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Law, Environmental Policy and Kantian Philosophy

Abstract: Are Kantian philosophy and its principle of respect for persons inadequate to the protection of environmental values? This paper answers this question by elucidating how Kantian ethics can take environmental values seriously. In the period that starts with the Critique of Judgment in 1790 and ends with the Metaphysics of Morals in 1797, the subject would have been approached by Kant in a different manner; although the respect that we may owe to non-human nature is still grounded in our duties to mankind, the basis for such respect stems from nature's aesthetic properties, and the duty to preserve nature lies in our duties to ourselves. Compared to the "market paradigm", as it is called by Gillroy (the reference is to a conception of a public policy based on a criterion of economic efficiency or utility), Kantian philosophy can offer a better explanation of the relationship between environmental policy and the theory of justice. Kantian justice defines the "just state" as the one that protects the moral capacities of its "active" citizens, as presented in the first Part of the Metaphysics of Morals. In the Kantian paradigm, the environmental risk becomes a "public" concern. That means it is not subsumed under an individual decision, based on a calculus.

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I. Introduction

Are Kantian philosophy and its core principle of respect for persons inadequate to the protection of environmental values? This paper answers this question by elucidating how Kantian ethics can take environmental values seriously. In the period that starts with the Critique of Judgment in 1790 and ends with the Metaphysics of Morals in 1797, the subject would have been approached by Kant in a different manner; although the respect that we may owe to non-human nature is still grounded in our duties to mankind, the basis for such respect stems from nature's aesthetic properties, and the duty to preserve nature lies in our duties to ourselves. Compared to the "market paradigm", as it is called by Gillroy (the reference is to a conception of a public policy based on a criterion of economic efficiency or utility), Kantian philosophy can offer a better explanation of the relationship between environmental policy and the theory of justice. Kantian justice defines the "just state" as the one that protects the moral capacities of its "active" citizens, as presented in the first Part of the Metaphysics of Morals. In the Kantian paradigm, the environmental risk becomes a "public" concern. That means it is not subsumed under an individual decision, based on a calculus.

Firstly, I would like to show how Kantian moral philosophy is not only compatible with duties in relation to nature, but it also explicitly acknowledges such duties. This is achieved without the principle that mankind, as the objective of moral action, is put into question. Secondly, I am going to analyze Kant's legal and political philosophy, especially with a focus on its relevance to the role of the State, of public institutions, in the adoption of intervention policies that are non-paternalist. It has been claimed, and rightly so, that Kant's liberal philosophy is compatible with the Welfare State. The aim here is to show how Kantian philosophy can be an asset in the moral and political grounding of public policies on the environment.

II. Kantian ethics and environmental values

One can find in Kantian philosophy an important redefinition of the value of nature and mankind's duty toward it. In some early works, such as his *Lectures on Ethics*, Kant, quoting Baumgarten, says these duties are indirect and stem from duties to mankind. However, Kant does not yet develop a conception of his own. Later, in the period that begins with the publishing of the *Critique of Judgment* and culminates with the *Metaphysics of Morals*, Kant proposes a foundation that was very different from the one featured in the moral philosophy of that time, since the foundation ceases to be the usefulness of fruits, animals and plants, as in Hume. Kant claims that the foundation is nature's aesthetic properties – the beauty of natural forms. It should also be noted that the duty to preserve natural beauty does not arise from our duties to others, but from duties to ourselves, our duty to cultivate our moral disposition¹.

The text that explains this shift in the grounding of duties towards nature is certainly the *Doctrine of Virtue*, which appears in the second part of *The Metaphysics of Morals*. This is the work where Kant distinguishes nature-related duties and duties *to* nature.

A human being can therefore have no duty to any beings other than human beings; and if he thinks he has such duties, it is because of an amphiboly in his concepts of reflection, and his supposed duty to other beings is only a duty to himself. He is led to this misunderstanding by mistaking his duty with regard to other beings for a duty to those beings.²

Kant is concerned, then, with duties that are grounded on morality's supreme principle, whereby mankind is seen also as an end, and not just as a means. Such duties do not concern nature primarily, but have implications for it. In §17, Kant shows how these nature-related duties can be man's duties to himself:

¹ Paul Guyer, *Kant and The Experience of Freedom*, 1993.

² Immanuel Kant, *The Metaphysics of Morals*, 1996, 6:442.

A propensity to wanton destruction of what is beautiful in inanimate nature (spiritus destructionis) is opposed to man's duty to himself; for it weakens or uproots that feeling in man which, though not of itself moral, is still a disposition of sensibility that greatly promotes morality or at least prepares the way for it: the disposition, namely, to love something (e.g., beautiful crystal formations, the indescribable beauty of plants) even apart from any intention to use it.

With regard to the animate but non rational part of creation, violent and cruel treatment of animals is far more intimately opposed to man's duty to himself, and he has a duty to refrain from this; for it dulls his shared feeling of their pain and so weakens and gradually uproots a natural predisposition that is very serviceable to morality in one's relations with other men. Man is authorized to kill animals quickly (without pain) and to put them to work that does not strain them beyond their capacities (such work as man himself must submit to). But agonizing physical experiments for the sake of mere speculation, when the end could also be achieved without these, are to be abhorred. Even gratitude for the long service of an old horse or dog (just as if they were members of the household) belongs indirectly to man's duty with regard to these animals; considered as a direct duty, however, it is always only a duty of man to himself.³

The excerpt above makes it clear that nature-related duties are duties of man to himself, for nature activates sensitivity to beauty, which can lead to a moral disposition. As far as the vegetal and mineral realms are concerned, there is a clear matter of beauty, not usefulness, driving our duties. Some brief considerations on the relations between judgments of beauty and moral disposition in Kantian philosophy, especially the Third Critique, are called for here.

For Kant, the beautiful is a symbol of morality, for the experience of the beautiful is felt as an experience of freedom: the freedom of imagination is taken as a symbolic representation of the freedom of choice which is essential to morality. Yet while freedom of choice is solely represented by concepts, freedom (free play) of imagination is felt; this implies a sensible representation which in turn may symbolize an object of pure reason that is not able to be intuitively thought of, as is the object of morality⁴. Nevertheless, Kant certainly values the sublime as a symbolic representation of the good; this is so because the feeling towards the sublime in nature couldn't be thought of without a connection with a moral disposition. As explained by Paul Guyer, we could say that beauty and sublimity symbolize different aspects of human autonomy. Freedom of imagination in experiencing beauty would represent the potential that we have for being free of the determinisms of impulses and inclinations, while the most painful experiences of the sublime would remind us that we will only reach our potential for freedom by rigorous submission of our most human inclinations to the principle

³ See Kant (note 2), 6:442.

⁴ Paul Guyer, *Kant and The Experience of Freedom*, 2000, 252.

of pure practical reason⁵. Aesthetic experiences have a direct influence on our affections and inclinations, with an evident symbolic meaning. Moral knowledge also plays a role, even though this may not and ought not to be translated into a reduction and confusion of the beautiful and the sublime towards the good and vice versa. Moreover, in the *Doctrine of Virtue* the philosopher mentions a true ethical duty to preserve natural beauty and to seek natural perfection. Then would it be possible to have sublimity and beauty that are intellectual, in other words, sublimity and beauty not founded on the feeling of pleasure and displeasure? This would only be possible if we were pure intelligences and if in the aesthetic judgment there weren't the necessity of an interest for sensibility, which would rupture the purity of such a judgment. He also reminds us that the object of pure intellectual complacency which is also unconditional is the moral law and its power over us, and this power can only be aesthetically known through sacrifice. Thus we have the compatibility between the aesthetic and moral judgments.

From this it follows that the intellectual, intrinsically purposive (moral) good, judged aesthetically, must not be represented so much as beautiful rather as sublime, so that it arouses more the feeling of respect (which scorns charm) than that of love in the intimate affection, since human nature does not agree with that good of its own accord, but only through the dominion that reason exercises over sensibility. Conversely, even that which we call sublime in nature outside us or even without ourselves (e.g., certain effects) is represented only as a power of the mind to soar above certain obstacles of sensibility by means of moral principles, and thereby to become interesting.⁶

It is also important to stress that nature-related duties are not linked to the needs or claims of other people, but to duties related to one's own moral development. Such duties appear as perfect duties to ourselves as moral beings. This means a demand for what is valuable for themselves in the process of preserving or improving the capacity to act as rational subjects, while forbidding all that is contrary to this purpose. As a perfect duty, in Kantian terms, the form is that of a negative duty; these negative duties forbid men to act against nature and are about self-preservation only, not improvement. As Paul Guyer shows, this classification comes from Kant considering such duty as a given in our moral disposition. Still, this does not preclude the acknowledgment of a duty to develop it through the improvement of the same disposition towards others. In any case, the constitution of this duty as a negative or perfect one gives it undeniable strength, since it means in the Kantian system that it must always be prioritized over other duties; no other duty, such as human development

⁵See Guyer (note 4), 253.

⁶Immanuel Kant, *Critique of the Power of Judgment*, 2000, 5:271.

itself, can ever be mentioned to make it relative. Thus, one must come to the rather curious conclusion that the nature-related duty in question is both indirect and perfect. This means no autonomous agent is exempted.

By considering the acknowledgement of nature-related duties featured on Kant's work, one can immediately refute the claim that the anthropocentric character of Kantian theory implies the denial of all ethical duties that concern environmental issues. Kant sees nature as having an important role in strengthening mankind's worth through the ability to grasp beauty. Nature enhances individual autonomy, and that shapes preferences in a way that favors moral law. Even if this means a kind of instrumentalism in the use of nature, it is non-consequentialist; it is linked to a broader duty to search for moral improvement and justice in society. Indeed, disrespecting nature reveals a lack of perception of the best features of human beings. The second part of the *Critique of Judgment*, the *Critique of Theological Judgment*, is a relevant text in this context. There, Kant reminds us that nature as a whole can be seen as a final cause only relative to mankind's moral aim. In other words, nature as a whole is seen as a final cause only when the unlimited aim of human freedom is aimed at. The only end to which nature can be subordinated is mankind, but a mankind that is morally valuable because of its freedom, not a mankind where another value is put into perspective (with an interest that is not the moral one):

Now we have in the world beings of but one kind whose causality is teleological, or directed to ends, and which at the same time are beings of such a character that the law according to which they have to determine ends for themselves is represented by them as unconditioned and not dependent on anything in nature, but as necessary in itself. The being of this kind is man, but man regarded as noumenon. He is the only natural creature whose peculiar objective characterization is nevertheless such as to enable us to recognize in him a supersensible faculty – his freedom...⁷

The groundings for ethical duties to the environment are not usefulness, economic value or human preferences, but – through the judgment of natural beauty, which has no purpose but to appreciate the form of that which is beautiful – the affirmation of people's moral autonomy. It is not absurd, in this context, to suppose that nature should be protected by law. This would facilitate the free coexistence of different people.

Finally, it would be good to get back to Kant's philosophy, based on the same principle of mankind as an end, to dismiss the criticism that Kantian thought does not take future generations into consideration. François Ost rightly claims that Kant's concept of mankind expresses a demand for the universal which is not restricted to a logical generalization, as the categorical imperative's form is often interpreted; a process of actual logical universalization

⁷ See Kant (Note 6), 5:435-6.

is involved also. This process involves a “natural skill” that leads mankind to look ever deeper for its moral condition:

I shall therefore be allowed to assume that, since the human race is constantly advancing with respect to culture (as its natural end) it is also to be conceived as progressing toward what is better with respect to the moral end of its existence, and that this will indeed be interrupted from time to time but will never be broken off. I do not need to prove this presupposition; it is up to its adversary to prove (his) case. For I rest my case on my innate duty, the duty of every member of the series of generations – to which I (as a human being in general) belong and am yet not so good in the moral character required of me as I ought to be and hence could be – so to influence posterity that it becomes always better (the possibility of this must, accordingly, also be assumed), and to do it in such a way that this duty may be legitimately handed down from one member [in the series of generations to another].⁸

The idea of mankind as expressed above presupposes that man has an open-ended capacity of self-improvement, and this capacity will influence future generations. This improvement, though, is not random, as Ost reminds us. It involves the natural state and then creates the civil state, where a just political Constitution must exist. The notion of a cosmopolitan law followed. Here, Kant did not mean to establish an obligation relative to future generations, but this conception could give us the basis for just such an obligation today. In fact, Kant himself derives practical consequences from the concept of mankind, as far as international relations are concerned. In *Toward Perpetual Peace*, Kant, while defending the legal right of universal hospitality among peoples – defined as the right of a foreigner not be treated with hostility when arriving in a country that is not his own (and this right comes from common property of the Earth’s original surface) – stresses that the visitor’s right does not go beyond that:

If one compares with this the inhospitable behavior of civilized, especially commercial, states in our part of the world, the injustice they show in visiting foreign lands and peoples (which with them is tantamount to conquering them) goes to horrifying lengths. When America, the negro countries, the Spice Islands, the Cape and so forth were discovered, they were, to them, countries belonging to no one, since they counted the inhabitants as nothing.⁹

In Towards Perpetual Peace, Kant lays down the foundations of a cosmopolitan law over the concept of an equitable sharing of resources and the peaceful occupation of the available spaces, which is to occur under the rule of common law, as François Ost reminds us. The idea of mankind would effectively extend to the whole of humankind from a synchronic

⁸ Immanuel Kant, *On the Common Saying: That may be correct in Theory*, in *Practical Philosophy*, 1996, 8:308-9.

⁹ Immanuel Kant, *Toward Perpetual Peace*, in *Practical Philosophy*, 1996, 8:358-9.

viewpoint. But would the same notion of mankind not be open to considerations related to the moral interests of future generations? Cosmopolitan law would lead both to respect of rights acquired by past inhabitants and the acknowledgment of the rights of future generations. Dilapidation of natural resources to the point of risking the very existence of future generations is incompatible with the idea of mankind discussed above. This is the case because destroying the natural world is against the categorical imperative, which obliges one to respect mankind as it manifests on others, not only as a means, but also as an end. As Ost tells us, it may be the case that this subject is not present in Kant's writing because the effects of ecological imbalance had not become apparent in the eighteenth century.

In any case, we have already hinted at a legal, and not just ethical, duty to protect the environment. But the constitution of this legal duty and its role in the political society is something that needs elaboration. Thus, a Kantian inspiration for a political philosophy that reflects on environmental policies is not only a possibility; it can be seen as a relevant alternative to theories based on economical usefulness grounded on utility or efficiency. This is the case because the Kantian inspiration possesses a moral dimension for policies, and this stresses the right to the environment relative to other human rights. In the following section, I will outline the possible action of the State regarding the protection of natural resources. This is compatible with liberal Kantian theory; in fact, it strengthens it through the notion of human dignity itself.

III. The Kantian Liberal State, Public Policies and Environmental Protection.

In Kantian contractualism legal duties do not change when one moves from the state of nature to the civil state. However, as Kant explains, public law creates the possibility of coexistence of freedoms overseen by private laws. The state of nature is insecure, and this is overcome with the rise of civil union. In this state of nature there is already human association, such as family or contract-based human association, for example. Thus, this right will continue to apply after the rise of political order.

Yet, there is an unlimited exterior freedom in the state of nature. For this reason, this state is potentially violent, for "no one is sure of what is His against violence". Kant concludes that the first principle that man must decree is the abandonment of the state of nature and submission to an external limitation on which all agree, and the law establishes what is mine or what is yours. However, this state of nature is not (Hobbes notwithstanding) a state of violence and injustice, but a state of negative justice "in which should the law be

controversial, there would not be a judge capable of dictating a legitimate sentence...”¹⁰ The appearance of public law and the implied insertion in political society is not just the insertion into an internal political order (the State’s); it is also the insertion into international public law (which Kant calls people’s law) and cosmopolitical law (which applies to citizens of the world). The social contract that grounds the institution of civil or political order differs from other kinds of contract:

The union of many for some common end (that all of them have) is to be found in any social contract; but that union which is in itself an end (that each ought to have) and which is therefore the unconditional and first duty in any external relation of people in general, who cannot help mutually affecting one another, is to be found in a society only insofar as it is in the civil condition, that is, constitutes a commonwealth. ¹¹

In Kant’s view, the aim of constituting the State is a duty and “the supreme formal condition” of all legal duties. Not only does it establish the belongings of every person, but it also protects one’s belongings against the intervention of others. The original contract is a rational idea, but a rational idea with a practical reality: it obliges all lawgivers to state its laws as coming from the collective will of a whole people. The legal state is established through a relation of subordination of citizens relative to the powers of the city. A contract whereby “everyone gives up their exterior freedom before the people to recover it later as a member of a republic, that is as members of a community or the people as a city” underlies the aforementioned legal state. In *The Idea of a universal history with a cosmopolitan purpose*, Kant affirms the existence of a natural disposition in men that finds its full development not in the individual but rather in the species and through reason. He also affirms that all human strengths are awakened by the unsociable sociability of men, that is, their tendency to form a society that must contend with a tendency to isolation and domination. This opposition drives men to their first steps from brutality to culture, as the philosopher reminds us: thus, talents develop little by little, taste takes shape and, through continued illustration, the beginning becomes the foundation for a mode of thought that eventually can convert the crude natural disposition into a natural differentiation that is relative to determined practical principles. For this reason, says Kant, the greatest problem for humankind is the establishment of a civil society that guarantees the rule of law and, consequently, allows natural dispositions to flourish.

¹⁰ See Kant (note 9), .8:289-290.

¹¹ See Kant (note 9), 8:290.

The rational imperative that allows men to overcome the unsociable sociability of their state of nature does not, however, impel society to an unspecified political order. Men are driven to form a constitutional order that allows reason to overcome through law all kinds of legislation that are inherited from tradition, custom and prejudice. Two years later, in *Toward Perpetual Peace*, these principles are repeated almost word for word in the statement of the basic values of a republican constitution. The principles that will regulate this “civil state” are 1. The freedom of each member of the society as a man 2. His equality before all others as a subject 3. The independence (or autonomy) of each member of a community as a citizen”. The Kantian republican state is based on two key principles: the principle of separation of powers and the principle of popular sovereignty combined with political representation.

Civil and political freedom both presuppose that none can be obliged to be happy in their own way, “but each person is allowed to pursue happiness as they see fit, as long as this does not limit the freedom of others to seek a similar goal, and its coexistence with each person’s freedom is possible, in accordance with a possible universal law.”¹² The philosopher says that the State should not decide how citizens can find happiness. Kant criticizes a “paternal government” as the worst kind of despotism, which is unlike a “patriotic government”, where the rights of the State are assured by laws that express a common will. Civil and political freedom are implied, because a despotic State that violates individuality and imposes its own conception of the common good is avoided by the participation of citizens in the making of political will.¹³ It must be noted, however, that this does not imply denying that the state can have a role in welfare policies. Indeed, Kant himself acknowledges the need for such policies if they are indispensable for the affirmation of the values themselves of a republican constitution. This affirmation ensures the survival of the legal state and the community of citizens:

Certain restrictions on imports are included among these laws, so that the means of acquiring livelihood will promote the subjects’ interests and not the advantage of foreigners or encouragement of other’s industry, since a state, without the prosperity of the people, would not possess enough strength to resist foreign enemies or to maintain itself as a commonwealth.¹⁴

As far as this point in particular is concerned, an excerpt is worth mentioning from the *Doctrine of Right*, the first part of *The Metaphysics of Morals*, where Kant affirms that the

¹² Immanuel Kant, , *Teoria e Prática*. In *À Paz Perpétua e outros opúsculos*, 1997, 75

¹³ It is worth comparing this excerpt of Kantian theory with some contemporary political theories, such as Jürgen Habermas’, and his purpose of placing his political theory between liberalism and communitarianism. The articulation of civil freedom and political freedom in Kant’s theory highlights the possibility of bringing the question of freedom to the State’s organization.

¹⁴ See Kant (note8), 8:299.

rich must contribute toward the sustenance of the poor, which implies state action with this purpose:

The general will of the people has united itself into a society which is to maintain itself perpetually; and for this end it has submitted itself to the internal authority of the state in order to maintain those members of the society who are unable to maintain themselves. For reasons of state the government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs.¹⁵

Civil equality is reflected in equality among citizens; privileges are not justified, for each member of this whole must be able to reach any stage of their condition (that can be obtained by a subject) that is made possible by their talents, their activity and their fortune. When referring to civil independence, Kant says citizens must not be dependent in a way that precludes their participation, regardless of the will of others, in the community. Even so, passive citizens have a right in the civil state: as Kant explain, whatever their purpose, they must never be contrary to natural freedom and this proportional equality of everything that allows everyone to work and thus evolve from a passive condition to an active one.

The aforementioned political theory makes it possible to think of the role of the State relative to the implementation of environmental law. This applies both to current citizens and future ones. As Gillroy reminds us, a just State would be a necessary condition (even if not a sufficient one) for establishing a “Realm of Ends”, and these conditions certainly include an environment that is conducive to mankind’s moral and political enhancement. While political justice distributes freedom, nature is the environment where mankind’s best features can be achieved. Consequently, public policies meant to protect and preserve the environment are possible. Kant wrote about the “Realm of Ends” as the only consideration of human moral choices, but he also wrote about a “Kingdom of Nature” that exists in perfect harmony with the former, and is indispensable for the supreme being of the human condition. Kant proposes a new harmony between nature and culture that is to be reached with the adoption of a perfect political Constitution. As suggested by Gillroy, in today’s terms one could use this Kantian relationship between political morals and nature to state that “...Humanity alone has both the moral capacity and the strategic rationality to express freedom responsibly and to innovate or adapt itself so that interdependence with the environment can persist over time and establish the harmony of human and natural realms.”¹⁶ Thus, respecting nature does not mean stopping the use of natural resources, which would be impossible. Respecting nature means

¹⁵See Kant (note2),. 6:326-7

¹⁶ John Martin Gillroy. Justice&Nature – Kantian Philosophy,Environmental Policy & The Law, 2001, 191.

recognizing its existence as a system that is by itself capable of and directed to perfection, regardless of human choices.

Gillroy reminds us that the state of nature in Kant is not characterized by the famous “prisoner’s dilemma”; it is rather an “assurance game”. In other words, the question begged by the state of nature is not the definition of interests in a community. Instead, it is the lack of security for citizen rights that an absence of civil order would bring, since such rights are not grounded in a contract; instead, they are grounded on human reason itself. Thus, the political system resulting from the Kantian contract, where there exists a principle of distributive justice, making a fair political society arise that assures the moral disposition of each individual will not be affected or exploited by the behavior of the others (taken by other reasons for their actions, other than their moral disposition). This means not just a simple conjugation of private interests that public decision-makers must consider; those who manage public policies must strive to implement policies that actually promote the moral value of a given policy:

It is therefore critical that the decision maker, basing policy recommendations on the Kantian paradigm of public choice, be cognizant that his or her understanding of how the rules of the political game and his or her subsequent decisions are construed will influence how the individual perceives the strategic environment and subsequently influence with iterated game one plays, given this context. The power of the policy maker is not just to assume the assurance game but to support its play by avoiding decisions that place stress on the individual actor to change her goals or forsake her complex practical reason for a simpler and pure rationality where moral imperatives, intrinsic value, and non-consequentialist motives becomes difficult and one’s exercise of reason is purely rational event if focused on public/universal goals.¹⁷

A State that is just or legitimate will only materialize if an active government regulates and supports the welfare of its population with a structure that encourages basic material conditions through distributive justice, as shown by Kant in his defense of policies of assistance for the poor. Since the reasons that feed the practice of freedom and civil independence do matter, a State that is “patriotic” while not “paternalistic” must adopt welfare policies. The latter allows free agents to make choices in conditions of formal and material equality. Consequently, these policies must often count on institutions that regulate political choices beforehand. This would avoid the grounding of political choices uniquely on criteria of economic rationality or the arbitrary preferences of the relevant individuals. From

¹⁷ See Gillroy, 275.

the viewpoint of the imperative of preservation of human freedom through the protection of natural systems, in which the natural system and the human one both contribute to the Ecosystem, two consequences can be identified. Firstly, all public choices must value the protection of the environment in its interface with mankind and its needs and desires. Secondly, mankind should be responsible for understanding how natural systems work in order to define our rights relative to them and observe these rights in collective human action itself. Another Kantian concept might be relevant here, namely, the public use of reason, which allows one to discuss public norms that evolve in conjunction with environmental issues and differ from a certain feeling of ecological urgency that characterizes a certain current “ecologism”, as Bjarne Melkevik says¹⁸.

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¹⁸ Bjarne Melkevik, *Considérations Juridico-philosophiques*, 2005, 83.