The common ground between religions could be fruitfully promoted in order to call for an effective protection of the climate system. Positioned at a junction of different worlds, this book is a multidisciplinary work on Islamic law, common law and environmental law. Looking at the past, present and future, the author suggests a paradigm shift starting from the common ground in order to propose a better future for environmental law in Muslim countries. As the first book to compare Sharia’ and common law in field of environmental protection, it suggests a new path in comparative environmental law by recognizing the contributions of both history and spirituality.

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Rediscovery and Revival in Islamic Environmental Law

BACK TO THE FUTURE OF NATURE’S TRUST

SAMIRA IDLLALÈNE
Cadi Ayyad University
To my nieces and nephews: Salma, Emyliah, Issam, Youssra, and Noah, the New Seeds and the Common Grounds, with love.

To my professors: Mohamed-Ali Mekouar and Veronique Labrot.

To my students.
Do not strut arrogantly on the earth.
You will never split the earth apart
nor will you ever rival the mountains’ stature.

Qur’an (Al-Isra), 17: 37

This is a time in human history when lawyers world-wide must draw upon time-less principles and extrapolate them in logical fashion to new circumstances. Throughout history, courts have found themselves in the position of declaring new law in response to enforceable, often urgent, circumstances. The same principles that have informed all of the historic public trust cases apply with even greater force to the atmosphere.

Michael C. Blumm and Mary Christina Wood, The Public Trust Doctrine in Environmental and Natural Resources Law
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Preface

The story of this book started more than ten years ago in France, when I was a PhD student at the University of Western Brittany.

My PhD thesis focused on legal aspects of coastal management in Morocco. This led me to study comparative law on this issue and to learn about the concept of the “Trust” in English law.

My focus on the Trust came from my interest in the Conservatoire du littoral as a tool to protect and conserve the coastal zones in France. I discovered then that the Conservatoire du littoral was inspired by the English Trusts, especially by the National Trust.

Many years later, I started teaching comparative law at the University of Cadi Ayyad in Morocco; I taught then the origins of the Trust concept and how this institution works.

I discovered that there are various similarities between the Trust and the Waqf, an Islamic law institution, which is, like several Trusts, a charitable endowment. I started to collect more information on both the Trust and the Waqf. I was fascinated by the possibility to use the Waqf in the same way the Trust has been used in England for nature conservation.

I found in historical books a wealth of information on how Waqf was also used for the protection of natural resources few centuries ago. More than that, the Waqf was a revolutionary legal concept because it holds animals, not just humans, as beneficiaries.

The combination of both comparative law and environmental law sheds more light on other institutions such as Agdal or Hima, protected areas under customary

1 The Conservatoire du littoral is a French institution in charge of coastal protection. Its main work is to purchase coastal lands and keep them for natural conservation purposes. The Conservatoire du littoral was inspired by the national trusts or public trusts in England. www.conservatoire-du-littoral.fr
law that also have a spiritual component. Moreover, these protected areas can be created through the Waqf.

More frequently analyzed in scholarship on anthropology and ecology, these protected areas are not sufficiently studied in legal scholarship. Yet it is curious that these institutions can be found in all Muslim countries. In addition, their social and ecological potential still exists in many countries despite their decline. So why are these protected areas never studied or taught in law schools in Muslim countries?

During my hikes in the Atlas Mountains, I could see how the Agdals (protected areas) work in real life for the efficient distribution of water between the inhabitants of a village, to ensure good pasture for cattle. It is amazing how well the law is respected when it is governed by customary rules. It’s not comparable with what happens in town. In Safi, the city where I work, factories discharge tons of sulfuric acid into the sea, day and night. In Agadir, my hometown, the former Tagazout campsite, where all the inhabitants have at least one memory of a holiday, has been transformed into a beach resort, large areas of the coast have been concreted over and disfigured, and the endemic trees of Argan have been destroyed. How did we move from such awareness of nature to this situation of contempt for it?

It’s very difficult to find information on the environmental Waqf. I only found scraps collected here and there. But that was enough to learn that this Waqf is possible. Why isn’t this kind of Waqf taught in our law schools in environmental law curricula? We study Waqf in law curricula but the connection between this institution and the protection of the environment is not taught anywhere. Sometimes here and there we find a few paragraphs given to the Islamic aspect of environmental law. As for “customary law”, it generally has no place in law schools (at least not in Morocco).

Why don’t Muslim countries exploit this rich heritage?

In the Atlas Mountains, national parks have been created since the end of the nineteenth century. To better protect these parks, the administration put barbed wire all around. But in some places the barbed wire has been torn away. When I asked a resident of a hilltop village in the Atlas (which is only accessible on foot because there is no paved road), he replied, “I do not recognize this policy. The government is too far from here!” Statutory law was superimposed onto customary law and this most often led to a difficult cohabitation.

In my research on the Trust, I was led to study what is known as the Public Trust Doctrine – a doctrine that has evolved over more than a century in the United States. I considered first that this doctrine was similar to the English Trust. I was wrong.

During my fellowship at the University of Oregon School of Law, in the United States in the fall of 2016, I started to understand that actually the Public Trust Doctrine is a mixture between the English Trust and the domaine public in the civil law system of continental Europe.
This led me not only to look at the Public Trust Doctrine but also to go back to the domaine public theory in order to explore its ecological potential.

At the same time, it oriented me towards other ways to protect nature in the United States that are similar to the Public Trust Doctrine, even if they are not labeled as such, like the charitable Trusts, for example.

Similarly, this resulted in expanding the topic of my research to a wider variety of institutions dedicated to environmental protection that are similar to the Trusts but have declined in the same way as Hima-like institutions.

This book documents the ecological potential of Islamic law through a comparative law approach. While the Waqf is compared with the Trust by scholars, this comparison does not extend to the field of environmental law. Besides, the few environmental studies including Islamic law and ethics did not focus on the Waqf, nor did they concern the comparison between the common law and Islamic law. This book aims to fill that gap. It demonstrates the fruitfulness of such comparisons in both environmental law and comparative law scholarship.

In addition, this book is based on the general framework of “Spiritual Ecology”. This framework has not yet served much as a research agenda in comparative environmental law, even if its potential is abundant.

This book aims to contribute to the new research agenda in environmental law in Muslim countries. It is dedicated to academia, civil society and decision-makers, but also to every curious mind. Its main objective is to help to strengthen and expand environmental law in Muslim countries, inasmuch as Islamic law is not, paradoxically, concerned with environmental law in these countries. Yet this law has a huge potential as it encompasses cultural (including spiritual), economic and political aspects.

As I was finalizing the editing of this book while the coronavirus started to devastate the world, including my country, I feel that I have to add a few words on it: I think that this virus is a reminder for humans of the finitude of our planet and that we need to rethink our relationship to nature. It is an illustration that globalization can be harmful for humans and for nature. We need to envisage new ways to live and to work. We need to come back to the roots of our humanity. This is also what this book is about.
Acknowledgments

I am indebted to Professor John Bonine for his support during my stay as a visiting scholar at the University of Oregon School of Law, and as an Environmental Law Alliance Worldwide (ELAW) Fellow, during the fall of 2016. I couldn’t find a better title for this book than the one he generously suggested. I am also indebted to ELAW members for their kindness and valuable support.

I gratefully acknowledge support from those at the Moroccan American Commission for Educational and Cultural Exchange (MACECE) and the Fulbright Program who enabled me to go to the University of Oregon, to meet environmental scholars and to have wide access to documents.

The University of Oregon School of Law was an immensely inspiring environment for working on this research. I am deeply grateful to Professor Mary Christina Wood for her warm, welcoming and instructive discussions. I was honored to meet faculty, staff and students, all of whom were encouraging and hospitable, and who were, above all, “believers” in the Public Trust Doctrine. Everyone had knowledge and kindness to share with me and it was a blessing being at such a great school and beautiful campus. I am very grateful to Jill Elizabeth and Whitney Danielson and to Professors Caroline Forell, Suzan Gary, Ibrahim Gassama, Kristie Gibson, Dick Hildreth, Roberta Mann, Michael Moffett and Nancy Shultz.

I also gratefully acknowledge the Environmental and Natural Resources 2016 LLM students and team. Their contact was stimulating and inspiring for me.

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My warm thanks also go to Mr. Abdelmajid Tribak from the Islamic World Educational, Scientific and Cultural Organization (ISESCO), who invited me to present this work in its initial format at the first meeting of the Faith for Earth Initiative at the UNEA 4 in Nairobi, Kenya. It is much improved since then.

I am grateful to my Mom and to my sister Yasmine, whose support was valuable during the writing phase of this book.
# Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agdal</td>
<td>Protected area. The equivalent of Hima in North Africa</td>
</tr>
<tr>
<td>Aya</td>
<td>Qur’an’s verse</td>
</tr>
<tr>
<td>Fiqh</td>
<td>Islamic science</td>
</tr>
<tr>
<td>Fuqahas (or Ulamas)</td>
<td>Plural of Faqih, person who is specialized in Fiqh</td>
</tr>
<tr>
<td>Hadith</td>
<td>sayings of the Prophet Muhammad considered as the second source of Sharia’</td>
</tr>
<tr>
<td>Haram</td>
<td>what is forbidden by Sharia’; it also has the meaning of sanctuary</td>
</tr>
<tr>
<td>Harim</td>
<td>areas around bodies of water, or any other places, dedicated to protecting them (sanctuaries)</td>
</tr>
<tr>
<td>Hima (or Hema)</td>
<td>protected area under Islamic law or customary law</td>
</tr>
<tr>
<td>Ijma’</td>
<td>consensus of Fuqahas (or Ulamas) which can be considered as a source of Islamic law</td>
</tr>
<tr>
<td>Ijtihad</td>
<td>the effort of interpreting Islamic science and sources of Sharia’</td>
</tr>
<tr>
<td>Istihsan</td>
<td>a source of Sharia’; literally means “seeking of good”, the equivalent of Equity</td>
</tr>
<tr>
<td>Khilafa</td>
<td>viceregency, trusteeship; it also has the meaning of political authority</td>
</tr>
<tr>
<td>Maqasid</td>
<td>higher purposes of the Sharia’</td>
</tr>
<tr>
<td>Maslaha</td>
<td>public interest or benefit (is also part of Maqasid)</td>
</tr>
<tr>
<td>Qiyas</td>
<td>a source of Sharia’ that applies analogy</td>
</tr>
<tr>
<td>Qur’an</td>
<td>Muslim holy book and the first source of Sharia’</td>
</tr>
<tr>
<td>Sharia’ (or Sharī’ah)</td>
<td>Islamic law</td>
</tr>
<tr>
<td>Sunnah</td>
<td>acts of the prophet Muhammad considered as the second source of Sharia’</td>
</tr>
</tbody>
</table>
## Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surah (or Sura)</td>
<td>a verse from the Qur’an</td>
</tr>
<tr>
<td>Ulama (or Ulema)</td>
<td>Sharia’ and/or Fiqh scholars</td>
</tr>
<tr>
<td>Urf</td>
<td>customary law</td>
</tr>
<tr>
<td>Waqf or Habous</td>
<td>charitable endowment</td>
</tr>
<tr>
<td>Zakat</td>
<td>tax alms</td>
</tr>
</tbody>
</table>
Acronyms

ARC: Alliance for Religions and Conservation
IDB: Islamic Development Bank
IEP: Islamic Ecological Paradigm
IFEES: Islamic Foundation for Ecology and Environmental Sciences
IPCC: Intergovernmental Panel on Climate Change
ISESCO: Islamic Scientific, Educational and Cultural Organization
IUCN: International Union for Conservation of Nature
MENA: Middle East and North Africa region
OIC: Organization of Islamic Cooperation
PTD: Public Trust Doctrine
SDGs: Sustainable Development Goals
UNDP: United Nations Development Programme
UNEP: United Nations Environmental Programme
UNFCCC: United Nations Framework Convention on Climate Change
WANA: West Asia–North Africa Institute (WANA)