

PORTUGUESE COLONIALISM AND ISLAMIC LAW IN NORTHERN MOZAMBIQUE

Liazzat J. K. Bonate

Introduction

European colonialism was instrumental in transforming aspects of interpretations of the *shari'a* (Ar., the divine path) and *fiqh* (Ar., Islamic jurisprudence) into a modern concept of Islamic law. Dutch, British and French scholars and administrators, and associated with them colonized elites, were at the centre of this process. However, virtually nothing is known about the context of Portuguese colonialism. This article aims to examine Portuguese colonial perceptions of Islamic law through the analysis of legal and ethnographic documents about Muslims of northern Mozambique between the period of the 'effective occupation' (1896-1913) and the end of colonialism (1974). The central questions to be addressed are: did the Portuguese colonial regime adopt policies and legal reforms reflecting aspects of Islamic governance in a manner similar to other European powers? Did it grapple with such terms as *shari'a*, *fiqh* and "custom" the way other European colonial scholars and administrators did?

Shari'a and Colonialism

Most of the colonial and some post-colonial literature on northern Mozambican Muslims reflects an Orientalist stance on Islam (see for example, Medeiros 1997, 61 and *passim*; Pélissier 2000, vol. 1: 319-20; Morier-Genoud 2000, 422). This means that Islam was viewed, not as a living faith but as one of the "transcendent, compelling Oriental facts; "a single, unitary, and all-defining object identified with a 'classical' body of continually reasserted principles, including *shari'a*, found in the writings of the 'orthodox' *'ulama* (Ar., pl., Islamic scholars, sing., *'alim*) (Said 1995, 259-61, 278-79, 281-83, 300-301). The term *shari'a* acquired its current meaning of 'Islamic law' due to British, Dutch and French Orientalist scholarship, colonial administrators and their Muslim associates (Messick 1992; Jeppie, Moosa, and Roberts 2010, 13-60; Buskens and Dupret 2015, 31-47). The first instances of such an accommodation were orchestrated by the chartered companies in the seventeenth and eighteenth centuries. In 1642, the Dutch East India Company issued *Statuta Batavia*, a compilation of Shafi'i *fiqh* (rules to be applied to Indonesian

Muslims (Nurlaelawati 2010, 45). It was based on *Minhaj al-Talibin* by Muhiy ad-Din al-Nawawi's (1233–1277). In 1770, another legal manual called *Mogahharer* was issued based on *al-Muharrar* by Abu al-Qasim al-Rafi'i (d. 1431). The English East India Company soon emulated the Dutch, beginning with David Anderson translating, in 1774, *Fatawa-i-Alamgiri*, a set of religious decrees and extracts from *Hanafi fiqh* treatises that were compiled under the emperor Aurangzeb in the seventeenth century. Then followed in 1783 Charles Hamilton's translation of *al-Hidaya*, written by Burhān al-Dīn Abu'l-Ḥasan al-Marghīnānī (1135-1197) and considered one of the most influential compendia of Hanafi jurisprudence (Giunchi 2010, 1124-1127). These two sources formed the basis of what became a code known as *Anglo-Muhammad Law* under Warren Hastings (1732 –1818), facilitating the beginning of the establishment of a hierarchy of courts charged with the task of implementing Hindu and Islamic laws in India (Kugle 2001, 262-264, 272- 274; Roff 2010, 459).

The *fiqh* literature was not a definite legal code but rather a series of intellectual and cultural syntheses, developed outside of the state's control (Khalafallah 2001, 150). But for the European Orientalists, the translation of *fiqh* texts enabled them to view *shari'a* as positive law and the resulting manuals as legal codification (Buskens and Dupret 2015, 77; Kugle 2001, 282). The *fiqh* manuals were assumed to represent a codification of the *shari'a* done centuries before upon the so-called 'closing of the gates of *ijtihad*' (Ar., independent reasoning) in the tenth century (Kugle 2001, 297; Abbasi 2014, 325). The '*ulama* allegedly legitimized then only four Sunni (and some other non-Sunni) legal schools (*maddhahib*, pl., sing., *maddhab*), namely Shafi'i, Hanafi, Hanbali and Maliki. From that time onwards, therefore, original investigation upon sources was interdicted to Muslims who were required instead to imitate (see *taqlid*, Ar., imitation) the methods and the rules of the founders of the *maddhahib*. This method of creating and applying 'Islamic law' through specific *fiqh* manuals translated into European languages for the benefit of colonial administrators and judiciary, continued to be practised in various regions throughout the nineteenth and twentieth centuries. For example, in most of the Indian Ocean rim areas, where Shafi'i *maddhab* predominated, a classical *fiqh* manual was Nawawi's *Minhaj al-Talibin*. It was translated into French by L. W. C. van der Berg and published in 1882 by the government of the Netherlands Indies (now Indonesia) to facilitate the

application of the *Shafi'i* doctrine (Messick 1992, 22, 66; Zubaida 2005, 32). E. C. Howard translated it into English in 1914 for treating with Aden (South Yemen) and later, East Africa (Messick 1992, 66; Bang 2003, 162). In Algeria and West Africa, where most Muslims were identified as followers of the Maliki *maddhab*, the French used *al-Muwatta* by Malik ibn Anas (711–795) and *al-Mukhtassar* by Khalil ibn Ishaq al-Jundi (died ca. 1365), the latter translated into French by George-Henry Bousquet (1900-1978) (Buskens and Dupret 2015, 77; Cooper 1997, 73-78; Robinson 1992, 234; Bousquet 1950, 59-61).

Custom and the Portuguese

The historical pattern of relationships that Portugal had with Muslim populations ranged from outright crusades and forced conversion (the Reconquista, Inquisition, confrontations in Morocco and the Swahili coast and, in the case of Mozambique, the elimination of Muslim settlements in Quelimane, Inhambane and Sofala) to relatively peaceful co-existence; allowing Muslims to follow their own cultural and religious traditions (the Red Sea area, India, Straights of Melaka, and eventually on the Swahili coast). The influence of the Orientalist approach to Islam became apparent in Portuguese colonial thought only in the early twentieth century but had prevailed throughout the colonial period. African Muslims in northern Mozambique were often described as illiterate, 'syncretic', heterodox followers of 'Black Islam'; *islão negros* (a translation of the French *islam noir*), who mixed the 'true' 'orthodoxy' with local culture (Amorim 1911, 98; Vilhena 1905, 55-56; Machado 1970, 249-253; Monteiro 1993, 120-124, 195-208). However, in contrast to other European Orientalists, the Portuguese did not try to define Islamic 'orthodoxy' except for equating it geographically with Arabia. More often than not, Islamic legal norms were subsumed under the concept of custom or, in Portuguese *usos e costumes* ("usages and customs"). For example, from the mid-nineteenth century, the family life of the overseas territories was regulated by the 1869 Civil Code, Article 8 of which stated that Portugal did not oppose "the usages and customs that were not in conflict with morals and public order" not only of the "natives," but also those of "oriental" immigrants such as "Banyans [Hindu Vanya], Bhatia, Parsees, and Moors [i.e., Muslims]" (Cota 1946, 45).

Notably, Portuguese colonialism did not fully engage the concept of custom either, especially with regard to Muslims. The relationship between customs and Islam, however, was one of the central questions addressed by Orientalist scholars of Islamic law, according to whom *shari'a* does not recognize custom (Ar., *adat* or '*urf*, habit, usages, custom) as a source of law (Coulson 1964, 143-146; Anderson 1962, 621-623; Bousquet 1950, 65; Vikør 2005, 166-167). Comparatively speaking, the British colonial regime was hardly accommodating to customs in India until 1922 (Abbasi 2014, 346-347). Afterwards, the customs of various regions were compiled and gradually codified for administrative and judicial use. Similarly, the French applied Islamic law in Algeria in the nineteenth century without regard for custom which however they recognized in the early twentieth century, especially in Grand Kabylie and West Africa (Bousquet 1950, 63; Roff 2010, 457-459; Christelow 1982, 10-11). By contrast, the Dutch in the Netherlands' Indies ended up privileging local custom over *shari'a* in the nineteenth century, mainly due to Christiaan Snouck Hurgronje's (1857-1936) approach to the administration of 'native' Muslims. Hurgronje, like other Orientalists, viewed *shari'a* as a completely separate field that could not accommodate local custom in the realm of law, but realized that custom rather than *fiqh* was a lived reality in Indonesia (Nurlaelawati 2010, 47-48; Keener 2002, 103; Roff 2010, 456). Under his influence, Cornelius van Vollenhoven (1874-1933) elevated *adat* as a source of law in the local pluralistic legal environment and systematized and codified it as a 'customary law' (*adatrecht*). In 1927 the Dutch colonial government officially established the primacy of *adat* over Islamic law as formal legal policy in the East Indian colonies. Thus, by the early twentieth century, the Dutch, French and British colonial regimes elaborated concrete legal pluralism, whereby to varying degrees, the *shari'a*, customary law and European legal systems operated side-by-side.

Portugal attempted to emulate other European countries when, during the 'effective occupation' (1895-1913), military officers were ordered to collect detailed ethnographic data on local societies and meant to be used for building modern colonial administrative and justice systems resembling those of other European powers (Lupi 1907, 80). However, as functionaries who were not yet affected by European Orientalism of the *shari'a*, they had no 'knowledge of Islam' or of the translation of the *fiqh* manuals and therefore recorded Islamic concepts as they

heard them from local people. Only Eduardo do Couto Lupi (1907, 80-81) mentioned the word *shari'a*. However, while pointing to the widespread use of the term in the region, he did not equate it with 'Islamic law' but rather with an 'ethnic' legal system, "the Makua code." A handful of *fiqh* terms, such as *mahr* (Ar., dower) and *talaka* (Sw., local vernacular from Arabic *talaq*, repudiation) are scattered throughout the reports on Muslim societies of northern Mozambique overwhelmingly described as matrilineal and matrilineal (Amorim 1911, 102-104, 120-121; Lupi 1907, 154-157; Almeida 1956, Vol. 1, 101; Vilhena 1905, 55).

In 1941, the Governor-General of Mozambique commissioned a jurist, José Gonçalves Cota to collect "all the ethnographic elements indispensable for the elaboration of the project of the civil and penal codes of the indigenous populations" (Cota 1944, 5). This was the first and a significant attempt by Portuguese colonialism to codify 'customary law' in Mozambique. Cota's findings were quite similar to those of the military officers of the conquest period, and he noted the prevailing matrilineality in northern Mozambique, including among Muslims (Cota 1944, 240-41). His works also contained some *fiqh* terms, such as *nikah*, *mahr*, and *talaq* without reference to classical or modern texts on *shari'a*, *fiqh* or Islamic law.

Various ethnographic studies were undertaken by Portuguese scholars and administrators until the mid-1960s but, with regard to Muslims, their orientation remained in essence the same. Changes came in the last decade of colonial rule, when Portugal created a special branch of the Secret Service called the Services for Centralization and Coordination of Information (SCCI, or SCCIM for Mozambique) which was mandated to study and prevent the susceptibility of Africans to the ideology of independence. Between 1965 and 1973, the SCCIM collected data on Islam in general and Muslim leaders in particular, with the objective of obtaining detailed information on Islamic networks and the means of communication between various Muslim regions and so-called 'poles' of religious authorities (Monteiro 1993, 280-81, 305-307). The reports again outlined the prevalence of matrilineality, but described instances where some Muslims attempted to confront matrilineal practices and even convert them into Islamic patrilineality. *Fiqh* terms such as *talaq*, *mahr*, and *nikah* featured without discussion of the links between them and the *fiqh*, but some short definitions of the concepts of *maddhab* and *Shafi'i* began to surface (Branquinho 1969, 423; Monteiro 1989, 73-75). The scholars of the early 1970s,

studying northern Mozambican Muslims, also described them as *Shafi'i* (Hafkin 1973, 42; Machado 1970, 274). But neither secret service officers nor the academics related this term to any *fiqh* texts or explained what it implied in practice for northern Mozambican Muslims.

Conclusion

Portuguese authorities and scholars maintained an Orientalist view of Muslim communities of northern Mozambique throughout the colonial period. This Orientalism, however, did not result in the study of Arabic or written Islamic sources, the translation of the *fiqh* manuals or instrumentalization of 'Islamic law' as the Dutch, British, and French colonial authorities and scholars did. The Portuguese defined the Muslims of northern Mozambique as 'syncretistic' people who mixed Islamic concepts with local African 'usages and customs', especially because they were matrilineal. While other European Orientalists theorized and put forward legal policies that separated *shari'a* and custom, the Portuguese did not engage in similar rationalizing of the relationship between these two concepts, although they seemed to have generally considered Islamic practices as part of custom. Only in the last decade of the colonial rule were the northern Mozambican Muslims described as followers of the Shafi'i *maddhab*, although neither a classical nor a contextualized meaning of this term was given. The concept of the Shafi'i legal school and other *fiqh* terms appeared in Portuguese reports and other writings, not because of the Portuguese colonist's knowledge of Islamic law, but because these concepts were employed and transmitted to them by local African Muslims. This clearly indicates that these Muslims were practising Islamic law throughout the colonial period. In fact, fieldwork carried out in northern Mozambique between 1997 and 2007 revealed that local Muslims identified themselves as Shafi'i and the most widely circulated and consulted *fiqh* manuals in the region were indeed of the Shafi'i *maddhab*, with *Safinat an-Najah* by Salim ibn Abdallah ibn Samir al-Hadrami (mid-19th c.) and, of course, *Minhaj al-Talibin* being the topmost. Obviously, Muslims of northern Mozambique have been long-term Shafi'i because Islam spread into the coast from the eighth century onward through the Indian Ocean and Swahili networks, and the Shafi'i legal school has been predominant historically along the Indian Ocean rim as well as in East Africa; both being regions to which northern

Mozambicans were connected for centuries (Trimingham 1964, 69; Ahmed 1999, 37; Christelow, 377; Schacht 1965: 91-136; Cammock and Feneer 2008, 96). However, how local Muslims have conceived of *shari'a* and *fiqh*, and how they practised Islamic law remains to be explored further.

Glossary

Adat or '*urf*' (Arabic) - habit, usages, custom.

Adatrecht – a code elaborated for Indonesia by its Dutch colonial administrators.

Al-Hidaya - a Hanafi treatise written by Burhān al-Dīn Abu'l-Ḥasan al-Marghīnānī (1135-1197).

Anglo-Muhammad Law - a legal code elaborated for India under Warren Hastings (1732 –1818).

Al-Mukhtassar – a legal treatise of the Maliki school written by Khalil ibn Ishaq al-Jundi (died ca. 1365).

Al-Muwatta – a legal treatise of the Maliki school written by Malik ibn Anas (711–795).

Fatawa-i-Alamgiri - a set of religious decrees and extracts from *Hanafi fiqh* treatises that was compiled under the emperor Aurangzeb in the seventeenth century.

Fiqh (Arabic) - Islamic jurisprudence.

Ijtihad (Arabic) - independent reasoning.

Islāo negro (Portuguese) – a term used by Portuguese colonial administrators and scholars (translation of the French colonial term *islam noir*) to denote the alleged heterodox nature of Islam practised by African Muslims.

Maddhahib (Arabic) - pl., sing., *maddhab*, Islamic legal schools.

Mahr (Arabic) – dower.

Minhaj al-Talibin - a legal manual of the Shāfi'i school of law written by by Muhiy ad-Din al-Nawawī's (1233–1277).

Nikah (Arabic) - Islamic marriage ceremony/contract.

Al-Muharrar or *Mogahharer* - a legal manual of the Shafi'i school of law written by Abu al-Qasim al-Rafi'i (d. 1431).

Safinat an-Najah – shafi'i legal treatise written by Salim ibn Abdallah ibn Samir al-Hadrami (mid-19th c.).

Shari'a (Arabic) - the divine path.

Statuta Batavia - a compilation of Shafi'i *fiqh*, legal rules to be applied on Indonesian Muslims issued the Dutch East India Company in 1642.

Talaka (Swahili from Arabic *talaq*) - repudiation of a wife by a husband; divorce.

Taqlid (Arabic) – imitation.

Ulama (Arabic) - pl., Islamic scholars, sing., *'alim*.

Usos e costumes (Portuguese) - usages and customs.

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