Comments. Roundtable on Taxation, Association of American Law Schools, 1968 Conference

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I have had over the years a number of expressions of puzzlement from Latin-Americans as to how it is that a legal system that normally bases itself on territoriality of law should, when it comes to revenue matters, base itself on nationality? They find that strange. I don't mean to speak against the 16th Amendment here; I simply report an attitude that I have detected. That attitude fits very well with an underlying latent fear, that United States private sectors foreign investment is draining out their foreign exchange resources. This is a very strongly held basic fear that has been fed now by a distorted version of Servan-Shrieber's book. All of this presents us, really, with a very serious psycho-diplomatic problem from the standpoint of the future of private foreign sector investments in Latin-America.

CHAIRMAN WOLFMAN: Thank you, Covey.

With thanks again to Prentice-Hall, let's take a coffee break.

(A coffee break was held at 10:40 A.M., and the meeting resumed at 11:00 o'clock A.M.).

CHAIRMAN WOLFMAN: I would appreciate it if you would all take your seats. Bring your coffee with you as we must get started.

Our next speaker will discuss, "Legal Education and Tax Law in the Developing Countries."

For this topic we are fortunate to have Professor William Popkin of the University of Indiana at Bloomington.

PROFESSOR WILLIAM D. POPKIN: We often forget in the United States that our approach to legal education is different from that followed in other countries. We are accustomed to law being taught in the university after college preparation; university affiliation has not, however, prevented the training from being professional, aimed primarily at preparing students for the practice of law. In much of the rest of the world, including developing countries, legal education is normally undergraduate training of a non-professional nature. In the few cases when legal education is graduate education, as in India, it still has academic training analogous to college education as its ideal, rather than professional training. The 14th Indian Law Commission Report states as follows:

"We have indicated our view that the teaching of law at the University should be confined to a scientific and academic study of the theory and principles of law.

If the university legal training purports to be professional, it emerges as vocational training and seems to fit uncomfortably in the university setting; indeed, the term “professional” is considered synonymous with “practical” or “vocational.”

Our main concern is the effect of this approach to legal education on the teaching of taxation in developing countries.

I would like to be able to discuss the teaching of tax law in developing countries generally, but my experience and the literature with which I am familiar has limited me to the English-speaking countries of Asia and Africa and the Latin American countries. I have no knowledge of the former French.

colonies. Furthermore, my acquaintance with countries in Asia, Africa and Latin America is far from complete. My information is greatest concerning India as a result of a year’s residence. My other primary sources of information are conversations with students from about twenty other countries who attended the International Tax Program at the Harvard Law School where I taught for two years and with those associated with Dean Harvey’s efforts at the Ghana law school.

This disclaimer is intended to create a healthy suspicion of the general statements which I make. My conclusions should be considered only as tentative hypotheses based on preliminary observations.

II. Former English Colonies

The English tradition dictates that university legal education be undergraduate training. Law is treated as an academic or cultural subject with professional training left to the professional bodies. This has exerted its influence on former English colonies in Africa where the LL.B., if it is offered at all, is still an undergraduate degree. In Ghana, a concession was made to the need for professional training by providing a fifth year of “practical” courses, until the reforms in 1963 associated with Professor Harvey’s tenure as dean during which a five-year LL.B. program which did not distinguish sharply between the academic and practical was adopted.

In India, the LL.B. is a graduate degree. However, the English distinction between the cultural and practical approach prevails as an ideal. Considerable pressure was brought by the Indian Law Commission in its 14th Report (although unsuccessfully) to make the LL.B. a two-year “academic” or “cultural” course, to leave practical training to the bar, and to require only two years of college training as a prerequisite for admission to law school.

The academic-practical distinction has had its effect on the teaching of taxation. As you might have guessed, tax law is considered a “practical” subject. Taxation is not viewed as an appropriate vehicle for exploring the legal history or institutions of the society.

In Ghana, tax law was restricted to the fifth “practical” year prior to the 1963 reforms. After the departure of Dean Harvey, an earlier antipathy to tax law in the curriculum emerged and there was considerable agitation to drop it entirely. Apparently, this is not an accomplished fact since Professor Hellawell from Columbia will teach tax law in Ghana this following semester.

In India, taxation is currently offered as an optional course in law schools. However, its widespread adoption is only the result of the law program being expanded from a two to a three-year course. Prior to this expansion, very few law schools offered tax law, even as an optional subject. The Law Commission had even proposed in 1959 that law

5 Aggarwal, Legal Education in India, 12 J.Legal Ed. 231, 239 (1959). A friend confirms that taxation is not in the law school curriculum in Pakistan.
teaching at the Universities should not include procedural, taxation (emphasis added), and local laws and their cognate subjects which may, with advantage, be left to be taught later to those who intend to take a professional career, in a course where teaching will be imparted by professional men.”

The Commission’s view was based on a desire to shift practical training to the profession.

The view that tax law is a “practical” subject has contributed to the tax course being a simple memorization of statutory provisions and, perhaps, the rules laid down in a few leading cases. The essence of learning tax law is to obtain information; the course is not considered useful in developing among law students the discipline of a legal mind or an understanding of the way in which law orders the interests which are at work in society.

There are two other possible reasons for the bias against university training in tax law in the former English colonies. First, there is an antagonism towards subjects involving statutes rather than common law. Second, accountants have traditionally played a greater role as tax advisors than lawyers.

It is one of the ironies of colonialism that the academic-practical distinction, the derogation of courses involving statutes; and the predominance of accountants among tax advisors are beginning to decline in the United Kingdom at the same time that these views apparently continue in the former colonies.

III. Latin America

In Latin America, the LL.B. is usually a five-year course after what is analogous to a high school level of education. Taxation is generally taught as part of a course on public finance or administrative law.

But tax law is not taught. In a public finance course, the study of taxation might consist of an analysis of direct versus indirect taxes. The time spent on such inquiries is, furthermore, limited by the interests of the instructor. Taxation must vie with such topics as government expenditure for a hearing. In an administrative law course, the concern with taxation is usually restricted to a study of enforcement procedures available to the government. Thus, the inclusion of taxation in the undergraduate curriculum in Latin America has led to its absorption into traditional academic disciplines, whereas in the former English colonies it has managed to push its way in only as a vocational course.

IV. General Considerations

A. Low academic standing of tax law

The special history of the former English colonies and Latin America is not alone in explaining the low academic standing of tax law. The low level of tax compliance and the inadequate level of tax administration in develop-

6 See note 1, supra, at 542.


8 Horack, Legal Education in the Latin-American Republics, 2 J.Legal Ed. 287, 290-91 (1950).
ing countries contribute to and reinforce this result. If delays, bargaining, obfuscation and outright fraud are a widespread practice, one can be forgiven for not devoting too much time to tax law in the universities. Professor Surrey has suggested that "universities [in South America] should institute courses in the legal aspects of tax law as well as those in fiscal policy" in order to help improve national attitudes towards tax compliance.  

Another major factor is the LL.B. graduates often become civil servants, which includes a significant number of lower level judgeships; many students also seek undergraduate training in law as part of their educational background. The study of tax law seems less relevant to them than other subjects.

The failure to teach tax law often leads LL.B. graduates who want to specialize in taxation to work for several years for the government, in much the same way that students in the United States work for the NLRB or SEC. This provides both substantive knowledge and a familiarity with how to get things done. In Pakistan, Mexico and Brazil, special tax courses have been offered to practicing lawyers seeking specialized vocational training under non-university auspices.

B. Low academic quality of tax teaching

The low academic quality of tax teaching cannot be isolated from the quality of legal education generally. We have noted the vocational quality of teaching tax law in the former English colonies. But all law teaching tends to be vocational in developing countries in the sense of being one-dimensional, whether it purports to be academic or practical in its approach. Thus, in Latin America, where taxation is part of an academic course, the approach is highly abstract. Outdated public finance texts by continental authors make no reference to the economic or social data of the developing country. In the administrative law course, the "nature" of the sovereign's claim based on a government assessment, as compared with a claim for a private debt, would provide the framework for discussing the rules governing tax collection. There is little critical analysis, problem solving, history or economic and social data to give depth, whether the course is taught under the heading of public finance or tax law.

Poverty in developing countries is a contributing factor. Human resources are often a neglected investment. Outdated books and part-time teachers who teach to supplement their income are frequently all that the society is willing to pay for. Both factors contribute to a superficial approach to legal subjects.

The democratization of education and population growth have put considerable pressure on educational institutions to admit students. In former English colonies, the result has been that fluency in English has declined, at the same time that it continues as the language of legal education. It is obviously hard to engage in meaningful lectures or discussion when intellectual and verbal skills are low.

Surrey, Tax Administration in Underdeveloped Countries, in Bird & Oldman, Readings on Taxation in Developing Countries 479, 523 (Johns Hopkins, 1967: Rev. Ed.).
V. Future Reforms

What will be the pattern of reform of tax teaching, if it is attempted at all, and what role can it play in the reform of legal education?

In South America, the obvious first step is to emancipate taxation as a separate course, as has been done this year in Mexico. This step, however, is a procedural one and does not affect content.

There are attempts to develop tax courses in Latin America which are not superficial examinations of tax statutes or abstract explorations of economic theory, but which stimulate students to consider the economic and social significance of the tax law for their country. The Harvard-Chile Tax Project has such a separate course in tax law as one of its goals and will produce a book for class use which has this objective. In Brazil, the Ford Foundation is sponsoring a graduate studies program for prospective law teachers which deals with many facets of business law, including taxation, in a manner designed to produce law teachers capable of dealing with both the economic and legal aspects of their subjects.

These attempts seem well-grounded in the Latin American tradition that taxation should be taught as part of a public finance course. The addition of tax law makes it likely that the course will take on a flavor similar to those interdisciplinary courses in this country which are most responsive to the demands of non-lawyers, prospective teachers or lawyers planning to work in the public sector rather than private practice.

In the former English colonies, the first step is to obtain full acceptance for tax law in the curriculum. There is evidence of considerable progress in this direction in addition to the Indian and Ghanaian experience noted above. East Africa, with the aid of Professor Hiller from Valparaiso in developing teaching materials, has introduced tax law into the curriculum. Ceylon will teach taxation beginning next year.

However, the process of reform in the former English colonies is not likely to have the heavy interdisciplinary flavor which will probably develop in Latin America since there is no tradition that a tax course serve as a vehicle for examining significant public law issues. Reform might, therefore, be closer to the pattern to which we are accustomed. Critical analysis, statutory interpretation and problems might be emphasized, rather than economic and public policy considerations.

The demand for law courses to serve the needs of those not planning to practice law will probably push the tax course to the end of the LL.B. program, rather than into an interdisciplinary mold. For example, when Professor Harvey was dean at Ghana, it was expected that certain courses, not including taxation, would be suitable for B.A. students seeking a concentration in law and that some students would graduate with a B.A. with honors in law after only three years of study which excluded taxation. Only LL.B. students, who planned to practice law, would complete the five-year course including tax law.

When Professor Bittker visited Ghana he proposed that the tax course be used for raising issues of public policy but the proposal could not be acted upon at the time. Perhaps the English tradition made it more difficult to
introduce a tax course with a heavy interdisciplinary content. The placing of taxation in the earlier years of the curriculum to be taken by those not planning to practice law would certainly be more likely to result in adopting Professor Bittker's suggestion.

I would urge, furthermore, that the reform of tax teaching has a significant role to play in the process of reforming legal education generally in developing countries. Myrdal has asserted that a major difficulty in developing countries is "a general lack of social discipline," referred to as a "soft state," by which he means a lack of law observance and enforcement, collusion by public officials with powerful persons whom they are supposed to regulate, a resistance to public control and corruption.\(^\text{1}\) He further asserts that there are "reasons for hope that American students of social science and law [will] begin to make really significant contributions in laying bare the facts of the soft state in underdeveloped countries and to investigate also the practical and political problem of how gradually to improve the possibilities for development by strengthening the state." Part of the improvement process should be the improvement of legal education. And within the legal curriculum there is certainly no more suitable vehicle for the examination of problems of the "soft state" than a study of the substantive law and administrative and judicial machinery by which private resources are transferred to the public sector, i.e., a study of taxation.

\(^\text{1}\) Myrdal, The "Soft State" in Underdeveloped Countries, 15 UCLA L.Rev. 1118 (1968).