

The Contemporary Tax Journal

Volume 9
Issue 2 *The Contemporary Tax Journal Volume*
9, No. 2 – Summer 2020

Article 5

7-13-2020

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Recommended Citation

Loayza Jordán, Fernando J. (2020) "A Peruvian Tax Lawyer in a U.S. Corporate Tax Class: What Can be Explained and What Cannot be Explained," *The Contemporary Tax Journal*: Vol. 9 : Iss. 2 , Article 5.
Available at: <https://scholarworks.sjsu.edu/sjsumstjournal/vol9/iss2/5>

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A Peruvian Tax Lawyer in a U.S. Corporate Tax Class: What Can be Explained and What Cannot be Explained

Fernando J. Loayza Jordán¹

The title of this paper is, in part, borrowed from Professor Mirjan Damaska's paper, "A continental lawyer in an American Law School: trials and tribulations of adjustment."² I have adjusted it because my experience is obviously not as broad as Professor Damaska's, and our interests are different. I do not feel confident enough to consider myself a representative of "a continental lawyer," hence the reference to my home country. My experience in U.S. legal education is limited to my experience as an LL.M. candidate in a single law school that many would characterize as different from most U.S. law schools.³ That is why I refer to "a U.S. corporate tax class." I also changed the part of "trials and tribulations of adjustments" for "what can be explained and what cannot be explained" because I am much more interested in explaining what is taught in a U.S. corporate tax class (and why is taught in a particular manner) from a comparative perspective.

Thus, this paper is more of an ethnographic comparison, inspired by classroom experiences, between U.S. and Peruvian tax law education than what Garbarino calls "hard-nose comparative work" that requires an underlying theory and a clear methodology.⁴ It is also different from most comparative works because it is not actually about an area of law itself but about how it is taught and why, visiting some of the most critical variables in legal education.⁵ Nevertheless, I have tried to keep in mind the main critiques of comparative tax studies that could also become errors in the comparisons that I intend to draw.

¹ Yale Law School, J.S.D. expected 2025; Yale Law School, LL.M. 2020; Pontificia Universidad Católica del Perú, LL.B. 2016. Thanks to Mirjan Damaška, Steven Dean, and James Whitman for reviewing previous versions of this paper and particularly to Anne Alstott for her valuable comments and all her kind encouragement during my LL.M. year. Special thanks to the kind commentators of the 23rd Annual Critical Tax Conference at the University of Florida Levin College of Law.

² Damaška, Mirjan. "A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment." *University of Pennsylvania Law Review* 116, no. 8 (1968).

³ There are plenty of references to the uniqueness of Yale Law School. My personal favorite is the description of David Lat, a Yale alumnus himself: "For starters, is Yale Law truly a 'law school'? The school takes a highly theoretical, interdisciplinary approach to legal education that arguably takes the 'law' out of 'law school' (at least if we construe 'law' as black-letter legal doctrine). Yale Law is a great something — writer and YLS alum Elizabeth Wurtzel describes it as 'a cult of the Fourteenth Amendment... that happens to have a registrar's office' — but that something might not be a law school (at least if we view law school narrowly, as a place that teaches students legal doctrine so they can practice law)". *Why Yale Law School Isn't the Number-One Law School (In the ATL 2018 Law School Rankings)*. Above the Law Blog. June 7, 2018. Available at: <https://abovethelaw.com/2018/06/why-yale-law-school-isnt-the-number-one-law-school-in-the-atl-2018-law-school-rankings/?rf=1>.

⁴ Carlo Garbarino. *An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research*. In: *The American Journal of Comparative Law*, Vol. 57, No. 3 (Summer 2009), p. 685.

⁵ According to Jakab's overview, those variables would be the aim of legal education, content of teaching, method of teaching, structure and evaluations and examinations. András Jakab. *Dilemmas of Legal Education: A Comparative Overview*. In: *Journal of Legal Education*, Vol. 57, No. 2 (June 2007), pp. 253-265.

These critiques are related to the fact that “comparative” studies are “often limited to the description of foreign tax laws”⁶ with no context of the tax system in which they are located and its social and institutional framework. This is particularly dangerous in tax law because “Tax law is very much about local context. It is the very essence of the political orientation of any regime in any given jurisdiction. Significantly, unlike some other areas of law, this politicized characteristic of taxation is clearly evident.”⁷ In this vein, I will avoid a simply descriptive tale of how a particular aspect of taxation is taught in both countries, always trying to explain the differences between them by the way its tax legal education is structured, by the features of their legal systems or by their socioeconomic framework.

This could be interesting for Peruvian tax lawyers, but besides some gentle U.S. scholars that might find interesting to read the perspective of a visitor on how they have been teaching tax law, why would it be interesting or useful for U.S. readers to compare its tax legal education with the one from a small country in South America? I would suggest two answers: (i) tax law has developed a common international language that makes it easier to draw comparisons between the content of tax courses and (ii) Peru is the opposite of the U.S. in several ways. These two factors allow to more easily describe the differences between the two tax systems (and how they are taught) and to analyze by contrast whether those can be explained by structural differences between both countries.

I have emphasized the relevance of local context for the comparative study of tax law, and indeed, I believe that this makes it harder to draw comparisons between components of different domestic tax regimes without diving deep in its contexts. But tax law also has a relevant advantage in comparative studies. It is easier to compare⁸ because, in contrast, for example, with private law, in which the categories used by Civil Law countries can be extremely hard to “translate” to Common Law categories, tax law categories have been undergoing a process of profound global homogenization for a while now.⁹ From an international tax practice

⁶ Carlo Garbarino. An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research. In: The American Journal of Comparative Law, Vol. 57, No. 3 (Summer 2009), p. 679.

⁷ Omri Y. Marian. The Discursive Failure in Comparative Tax Law. In: The American Journal of Comparative Law, Vol. 58, No. 2 (Spring 2010), p. 465.

⁸ In contrast with Garbarino, who thinks that, on the contrary, tax concepts from different domestic tax regimes are often not easily comparable, pointing out that “[t]he problem with tax concepts is that they can often not be compared directly as they are not readily convertible into each other. In certain cases, similar terms do not have an identical legal meaning while in other contexts, different terms may mean the same.” Carlo Garbarino. An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research. In: The American Journal of Comparative Law, Vol. 57, No. 3 (Summer 2009), pp. 687-688.

⁹ The OECD has played a leading role in this homogenization process. It must be noted that, throughout time, the OECD has always chosen to influence domestic legislations by offering practical solutions to public policy problems, instead of issuing binding instruments for OECD States. This has enabled the OECD to expand its scope of action, allowing it to exert influence even in non-OECD States. This practice has been named “governance through soft law” and has turned the OECD into a sort of informal “World Tax Organization”. The outcomes of this strategy have clearly been successful: the OECD Model for Tax Treaties, the OECD Transfer Pricing Guidelines, the BEPS Project Actions and other numerous reports on tax issues are now world standards to deal with a wide variety of tax issues and have largely contribute to developed a common language between tax experts all around the globe. Regarding the “soft law” strategy of the OECD, see Marcussen, M. (2004), “OECD Governance through Soft Law”, in MÖRTH, U. (ed.), Soft Law in Governance and Regulation: An Interdisciplinary Analysis, Edward Elgar, Cheltenham

perspective, tax consulting is never about knowing the domestic tax legislation of every country involved, but about knowing an internationally shared tax language. That *tax Esperanto* is useful, on the one hand, to ask the appropriate questions to foreign colleagues and correctly understand their answers, and on the other, to respond to similar questions in the same common language and to comprehensively explain to the foreign counterpart those specific aspects of the domestic tax legislation that are outside of the mainstream categories of that common language.

On the other hand, Peru is the opposite of the U.S. in several factors that are relevant for this comparative analysis, as I will further explain through the paper: Peru is mainly a capital importing country, has a relatively weak government, is a small economy in the globalized context, and has a system of legal education informed by a formalist Civil Law tradition. These factors can explain most of the differences that will be analyzed but will not explain others. Those last may be explained by undesirable factors such as path dependency or intellectual laziness. This will be the most important contribution of the paper: to point out those aspects of the U.S. and Peruvian tax legal education that cannot easily be explained by their context, because those are the aspects that probably need to be rethought by tax professors.

This Article proceeds as follows. Section 1 compares how U.S. and Peruvian tax law courses fit in their respective law curriculums. Section 2 compares how each tax curriculum is designed and how tax courses in them interact with each other. Section 3 compares the content of corporate income tax courses and how they are taught in each country. Section 4 concludes summarizing which features of tax legal education should be questioned and presenting a warning on the influence of Big Law firms on the content of tax courses.

1. How Tax Law Courses Fit in the Law Curricula

U.S. law curricula are notably flexible. Depending on the law school, usually, at least two-thirds of the curriculum is customized by the students, who are able to choose among a broad selection of elective courses. Prerequisites for the elective courses tend to be limited, to allow more flexibility. Under the Yale Law School curriculum, for example, a student may take her first tax course, Federal Income Tax I, during her first year in law school, without having any previous experience in administrative law or in interpreting statutes and could take her Federal Income Tax II course (that includes corporate income tax) immediately after, without having taken any corporate law course before.

Besides the general flexibility already mentioned, this is possible, in part, because of the relative independence of U.S. tax law from other areas of law. The Internal Revenue Code structures its own categories, and those concepts that need further clarification are defined by the courts with reference mainly to tax law, and not by other bodies or sources of law. This

(UK), Northampton (MA, USA), pp. 103-126. Regarding the role of the OECD as an informal “World Tax Organization”, see Cockfield, Arthur, “The Rise of the OECD as Informal ‘World Tax Organization’ Through National Responses to E-Commerce Tax Challenges”. *Yale Journal of Law and Technology*, Vol. 8, p. 136, Spring 2006.

independence is what Legosmky has identified as the discreteness of an area of law¹⁰ and is part of the arguments that support tax exceptionalism as *“the notion that tax law is somehow deeply different from other law, with the result that many of the rules that apply transsubstantively across the rest of the legal landscape do not, or should not, apply to tax.”*¹¹

However, this flexibility and lack of prerequisites also impose severe limitations on the content of tax law courses. Without having studied *Chevron*¹² in an Administrative law class, it is hard to discuss *Mayo Foundation* and how tax law should or should not receive special deference from the courts.¹³ Without previous knowledge of corporate law, its rather difficult to go deep on issues around transactional taxation, including a comprehensive understanding of the policy substance of antiavoidance rules for mergers and acquisitions.

In contrast, the Continental Law tradition is built on structuralism. The first part of Continental Law education, usually (and in the case of the Peruvian legal education, always) offers an introduction to jurisprudence and a “panoramic presentation” of the most important fields of law.¹⁴ Peruvian legal curricula, following such panoramic structuralism, situate tax law as part of public law and, therefore, require students to take a couple of constitutional law courses and at least one administrative law course before allowing them to register in the first tax course, which is compulsory for most of the Peruvian law students. With that knowledge, it is easier for students to draw analogies between the constraints on the Public Administration power in

¹⁰ Legosmky, Stephen H. *Specialized Justice: Courts, Administrative Tribunals, and a Cross-National Theory of Specialization*. Oxford: Oxford University Press, 1990. Oxford Scholarship Online, 2012, p.26-28.

¹¹ Lawrence Zelenak, "Maybe Just a Little Bit Special, after All?" *Duke Law Journal* 63, no. 8 (May 2014): 1901.

¹² *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is one of the most important decisions in U.S. administrative law. Through it, the Supreme Court established a test for determining when to grant deference to a government agency's interpretation of a statute under its control. For an overview on the doctrine set by this decision, the “Chevron deference”, see Brannon, Valerie C.; Cole, Jared P. (September 19, 2017). *Chevron Deference: A Primer*. Washington, DC: Congressional Research Service.

¹³ *Mayo Foundation v. United States*, 562 U.S. 44 (2011), is a United States Supreme Court case in which the Court clarified that the Chevron deference applied also to tax provisions, stating that it would not be wise to *“carve out an approach to administrative review good for tax law only”*. *Mayo Foundation* constituted a huge change in the perception of the uniqueness of tax law and, as Coder pointed out, a (perhaps mortal) wound on the idea of tax exceptionalism: *“The tax world finally recognized a stark fact of life in 2011: Tax law is not special. It took an explicit Supreme Court statement for the tax bar to become aware of its run-of-the-mill status, but that statement has prompted soul-searching [B]y and large the field assumed for decades that its unique set of issues required specialized legal treatment when it came to litigation postures, judicial deference, and administrative procedures. That notion was turned on its head [by Mayo]”* Jeremiah Coder, Year in Review: Tax Law's Vanity Mirror Shattered, 134 *TAX NOTES* 35 (2012). For a more detailed review of *Mayo Foundation*, see Hall, Michael. "From Muffler to Mayo: The Supreme Court's decision to apply Chevron to Treasury regulations and its impact on taxpayers." *Tax Lawyer*, Spring 2012, p. 695+ and Dmitry Zelik, "Student Tax Notes: Chevron Deference In Tax Law Following The Supreme Court's Decision In Mayo Foundation V. United States" *Michigan Tax Lawyer*, 38, 22 (Fall, 2012).

¹⁴ *“In addition to an initiation into the grammar of law, the Continental student is also offered what would, to an American lawyer, appear to be a panoramic presentation of the most important fields of law. This comprehensive view of the whole is considered to be of utmost importance. It is feared that if the young lawyer fails to perceive the great contours of private and public law in school, he will seldom acquire an overview later in practice. Entangled in the jungle of practical problems, he will be deprived of the guidance that comes from an awareness of the totality of law in his particular field”*. Damaška, Mirjan. "A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment." *University of Pennsylvania Law Review* 116, no. 8 (1968): 1367.

general and on its power to tax, collect and administer those taxes at different governmental levels. The discussion about the application of the Peruvian General Administrative Procedure Act appears almost immediately, in contrast with the discussion about the application of the U.S. Administrative Procedure Act, which is rarely developed in U.S. tax courses.¹⁵

Also, by the time Peruvian students are allowed to take their first tax course, they have also taken plenty of private law courses. This is necessary given that several concepts in tax law are built upon private law concepts. For example, the concept of “property transfer” in the Income Tax Law has its own tax definition, but it is built on private law concepts borrowed from the Peruvian Civil Code. Students are also required to take corporate law before taking any courses involving corporate tax because this last also relies heavily upon concepts from the Peruvian General Corporations Act (for example, to define what kind of corporate reorganizations are considered neutral for corporate tax purposes).

The introduction to jurisprudence allows Peruvian students to become familiarized with a general legal framework: the system of sources of law,¹⁶ the hierarchy between different statutes and regulations, methods of interpretation, and general legal principles. This way of shaping their legal minds immediately pushes them to situate tax law in this framework and to raise questions about the issues in which their learned categories do not seem applicable. That is why there is no need to explain the place of Tax Authority regulations in the system of sources of law in a Peruvian tax class (they have already learned the place of regulations within the classic Kelsen hierarchy scheme¹⁷) while in a U.S. tax class, it is explained incidentally (and students don’t find it a really relevant issue). That is also why, when a U.S. professor explains that tax provisions usually are deemed in force from the date they were presented as part of a bill, i.e., before they were passed by Congress, little concerns are raised by U.S. students regarding the retroactive application of a tax provision. Peruvian students would be scandalized by such a violation of the general principle of legal certainty.

¹⁵ An interesting analysis on the compliance of the US Treasury with the Administrative Procedure Act can be found in Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 *Notre Dame L. Rev.* 1727 (2007).

¹⁶ As Whitman points out “*The question, “what are the sources of law?”, is one that is not often asked in the United States. Unlike lawyers in the civil law tradition, Americans possess no developed doctrine of the sources of law. The difference is indeed striking. Every introductory text in every civil law country begins with an orderly account of the different sources of law, of their hierarchy, and of the methods used in interpreting them. (...) No such orderly account, by contrast, is ever given of the sources of American law. Indeed, the very phrase “sources of law” is unfamiliar to most American lawyers, and readers in search of a rudimentary account of the sources of American law will search in vain. This state of affairs will seem bizarre to lawyers trained in the civil law tradition, but it is unsurprising. Americans do not, in general, think systematically about their law. The absence of any carefully worked out doctrine on the sources of law is only one symptom of a characteristic American toleration for disorder in the legal system – a toleration for multiple methodologies, jurisdictions and forms of authority. There is no single authoritative account of the sources of American law (...) American law remains a jungle. It has never become the kind of well-tended cropland that we discover in the civil law tradition*” James Q. Whitman. *The Sources of American Law*, pp. 1-2.

¹⁷ The Kelsen scheme has been highly influential in the Continental Law legal education. Most of Continental Law jurisprudence manuals have a reference to Kelsen when explaining the hierarchy principle between sources of law. See Kelsen, Hans (1960) [1934]. *Pure Theory of Law*. Translated by Knight. Berkeley, CA: University of California Press.

While Peruvian students, trained in the formalistic structuralism described, are concerned about fitting tax concepts into categories or denouncing how they don't fit in them, U.S. students are much more concerned about the practical consequences and policy issues that arise from the tax law. This is an inheritance of the legal realism that has dictated the U.S. legal training for several decades now.¹⁸ We can illustrate this difference with the way that students react to the theories or definitions of income. When a U.S. student is taught the Haig-Simons definition of income,¹⁹ her first reaction would probably be to assess its desirability or its consequences for the taxpayer activities. For a Peruvian student, it will be a new category, and therefore, her next move would be to try and fit tax provisions into that category and to understand the differences between such category and others.

2. How the Tax Curriculum is Designed

The first difference between U.S. and Peruvian tax curriculums is that in the latter, the first tax course is a general tax course, not about any specific tax unlike the U.S. curricula, in which the first tax course is associated with the Federal Income Tax on individuals. The Peruvian tax curriculum starts this way following the mentioned Continental Law tradition of providing a panoramic view before deepening in the specifics. It is also due to the custom in Peruvian Law Schools (and in most Continental Law Schools) of designing black letter law courses following the structure of the statutory bodies related to them. For example, Private Law courses tend to follow the structure of the Civil Code. In the case of tax, Peru and most of the Latin-American countries have a General Tax Act or a General Tax Code whose provisions apply to all taxes as default rules when their respective statutes don't have specific provisions. In these countries, the first tax courses are dedicated in large part to study the provisions on this General Codes and the issues arising from them.

What does the content of this General Tax course look like in Peru? It usually starts with a definition of the kinds of government-imposed obligations that can be categorized as taxes, an explanation of which are the categories of taxes and the presentation of the constraints that the tax provisions in the Constitution establish to limit the power of the different government bodies to impose each of these taxes. While doing this, students are introduced to the main taxes in the Peruvian system, learning about their main features in a nutshell. After that, the course goes on to comment on tax jurisprudence issues, such as the interpretation methods of tax provisions, the applicability of non-tax provisions to tax contexts, when tax provisions enter in force, among others. Then it usually presents the structure of a tax obligation and its

¹⁸ For a valuable overview of U.S. legal realism see Tamanaha, Brian Z. 2009. Understanding legal realism. *Texas Law Review* 87, (4) (03): 731-785 and Leiter, Brian. "Legal Realism and Legal Doctrine." *University of Pennsylvania Law Review* 163, no. 7 (2015): 1975-984. To contrast what might be called classic legal realism or old legal realism with the new legal realism, see Stewart Macaulay, *The New versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 *Wis L Rev* 365 (for a broad definition of new legal realism) and Miles, Thomas J., and Cass R. Sunstein. 2008. The new legal realism. *The University of Chicago Law Review* 75, (2) (Spring): 831-851 (for a narrower definition of new legal realism, limited to judicial decision-making).

¹⁹ In tax literature in Spanish is best known as the consumption plus net worth increase income measure or criteria, referring to the Haig-Simons formula $I = C + \Delta NW$, where C = consumption and ΔNW = change in net worth.

components: the taxpayer and other subjects that are liable for tax, the content of tax obligations (that may include, besides the main tax debt, fines and interests), how tax obligations are fulfilled, their general statute of limitations, and other central features of those obligations. Finally, there is also an introduction of the interactions between the Peruvian Tax Authority and taxpayers and the procedural rules that regulate tax disputes at an administrative level (tax audits, tax claims before the Tax Authority and tax appeals before the administrative Tax Court).

On the other hand, besides a brief introduction to the U.S. tax system in the introductory class of the first US tax course, all the content of such course addresses the Federal Income Tax on US individuals, without mentioning any of the issues taught in a Peruvian General Tax Course. This fact certainly raises the question of how useful it is to teach such content to Peruvian law students and how necessary it is to teach it before Income Tax. It is my impression that some of that content could be spared, but that the General Tax Course does provide to the students the tax language that most Peruvian tax statutes use. I also believe that the different content in the first course is highly influenced by the different design of the tax statutory bodies and that if the U.S. had a similar tax statutory body design as the Peruvian, general tax code plus a statute for each tax that is informed by such general tax code through shared concepts and default rules, the first tax course would need to address at least part of the content of such general tax code.

The fact that no comprehensive general overview of the U.S. tax system is provided at any point in the US students' legal education seems particularly problematic given that, in contrast with the Peruvian case,²⁰ there is taxation at several levels: federal, state, local and special-purpose governmental jurisdictions. There appears to be little discussion about how these different levels of taxation interact²¹ and, in general, how different taxes interact. There is a particular disdain for taxation outside of the federal level, and almost no attention is granted to property or sales taxes, even though they can be tremendously relevant for the budget of several states.²²

The considerable amount of constitutional content in the Peruvian general tax course and the lack of constitutional discussion on U.S. tax courses can be explained as a result of the longevity of the U.S. constitution and the youth of the Peruvian constitution:²³ the tax provisions in the

²⁰ Regional and local governments in Peru do have limited taxation power but is limited to finance some very basic public services. For example, it is strictly forbidden for them to impose any kind of income or sales tax.

²¹ I clearly remember that when I learned, while an intern in a Peruvian law firm, that a resident in New York City could be taxed with a Federal, State and City income tax at the same time, my mind became dizzy of all the possible jurisdiction and multiple internal tax issues that could arise from that fact. I expected those issues to be a central part of the introductory US tax courses. My expectations were clearly unfounded.

²² In several cases, such as Texas, Wyoming, Nevada and Washington, where no state income taxes exist (neither on individuals or corporations) property and sales taxes are almost all their own-generated income. See State and Local General Revenue, FY 2015. Tax Policy Center. Available in: <https://www.taxpolicycenter.org/statistics/state-and-local-general-revenue>.

²³ Peru's current constitution was issued in 1993, under the authoritarian dictatorship of Alberto Fujimori. It is interesting to note that during the XX century, Peru issued 4 constitutions: in 1920, 1933, 1979 and 1993. There is a huge difference between the tax provisions in the first two and the latter two, which were much more detailed in

Peruvian constitution are much more detailed than in the U.S. constitution because they were approved when tax systems were much more complex. The U.S. Constitution barely has some regulation on its government taxing power in accordance with a time in which tax systems were quite primitive²⁴. In contrast, the Peruvian constitution, not only regulates which institutions exercise taxing power (the most basic and standard tax provision in constitutions) in article 74, but also certain constitutional principles and limitations that must be respected for the creation, modification, and repeal of taxes (both in article 74 and in article 79). Also, the Peruvian constitution gives taxation a unique character by forbidding its regulation during sensitive periods: it is expressly forbidden to subject tax rules to referendum (Article 32), to issue emergency decrees containing tax matters or to include tax rules in budget laws (Article 74). In what could be judged as an excess of detail, the Peruvian constitution even regulates the temporal aspect of the entry into force of annual taxes in the mentioned article 74.²⁵

After taking the general tax course, the following Peruvian tax course is usually dedicated to Income Tax (both on individuals and on corporations, both foreign and domestic) and sometimes also Value-Added Tax (VAT).²⁶ This second course is intended to be introductory and to be complemented by elective courses afterward, such as specific courses on VAT, corporate tax, International Taxation, local taxes, among others. As will be explained below, this also follows the mentioned tendency of providing a general overview before going into detail. In contrast, in the U.S. tax curriculum, even though some of the concepts of Federal Income Tax are used in the following courses, no general overview is provided. Therefore, when a U.S. student starts with any of the usually advanced tax courses (partnership taxation, international taxation, estate taxation, among others), she has had no introduction to these subjects whatsoever. Without any place in the curriculum that may help to put all this knowledge in a coherent and panoramic perspective, U.S. students could face the problem of

its regulations of the government taxing power. My preliminary research has shown that the main reason for this is that there was no need to control a government with such a weak administration and with such primitive taxing tools and that therefore it was not considered relevant to include specific tax provisions in the constitutions. That changed drastically between 1933 and 1979, period in which the government revenue shifted from tariffs and property taxes to income and consumption taxes. Regarding this change, see Contreras, Carlos. 1997. *Los Ingresos Fiscales En El Perú: Desde El Final de La Guerra Con Chile Hasta El Presente*.

²⁴ This became a problem when the need of a federal income tax arose at the end of the XIX century. The constitutional tax provisions at the time were not precisely design thinking of such tax and, therefore, the Supreme Court struck down the income tax provision contained in the 1894 Wilson–Gorman Tariff Act in the case of *Pollock v. Farmers' Loan & Trust Co.* In response, the Sixteenth Amendment was introduced in the US Constitution: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” As Jensen points out “*if the United States was going to have a workable, national income tax, the Sixteenth Amendment was legally and politically necessary in 1913*”. Jensen, Erik M. “Did the Sixteenth Amendment Ever Matter? Does It Matter Today?” *Northwestern University Law Review* 108, no. 3 (2014): 799.

²⁵ For a more detailed analysis of the tax provisions in the Peruvian constitution, see Danós Ordóñez, Jorge E. *El Régimen Tributario en la Constitución: Estudio Preliminar*. Themis, No. 29, 1994 and Landa Arroyo, César. *Los principios tributarios en la Constitución de 1993. Una perspectiva constitucional*. In: *Temas de Derecho Tributario y de Derecho Público. Libro Homenaje a Armando Zolezzi Moller*. Lima: Palestra, 2006.

²⁶ For a brief explanation of the VATs, an overview of its presence worldwide (every OECD country and more than 160 countries employ a VAT) and a proposal for a US VAT, see Graetz, Michael J. “The Tax Reform Road Not Taken - Yet.” *National Tax Journal* 67, no. 2 (06, 2014): 419-439.

compartmentalizing each area within tax law and facing tax issues from only one of those compartments. The tax isolation that came from tax exceptionalism could easily turn into corporate tax isolation or partnership tax isolation.²⁷

Some explanation should also be given to the special place that Federal Income Taxation (on individuals) has as the first tax course in U.S. curriculums, and often, the only tax course that US students take during law school. As mentioned, this content is studied only during a portion of the second tax course in Peruvian curriculums. This can be explained by the gravitating importance of this tax for U.S. revenue in contrast with its far lower impact on the Peruvian budget.²⁸ but also by the complexity of both taxes: the Peruvian Income tax on individuals is rather simple compared to the U.S. Federal Income Tax.²⁹

It also must be noted that the Federal Income Tax course content includes concepts that will be the bases of the following tax courses: tax basis, realization, imputation, among others. In that sense, it is used as an introductory course in a way that a Peruvian course on income tax on individuals could not, given that the simplicity of the Peruvian income taxation on individuals does not include several of the key concepts used for corporate taxation and other areas of tax law.

Finally, there is the issue of code reading. The Federal Income Tax is sometimes the first approach of US students to code reading, and that fact increases the apprehension that U.S. law students already have regarding tax courses.³⁰ This course is supposed to train U.S. students in the application of statutory provisions, but I found their training strange. Besides some general tips (like reading thoroughly the provisions, beware of exceptions to the general

²⁷ That is what is so special about Professor Alstott Federal Income Tax II at Yale Law School, which content includes an overview of corporate income taxation, international taxation and partnership taxation in an integrated way. I truly hope such model can be replicated in other law schools and kept in YLS.

²⁸ The relevance of the Income Tax on individuals for the U.S. budget is not only far superior to its relevance for the Peruvian budget, but to its relevance in the average of the OECD countries (which can be largely explained by the lack of presence of a VAT in the U.S. previously mentioned). According to OECD data, the tax on personal income as a percentage of the total amount of taxation represents 40.73% in the US, while the OECD average is nearly half: 23.91%. See, Tax on Personal Income 2018. OECD. Available in: <https://data.oecd.org/tax/tax-on-personal-income.htm>.

²⁹ For example, the Peruvian Income Tax does not allow any tax depreciation of assets for individuals. Also, until quite recently, almost no expenses were deductible and even today are limited. For example, only since the fiscal year 2017, housing expenses were deductible for individual income tax purposes and with quantitative restrictions. Such simplicity has always been justified by the limited resources of the Peruvian Tax Authority to handle a more sophisticated individual income taxation system, a limitation that currently affects the equality principle. The argument continues asserting that only when its resources increase, a more equitable individual income taxation system could be afforded. I believe such point has largely been reached and that is long due the duty to modify the Peruvian individual income taxation system. Such is the direction pointed out by el Grupo de Justicia Fiscal (Group for Fiscal Justice), a civic platform whose goal is to contribute to the development of more equitable fiscal policies for Peru, as a goal for the following years. See Arias Minaya, Luis. El Perú hacia la OCDE - la agenda pendiente para la política tributaria 2018-2021. Grupo de Justicia Fiscal. July 2018; available at <http://cooperaccion.org.pe/wp-content/uploads/2018/09/17071-El-Peru-hacia-la-OCDE-CORR-web.pdf>.

³⁰ Regarding the perception of students in U.S. law schools, Caron notes that "students follow the conventional wisdom that there are only two types of law school courses: tax and everything else". Paul L. Caron, "Tax Myopia, or Mamas Don't Let Your Babies Grow up to Be Tax Lawyers," Virginia Tax Review 13, no. 3 (Winter 1994): 520.

rules and be attentive to statutory definitions of concepts that are different to their ordinary meaning),³¹ it seems that the only training is familiarizing the students with the code by forcing them to read its relevant provisions for each section of the course and that students are supposed to learn code-reading by the examples of cases.³² At many U.S. law schools, there is no training on how to actually interpret the language in the code or discussions on the adequacy of applying a certain interpretation technique. The hierarchy or ponderation between interpretation methods, the importance of the place of the provision in the statutory body for its interpretation, when to resort to a plain language definition of the text or when to seek its meaning in other areas of law are all issues that are definitely not taught in a Federal Income Tax course while they are at the front center of the jurisprudence course that any Peruvian legal student takes on its first semester.

That is not to say that the Peruvian students don't face problems when interpreting tax provisions; the fact of the matter is that sometimes I wonder whether having too much background on statutory interpretation can become problematic for Peruvian students. Given that they start learning statutory interpretation in its first semester, most of the examples used in class come from the Civil Code and their mindset gets used to the provisions in that body of law which have an entirely different design than, for example, the one of the Peruvian Income Tax Law. The design of the latter can be explained by the dialectic between the tax legislator and the taxpayer: the legislator will want to tax certain manifestations of wealth, and the taxpayer will want to avoid such a tax. Given that the taxpayer will always find new structures to circumvent existing provisions, the legislator will always have to update the tax law with new anti-avoidance provisions regulating such structures. This legislative zeal to remake laws that can never be completely shielded from the elusive creativity of taxpayers results in the Frankensteinian appearance of many tax bodies of law. I believe that this normative format of very long statements followed by an infinite number of convoluted clarifications and exceptions to the same statement generates panic in Peruvian law students who review tax legislation, as much as in US law students.

3. How Corporate Income Tax is Taught

The first great difference between the way corporate income taxation is taught in Peru and in the U.S. is the general design of the content, where the differences between both legal traditions are clearly observable. The Peruvian Continental structuralism is clearly noted in the presentation of the corporate taxation content, which is divided into several variables of the corporate income tax obligation structure. Each variable is studied as a piece of a puzzle: students have to identify each different piece and learn how that piece fits with the others and how they all serve a function as part of the puzzle as a whole. Those variables respond to a general structure of tax obligations already developed in the mentioned General Tax Course:

³¹ For example, in the Federal Income Tax course syllabus (Fall 2019) at Yale Law School, by Professor Zachary Liscow, code-reading hints can be found, such as: "Code-reading hint #1: If you think you've read enough, you're likely wrong. Keep reading. Sometimes the rule that is given is reversed nearly 180 degrees by later material".

³² As Professor Alstott pointed out, this is possibly an unconsidered "hangover" of using the case method in a statutory course.

the objective variable (what is income for corporate tax purposes?), the subjective variable (which entities are considered corporate income taxpayers?), the timing variable (when is income recognized or realized?), the jurisdictional variable (when corporate income is considered taxable following the residence and source variables?), the measurement variable (how to value and determined corporate income?), the quantitative variable (what tax rate is applicable?), among others.

In contrast, U.S. legal realism clearly inspires the functional approach to the U.S. corporate income taxation content, which is taught following the life of a corporation. As it is said that a human being is born, grows, reproduces, and dies, it can be said that a corporation is incorporated, generates profits, distributes them, and dies (through corporate liquidation or a reorganization via merger or acquisition). The U.S. corporate income tax is taught following the development of such life, analyzing each of these “corporation life” steps. Given the emphasis on functionality, U.S. courses could not perform the segregation that their Peruvian counterparts do, because it would be impossible to explain the tax impact of each step without all the aspects that the Peruvian courses disaggregate. It would be impossible to explain the tax consequences of an incorporation process without grasping all of the variables of corporate taxation. That is why a Peruvian student will only be able to fully understand the latter at the end of the course, while the U.S. student already knows everything about the taxation of the incorporation process after finishing the corresponding corporate formation module. But, on the other hand, given the disaggregated design, Peruvian corporate taxation courses dedicate a certain time to integrate all the aspects studied and wrap up its content in the same way that they introduced it: through a panoramic view. Even though in my case that was done through the module on integration,³³ it is my impression that most U.S. corporate taxation courses do not dedicate enough time to put all the pieces together.

In other words, Peruvian corporate taxation is taught through each of the aspects of the corporate tax structure as a whole, and its U.S. counterpart is taught following each of the steps under which a corporation goes through given its purpose and functions. These differences are reflected, to a certain degree, in the way the U.S. Internal Revenue Code and the Peruvian Income Tax Law are structured. On the one hand, most of the aspects of corporate formation, distributions, reorganizations, and liquidations are established in Subchapter C, rarely having to resort to other parts of the IRC to determine the tax treatment of these transactions. On the other, each of the sections of the Peruvian ITL is dedicated to one of the aspects of the corporate tax structure previously mentioned and, therefore, it is impossible to assess the tax treatment of any of the mentioned transactions without jumping from one section of the Peruvian ITL to another. I haven't found any convincing argument to assess whether in the U.S. case the IRC influenced the way of teaching or if the way of teaching influenced the IRC, but in the case of the Peruvian Income Tax Law, it was definitely the first, following the general tendency of the content of the courses following the structure of the statutory bodies related to them.

³³ Again, this seems a particularity of the Professor Alstott Federal Income Tax II content. Integration does not seem as a usual part of U.S. introductory tax courses.

U.S. corporate taxation courses often take certain premises for granted, without any mayor discussion, in order to be able to go through its content. The most relevant of the obviated premises is the jurisdictional issue. During most of the U.S. courses, the tax treatment explained is limited to U.S. corporations receiving U.S. source income, despite the fact that it is hardly ever explicitly clarified. This would be scandalous for Peruvian standards, given that the discussion of the jurisdictional criteria, residence and source, are part of the first main tax concepts that are taught in a Peruvian Income Tax course. Under the U.S. course design, any reference to these criteria, to non-resident taxation and to foreign income taxation, is deemed as an international taxation issue and set aside from the content of the corporate taxation course. In contrast, no Peruvian Income Tax course would be deemed complete without incorporating all of these issues.

This can be explained in part by this differentiation of corporate taxation and international taxation in the U.S., but also by the relevance of non-resident taxation for the Peruvian revenue. The fact that Peru is mainly a capital importer generates that much more attention is provided to withholding taxes on non-residents, source rules, and rules applicable to branches and permanent establishments. In contrast, in the U.S., little attention is paid to these issues in the corporate tax course (i.e., no explanation about U.S. branches of foreign corporations is usually provided and almost no elaboration on the permanent establishment concept) and much more attention is given to outbound taxation issues, such as CFC rules (Subpart F of the IRC) or foreign tax credits (even after the 2017 tax reform that dramatically reduced the cases in which corporations are taxed for foreign income). In contrast, until relatively recently, Peru had no CFC rules³⁴, and the foreign tax credit rules were quite primitive, with the indirect foreign credit just entering in force in 2019.³⁵

Another relevant difference is how dependent the Peruvian corporation taxation is on corporate law concepts. As mentioned, by the time Peruvian students are allowed to take corporate taxation, they have already taken at least one corporate law course. Therefore, concepts like the corporate veil³⁶ and corporate legal personhood are already assumed by Peruvian students as a given, so there is no need to explain the “alter ego” problem, which they wouldn’t find a problem, just a “natural” consequence of corporate legislation. The fact that a corporation generates profits and is able to decide whether to distribute them or not to its shareholders is not seen as a tax deferral because the corporation and its shareholders are automatically thought of as separate taxpayers. Indeed, such separation is so strong in their minds that they do not immediately recognize the double taxation problem that taxing

³⁴ The CFC rules were introduced in the Peruvian Income Tax Act in 2012 and entered in force for the 2013 fiscal year. For an overview and analysis of the Peruvian CFC regime, see Villagra Cayamana, R. A. (2013). Análisis crítico del régimen de transparencia fiscal internacional vigente en el Perú a partir del 2013. THĒMIS-Revista De Derecho, (64), 51-73.

³⁵ For a review of the new Peruvian indirect foreign credit, see Sotomayor, Pablo. El crédito por impuesto a la renta pagado en el exterior y el Impuesto a la Renta (IR) peruano. Enfoque Derecho. October 20, 2018; available at <https://www.enfoquederecho.com/2018/10/20/el-credito-por-impuesto-a-la-renta-pagado-en-el-exterior-y-el-impuesto-a-la-renta-ir-peruano/>.

³⁶ For a useful comparative work on the corporate veil see Lezcano Navarro, José Maria. Piercing the corporate veil in Latin American jurisprudence: a comparison with the Anglo-American method. Abingdon, Routledge, 2016.

corporate income and also dividends received by shareholders generates. If the problem is not presented to them from an “economic” perspective, they usually fail to see any issue because they identify two different incomes, each being taxed on a different taxpayer. This takes as to a final relevant distinction between the discussed systems: the U.S. partnership regime.

Contrary to how Peruvian students react to the double taxation generated by corporate taxation, U.S. students immediately recognize it and find it troublesome. For them, the “natural” way of taxing this income should be the partnership regime because they identify a single income that should be imputed to the final beneficiary. They haven’t interiorized legal personhood in the way Peruvian students do, so they see corporate entities as naturally tax transparent – almost as just a piece of paper. For them, corporate taxation is an exception to the should-be-rule of partnership taxation.

Some could argue that the difference between corporate and partnership taxation is based on the difference that U.S. corporate law does, providing different classes of entities: some with a more relaxed or no corporate veil (partnership) and some with a stricter corporate veil (corporation). But such an argument is quite weak. First, because the “check-the-box” regulations adopted in 1996 implied that entities could freely elect to be treated as a corporation or a partnership, with almost no regard for their corporate form.³⁷ At least from that point on, it was clear that the distinction was made for policy reasons and not for a simple desire to follow corporate law. Second, because there is no relation between the limited liability that the corporate veil provides and the transparency of an entity for tax purposes. Third, because the regulation of a U.S. partnership from a corporate law perspective is so flexible that a partnership can function almost exactly like a corporation, leaving the tax distinction between a corporation and a partnership to the decision of the partners more than to mandatory features set by the law. Therefore, the fact that there are two available regimes for U.S. entities for tax purposes is not a result of the features of the corporate law provisions applicable to such entities but merely a policy decision, as it was a policy decision for the Peruvian legislator to establish that the general rule for entities is to treat them as opaque entities for tax purposes,³⁸ as in the U.S. corporate taxation regime.

4. Some Final Thoughts and a Warning About Big Law Influence

³⁷ The most relevant exception to this freedom to choose is that U.S. entities of the type that can be publicly traded must be treated as corporations for tax purposes.

³⁸ For Peruvian tax purposes, all Peruvian entities with independent legal personhood are considered opaque. Only specific Peruvian entities with no independent legal personhood, such as trusts and joint ventures that meet certain requirements are considered transparent for income tax purposes. In the case of foreign entities, only when CFC rules apply an entity would be considered as a transparent entity for income tax purposes. This last exception is the only one in which an entity with independent legal personhood is transparent and is because of specific policy objectives: to avoid the accumulation of capital in CFC entities and to raise the tax revenue by forcing the attribution and realization of CFC profits. Regarding this policy objectives, see Villagra Cayamana, R. A. (2013). *Análisis crítico del régimen de transparencia fiscal internacional vigente en el Perú a partir del 2013*. THĒMIS-Revista De Derecho, (64), 51-73.

As mentioned, it is my belief that the most important contribution of this paper is to identify which differences between the U.S. and Peruvian tax legal education can be explained by the economic, social, and legal context of both countries and which cannot. These last should be subject to review and serve as input for rethinking the way tax law is taught in both countries.

In the case of the U.S., tax professors could question whether the content of their tax courses should include an overview of the U.S. tax system that explains both the different levels of taxation (federal, state, local, and special-purpose governmental jurisdictions) and the interaction and differences between such levels. Without any introductory jurisprudence course in the U.S. curricula, one could wonder if it would be useful to have an introductory and general tax course that addresses jurisprudence issues applied to tax law. Recognizing that several issues cannot be treated properly in tax classes given the lack of knowledge on other areas of law, it seems that the position of tax courses in the tax curricula and its prerequisites should be discussed.

In the case of Peru, one could wonder why tax law courses should be compulsory in the first place and why should so many prerequisites be demanded before taking them. Also, a Peruvian professor (and students) should ask why there is rarely any policy or functional approach to tax law in an area that is highly political and if courses should be structured following tax bodies of law without further discussion. It is also questionable whether it is necessary to spend that much time in formal content and legal categories, such as the formal structure of tax obligations. On the other hand, an increasingly complex and relevant individual income taxation might require a change in the introductory tax courses as well, given the arguments displayed before.

Finally, I would like to present a warning about the heavy Big Law influence in tax legal education, both in Peru and in the U.S. During the analysis performed for this paper, this influence has become increasingly obvious. There are mainly two ways in which this influence is exercised. The first is through their offer of jobs. Obviously, law schools should prepare students to face the labor market, and law schools will want to place their alumni in the most prestigious Big Law firms. This would favor courses of practical training and heavy information transmission, to the detriment of courses with a critical approach to the current tax law and with policy analysis. The second is through professors, who have themselves been educated at these elite law schools³⁹ and have often worked in Big Law firms (or held clerk positions for high level courts) or have been influenced by the content developed by professors of such background. Through both ways, law schools can become victims of a process through which they lose their research and scholarship purposes, and therefore, lose their capacity to train legal professionals beyond mere practitioners and to develop and offer new intellectual ideas to the academic discussion.

³⁹ Elite law schools might also be referred to as “top” or “best” law schools, such as the ranking of “Best Law Schools” by U.S. News and World Report for 2019; available at <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings>.

Such influence becomes even more negative in non-elite law schools. In the U.S. case, tax professors still usually come from Ivy-League-type schools⁴⁰ and have practiced in Big Law firms, so they are not always representative of their students, who may not be hired by these firms. In these cases, tax professors may end up teaching content that their students will not be able to apply and miss out on less sophisticated content that would be more helpful for them (e.g., state and local taxes or the regime of tax procedure for low-income to high-income clients). In the Peruvian case, tax professors in non-elite law schools rarely work at Big Law, and we could have expected them to focus their classes on their student's needs better. Regretfully, usually, that is not the case: tax professors in non-elite law schools are usually part-time professors and do not (or cannot, to be fair) invest relevant resources in designing their courses, so they basically follow the Big Law-influenced content developed by professors in elite law schools for their classes and textbooks. As in the U.S. case, non-elite law school students are not receiving a tax legal education that prepares them for the labor market they will enter (e.g., there is not enough content devoted to the special regimes for small to medium-sized businesses or to individual taxation).

There is a delicate balance between preparing students to face the labor market and surrendering legal education to Big Law demands in elite law schools. It can be dangerous both because it could lead to tax curriculums that favor pro-business positions or are too comfortable defending the law as it is, without presenting any critical approaches to the policies behind such laws. But even when the content is balanced, non-elite law school students will suffer if their law schools and tax professors do not expand such elite law school content to meet the needs the students might encounter in their careers.

⁴⁰ See Sarah Lawsky. Spring Self-Reported Entry Level Hiring Report 2019; available at <https://prawnsblawg.blogs.com/prawnsblawg/entry-level-hiring-report/>.