



NATIONAL DISTANCE EDUCATION UNIVERSITY

Faculty of Economics and Business Administration

Department of Applied Economics and Public Management

DOCTORAL DISSERTATION

**TELEOLOGICAL ANALYSIS OF THE CONCEPT OF DISPOSAL
IN THE FISCAL REGIME OF THE PROTECTED HERITAGE**

Juan Antonio Navarro Garmendia

Business Administration Degree

Law Degree

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DOCTORAL DISSERTATION SUBMITTED BY:

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SUMMARY

The teleological analysis of the concept of disposal in the fiscal regime of the protected heritage has as its aim to study the final causes that shape the legal regime of the disposals made in a protected heritage and its fiscal effects.

First of all, the state of the question is introduced. The law 41/2003 created the protected heritage and, from that moment, this legal form has received constant attention and development by the legislator, the doctrine and the jurisprudence. The analysis begins with these antecedents and the contributions about the legal regimen of the protected heritage, in general, and its fiscal regime, in particular. Particularly relevant are the difficulties concerning the concept of disposal detected in the early years of the protected heritage and recognized by the doctrine.

Secondly, a teleological approach focuses on the analysis of the final causes so it is essential to clarify these final causes of the protected heritage. For this purpose, it is necessary to focus attention on the legal nature of this new institution. Without attempting to cover all the extension of this study, this analysis shows an introduction to the legal nature of the protected heritage focusing on its substance and its normative, conceptual and jurisprudential autonomy in the legal system.

In this approach, the protection of the disabled people, *de protectione impari homini*, is considered as the guiding principle of the legal regime of the protected heritage. This principle is incorporated in its regulation, the doctrinal analysis and the existing jurisprudential decisions about this subject.

Later, the analysis focuses on the essential characteristics of the institution. These characteristics individualize and differentiate this institution from other similar ones. These

characteristics include that the protected heritage is a patrimonial entity devoted to a specific purpose and this purpose is the satisfaction of the vital needs of the holder of the protected heritage. Nowadays, there are institutions, such as the foundations and the legal dependency, that show some similarities with the protected heritage. Each one of these institutions shares one characteristic with the protected heritage. For this reason, these classic institutions are analyzed to guide and illuminate the development and definition of the legal regime of the protected heritage.

The definition of the protected heritage differs from the one of the foundation in that the first one does not have legal personality. For this reason, it is recommended to study this subject considering the antecedents of the foundations in the Roman Law. The analysis of these antecedents incorporates coherence and integration in the legal regulation of a patrimonial entity without legal personality but devoted to a specific purpose, such as the protected heritage. This analysis considers the similarities highlighting the interest in ensuring that the goods and rights of the patrimonial entity are devoted to the specific purpose, and the solutions provided by the classic jurisprudence. The autonomy of the protected heritage from the foundations is considered too, focusing on the legal personality, the duration and the beneficiaries as the main differences. This autonomy requires that the protection mechanisms that ensure that the patrimonial entity is devoted to the determined purpose must be adapted to the specific situation of each one of these two institutions. The analysis of these antecedents provides several contributions such as the identification of the group of goods and rights devoted to the purpose of the protected heritage and the importance of increasing the external supervision over the asset management.

The ultimate purpose of every good and right integrated in the protected heritage is the satisfaction of the vital needs of the holder of the protected heritage. This purpose is the same for the returns generated by the active asset management of the protected heritage. For this reason, the

analysis of the legal regime of the protected heritage requires the definition of what can be considered as the vital needs of the holder. The institution of the legal dependency has connections with the vital needs. Consequently, its study can illuminate the question. However, the concept of vital needs is wider than the needs included in the legal dependency and it is recommended to analyze the antecedents of the legal dependency in the Roman Law to identify, in a more precise way, the content of the vital needs in the legal regime of the protected heritage. A first approximation to the legal dependency can determine that the legislation, the doctrine and the jurisprudence on legal dependency of the relatives can be used to specify the cases contemplated in the vital needs definition. Nevertheless, the vital needs of the disabled people are wider than the needs considered in the legal dependency of the relatives because the disabled people have the vital needs of the people without disabilities and the needs that are generated by their own disability. This analysis contributes to the present study with the specification of the vital needs. It distinguishes a minimum core content that can be illuminated with the needs included in the legal dependency of the relatives, and an extended content that differentiates between the general vital needs and the vital needs that emerge from the disability.

Thirdly, the teleological analysis of the concept of disposal is confined to the fiscal regime of the protected heritage. For this reason, the fiscal regimen of the disposal needs an in-depth analysis. The current difficulties and inputs on this subject are initially summarized to provide the basis for the teleological analysis of this regime. The concept of disposal has evolved from the original conception reflected in law 41/2003 to the current definition, influenced by the reform introduced by the law 1/2009.

The aforementioned law 41/2003 does not provide an explicit definition of the concept of disposal but its fiscal regime generates the loss of tax incentives in certain situations. The concept

of disposal acts as material limit establishing the destination of the disposals that maintains the fiscal incentives generated by the protected heritage. This regulation states the productivity of the protected heritage as a secondary aim and the satisfaction of the vital needs of the holder as the primary objective for the patrimonial entity of the protected heritage. In this analysis, the consequences of the universal asset liability have an important practical significance. The concept of disposal acts as a time limit too. It identifies the periods when the disposals maintain the fiscal incentives of the protected heritage. It is considered the controversy about the satisfaction of the vital needs of the holder of the protected heritage in the time period set out in the aforementioned law 41/2003 and its consequences in the fiscal incentives. This analysis is illuminated by the current contributions about this question.

The reform of the aforementioned law 41/2003 introduced a legal clarification concerning the concept of disposal, as a consequence of the referenced controversy. The analysis continues updating the situation of the concept of disposal as a material and time limit after the entry into force of the law 1/2009, clarifying the scope and meaning of the legal clarification. The analysis also considers the parliamentary debate over the fiscal regime of the protected heritage and its sufficiency as an incentive for the use of this new institution. The aforementioned law 1/2009 was not considered the proper instrument to implement a reform in the fiscal regime of the protected heritage and this reform was delayed. However, the law 1/2009 includes a parliamentary mandate to the Government to elaborate a draft law to improve the fiscal regime of this institution.

Fourthly, the analysis focuses on the study of the current problems of the disposal. It is considered that the draft law that intends to improve the fiscal regime of the protected heritage does not have to focus only in the improvement of the current fiscal incentives but it should clarify the destination of the goods and rights that integrate the protected heritage. For this purpose, a

teleological analysis of the concept of disposal in the fiscal regime of the protected heritage is recommended. Relevant questions over the concept of disposal are the productivity of the protected heritage, the specification of the cases contemplated in the vital needs definition, and the ones related to the universal asset liability contained in the Article 1911 of the Civil Code.

Fifthly, the analysis considers the fiscal impact of the protected heritage in the Income Tax collection. The tax benefit in the Corporate Tax introduced by law 41/2003 was repealed by the law 35/2006. For this reason, the analysis of the effective impact of the protected heritage in the tax collection must focus on the Income Tax.

The analysis of the concept of disposal must start from real application of the protected heritage. For this reason, it is especially interesting to compare the initial forecast included in the economic report used in the parliamentary work of the law 41/2003 with the real effect observed from 2004 tax year, the first one with an effective impact of the fiscal regime of the protected heritage, to 2010 tax year, the last one with available data. This study starts with an approximation to every tax year that distinguishes between the tax payers that have opted for joint income tax return and the tax payers that have opted for individual income tax return. The aggregate data are also presented. In each one of these analysis, it is specified the number of income tax returns that apply the tax benefit generated by the contributions to the protected heritage, and the average amount of contribution. This study continues with an analysis of the evolution in the comparable period 2007-2010. This period includes the fiscal years after the date of entry into force of the law 35/2006 and it has been chosen because it is the most recent with uniform data available that allow a comparison.

In order to complement the analysis of the effective impact of the protected heritage, two tax

reform simulations are conducted. The first scenario considers an increase in the annual limit of the tax benefit for contributions to the protected heritage, similar to the reform introduced by the law 35/2006. The proposed increase ranges from 1.000 Euros to 5.000 Euros but in all cases, the effective collection impact is very small because of the few affected tax payers. The second scenario considers an increase in the number of tax payers that contribute to a protected heritage, similar to the aforementioned initial forecast included in the economic report use in the parliamentary work of the law 41/2003. This increase is supposed to be obtained by improvements in the fiscal regime of the protected heritage that differ from the increase in the annual limit of the tax benefit for contributions to the protected heritage. It is assumed that these improvements will modify the behavior of the tax payers and the 2010 fiscal year data are extrapolated to consider the effective impact in the Income Tax collection.

Finally, the teleological analysis of the concept of disposal in the fiscal regime of the protected heritage is concluded with a record of the conclusions obtained.

CONCLUSIONS

First.- The protected heritage has a regulatory autonomy that emerges from the legislator and its specific regulation, a conceptual autonomy provided by the doctrine, and a jurisprudential autonomy determined by courts. Nevertheless, the low incidence of disputes as a result of the reduced use of the protected heritage makes it difficult to obtain reiterated pronouncements that can clarify the most problematic aspects of the legal regime of this institution.

Second.- The protected heritage, as a new institution in the legal system, requires the definition of its substance. Nowadays, this definition is especially important because its legal regime is in a development process. This process can be observed in the parliamentary mandate to the Government of the second final provision of the law 1/2009. This provision has not been implemented in the stated deadline.

Third.- The legal regime of the protected heritage has the protection of the disable people as a guiding principle. This principle can be expressed with the aphorism *de protectione impari homini*. The use of the adjective *impar, imparis* aims to highlight that the disability implies an inequality. This inequality is considered in the development of the normal daily activities. The adjective underlines its connection with the Article 9.2 of the Constitution that entrusts the protection of the disable people to the judiciary, legislative and executive powers.

Fourth.- The institution of the protected heritage is a patrimonial entity devoted to a specific purpose. This essential characteristic is shared with the foundations but it differs from them in the legal personality, the beneficiaries and the duration.

Fifth.- The study of the protected heritage in the light of the foundations antecedents in the

Roman Law allows to highlight several procedures to ensure that the goods and rights of the protected heritage are devoted to the satisfaction of the vital needs of the holder of the protected heritage. These procedures are the identification of the goods and rights devoted to the specific purpose and the external supervision over the asset management.

Sixth.- The current protected heritage regulation makes it difficult to identify the contributions made after the constitution of the protected heritage and the movable property that is not registrable. The protected heritage should have a tax identification number in order to identify the goods and rights that are included in the institution in an easier way, to avoid the confusion with the personal wealth of the holder of the protected heritage and to facilitate that the active asset management fulfills the administration system established in the formally drawn up document that creates the protected heritage.

Seventh.- The external supervision over the asset management distinguishes between a general supervision, a tax supervision and an indirect supervision. The general supervision, entrusted to the office of Public Prosecutor, shows a permanent supervision and a specific supervision but it has certain problems caused by the information obligations about the effective management. The tax supervision, in a similar way contemplated in the classical antecedents with the *Fiscus*, is entrusted to the National Tax Agency. This Agency has the information collected in the model 182 annual information return and it can act effectively through its management and inspection units. The indirect supervision is conducted by third parties that deal with the protected heritage in legal transactions. Similar to the Roman Law antecedents, the formally drawn up document that creates the protected heritage and the identification of the goods and rights integrated in the protected heritage are very important to obtain an effective indirect supervision.

Eighth.- The institution of the protected heritage has as its purpose the satisfaction of the vital needs of its holder. This essential characteristic is shared with the legal dependency but it differs from this classical institution in the wider range of the vital needs. In order to clarify the specific scope of these vital needs, a tax question was formulated to the Department of Taxation in January 16th 2007 and it was answered as V1526-08 without solving the controversy. The absence of a clear definition of the vital needs is one of the main obstacles to increase the number of disposals in the protected heritages.

Ninth.- The study of the antecedents of the legal dependency in the Roman Law clarifies the process to define the vital needs. Reiteration of management and inspection National Tax Agency units' decisions and jurisprudence will specify the content of vital needs and its evolution.

Tenth.- The range of vital needs distinguishes between a core content, that includes the vital needs that are already considered in the legal dependency of the relatives, and an extended content that includes the needs that are not contemplated in that legal dependency. The extended content distinguishes between the general vital needs that can be analyzed from the judicial pronouncements about the contract of assistance and the vital needs that emerge from the disability that must be defined by the legislative, conceptual and jurisdictional development of the protected heritage.

Eleventh.- The vital needs of the holder of the protected heritage include the ones that are already integrated in the minimum of the legal dependency of the relatives, the ones that can be considered in the agreement that constitutes the contract of assistance, and the specific needs that emerge from the disability. It is possible that future judicial pronouncements will include certain aspects of the protection of the family in the vital needs of the holder of the protected heritage.

Twelfth.- The concept of disposal in the protected heritage acts as a material limit establishing the destination of the disposals that maintains the fiscal incentives generated by the protected heritage. The regulation states the productivity of the protected heritage as a secondary aim and the satisfaction of the vital needs of the holder as the primary objective for the patrimonial entity of the protected heritage. The Department of Taxation has specified this secondary aim in certain cases but, in numerous occasions, it has pointed to the management and inspection National Tax Agency units to clarify the vital needs included in the primary objective of the protected heritage.

Thirteenth.- The concept of disposal in the protected heritage acts as a time limit identifying the periods when the disposals maintain the fiscal incentives. The tax question formulated to the Department of Taxation in January 16th 2007 included the document named “Patrimonial protection for the disabled people”. This publication influenced the parliamentary work of the law 1/2009 and it allowed the preservation of the fiscal incentives when the satisfaction of the vital needs of the holder of the protected heritage were made in the time period set out in the law 41/2003. This statement was assumed by the law 1/2009 when it clarified the concept of disposal.

Fourteenth.- The aim of maintaining the productivity of the protected heritage requires that the active asset management has to fulfill the administration system established in the formally drawn up document that creates the protected heritage and that the new goods and rights can be distinguished from the replaced ones. The proposal of giving a tax identification number to the protected heritages makes these requirements easier to fulfill. A tax question was formulated in March 14th 2011 in order to obtain an answer from the Department of Taxation.

Fifteenth.- The current regulation does not consider an autonomous patrimonial liability for the protected heritage. Consequently, the goods and rights of the protected heritage may be linked to liabilities that are not connected to the satisfaction of the vital needs of the holder, as it is established in the Article 1911 of the Civil Code. There is an important doctrinal and parliamentary discussion about this question so the intended reform of the law 1/2009 should clarify this issue.

Sixteenth.- The effective impact of the protected heritage in the Income Tax collection during the 2004-2010 period shows that the majority of the contributions to protected heritages are included in middle-high income tax returns, ranged from 30.000 Euros to 60.000 Euros of annual income. The joint income tax returns shows a bigger proportion in number than the individual tax returns.

Seventeenth.- The analysis of the real impact during the comparable period 2007-2010 shows that highest level of contributions, reached in 2009 tax year with 4.712 contributions, is far lower than the initial forecast used in the parliamentary work of the law 41/2003 that considered 30.000 tax payers with contributions.

Eighteenth.- The current model 182 annual information return allows to analyze the disposals made after 2007 tax year. This information is not currently available in the public Tax Administration documents but it should be considered to elaborate a future legal reform of the protected heritage because the current use shows a low number of disposals.

Nineteenth.- The tax reform microsimulations realized under the assumption of an increment of the annual limit of the tax benefit for contributions to the protected heritage, similar to

the reform introduced by the law 35/2006, show the limited impact of these measures due to the low number of tax payers affected by these reforms. For these reasons, a reform of the fiscal regime of the protected heritage that aims to favour the constitution and use of this institution should be more ambitious than the reform introduced by the law 41/2003 and it should clarify the legal regime of the protected heritage.

Twentieth.- The tax reform microsimulation that considers an increase in the number of contributors shows that the increment in the level of tax payers that are benefited by the fiscal regime of the protected heritage similar to the initial forecast included in the economic report used in the parliamentary work of the law 41/2003 will have a lower effective collection impact than the originally considered when this institution was created. For this reason, a reform that clarifies the concept of disposal in the fiscal regime of the protected heritage will give a new impetus to this institution within the initial collection impact forecast originally accepted.

