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Introduction

The Right to Water in Context

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More than a decade has passed since the emergence of a transnational discourse and practice on the right to water. From a right that attracted previously little attention, it became soon the subject of widespread agreement yet furious contestation. From localised debates over tariff prices, access and disconnections to global debates over privatisation, international watercourses and climate change, the right to water has attained an important and sometimes central place in law and political economy. With this backdrop, it is an opportune time to reflect on the theory and practice related to the human right to water and the prospects for the field.

In this volume, an in-depth examination of the right across diverse contexts is sought. The questions explored are of both a descriptive and prescriptive nature. Descriptively, it asks how and to what degree the right to water has emerged in law, policy and practice? As part of this inquiry, the nature of the adoption of a right to water by various actors, and whether it may have catalysed any positive impacts, is of particular interest. Normatively, it asks how the right can be sensibly justified and what are its implications for public policy and practice? These questions are explored within four broader dynamics of the water sector: (1) the allocation of water resources; (2) the accessibility of water and sanitation for personal and domestic uses; (3) the liberalisation of service delivery; and (4) the politics and practice of contemporary rural water sector reform. The book is structured along these lines.

This introductory chapter, first sets out background to the emergence of the human right to water by probing some of the factors that explain the turn to this right. After setting out the book's contents, a number of the key themes

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that the book raises for theory and practice are examined – the legitimacy of the right in philosophy and law, its content and practical feasibility, and the politics of practice. The chapter concludes with a discussion of general prospects for the right.

1 THE EMERGENCE OF THE RIGHT TO WATER

In comparison to other rights, references to the human right to water were almost negligible at the turn of the twenty-first century. They could be found only on the periphery of scholarly literature, human rights legal standards and jurisprudence, policy debates and civil society activism. The right was not explicitly included in the 1948 Universal Declaration of Human Rights, nor was it included in the two major international human rights treaties of 1966 dealing with civil and political rights and economic, social and cultural rights.¹ Why such a seemingly basic right was excluded from these foundational standards has been a matter of conjecture. It might be explained by the fact that water scarcity was not as prominent an issue as it is today or that access to the resource was viewed as a necessary component for fulfilling other internationally recognised human rights.²

In any case, this position began to slowly shift from the late 1970s. Governments at the United Nations (UN) Water Conference in 1977 pronounced that ‘all peoples, whatever their stage of development and their social and economic conditions, have the *right* to have access to drinking water in quantities and of a quality equal to their basic needs’.³ Moreover, the 1979 Convention on the Elimination of Discrimination Against Women (CEDAW) referred to the right of women living in rural areas to ‘enjoy adequate living conditions’, particularly in relation to ‘sanitation’ and ‘water supply’.⁴ Water was further mentioned in the context of implementing the right to health of children in the 1989 Convention on the Rights of

¹ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 UNTS 3, (entered into force 3 Jan. 1976).

² P. Gleick, ‘The Human Right to Water’, *Water Policy*, Vol. 1, No. 5 (1999), pp. 487–503.

³ UN Conference on Water, Mar Del Plata Action Plan Resolution (1977), preamble [emphasis added].

⁴ Article 14(2)(h) states that State parties ‘shall take all appropriate measures to eliminate discrimination against women in rural areas . . . and, in particular, shall ensure to such women the right: [t]o enjoy adequate living conditions, particularly in relation to . . . sanitation . . . and water supply . . .’ (Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, GA Res. 34/180 (entered into force 3 Sept. 1981)).

the Child (CRC).⁵ While there is debate over whether these two treaties necessarily recognise a human right to water,⁶ they at least made the connection between water and human rights more patent.

Shortly afterwards came an explicit recognition of the right in the Dublin Statement of 1991.⁷ However, the Dublin Statement is better known for its affirmation of water as an economic and environmental good, rather than as a social good or a right. This focus is illustrative in the outcomes of the UN Conference on Environment and Development, held a few months later in Rio de Janeiro. Reference is made to the right in the resulting Agenda 21 programme of action, but only in passing.⁸ At the national level, only a number of countries, such as South Africa in 1996, included the right to water in their constitutions,⁹ while scattered instances of jurisprudence emerged in a few countries, such as Ireland, Belgium and India.¹⁰ Likewise, the first scholarly exploration of the right to water appeared in 1992,¹¹ but this was almost a decade after the first major publications on related social rights, such as the

⁵ Article 24(2) states that 'States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: ... (c) to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution' (Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)).

⁶ Compare S. Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15', *Netherlands Quarterly of Human Rights*, Vol. 23, No. 1 (2005) pp. 35–63 and A. Hellum and B. Derman, 'Observations on the Intersections of Human Rights and Local Practice: A Livelihood Perspective on Water', *Law, Social Justice and Global Development*, No. 1 (2008).

⁷ Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment: Development Issues for the 21st Century, UN Doc. A/CONF.151/PC/112 (1992). Principle 4 states that 'Water has an economic value in all its competing uses and should be recognized as an economic good. Within this principle, it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.' It was not a formal government declaration, but the statement was endorsed by international experts from a hundred countries. It is also a formal UN document.

⁸ Agenda 21, Report of the United Nations Conference on Environment and Development 1992. Section 18.47 briefly recounts historical developments in the water sector making reference to the right to water in the Mar del Plata Action Plan.

⁹ Constitution of South Africa 1996 art 27(1)(b), Constitution of Uganda, 1995, XIV(ii).

¹⁰ See the judgments of *Ryan v. AG*, [1965] IR 294, at 315 [High Court of Ireland]; *Arrêt n° 36/98 du 1 Avril 1998*, Commune de Wemmel, Moniteur Belge, 24/4/98 *Hussain v. Union of India*, High Court of Kerala OP 274/1988 (26 February 1990).

¹¹ S. McCaffrey, 'A Human Right to Water: Domestic and International Implications', *Georgetown International Environmental Law Review*, Vol. 5, No. 1 (1992), pp. 1–24.

right to food, and it triggered little further scholarly reflection.¹² The same pattern was evident in national and transnational civil society activism: water issues were compartmentalised as largely a concern for the development sector or environmental policy, or addressed where relevant in the context of other rights, such as access to housing, education and health.

With the ushering in of the new millennium, the invocation of the right to water has exponentially increased. Its trajectory though the following fifteen years is perhaps best captured by Google. A closed web search in English for the 'human right to water' yielded over 225,000 hits and even higher if sanitation is included.¹³ In the calendar year of 2005, the number of new hits was 105, a number which was reached in the first two months of 2010, and the first two weeks of 2015. These figures track or exceed the human right to food.¹⁴

Constitutionally, recognition of the right to water (and sanitation) has increased considerably. While a significant number of countries place obligations on States to protect natural water resources or develop a national water policy,¹⁵ the key change concerns personal and domestic access: see Figure 1.1. In the period between 1990 and 1999, eight States included a reference to a basic water supply, but only in one instance was it framed as a right. By 2014, twenty-six States constitutionalised access to water, with thirteen recognising it as a self-standing right¹⁶ and another three as a part of other rights or as a directive principle.¹⁷ In some cases, the right to water has been included as part of a broad-ranging reform of domestic bills of rights (e.g. Kenya, Zimbabwe) although in a few cases it was added as part of a constitutional reform focused on water or sanitation (e.g. Uruguay). In addition, eight States have now recognised a free-standing right to sanitation.¹⁸

¹² See, for example, P. Alston and K. Tomasevski (eds.), *The Right to Food* (The Hague: Martinus Nijhoff, 1984).

¹³ Search conducted 4 February 2016. In Spanish, the figure was 1.66 million.

¹⁴ This includes a double search that includes the 'right to adequate food' and 'human right to food'.

¹⁵ For example, Article 81 of the Portuguese constitution states that 'In the economic and social field the State shall be under a primary duty: ... (n) To adopt a national water policy that uses, plans and rationally manages water resources.' Article 20 of the Nigerian Constitution states that 'The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.'

¹⁶ South Africa, Uruguay, Solomon Islands, Nicaragua, the DRC, Maldives, Ecuador, Bolivia, Niger, Kenya, Mexico, Zimbabwe and Fiji.

¹⁷ Dominican Republic, Algeria and Uganda (the latter as a directive principle).

¹⁸ Uruguay, Panama, Colombia, Maldives, Bolivia, Kenya, Mexico and Fiji.

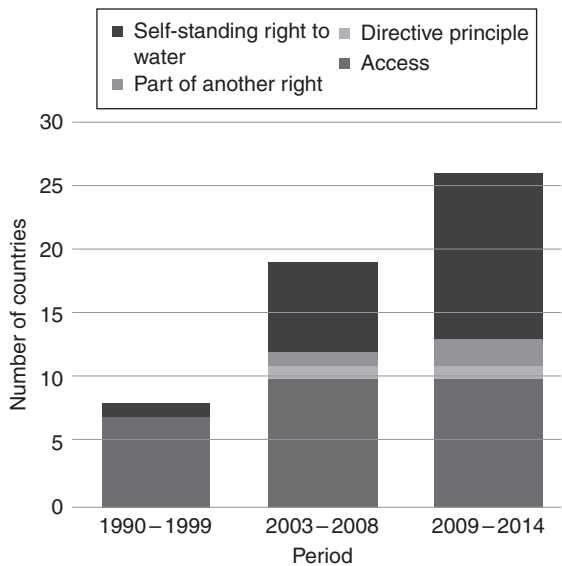


FIGURE 1.1 Constitutional recognition¹⁹

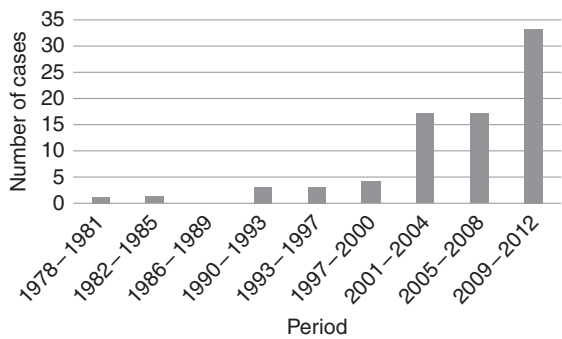


FIGURE 1.2 Trends in litigation: Cases decided

In terms of jurisprudence, there has been a significant upswing in cases addressing water issues through the lens of human rights. Figure 1.2 shows the number of judgments decided in 4-year periods from a collection of cases by WaterLex and WASH United.²⁰ Of these 79 judgments from 35 countries,

¹⁹ The coding was carried out using constitutional extracts from COHRE, *Legal Resources for the Right to Water and Sanitation: International and National Standards* (Geneva: COHRE, 2008) and the WaterLex Legal Database.
²⁰ See e.g., *The Human Rights to Water and Sanitation in Courts Worldwide: A Selection of National, Regional and International Case Law* by WaterLex and WASH UNITED (2014). See also examples in COHRE, *Legal Resources for the Right to Water and Sanitation: International*

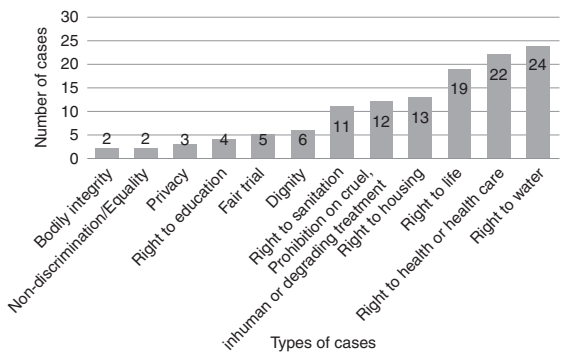


FIGURE 1.3 Rights considered by courts

the vast majority were decided since the start of the new millennium. In terms of success in the selection, 67 per cent of the discrete claims were fully successful and 13 per cent partially successful.²¹ However, the list is certainly not comprehensive. For example, the number of cases on the right to water in Costa Rica and Brazil, where legal standing is simplified, exceeds three hundred.

Returning to the sample, as to the right considered by the relevant court, this varied considerably, as depicted in Figure 1.3. Of the discrete claims, twenty-four were considered in relation to the right to water and twelve with the right to sanitation. The rest were considered under various social rights (e.g. health, housing, education), civil rights (e.g. life, cruel and degrading treatment, fair trial, privacy, bodily integrity), and non-discrimination and dignity. The reasons for this appear to be largely of a legal and positivist nature. The right to water was invoked in those countries in which the right was included in the constitution or the International Covenant on Economic Social and Cultural Rights (ICESCR) was incorporated in the constitution. However, in some cases the right was implied from other rights.

Why the dramatic change? Why the growing recognition? The growing appeal of the right to water could be accounted in three principal ways, as set out below. In each instance, particular actors appear to be influential in promoting the idea for either instrumental or intrinsic reasons.

and National Standards, pp. 277–315 and M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press).

²¹ There were ninety-nine discrete claims in the seventy-nine cases. Information was missing on the success of twenty of these claims and these were removed from the calculation.

1.1 Norm Clarification and Legal Diffusion

The timing of the turn to the right to water correlates with the adoption of the oft-quoted *General Comment No. 15 on the Right to Water* by the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2002.²² In this document, the Committee responsible for monitoring implementation of the ICESCR stated that the right to water clearly falls within the category of guarantees essential to secure an adequate standard of living, Article 11 of the ICESCR. The Committee also claimed that the right to water is inextricably related to other internationally recognised human rights, such as the right to the highest attainable standard of health in Article 12 of the ICESCR.²³ Although generally considered to be an interpretative instrument, rather than a legally binding document,²⁴ General Comment No. 15 is often seen as both a building block and key catalyst for subsequent recognition of the right to water by international bodies and States.²⁵

A few years later, for instance, the UN Development Programme (UNDP) Human Development Report opened with the statement that ‘Water, the stuff of life and a basic human right, is at the heart of a daily crisis faced by countless millions of the world’s most vulnerable people – a crisis that

²² Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The right to water* (Twenty-ninth session, 2002), UN Doc. E/C.12/2002/11 (2003). Note that in 2001 European Governments declared that ‘Everyone has the right to a sufficient quantity of water for his or her basic needs’ and noted that the right could be derived from international human rights instruments (Committee of Ministers to Member States on the European Charter on Water Resources Recommendation 14 (2001), para. 5). Note also that 2003 was the International Year of Freshwater.

²³ General Comment No. 15 para. 3. The General Comment notes that the right to water is also inextricably related to the right to an adequate standard of housing and adequate food and should be seen in conjunction with other rights such as the right to life and human dignity.

²⁴ General Comments are designed to assist State parties fulfil their reporting obligations under the ICESCR. By adopting General Comments the Committee on Economic, Social and Cultural Rights (CESCR) endeavours to make the experience it has gained from examining reports available for the benefit of all State parties in order to help them further implement the Covenant (Committee on Economic, Social and Cultural Rights (UNCESCR, (3rd Session) ‘Report of the Committee on Economic, Social and Cultural Rights - Supplement No. 4’ (6-24 February 1989) UN Doc E/C.12/1989/5 annex III (Introduction: The Purpose of General Comments) (1989) paras. 1, 3).

²⁵ Research indicates that prior to 2002, no State reports to the CESCR explicitly raised the human rights to water and sanitation, and from 2011–2012 about half of the reports did. See B. Mason Meir and Y. Kim, ‘Human Rights Accountability through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation’, *Duke Journal of Comparative and International Law*, Vol. 26, No. 1 (2016), pp. 139–228, at 195.

threatens life and destroys livelihoods on a devastating scale'.²⁶ The Report's first recommendation to all States was that they 'make water a human right – and mean it'.²⁷ This was followed by a statement from the UN High Commissioner for Human Rights encouraging States and other actors to identify good practices in relation to the fulfilment of the right.²⁸ In 2008, the first special procedures mandate, created by the newly formed UN Human Rights Council, the political body within the UN dealing with human rights, was the establishment of an Independent Expert on Human Rights and Access to Water and Sanitation.²⁹ In 2010, the UN General Assembly 'declare[d] the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights'.³⁰ Later that year, the UN Human Rights Council affirmed the right.³¹

Even if the General Comment can be considered a catalyst, such legal diffusion may simply be isomorphic or mimetic. In other words, the recognition of the right to water may simply be a reflection of a new norm of modernity emulated by all.³² Such norms may be actively diffused by advocates, consultants, lawyers, judges, corporations or elites³³ but they might lack utility, relevance or strength. The result is that there may be a 'decoupling' of the norm from prevailing policies and one should not expect it to exert significant influence.³⁴ However, the explanation of the uptake of the right to water extends beyond mere symbolic politics. It has been pushed by actors convinced of its material and discursive values, whether as a

²⁶ See United Nations Development Programme, *Beyond Scarcity: Power, Power and the Global Water Crisis* (New York: UNDP, 2006) p. 1.

²⁷ *Ibid.*, p. 8.

²⁸ OHCHR 'Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations related to Equitable Access to Safe Drinking Water and Sanitation under International Human Rights Instruments' (16 August 2007) UN Doc A/HRC/6/3.

²⁹ For information on the work of the Independent Expert, now Special Rapporteur, see www2.ohchr.org/english/issues/water/lexpert/

³⁰ UN General Assembly, *The Human Right to Water and Sanitation* (Sixty-fourth session, 2010) UN Doc A/64/L.63/Rev.1, para. 1. There were 122 votes in favour and 41 abstentions, including many developed countries.

³¹ UN Human Rights Council, *Human Rights and Access to Safe Drinking Water and Sanitation* (Fifteenth session, 2010) UN Doc. A/HRC/15/L.14 para. 3.

³² J. W. Meyer, J. Boli, G. M. Thomas and F. O. Ramirez, 'World Society and the Nation-State', *American Journal of Sociology*, Vol. 103, No. 1 (1997), pp. 144–181, 144, 153.

³³ See, e.g., B. Perry, 'Constitutional Johnny Appleseeds: American Consultants and the Drafting of Foreign Constitutions', *Albany Law Review*, Vol. 55, No. (1991–1992), pp. 767–792; A.-M. Slaughter, 'A Typology of Transjudicial Communication', *University of Richmond Law Review*, Vol. 29, No. 1 (1994–5), pp. 99–137.

³⁴ Meyer, Boli, Thomas and Ramirez, 'World Society and the Nation-State', 144, 153.

framing device and accountability tool, marker in struggles for and against privatisation, or other aspects, which are now discussed.

1.2 *Framing Device*

The emergence of the right to water coincides with attempts to foreground water issues in the international political and development agenda. Rights can provide a useful frame for different actors in drawing attention to the sector or their interests.³⁵ Articulating water concerns in such language can usefully capture two faces of the ‘global water crisis’ – both environment and poverty.³⁶ The UN estimates that a quarter of the world currently live in river basins that are ‘closed’ (water use exceeds minimum recharge levels) and the number of people in water stressed areas is expected to grow from 700 million to 3 billion in 2025.³⁷ Groundwater reserves continue to rapidly shrink as surface water is exhausted, pollution remains persistent while climate change already appears to be altering rainfall patterns with devastating effect. As regards poverty, estimates of the WHO and UNICEF Joint Monitoring Programme are that 663 million people do not use an improved source of drinking water.³⁸ Relatedly, diarrhoea is the second leading cause of death amongst children – responsible for the deaths of 760,000 children every year.³⁹

However, it is arguable that the interest in the right to water was not primarily driven by the broad paradigms of environment and development. Rather, it is the limitations of these very frameworks to locate and address the underlying causes of the crisis. Those championing human rights often drew attention to the variables of power inequalities, corruption, non-accountability, and discrimination, which they saw as key determinants of whether clean water was accessible in practice for individuals and communities. For example, the surprising

³⁵ On the use of human rights to frame debates and issues, see H. Miller, ‘From “Rights-Based” to “Rights-Framed” Approaches: A Social Constructionist View of Human Rights Practice,’ in *International Journal of Human Rights*, Vol. 14 (2010), pp. 915–931.

³⁶ See discussion in M. Langford, ‘Tragedy or Triumph of the Commons: Human Rights and the World Water Crises,’ *Human Rights 2006: The Year in Review* (Melbourne: Castan Centre for Human Rights Law, University of Monash, 2007), pp. 9–39. Historically, political inaction and not affording sufficient attention to the sector in the development context may constitute a factor in the ‘crisis’.

³⁷ UNDP, *Beyond Scarcity*, pp. 14, 140. The World Bank Water Resources Sector Strategy 2004 is more alarming, concluding that ‘an estimated 4 billion people – one half of the world’s population will live under conditions of severe water stress in 2025’ (p. 5).

³⁸ See WHO/UNICEF *Progress on Sanitation and Drinking Water - 2015 Update and MDG Assessment* (2015) p. 4. See www.wssinfo.org for updated statistics.

³⁹ WHO, *Diarrhoeal Disease*, Fact Sheet No. 330, April 2013.

persistence of a water gap in Europe has been attributed to discrimination on the basis of ethnicity or socio-economic status.⁴⁰ And, the failure of projects to improve water access in large informal settlements in Kenya has been attributed to a lack of attention to 'mafia' control and power differentials amongst tenants and landlords.⁴¹

This explanatory potential of the human rights and broader governance dimension has been partly corroborated by empirical work. For example, in his intra-country regression analysis of Colombia, Krause finds that water governance (including user participation and presence of civil society groups) is highly significant in explaining variance in water outcomes across provinces.⁴² Moreover, attention to the different dimensions of the right to water has led to adjusted figures concerning access. In-depth studies by UN-Habitat of informal settlements show that the number of those without adequate water rises considerably if the actual affordability, regularity and potability of water – all key elements of the right to water – are included in the definition.⁴³

It is further claimed that approaches based on human rights provide new 'tools'.⁴⁴ This ranges from the establishment of legal standards and substantive norms, stronger participatory rights, an emphasis on disaggregation and non-discrimination through to the encouragement of cultures and institutions of accountability. There is also an attempt to shift the focus from technocratic approaches to water resource management to the broader political landscape and the need for a wider range of strategies that address power imbalances, including mobilisation, advocacy, and when appropriate, litigation.

⁴⁰ Greek Helsinki Monitor et al, *Greece: Continuing Widespread Violation of Roma Housing Rights* (2006) Centre on Housing Rights and Evictions (15 February 2007).

⁴¹ Centre on Housing Rights and Evictions, *Listening to the Poor? Housing Rights in Nairobi, Kenya* (Geneva: COHRE, 2006).

⁴² M. Krause, *The Political Economy of Water and Sanitation* (London: Routledge, 2009).

⁴³ See G. Mboup, 'Existing Indicators in the Water and Sanitation Sector: Indicators for Accessibility, Affordability and Non-Discrimination' in V. Roaf, A. Khalfan and M. Langford (eds.), *Indicators for the Right to Water: Concept Paper* No. 13 (2005). See also J. Bartram, 'Improving on Haves and Have-nots', *Nature* Vol. 452 (20 March 2008), pp. 283–284.

⁴⁴ See, e.g., R. Offenheiser and S. Holcombe, 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: an Oxfam America Perspective', *Nonprofit and Voluntary Sector Quarterly*, Vol. 32, No. 2 (2003), pp. 268–301; A. Yamin, 'Defining Questions: Situating Issues of Power in the Formulation of a Right to Health under International Law', *Human Rights Quarterly*, Vol. 18 (1996), pp. 398–438.