law (generally explained as the law of nature, divine law or law which is universal and eternal) believes that law is not created by man but by nature. The analytical school or the positivist school of law believes that law is man-made or is enacted by the legislature. The historical school of law considers history as the foundation of knowledge in the contemporary era. Laws according to this school are created by the interaction of local situations and conditions of the people. The sociological school of law considers law as a social phenomenon and it perceives law from the viewpoint of people in society. The realists place great importance on the role of judges in the implementation, interpretation and development of law. This evolutionary question thus advances an argument that the two fields share the same origins which calls for a better appreciation of how their joint application can be of better significance to society.

**Domains of study: The academic study question**

The two fields of law and public administration have the same unit of analysis which is government. Both have a philosophical common understanding of how and why government came into force. They both at an analytical level believe there is a difference between the state and government and that broadly while every citizen is a member of the state, not everybody is in government. In government, some officials are labelled ‘state attorney’ as a state has territorial boundaries and sovereignty and a state has government which is an institution created to manage the interests of the state. Both fields attempt to examine the functioning of the three branches of government as they serve the wider citizenry. Law as an academic field further examines why administration needs to be exercised through institutions which are a creature of the law; while the teaching of public administration emphasises why public administration has to be conducted in strict compliance to the laws.
Schools in Universities: The locus question

This question deals with the locus matters of the two disciplines. The concern here is in which schools within universities should law and public administration be located. While in the contemporary era such a debate may not suffice, especially regarding law since it now has specialised schools or faculties, the evolution of this field faced a locus question. Public administration still faced this fundamental challenge. In Uganda just like other countries, law started as part of the broad classification of the social sciences and the department of law tended to be located in the social science faculty. Law at Makerere University started as a department in social sciences. Earliest philosophers and political thinkers favoured this. While in contemporary times law has its stand-alone schools or faculties of law and public administration has its own schools of public administration or so-called schools of public management, government and public policy, the two have historically shared the same roof. Public administration started as part of departments of political science but now in some universities it has completely divorced itself from political science; yet in others, it lacks its own home hence being fused under management or business departments.

Common approaches: The approach question

In the teaching of the two disciplines, similar approaches have been used and can be used. In public administration, the dominant approaches are the institutional, legal, managerial and comparative approaches. The legal profession has always used the institutional approaches as a laboratory ingredient for their experiments. Law examines how institutions need to function and deliver a service. Law can also be taught within the context of different jurisdictions; hence, the need to compare. Law has also been taught taking into consideration the changing paradigms of public management. Law in the era of privatisation and reliance on private actors in the delivery of public services is slightly modified when public services are purely to be delivered by the government. Courses like law and development have been created to cater for these changing paradigms.

Claim of being sciences: The scientific claim question

Both law and public administration have in their discourses made an attempt to claim that they are a science as opposed to being ‘an art’. While both claim they have not reached the maturity expected and practiced in the natural sciences which have a high degree of precision, they believe they have both crafted principles which can be universally accepted. In law for example, there are universal guidelines on the relevance, admissibility of evidence in courts of law. Criminal
law offences have agreed upon elements or ingredients which need to be proved beyond reasonable doubt for one to secure a conviction. Criminal law also has a consensus on who has a burden of proof. In family law, they have agreed principles and guidelines on what constitutes a valid marriage. In land law, they have guiding principles on who owns land and the rights of a person on land either on surface, underground or in the airspace. Constitutional law has its parameters of determining rule of law. Public administration has its own principles as was conceived in the ‘Principles Paradigm’ (1927–1937) of the development of the field of public administration. While they do not claim the status of natural and biological sciences, they argue and more correctly so, that they have reached some universal principles and rules in their undertakings that qualifies them to be a science. A debate can be raised on the level of precision but no contestation exists on this fact. While the human factor always interferes in the judgement, some rules to guide decision-making exist and this is the only scientific status these disciplines claim.

**Professional associations: The professional question**

Both law and public administration have established associations to advance their fields and have established academic journals to propagate their disciplines. The discourses in the conferences and workshops of the two fields and in scholarly and academic journals concern the same unit of analysis – the government; and how to meet the needs and interests of society. Serious dividends would be derived where joint conferencing between these two brotherly fields would be encouraged.

As seen from the above, there is indeed a common ground set for the reunion of law and public administration; both as areas of practice and academic study. While both law and public administration as academic disciplines are rather recent in some countries, their practices are much older and have trekked the entire journey of civilization. Both fields in their practices concern themselves with management of society affairs and as academic disciplines, both aim at producing graduates with zeal and capacity to discharge their functions for the broader common good. Although both law and administration apply to the non-public sectors, their greatest concern directly or indirectly relates to the public. In this article we support the need to revisit the debate on the nexus and interlinkages between law and public administration through seven fundamental questions.

**THE NEXUS OF LAW AND PUBLIC ADMINISTRATION: HISTORICAL TRAJECTORIES**

From a conceptual analysis, public administrators are entrusted by citizens and their governments (the principal-agent theory) with the noble responsibility of
delivering public services that meet the public’s will as expressed in laws enacted by the established institutions in a democratic process. There is no doubt thus that administrators of any jurisdiction derive their authority from the laws of the particular land. The absence of respect for law in the administrative affairs of a country only results in what the 1989 World Bank Study on sub-Saharan Africa (SSA) characterised as state officials serving their own interests without fear of being called to account. Law has thus been part of public administration areas of concern. In this section, we attempt some historical trajectories to show how philosophers and scholars of law and public administration have conceptualised the nature of the nexus between the two disciplines and areas of study.

Aristotle in his ‘Politics’ favoured a mixed form of government to operate under the doctrine of separation of powers and checks and balances. Aristotle defines the polis, or city, as a political association, and he asserts that all such associations, like all deliberate human acts, are formed with the aim of achieving some good. He adds that political association is the most sovereign form of association since it incorporates all other forms of association and aims at the highest good (Barker 1995:2). The doctrines of separation of powers and checks and balances which were later to govern the political associations were thoroughly explained by Montesquieu based on the British constitution of the early 18th century. He suggested that there are three distinct functions of government – legislature, executive and judicial functions.

According to Montesquieu, the three functions of government, or political associations to use Aristotle’s words, should be vested in distinct bodies so that excessive power is not concentrated in the hands of one body (Hoff 2015:4). To do otherwise could be to abuse power, or what he called tyranny. The best version of separation of powers, which ultimately supported rule of law as a guiding framework; appeared in Montesquieu’s 1748 book entitled ‘The Spirit of Laws’ although he too appears to have adopted John Locke’s version of the nature of government. Montesquieu divided government powers into legislative powers; which he classed as that of ‘enacting laws’, executive powers which concerned executing the public resolutions; and judicial power which was for trying the causes of individuals. Locke’s version of government had earlier merged judiciary and executive functions and separated the conduct of foreign affairs (the federative power). This analysis of the earliest philosophers tells us that law was given an increasing emphasis as a branch in management of public affairs (public administration).

Dicey (1885), who was a British jurist and constitutional law theorist, gave law the highest priority in society. This was in his book entitled ‘Introduction to the study of the law of the constitution’. He insisted that “no person is above the law and it is law that rules all”. He argued for the impartiality of the courts and insisted that not even those in the highest positions of power were exempt from law. The author emphasised that rule of law was based on three features and these features
were undoubtedly central in public administration. The first feature is in admin-
istrative systems that emphasise rule of law and no person is punishable in both
body or goods except for a distinct breach of the law. Second, that in such admin-
istrative system, every person, irrespective of rank, is subject to the ordinary law
of the land and the jurisdiction of courts. Third, the common law creates a system
of rights and liberties superior to that offered by any declaration or bill of rights.

Dicey believed that the freedom British subjects enjoyed was dependent
on two pillars: the sovereignty of Parliament and the supremacy of common
law through the means of the courts’ freedom from governmental interference.
Dicey believed that in a society organised in that way, political freedom could be
preserved and democratic society could function harmoniously. In his analysis,
the “Rule of Law” ensures that leaders, who were elected by the people and to
whom were given the power and authority by the people, always act in the best
interest of those people. Dicey, however, warned that the law must be followed
by all, as people in power often thought that they were “above the law”. Dicey
argued that the inner tendency of all people in power is to satisfy their personal
needs out of public resources. Recently Brigham (2010), in his book ‘The Rule of
law’ has attempted to give a more elaborate, accommodative classification of rule
of law. He has condensed his views into eight principles that characterise the rule
of law. His definition of rule of law is a form of arrangement where “all persons
and authorities within the state whether public or private should be bound by and
entitled to the benefit of laws publicly made, taking effect (generally) in the future
and publicly administered by the courts”.

Rule of law was widely held by several classical scholars to be a resounding
bedrock principle of any democracy and an essential for effective functioning of
a government. While constitutional law gave the general plan of state action ac-
cording to Goodnow, administrative law was responsible for carrying out this plan
in its minutest details (Goodnow 1886:534–535). In his well cited classical found-
ing essay on public administration, The Study of Administration, Woodrow Wilson
(1887:198) insisted on the need to develop “the eminently practical science of
administration” and took pains to distinguish administration and law, bemoaning
undue attention to the questions of lawmaking and constitutional framing at the
expense of law implementation. He defined the object of administration in decidedly non-legal, policy laden terms – as being “to discover, first, what government
can properly and successfully do, and, secondly, how it can do these proper
things with the utmost possible efficiency and the least possible cost either of
money or energy”. He even advocated for a managerial approach to teaching of
administration contrary to the legal approach that Goodnow had propounded.

In later years, particularly in 1893, Goodnow vouched for one specialised field
of law and public administration which he defined as “that part of the public law
which fixes the organization and determines the competence of the administrative
authorities, and indicated to the individual remedies for the violation of his rights” (Harriman 1916:658). This was an insightful analysis of the role that law played in the administrative affairs of society. Although little is known about him by today’s students of public administration, Frank J Goodnow is regarded as the actual “father of public administration” (Waldo 1948:79) but most public administration scholars associate the fatherhood of public administration to Woodrow Wilson (Basheka 2012:28; Uwezimana and Basheka 2017:1). In the 1880s, Goodnow, a constitutional lawyer by training, began to write systematically about law and public administration albeit in the American context. In 1886, he gave a definition of public law that he considered as “law which governs the relation of the state or its organs with other states or with persons real or artificial [that is, legal entities such as corporations] within the state itself” (Goodnow 1886:533). This classical attention to the linkage between law and public administration ought to provide modern scholars with an exciting discovery of the long debate on the relationship between law and public administration; and it urges a renewed need to systematically explore how best the two disciplines can be brought back to the house of their youth.

It is imperative to observe from the above analysis that the definition that Goodnow (1905) advanced excluded private law, yet it is also a huge branch of law in its own right and often such a branch deals with the relationships among citizens; also the state still comes into the equation to provide a civilized mechanism of resolving the differences among these citizens. Moreover, the emergence of NPM in the 1980s which called for the injection of an entrepreneurial spirit in the running of government meant the need for stronger regulatory framework. The contracting out of public services to the private sector creates room for many areas of private law to apply. Goodnow (1886:534) who relied on the now stand-alone branch of public law – constitutional law – was of the view that administrative law filled the places left open by constitutional law as it regulated all minor points in the entire political organisation of the state, and governed the exercise of those functions which the state was obliged to assume in order to attain the ends laid down by its constitutional law.

Bruce Wyman (1903), another leading early administrative law scholar framed his 1903 treatise around a distinction between internal and external administrative law. Accordingly, “external administrative law dealt with the relations of the administration or officers with citizens, while internal administrative law was concerned with the relations of officers with each other, or with the administration”. Such a clear external-internal distinction could be seen to set the groundwork for downplaying the internal dimension – more hidden to begin with and less familiar to lawyers than courts – in favour of the external. But Wyman expressly acknowledged the internal aspects of administration as part of administrative law. It was probably Leonard D White (1926:ii), famously known for his stand of dismantling
the linkage between law and public administration by declaring in the preface to his book that “the study of administration should start from the base of management rather than the foundation of law.” In his view, “Exclusion of law was intended to protect administrative exercise of discretion from judicial interference and the restrictions of a rule-bound approach”. He was later to change this stance by the fourth edition that came 27 years later in 1955. Although this assumption disappeared and he became more sympathetic to law, the earlier quote continues to be widely cited.

Writing in 1933, Marshall Dimock (1933:35) perceived a need to revive Goodnow’s thinking as the basis for “a more realistic, a more complete development of public administration. Public administration and administrative law,” he said, “are as inseparable as cause and effect”. In a narrative of “cause and effect,” relationship, he argued that republican institutions and administration will produce a very different ethos of administration than a narrative of republican constraint that administrators must “minimize” and “go beyond”. John McDonald Pfiffner in his 1935 textbook argued that “law must lag behind social progress”. Making a case for the doctrine of precedents, he asserted that the lawyer must look to the past for his legal precedents, but in doing so he frequently develops an undue reverence for outworn social institutions. He, however, opposed the 18th century legalistic approach to government in favour of the realistic scientific method. It was his view that “the new public administration was impatient with blind obeisance to technical legal rules, which, at least to its followers, served only to hinder social progress” (1935:18). As will become clear, Pfiffner anticipated many contemporary attitudes.

Friedrich (1940:6) had argued that “politics and administration played a continuous role in both the formulation and execution of policy”. Politics then was used to be the equivalent of policy-making as had been conceptualised by Woodrow Wilson (1887) in politics administration dichotomy analysis. While Fisher (1997:63) much later observed that “administrators and practitioners played a vital, creative, and continuing role in defining public law”. A review of literature mainly from public administration context portends a trend where law and public administration have been historically intimate fields of debate by scholars. Scholars like Fritz Morstein (1946:498) were clear on the need to have a synergy between law and public administration. He argued that the role played by the lawyer in public administration is not adequately described in a simple statement but his special skill is utilised in a great variety of ways. Moreover, lawyers occupied quite different positions on various levels of the administrative hierarchy and that their actual influence went in many instances beyond the range of their specific duties (p. 498). The rule of law had been universally regarded as a fundamental principle of democratic governance although the field of public administration always tended to exhibit the “anti-legal temper” in
1926, when Leonard White’s managerialism largely displaced Goodnow’s emphasis on the intimacy of law and administration (Lynn 2009:803). This was not unique to law and public administration. From the dawn of civilization, political science and public administration were considered a single discipline but separated into distinct disciplines of study. Both, however, had a close relationship with law as a field.

Ferrel Heady (1987:489) who was one of the outstanding scholars of public administration at the time observed how Goodnow believed that “administrative law could be properly understood only in the context of politics and of its relationship to public administration”. Ernst Freund was another seminal thinker on law and administration and like Goodnow, he had graduate degrees in both law and political science and viewed the combining of bureaucracy with democracy as “one of the most important political problems of the present day” (Heady 1987:490). However, Freund attempted to draw a distinction between policy and justice, which he saw as two different aspects of administration. “In so far as administration is a matter of policy, it is a branch of political science; in so far as it is a matter of power, duty or individual right, it is a branch of jurisprudence” (Freund 1911:138). He continued, “[W]e shall not in this country get administrative law recognized as one of the legitimate and coordinate branches of jurisprudence, until we lay the main stress upon demonstrating that it contains a body of principles of constitutional and common law and of statutory construction in which the normal rules of law are modified by the interests and privileges of the public as a party to legal relations” (Freud 1911:139).

It is imperative to observe from the preceding paragraph that both Goodnow and Freund, saw politics, law, and administration as constituting a nexus by which public policy is formulated and carried out in accordance with constitutional principles and administrative law. Goodnow who began his 1905 treatise on administrative law with a disquisition on the meaning of administration, along with an insistence on paying attention to how government actually operates, provided an important parameter for understanding how law and public administration were close fields. The nexus of the narrative was that since administration and administrative law had to do with the actual operations of political life, it was absolutely necessary that the study of these two subjects take into account not merely the formal governmental system as it was outlined in charters of government and legal rules, but, as well, those extralegal conditions and practices which, it has been shown, had such an important influence on the real character of governmental systems. Goodnow followed this introduction with a detailed review of the organisation of administration, including the organisation of executive departments and chief executive authority, turning to judicial control of administration only at the end. Freund, in turn, sought to bridge what he saw as the differentiated study of administrative organisation and administrative powers.
Kettl and Fesler (2005:16) fully acknowledged the importance of law, but administrative responsibility “goes beyond … external controls” and must be concerned with reducing the burdens of “elaborate external controls”. In yet another exciting text – The Spirit of Public Administration, Frederickson (1997:232) argued that because laws were “vague and contradictory and power was shared, public administrators were still in finality left to make the decisions” (1997:232). In Henry’s (2007:6) book on Public Administration and Public Affairs, he observed that the “tradition of administrative constraint” at the heart of American governance was viewed from the outset as a cause of “stalemate” and “enfeebled” executives (p.6). In a similar spirit, Janet and Robert Denhardt (2007:7) expressed another popular view when they argued that “the separation of politics and administration lies at the heart of the Old Public Administration’s version of accountability, one in which public administrators were held to be accountable to their political ‘masters’- and only through them to the citizenry”. What emerges from the preceding literature is that the relation between law and public administration has long been recognised. One wonders therefore why such a relationship was never maintained and instead a separation focus on each of the disciplines – law and public administration, appears to be highly emphasised. Is it not time that law schools and schools of public administration should re-engage in brotherly debates and agreed on common approaches in the delivery of the curriculum to live up to the ideals of classical and ancient philosophers? In law and development, there is a renewed movement where it has been emphasised in no uncertain terms what law is to administration and the development enterprise. Let us now turn to why and how a renewed discovery is pertinent.

A NEED FOR REDISCOVERY OR RECONCILIATION BETWEEN PUBLIC ADMINISTRATION AND LAW?

Law is undoubtedly a profession and as such one of the oldest professions that has the deepest concerns of society. It fulfills this criterion of a profession based on five key features. Law graduates pass through a prescribed curriculum determined by an approved body, the practice of law has self-regulation, and is legally recognised; it involves client-advocate partnership and deals with matters at the deepest heart of society. Public administration has had such a claim of being a profession, but it does not yet fulfill all the credentials required for professions like law and medicine. However, public administration has professional associations and there is some modest consensus on what graduates of public administration need to study. Public administration has its specialised academic journals and it addresses matters of the deepest concern to society. It is in this context therefore to be regarded more an academic field of study and practice. But does the legal
profession or academic discipline recognise its long-time partner – public administration? Answers to this could lie in the nature of curriculum offered by law and how far they integrate public administration. There is an inherently discrete treatment of public administration in law rather than an overt attempt. Such covert analysis is only possible to scholars of public administration who venture into studying law.

In most law schools, the curriculum is covered in a progressive manner with more theoretical and conceptual modules covered at the beginning of the law course and more practical and applied courses being covered in later years of the study programme. Most foundational courses in law cover criminal and civil matters broadly. Law curriculum also covers an administrative law course which is critical for appreciating the linkage between law and public administration, as being argued in this article. Legal courses also address themselves to constitutional law and the development of the legal profession generally among other professionally-oriented modules. The constitutional history of a country shapes the nature and structure of public administrative systems. While the politics-administration debate remains a thorny contestation in public administration scholarship, there is less contestation that administrative systems of a country are heavily influenced by politics and law.

We advocate for a renewed rediscovery of the relationship between public administration and law. Some commendable scholarship has ventured into this health debate. While in 1995, Moe and Gilmour argued that public administration programmes tended to emphasise entrepreneurial models common in the study of business rather than affirm law as the field’s proper foundation (Moe & Gilmour 1995:135) and Rosenbloom (2005:12) observed that “the legal approach to public administration had been historically eclipsed by the other approaches, especially the managerial”; analysis by Hartmus (2009) that public administrators confront constitutional law questions throughout their careers, but only a few graduate programmes even offer courses in constitutional law; is a position that needs to be expounded.

There is need to reduce the tension that has focused on three main approaches – management, public administration and law. The managerial approach favours the adoption of business philosophies in the running of governmental affairs. The public administration approach favours the use of known public values and ethos while the legal approach emphasises the legalistic lens to all issues regarding management of the public sector. From the foregoing historical trajectory, public administration used to be a darling of law and its foundational basis was the legal approach. However, the entry of the management philosophies changed these dynamics. On this subject, Christensen, Goerdel, and Nicholson-Crotty (2011:126) in their article ‘Management, Law, and the Pursuit of the Public Good in Public Administration’ point out more specifically the tension between
managerialism and legalism in public administration as having been a recurring
feature of Minnowbrook conferences and the tension had extended even to the
literature. The tension is couched in the often conflicting values of efficiency and
performance, on one hand, and legal and democratic values such as account-
ability, equality, and transparency, on the other hand.

Both law and management are important fields for our understanding of public
administration. Public law is seen as either a champion of democratic values in
the administrative process or as an unwarranted constraint on the effective im-
plementation of public programmes. Likewise, management is viewed either as
the paramount basis of the study and practice of public administration (White
1926: vii–viii) or as an offender, indifferent to constitutional values, of legitimate
public bureaucracy. This calls for an integrated approach to our scholarship and
understanding of public administration. Christensen, Goerdel, Nicholson-Crotty
(2011:128) argued that law is either a hindrance to managerial reforms or that it is
being neglected as the legitimate guiding force in management. Wilson (1887:212)
who was among the earliest advocates of the need to link public administration
to law noted the public administrative function is primarily the “detailed and
systematic execution of the public law.’ This observation was deeply rooted in
Wilson’s regard for public law as a reflection of the political will of citizens at the
time, which today may be contested on a number of grounds. Nonetheless, it was
a prominent rationale for legitimising public administration within a representa-
tive democracy. Additionally, although White’s work (White 1926: vii) is often
regarded as favouring a managerial over a legal approach to public administra-
tion, there was an early call for the integration of law and management into public
administration. White specifically wrote that law provided the immediate frame-
work within which public administration operated: defining its tasks, establishing
its major structures, providing it with funds, and setting forth rules or procedures.
In this way, it was his view that “legality becomes a primary consideration of ad-
ministrators, and legal advisers acquire an importance, which far outweighs their
strictly administrative contribution. Moreover, public administration is embedded
in law, and the student of the subject will often be with the statutes’” (White in
Storing 1965).

The fear of losing identity needs to equally find scholarly attention. Indeed,
this risk was raised by More and Gilmour (1995:135) when they reported that the
question of whether public administration was at risk of losing its theoretical dis-
tinctiveness as a discipline of study and practice needed examination. In response
to the harmful effects of efforts to subject the executive branch to management
practices more appropriate to the private sector, the authors proposed principles
which needed to reaffirm the distinctive character of public administration. These
principles were rooted in public law and provided a basic theoretical framework
through which the administrative state could be effectively managed. Properly
understood and implemented, these principles can accommodate and enhance many of the useful contemporary management concepts such as total quality management while still conforming to the requirements of the constitution for politically accountable public sector management.

Consideration of the law and the legal process is essential for students of public affairs who are preparing for responsibilities as leaders, managers, and policymakers. In their foundational courses, public affairs students will need to encounter political theories about the constitutional law framework on which administrative authority is based (Szypszak 2011:483). Indeed, Yang (2018) recently argued that, an identity crisis has plagued public administration for over a century. The core of the crisis has been how to address the relationship between public administration and the three major related disciplines – political science, management, and law. The debate on integration can effectively be used to solve the crisis. Public administration and law not only do study and develop techniques for management of society, but the two disciplines undoubtedly work in innumerable ways towards accomplishing the cohesion of society. Law is nothing other than those rules established to manage society; while public administration in its simplistic terms applies to the management of public affairs.

The harmony and working practice between law and public administration needs to be a mutual one. Moreover, the two fields have historically moved side by side on the long journey of civilization, almost without interruption. Despite this fact, most public administration scholars who have attempted to acknowledge the relevance of law to their field have had a rather limited focus to only a small field of administrative law; yet law is an expansive field that touches every aspect of society. Legal educators have also not warmed up to the need to have public administration as one of the fields worth including as their own except as a mere mention in some courses like constitutional law, administrative law, etc. While it is common for most public administration courses to have a unique course of administrative law, law courses rarely cover public administration directly. Public administration is hidden under constitutional law and history, etc. This is an unfair treatment for two sister disciplines which have walked the journey of civilization almost simultaneously. As Chase (1982) reminds us, the current divide between administrative law and public administration is not a new phenomenon, but dates back to when both fields were being born as areas of academic study and practice at the beginning of the 20th century. Early scholars of administrative law disagreed in fundamental ways about how the field should develop. Some, in particular Frank Goodnow and Ernest Freund – both political scientists as well as legal academics – saw features of internal administration as a core part of administrative law’s ambit.

Rosenbloom (1983) suggests that a synthesis of what he identifies as the three mainstays of administration – politics, law, and managerialism – might be possible, though he concludes that it will be difficult because these forces are insulated by the
constitutional separation of powers within the federal government. Cooper (1985) at the height of the NPM era of the 1980s noted that the relationship between law and administration, or more precisely between judges and administrators, could be constructive despite the fact it was most often marked by animosity. In this regard, Dolan, (1984:86) conceded that while students of public administration may probably never agree on the proper blend for the elements of their discipline and on what degree of prominence should be given to the study of management, politics, social psychology, economics, or law, lawyers view the study of administrative law with a similar ambivalence. The challenge is now whether administrative law should be approached as a traditional law school subject, a compendium of judge-made and statutory substantive rules. A legalistic approach to public administration relies on law-based priorities and processes to balance discretion/innovation and accountability (Rosenbloom 1983). For nearly a century, theorists have debated whether the managerialism advocated by White (1926) or the legalism suggested by Goodnow (1886) should provide the legitimate basis for public administration. We support the legal approach to provide a legal basis for public administration.

CONCLUDING REMARKS

Public administrators benefit from being able to better inform themselves about the law. Governmental institutions must have an intimate connection with the making, application, and enforcement of legal rules in order to be considered also as legal institutions. Students preparing for public administration also benefit from gaining a better understanding of the realities of the legal system. An understanding of the dynamics of the legal profession can also better prepare future public administrators for managing lawyer relationships and legal services budgets. Also, future students who have experience with basic legal research learn how to find useful information but, just as important, they learn about how complex the law can be and not to be too confident about what seems to be a simple answer. This capacity and awareness can be very helpful in avoiding problems.

Public affairs programmes can better prepare their graduates for dealing with their future responsibilities by giving them more than a piecemeal or superficial knowledge of the law and the legal process. The curriculum should introduce students to fundamental legal principles and the basics of the legal subjects they are likely to encounter. It should also engage students in critical thinking about legal rights and obligations and explore personal responsibility for promoting a rule of law. When seen as a synthesis of political theory, decision-making, and personal responsibility, a law-based course can not only contribute significantly to students’ knowledge about their field but also better equip them for making sound decisions with real-world consequences for themselves and the public.
NOTE

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