

**REDISCOVERY AND REVIVAL IN ISLAMIC
ENVIRONMENTAL LAW**

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



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*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. Through-out 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*

Contents

<i>List of Figures</i>	<i>page</i> xi
<i>List of Tables</i>	xiii
<i>Preface</i>	xv
<i>Acknowledgments</i>	xix
<i>Glossary</i>	xxi
<i>List of Acronyms</i>	xxiii
1	
Introductory Context and Issues	1
1.1	
Background: The Ecological Spirituality Movement	1
1.2	
The Particularity of Islamic Law and the Research Gap	8
1.3	
Why Islamic Environmental Law Matters	12
1.4	
Reinvigorating Islamic Environmental Law and Building the Atmospheric <i>Waqf</i> Paradigm: Lessons from Comparative Law	28
2	
What Is “Islamic Environmental Law”?	31
2.1	
The Sources of Islamic Environmental Law	33
2.1.1	
The Qur’an: The Principal Source of Islamic Environmental Law	34
2.1.2	
The Sunnah or Hadith: The Interpreting Rules of Islamic Environmental Law	38
2.1.3	
<i>Ijma’</i> : The Necessary Consensus of <i>Ulamas</i>	39
2.1.4	
<i>Ijtihad</i> : The Evolutionary Principle for Islamic Environmental Law	40
2.1.5	
<i>Qiyas</i> (Analogy): A Tool for Comparison	41
2.1.6	
The Juristic Preference: <i>Istihsan</i> , a Tool for Seeking a Better Environment	42
2.1.7	
<i>Al Maslaha</i> (Public Benefit): The Vehicle of the Atmospheric <i>Waqf</i> Paradigm	43

2.1.8	<i>Al Urf</i> (Customary Law): Back to the Waqf Roots	44
2.2	Islamic Environmental Law Instruments: The Ingredients of the Atmospheric <i>Waqf</i> Doctrine/Paradigm	46
2.2.1	<i>Waqf</i> as a Landmark General Tool for Environmental Protection in Islamic Law	47
2.2.2	Protected Areas: A Specific Tool for the Protection of Natural Resources under Islamic Law	50
3	The Dormancy of Islamic Environmental Law	54
3.1	Historical and Political Factors	55
3.2	Socioeconomic Factors	59
4	A Fruitful Comparison with the Common Law	63
4.1	Exploiting the Numerous Similarities between the Trust and the <i>Waqf</i>	64
4.1.1	The Religious Foundations	65
4.1.2	Similar Functioning Modes	72
4.1.3	The Inalienability of the Assets	73
4.1.4	Similar Purposes	74
4.2	The Fabulous Destiny of Environmental Trusts (from the Trust to the Public Trust Doctrine)	75
4.2.1	From the Classical Trust to the Public Trust Doctrine	76
4.2.2	Atmospheric Trust Litigation: The Claim for a Trust for Future Generations	81
4.2.3	An Overarching Principle: The “Trust in the Higher Sense”	83
5	Potential for Growth of Islamic Environmental Law	86
5.1	Islamic Environmental Law Principles: The Core of the Atmospheric <i>Waqf</i> Paradigm	86
5.1.1	Sustainability	87
5.1.2	Green <i>Khilafa</i> or Stewardship	90
5.1.3	Adaptive Management	96
5.1.4	An Early Answer to the Tragedy of the Commons	99
5.1.5	Cutting-Edge Rules: The Recognition of Animal Rights	101
5.2	Current and Potential Applications of Islamic Environmental Law	110
5.2.1	The Evolution of Eco-Islam: From Theory to Practice	111
5.2.2	Environmental Waqf Initiatives and Islamic Green Finance	129
	Conclusion	141
	<i>Select Bibliography</i>	147
	<i>Index</i>	159

Figures

1.1	Evolution of the Ecological Spirituality movement and Islamic countries	7
1.2	Map of the Islamic world	10
1.3	Map of legal systems in the world	13
2.1	The sources of Islamic environmental law	34
2.2	Functioning modes of <i>Waqf</i> and Trust	49
5.1	The multiple uses of the <i>Waqf</i>	97
5.2	Map of the most developed Islamic finance markets around the world	99
5.3	The potential of Islamic finance to foster environmental <i>Waqf</i>	132

Tables

1.1 <i>Waqf</i> and the environment in Islamic countries' constitutions according to their legal systems	21
2.1 Environmental <i>Fatwas</i> in the world	37
4.1 <i>Waqf</i> laws and their potential application to the protection of the environment	66
4.2 Comparison between the <i>Waqf</i> and the Trust	70

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 littoral¹ 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.

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

Glossary

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

Surah (or Sura):	a verse from the <i>Qur'an</i>
Ulama (or Ulema):	<i>Sharia'</i> and/or <i>Fiqh</i> scholars
Urf:	customary law
Waqf or Habous:	charitable endowment
Zakat:	tax alms

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)