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# Constitution of Space through Law—A Study on the Question of Property of the Sea in Pre-Colonial and Colonial Law in the *Strait of Malacca*

**Abstract.** In the last few years, international researchers have discussed the concept of spatial turn, concerning the development of spaces and questions about the constitution of spaces. The focus has been placed on how spaces were culturally constituted and have to be seen as historically variable. However, spaces resulting from an implementation of law and their perception as representing a culturally different understanding of law in non-governed and governed territories, and as a common, monopolized and sole property have not yet been analyzed. The following study assumes that written law, which was globally accepted, constructed symbolic spaces surpassing geographical distances, or created spaces as territories and thereby created a new semantics of spatial distance and order. It focusses on the Strait of Malacca in a pre-colonial and colonial context. The Strait of Malacca was not constituted and structured as a closed, but rather an open space, available for everyone. The sea and Strait were not controllable from a pre-colonial perspective, but this changed after the conquest of Malacca by the Portuguese. The enforcement of their commercial monopoly was aimed at creating the Strait as a manageable space in order to own parts of the sea. This study will show that this plan could not be implemented completely, and therefore created simultaneously existing spaces of law in the Straits of Malacca.

## Introduction

In the last few years, questions regarding the development and constitution of spaces have gained prominence in the international field of historical research under the impact of the so-called “spatial turn”. The focus has been laid on how spaces were culturally constituted and should consequently be seen as historically variable entities. However, the creation of spaces as a result of the implementation of law and their configuration as culturally different understandings of law in non-governed and governed territories respectively, as well as the understanding of space as a common, monopolized and sole property have not yet been analyzed. The implementation of law is a human practice. The following study assumes, however, that written law constructed symbolic spaces

either by passing geographical distances or by perceiving spaces as territories and thereby creating new semantics of spatial distance and order. It focusses on the Strait of Malacca in a pre-colonial and colonial context, assuming that the pre-colonial Islamic and Islamic-Hindu law of *Udang udang Malakka* and *Udang udang Laut* originated as a hybrid from two traditions and that they legally structured the commercial center of Malacca and its harbours on the Malayan peninsula and connected this trading area with the Indian Ocean by its common Islamic legal practice. However, it did not constitute and structure the Strait of Malacca as a closed space but rather as an open one, accessible to everyone. Even in regions of straits, the sea was not controllable in pre-colonial times, but this changed after the conquest of Malacca by the Portuguese. The forced establishment of their commercial monopoly aimed at the creation of a manageable space in the strait in order to own the sea. The study will show, however, that this plan could not be implemented completely and therefore created several legal spaces in the Straits of Malacca, which existed simultaneously.

The Dutch East India Company (VOC), did not only purposefully accept domestic law besides their own commercial law, as long as this was helpful with regard to the acquisition of goods, but also kept it actively operating in legal transactions with local people, though always based on the Dutch monopoly.

In this context, a hybrid and interlinked law was developed, and the Strait of Malacca became a space of interlinked laws, but without a domination or even an occupation of the sea by the Dutch. On the contrary, the freedom of the sea and the respect paid to domestic law by the Dutch proved to be a useful strategy in order to gain access to all goods. In addition, contracts with the local people were based on natural law (the general rule of *pacta sunt servanda* as well as the principle of 'good will') and therefore lent substance to them.<sup>1</sup> In this sense, the Strait of Malacca represents the formation of a compact geographical space, consisting of coasts which define and border on a manageable part of the sea and thereby make it an interesting object of study.<sup>2</sup>

With this in mind, the particular object of this paper is the history of the commercial city of Malacca between the 15<sup>th</sup> and the 17<sup>th</sup> century. In the following, I will argue that the circumstances within the strait were not only pro-

1 Anthony d'Amato, Good Faith, in: *Encyclopedia of Public International Law*, vol. 7, Amsterdam/New York/Oxford 1984, 107–109.

2 Heinz Fischer defines a strait as a "narrowing of the sea between mainland or islands" (Verengung des Meeres zwischen Festlandmassen oder Inseln): Heinz Fischer, Meerengen. Eine vergleichende Studie, in: *Geographica Helvetica* 18/2 (1963), 212–222, here 212.

duced by physical presence (i.e. plying it) but also by the space-constituting and space-occupying effects of law. The term “production of space by means of law” is understood here as the spatial distribution of generally accepted and acknowledged rights. However, this can also be an imposed law (like colonial commercial law with a claim to monopoly), which superseded law based on military superiority.

In the course of the first part of my analysis, I will portray the origin of the Strait of Malacca as a pre-colonial legal space. Thus, I will develop the argument that during this period no property rights were applied to the sea and correspondingly to the strait. I will show that it was only with the establishment of European trade monopolies—especially the Lusitanian crown monopoly<sup>3</sup> and the Dutch commercial monopoly—and the contractual fixing of legal rights that an enforcement of property claims concerning the sea took place. This also had a space-structuring effect on the strait by producing several coexisting legal areas. It will be demonstrated that only the Europeans structured the geographical space of the Strait of Malacca (in its totality) through the instrument of arbitrary legal boundaries. It will be shown how law was used either to interconnect or to separate parts of the sea, and in this particular case how the Strait of Malacca was either closely connected to the Indian Ocean or separated from it.

## Who owns the Sea? Some Reflections

Within two years between 1493 and 1494, the papal bull *Inter cetera* and the subsequently concluded Treaty of Tordesillas—as well as the Treaty of Saragossa in 1529—divided the extra-European world between Portugal and Spain. In doing so, these documents legally assigned the seascapes to one sphere of influence or the other. In defining their claims and ideas of ownership, the two European crowns referred to the extensive power and sovereignty of the *Vicarius Christi*.<sup>4</sup> The Portuguese King Manuel I (1469–1521), for example, gave expression to his proclaimed rule over the Eastern Seas, including the maritime

<sup>3</sup> The study uses the term “monopoly” in its contemporary meaning as “exclusive freedom of trade” (*alleinige Verkaufungs=Freiheit*), which is ensured both contractually and militarily. Johann Heinrich Zedler, *Grosses vollständiges Universal-Lexicon Aller Wissenschaften und Künste*, vol. 21, Leipzig 1735, 1192. See also Kerry Ward on the law of the Dutch East India Company and briefly on their handling of domestic law: Kerry Ward, *Networks of Empire: Forced Migration in the Dutch East India Company*, Cambridge 2009, 74–75.

<sup>4</sup> For the idea of a closed sea (*Mare clausum*) in the Early Modern Times see Bo Johnson Theutenberg, *Mare clausum et Mare liberum*, in: *Arctic* 37/4 (1984), 481–492. Here

route to India, by adorning himself with a corresponding title: *Pela Graça de Deus, Manuel I, Rei de Portugal e dos Algarves, d'Aquém e d'Além-Mar em África, Senhor da Guiné e da Conquista, Navegação e Comércio da Etiópia, Arábia, Pérsia e Índia, etc.* (“D. Manuel, [...], Lord of Navigation and Commerce in Ethiopia, Arabia, Persia and India”).<sup>5</sup> In a comparatively unspecific way, and rather tailored to the terrestrial sphere, King Philipp II of Spain (1527–1598) called himself *Hispaniarum, Indiarum Rex*.<sup>6</sup> Although being conceptualized in terms of international law by John Selden (1584–1654) in 1635 for the first time, the idea of ownership of the seas can even be identified within European medieval discourses. Seldon’s concept of a *mare clausum* itself can be regarded as a response to Hugo Grotius’s *Mare liberum*.<sup>7</sup> The Spanish jurist Fernando Vázquez de Menchaca (1512–1569), on the other hand, argued along different lines when he stated, so Hugo Grotius quoted: “For it is manifest that if many hunt on the land or fish in a river, the forest will soon be without game and the river without fishes, which is not so in the sea”.<sup>8</sup> The Dutch lawyer Hugo Grotius (1583–1645) structured his argument in accordance with Roman law and finally

484 and 490. On the medieval idea of sovereignty see Jens Bartelson, *A Genealogy of Sovereignty*, Cambridge 1993, 88–136. However, Hugo Grotius argues: [...]: *cum alias etiam certum sit multa Christum habuisse in quae Pontifex non successerit, intrepide affirmarunt [...] Pontificem non esse dominum civilem aut temporalem totius orbis. Imo etiam si quam talem potestatem in mundo haberet, eam tamen non recte exerciturum, cum spirituali sua jurisdictione contentus esse debeat, saecularibus autem Principibus eam concedere nullo modo posse.* Hugo Grotius, *Mare Liberum. Sive De iure quod Batavis competit ad Indicana commercia Dissertatio*, Leiden 1648, 26. This article is based on an intensive discussion between Peter Borschberg and me in September 2014 during a research trip to Singapore. I am very grateful to him. I would also like to thank my partner Uwe Pirl for several juridic comments as well as my colleague Urte Weeber for discussions on international law. Besides, I would like to thank my research assistant Steve Bahn for the language editing of this article.

5 Damião de Góis, *Crónica do Felicíssimo Rei D. Manuel*, ed. José Barbosa Machado, Braga 2010, 81 (cap. 46).

6 Monica Brito Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden’s Debate on Dominion over the Seas*, in: *Journal of the History of Ideas* 64/3 (2003), 361–377, here 376. See also the copper plate from Emanuel van Meteren in the private collection of Peter Borschberg; Peter Borschberg, *The Memoirs and Memorials of Jaques de Coutre. Security, Trade and Society in 16<sup>th</sup>- and 17<sup>th</sup>-Century Southeast Asia*, Singapore 2014, 103.

7 John Selden, *Mare clausum: seu de dominio maris, libri duo*, London 1635.

8 Grotius, *The Free Sea* (cf. n. 4), 47. Baldus argued: *Maris est commune quod usum, sed proprietas est nullis [...] iurisdictio est caesaris, & sic ista tria sunt diversa; proprietas, usus, iurisdictio & protectio.* Theutenberg, *Mare clausum et Mare liberum* (cf. n. 4), 481–492. 488.

concluded as Vázquez de Menchaca that the seas were rather a common good of mankind. In his treatise *Mare liberum*, published in 1609, he claims:

“For even that ocean where with God hath compassed the Earth is navigable on every side round about, and the settled or extraordinary blasts of wind, not always blowing from the same quarter, and sometimes from every quarter, do they not sufficiently signify that nature hath granted a passage from all nations unto all?”<sup>9</sup>

Thus, the sea differed from the land in so far as it could not be taken into possession. Ownership, according to Grotius, results from a justified or unjustified physical occupation.<sup>10</sup>

Although the VOC utilized the Grotian argument in order to legitimize its call for an unimpeded access to the sea and for free trade in all regions of the world, their actual strategies of occupying both lands and parts of the sea rapidly foiled this very strand of thought.

Correspondingly, Gilles Deleuze emphasizes that the VOC, in line with the terrestrial experience, aimed at declaring certain parts of the sea to be shipping routes by means of mapping. The factual occupation of these routes was realized by both plying them and controlling them through a certain form of military presence. Following the argument of Deleuze and Guattari, this was how the ‘smooth’ maritime space was carved:

“Von allen glatten Räumen ist das Meer auch der erste, den man einzukerben versucht hat, den man in eine Dependance der Erde zu verwandeln versuchte, mit festen Wegen, konstanten Richtungen, relativen Bewegungen.”<sup>11</sup>

Seen from a historian’s point of view, this argument is corroborated by the systematic establishment of the so called *wagenspoor* of the Dutch,<sup>12</sup> the plied and guarded route of their ships.

9 Grotius, *The Free Sea* (cf. n. 4), 11. Karl Zemanek, *Was Hugo Grotius Really in Favour of the Freedom of the Seas?*, in: *Journal of the History of International Law* 1 (1999), 48–60, here 51. Martine van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595–1615*, Leiden 2006, 286. Martine Van Ittersum, *Kein Weiser ist ein Privatmann. Die Römische Stoa in Hugo Grotius’ De Jure Praedae (1604–1608)*, in: *Kosmopolitanismus: Zur Geschichte und Zukunft eines umstrittenen Ideals*, ed. Matthias Lutz-Bachmann, Andreas Niederberger and Philipp Schink, Weilerswist 2010, 59–100, here 89–90.

10 Grotius uses an argument of Seneca, cf. Van Ittersum, *Kein Weiser ist ein Privatmann* (cf. n. 9), 90–91.

11 Gilles Deleuze and Félix Guattari, *Tausend Plateaus: Kapitalismus und Schizophrenie*, Berlin 1992 553 and 533.

Comparatively, it seemed to be easier and thus more attractive to occupy those parts of the sea that were associated with straits which, due to their natural conditions, shaped and delimited manageable and thus controllable spaces.<sup>13</sup> Straits were thus of particular geostrategic importance, since their domination implicated great political and economic advantages. The control over the strait's waterscape could be constituted by maritime and commercial laws that in turn could be enforced by administrative and military institutions (administrative bodies, fleets). Straits, therefore, offered an opportunity for the implementation of a *Mare clausum*. The Portuguese jurist Serafim de Freitas (1570–1633) claimed in his work *De iusto imperio Lusitanorum Asiatico*, published in 1625, that the sea could be used by acts of navigating or fishing.<sup>14</sup> This recalls the idea of the Portuguese king Manuel I as “Lord of Navigation” as mentioned earlier. Referring to the Roman law, this denied the possibility of being the rightful owner of elements such as air or water. He nevertheless highlighted the point that the sea could only be controlled in the form of a river in its bed. This very ‘bed’ of the sea proved to be especially manageable within a strait.<sup>15</sup>

The territorial occupation of the sea by the Europeans contrasts with traditional Southeast Asian ideas of space, especially with regard to the execution of power. The sultans rather ruled over people than governed a territory. The quality of the sultans' access to their human resources depended on their physical presence. While the Portuguese and the Dutch made use of militarily marked strategies of occupation, the sultans did not command large fleets or possess fortified weir systems by means of which they might have been able to assert control over the sea.<sup>16</sup>

12 Femme S. Gaastra, *The Dutch East India Company: Expansion and Decline*, Zutphen 2003, 112.

13 Fischer, Meerengen (cf. n. 2), 212. Deleuze argues that the horizon plays an important role with regard to orientation and territoriality: “Die Wüste, der Himmel oder das Meer, der Ozean, das Unbeschränkte spielt zunächst die Rolle eines Umfassenden und tendiert dahin, Horizont zu werden: die Erde wird also durch dieses Element, das sie im unbeweglichen Gleichgewicht hält und eine Form möglich macht, zur Umgebung.“ (“The desert, the sky and the sea, the ocean, the indefinite first acts as surrounding and tends to become horizon: this keeps the earth in a fixed balance and creates its form and the earth becomes environment.”) Deleuze and Guattari, *Tausend Plateaus* (cf. n. 11), 685.

14 Serafim de Freitas, *Do justo Império Asiático dos Portugueses*, vol. 2, chap. XI, n. 15. See also Brito Vieira, *Mare Liberum vs. Mare Clausum* (cf. n. 8), 372.

15 Freitas, *Do justo Império* (cf. n. 14), vol. 2, chap. X, n. 129. Vieira, *Mare Liberum vs. Mare Clausum* (cf. n. 8), 373.

16 Regarding ideas of frontiers and boundaries see James Scott, *The Art of not Being Governed. An Anarchist History of Upland Southeast Asia*, New Haven 2009; Oliver William Wolters, *History, Culture and Region in Southeast Asian Perspectives*, Ithaca 1999, 27–28.

Thus the Portuguese and Dutch claims to power provide information on the European attempts to transform the Asian seas into systems of borders and subdivisions. In this context, it is still unclear to what extent the constitution of laws shaped spaces and subjected them to certain types of ownership.

## Precolonial Conditions

Geographically speaking, the Strait of Malacca is a waterway connecting the Indian Ocean (Andaman Sea) and the South China Sea. It runs between the Malay Peninsula to the East and the Indonesian Island of Sumatra to the West. During the 15<sup>th</sup> century, it predominantly served commercial exchanges between East Asian, Southeast Asian, Persian and Arabic communities. By the 16<sup>th</sup> century, in contrast, this trading system was additionally completed through trade links between European, Arab and Asian communities that even extended to the American continent. Thus, concerning at least the period between 1400 and 1699, the strait can be identified as one of the central points of globalization that significantly contributed to a worldwide transfer of goods, knowledge and ideas.<sup>17</sup> The town of Malacca, in turn, probably derived its name from the Arab term *malakat*, i.e. community of merchants.<sup>18</sup> Already prior to the arrival of the Europeans in 1511, the city constituted one of the region's most thriving places of transshipment and subsequently developed into the

Alexander Drost, *Grenzenlos eingrenzen. Koloniale Raumstrukturen der Frühen Neuzeit am Beispiel niederländisch-spanischer Konfliktfelder in Asien. Essay zur Quelle Vertrag von Ternate mit der Ostindischen Compagnie 1607*, in: *Themenportal Europäische Geschichte*, URL: <http://www.europa.clio-online.de/2013/Article=613> (accessed 30 August 2015), 1–8, here 1 and 5–6. According to the Malayan annals (*Sejarah Melayu*), the inhabitants of Malacca did not have the weapons nor the power to fight against the Portuguese. Pires mentions two cannons, but no fleet at all. Malcolm Dunn, *Kampf um Malakka. Eine wirtschaftsgeschichtliche Studie über den portugiesischen und niederländischen Kolonialismus in Südostasien*, diss., Wiesbaden 1984, 246, note 1. The Ottoman Empire supported Aceh with weapons when they attacked Malacca. Rui Manuel Loureiro, *Weapons, Forts and Military Strategies in East Asia*, in: *Revista de Cultura/Review of Culture* 27 (2008), 78–96, here 85.

<sup>17</sup> Antje Flüchter and Michael Jucker claim that Asian networks had a huge impact on the early globalization, into which the Europeans integrated themselves: Antje Flüchter and Michael Jucker, *Wie globalisiert war die Vormoderne? Ein Plädoyer für einen neuen Blick in den asiatischen Raum*, in: *Traverse* 14 (2007), 97–111, here 97.

<sup>18</sup> A different view supposes that the name derives from a tree which grows around Malacca. I am very thankful for this comment to Peter Borschberg, "Myrobalans, the fruit of a tree growing along the banks of a river called the Aerlele [...]" Manoel Godinho de Eredia, *Eredia's Description of Malacca, Meridional India and Cathay*, ed. J.V. Mills, in: *Journal of Malayan Branch of the Royal Asiatic Society* 8 (1930), 1–288, here 19.

central trading port of Southeast Asia—at least under Portuguese control. Due to its geostrategically advantageous location, the city was a crucial part of various trading routes. Since the contemporary maritime technologies did not allow the merchants to cross the Indian Ocean within one monsoon season, the city’s port proved to be a welcome stopover. In 1515, the Portuguese Tomé Pires (c.1468 – c.1540) noted:

“Melakka is a city that was made for merchandise, fitter than any other in the world; the end of the monsoons and the beginning of the others. Melakka is surrounded and lies in the middle, and the trade and commerce between the different nations for a thousand leagues on every hand must come to Malakka.”<sup>19</sup>

Within his account, Tomé Pires informs us on the colorful bustling activities of the city’s merchant community that was comprised of trading groups coming from 55 different regions and representing 40 language communities. He meticulously mentions merchants originating from Cairo (North Africa), Mecca, Hormus, Siam, the Indian province of Gujarat, Cambodia, China, the Maluku Islands and Timor. In accordance with Pires, Arabic, Bengal and Persian merchants settled in the area of the city. These settlement processes were closely linked to the ruling Malakkan dynasty’s conversion to Islam, which attracted Muslim merchants, but simultaneously did not impede the commercial activities of merchants belonging to other religious groups. Observing Malacca’s thriving economy, Pires concluded “that anyone who was a master of Malakka held Venice by the throat”.<sup>20</sup> This was the reason why first the Portuguese and subsequently the Dutch aspired to dominate the city.

Since the rule of Paramésvara (1344 ? – c.1414), an heir of the kings of Śrīvijaya who converted to Islam, Malacca was subordinate to the government of a sultan, according to the Persian model of a “coastal kingdom”. Moreover, the city enjoyed the protection of Ming China, to which Malacca payed annual

<sup>19</sup> Tomé Pires, *The Suma Oriental of Tomé Pires: An Account of the East, from the Red Sea to Japan, Written in Malacca and India in 1512–1515*, reprint 1944, Nendeln 1967, 286. Pires’s report needs to be seen critically and does not state the size of the city correctly, following the indigenous *Malay Annals* (Sejarah Melayu). He was probably exaggerating the importance of the city in order to emphasize its successful occupation. On the transmission of Pires’s reports see Peter Borschberg, Another look at Law and Business during the Late Malacca Sultanate, c. 1450–1511, unpublished paper, 3–4.

<sup>20</sup> Pires, *The Suma Oriental of Tomé Pires* (cf. n. 19), 269. Indian cotton and spices from South East Asia were mostly traded at the port of Malacca. Barbara Watson and Leonard Andaya, *A History of Malaysia*, New York 1982, 43–44; Ahmad Sarji and Abdul Hamid, *The Encyclopedia of Malaysia: The Rulers of Malaysia*, vol. 16, Singapore 2007, 114.



tributes.<sup>21</sup> This, too, made the city very interesting for the Portuguese and later for the Dutch.

Hugo Grotius highlighted the fact that local laws existed in some Asian regions, without further commenting on each of these codes of law, their contents or their geographical areas of validity.<sup>22</sup> Malacca, in this regard, is an excellent example of a well-functioning legal system. During the reign of Muḥammad Shah (1424–1444) the *Undang undang Malakka*, a public law that focused on the city of Malacca, was compiled. Initially, it was conceived as an instrument regulating the relations between the sultan and his subjects. In addition, it included a commercial law together with many references to trading.<sup>23</sup>

This law was complemented by the *Undang undang Laut*, a code of maritime law applied to ship owners and ship tenants of Malacca. Both the *Undang undang Malakka* and the *Undang undang Laut* could easily be interpreted as a reaction to the legal uncertainty that had been communicated by the Muslim merchants.<sup>24</sup> On site those people had to face a customary law that was hardly transferred into a written form (*‘ādāt* = arab.: unwritten customary law), and was based on the Hindu tradition established by Muḥammad Shah’s ancestors. Apart from that, this customary law partly clashed with Islamic law and the

21 Francois Gipouloux, *The Asian Mediterranean: Port Cities and Trading Networks in China, Japan and Southeast Asia, 13th–21st Century*, Cheltenham 2011, 74–75 and 104. On private and official trade as well as liberalizations see Bodo Wiethoff, *Die chinesische Seeverbotspolitik und der private Überseehandel von 1368–1567*, Wiesbaden 1963, 22–23. Idem, Tribut und Handel. Chinesische Seeräuber und Übersehändler im 16. Jahrhundert, in: *Saeculum* 15 (1964), 230–246, here 244. Between 1403 (under the Ming emperor Yongle [r. 1402–1424]) and 1511, Malacca had to pay tributes to China. Gipouloux, *The Asian Mediterranean* (cf. n. 21), 59, 63 and 142. Dunn, *Kampf um Malakka* (cf. n. 16), 31. See also Arun Das Gupta, *The Maritime Trade of Indonesia 1500–1800*, in: *South East Asia: Colonial History*, vol. 1: Imperialism before 1800, ed. Paul Kratoska, London 2001, 91–125. Benedict Richard O’Gorman Anderson, *The Idea of Power in Javanese Culture*, in: *Culture and Politics in Indonesia*, ed. Claire Holt, Ithaca 1972, 1–69; Borschberg, *Another look at Law* (cf. n. 19), 8.

22 De Freitas, *Do justo Império* (cf. n. 14), 195 (chap. XI).

23 On the emergence of different versions and on the content of *Undang Undang Malakka* see Liaw Yock-Fang, *Undang-Undang Melaka. A Critical Edition*, PhD thesis The Hague 1976, 33 and 45–48. See also Anthony Reid, *Southeast Asia in the Age of Commerce 1450–1680*, vol. 2: *Expansion and crisis*, New Haven 1993, 48–50. On the code’s age, see Richard Winstedt, *The Date of the Malacca Legal Codes*, in: *Journal of the Royal Asiatic Society of Great Britain and Ireland* 1/2 (1953), 31–33.

24 On the beginnings of Islamization of the Indian Ocean, see George Fadlo Hourani, *Arab Seafaring in the Indian Ocean in Ancient and Early Medieval Times*, Princeton 1951, 62–64.

commercial space constituted by it: a space that encompassed large parts of the Indian Ocean. In the process of its islamification, Malacca became a crucial part of this system. Henceforth, the *Undang undang Malakka* and the *Undang undang Laut* offered a set of rules and regulations for those areas, where Islamic law was superimposed on old-established customary laws. This law seemed more concerned with pointing out differences between Islamic Law and *‘ādāt*. As a result, uncertain and hardly comprehensible traditions of oral customary law—especially from the foreign merchant’s perspective—were transferred into a written form. Therefore, both codes formed a link between the ancient Hindu law and the ‘new’ Islamic law.<sup>25</sup> This combination strategically constituted the legal space of Malacca and structured it transparently.

First, the *Undang undang Laut* regulated the crews, the *nakhodas* (captains) rights and obligations as well as those of the *hukum Kiwi* (travelling merchants), their privileges regarding business contracts and the granting of loans. Furthermore, the *Undang undang Laut* firmly established the *commenda* system.<sup>26</sup> Nevertheless, it did not contain “specific laws to protect the trader and the entrepreneur.”<sup>27</sup>

Until the end of the precolonial era, the codes guaranteed and structured free trade within the city and provided a certain amount of legal certainty for the foreign merchants. Furthermore, they determined the dues for using the port, regulated the off-hire periods and particularly secured the sultan’s control over the local trade by settling custom matters.

<sup>25</sup> Peer Zumbansen, Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism, in: *Beyond Territoriality. Transnational Legal Authority in an Age of Globalization*, ed. Günther Handl, Joachim Zekoll and Peer Zumbansen, Leiden 2012, 53–86, here 53.

<sup>26</sup> Pires states: “If I am a merchant in Melaka and give you, the owner of the junk, a hundred cruzados of merchandise at the price then ruling in Melaka, assuming the risk myself, on the return [from Java] they give me a hundred and forty and nothing else, and the payment is made, according to the Melaka ordinance, forty-four days after the arrival of the junk in port.” Pires, *The Suma Oriental of Tomé Pires* (cf. n. 19), 284. On the system of commenda and its Roman roots, its circulation in Medieval Europe and simultaneously in the Arab trading area see Hans Lovrek, *Die mittelalterliche Commenda und die moderne Private Equity Industrie. Lösungen eines Prinzipal-Agent Problems*, unpublished PhD thesis Wien 2012, 8–25. See also Shlomo Dov Goitein, Economic Foundations, in: *A Mediterranean Society. The Jewish Communities of the Arab World as portrayed in the Documents of the Cairo Geniza*, vol. 1, Berkeley 1967, 170. Alfred Lieber, Eastern Business Practices and Medieval European Commerce, in: *The Economic History Review* 21/2 (1968), 230–243.

<sup>27</sup> Jeyamalar Kathirithamby-Wells, Ethics and Entrepreneurship in Southeast Asia c. 1400–1800, in: *Maritime Asia. Profit Maximisation, Ethics and Trade Structure*, ed. Karl Anton Sprengard and Roderich Ptak, Wiesbaden 1994, 171–187, here 178–179.

The *shahbandar*, a harbour master<sup>28</sup> who was paid by the court, had full control over the trading goods on behalf of the sultan. He collected the port dues and supervised both the port and the warehouses. This function guaranteed a proper solution to all matters related to logistical issues. Additionally, he was authorized to negotiate with foreign envoys. During his stay in Malacca between 1512 and 1515, Tomé Pires recorded four *shahbandars* being responsible for merchants from different regions: they were the merchants' official reference persons.<sup>29</sup> However, the *Undang undang Malakka* mentions only one.<sup>30</sup>

Nevertheless, on closer consideration it becomes obvious that the extent of the sultan's sovereignty was closely associated with the city and its port. Contrary to previous paradigms of research, it has to be emphasized that the sea itself was not included in his territory. Rather, the *Undang undang Laut* conceptualized the ships as sovereign entities, whose captains were endowed with the authorities of a *rāja* and correspondingly possessed a certain authority over people (e.g. crew, travelers) and goods entrusted to them. This corresponded to the European idea of a ship as a space within the spaceless vastness of the sea. Juridically speaking, it constituted a system comparable to an ancient *polis*, as the responsible people were provided with corresponding functions (reign, jurisdiction). During the early modern period, ships were seen as an extension of those European powers or trading companies that had delegated them. Their captains applied the law given by their commanders. With this in mind, the ship was regarded as a bubble of sorts, with its limits constituting the sphere of influence of the captain.<sup>31</sup> Once he left the ship, he lost most of his power.

28 Malcolm Murfett, John N. Miksin, Brian P. Farrell et al., *Between Two Oceans. A Military History of Singapore from 1275 to 1971*, Singapore 2011, 32. Dunn, *Kampf um Malakka* (cf. n. 16), 50. Ahmad and Hamid, *Encyclopedia of Malaysia* (cf. n. 20), 115. On this function see Charles O. Blagden, *Shahbandar and Bendahara*, in: *Journal of the Royal Asiatic Society of Great Britain and Ireland* 2 (1921), 246–248.

29 “They are the men who receive the captains of the junks. [...] These men present them to the Bemdara (the royal treasurer), allot them warehouses, dispatch their merchandise, provide them with lodging if they have documents, and give orders for the elephants. There is a Xabamdar [Shahbandar] for the Gujaratees [Islamic merchants of India], the most important of all; there is a Xabamdar for the Bunuaquijlim, Bengalees, Pegus Pase; a Xabamdar for the Javanese, Moluccans, Banda, Palembang, Tamjompura and Lucoes; there is a Xabamdar for the Chinese, Lequeos, Chancheo and Champa. Each man applies to [the Xabamdar] of his nation when he comes to Malacca with merchandise or messages.” Pires, *The Suma Oriental of Tomé Pires* (cf. n. 19), vol. 2, 265.

30 Liaw, *Undang-undang Melaka* (cf. n. 23), 63.

31 Eckart Schäfer, *Das Staatsschiff. Zur Präzision eines Topos*. in: *Toposforschung. Eine Dokumentation*, ed. Peter Jehn, Frankfurt am Main 1972, 259–292, here 260. Dietmar Peil, *Untersuchungen zur Staats- und Herrschaftsmetaphorik in literarischen Zeugnissen von der Antike bis zur Gegenwart*, München 1983, 700–870.

Neither the Malaccan law nor the maritime law forced the captains to land at the city's port and sell their goods at its markets.<sup>32</sup> On the contrary, every *nakhoda* was free to land his ship at the port he preferred. Although the *Undang undang Malakka* and the *Undang undang Laut* had a space-structuring effect on the Strait, they did not occupy this space. Turning the city and its port into a legally safe and lucrative trading place, their space-constituting influence was indirect.<sup>33</sup> In terms of a juridical terminology, it is wrong to assume that the Strait of Malacca was a legal monopoly of the sultan during the precolonial period.<sup>34</sup> It was rather the local advantages which attracted the merchants and thereby led to a concentration of the trade in the area of the city. The *Undang undang Malakka* and the functions created by it were a vital requirement for both a free, open and unrestricted market for strong trade and the rise of Malacca as a commercial center, which embraced most of the regional trading networks. Besides being structurally open, the city offered another attractive reason to the merchants of Sumatra and other Southeast Asian areas: the continuous presence of Chinese traders and their goods.

Borschberg argues that the *Undang undang Malakka* contains a regulation that possibly provides an indication concerning the Sultans' attitude towards the sea.<sup>35</sup> Paragraph 20.1 implies a distinction between "living land" (*tanah*

32 "When you administer these laws at sea, they shall not be afterwards interfered with on shore. Henceforth let the laws of the sea be carried into effect at sea, in like manner as those of the land are carried into effect on land; and let them not interfere with each other; for you (addressing himself to the *nakhodas*) are as *rajas* ('king') at sea, and I confer authority on you accordingly." Cited in James Reddie, *An Historical View of the Law of Maritime Commerce*, Edinburgh 1841, 484.

33 Thomas Stamford Raffles (1781–1826) stated in his *History of Java*: "Of this monopoly there is no trace in the *Undang undang* of the *Maláyus*, or in the fragments of their history." Thomas Stamford Raffles, *The History of Java*, vol. 1, Kuala Lumpur 1965, 235. Peter Borschberg refers to the sultan allied with *Orang laut*, free inhabitants or *sea gypsies* and their ships, who did not belong to a community and therefore could control the Strait with regard to piracy and prohibited trade. Borschberg, Another look at Law (cf. n. 19), 15. A similar idea can be found in Leonard Andaya, *Leaves of the Same Tree. Trade and Ethnicity in the Straits of Melaka*, Honolulu 2008, 114–115., 173–175. However, Wolters states that the cooperation between the sultan and the *Orang laut* can be regarded as legitimized piracy, i.e. corsairing, which benefited the sultan. This assumption thwarts the assumption of legal surety created by the two codes for Malacca as a trading spot. Oliver Wolters, *The Fall of Śrīvijaya in Malay History*, London 1970, 14.

34 See Dunn, Kampf um Malakka (cf. n. 16), 56. Sinnapah Arasaratnam, Monopoly and Free Trade in Dutch-Asian Commercial Policy. Debate and Controversy within the VOC, in: *South East Asia. Colonial History*, vol. 1, *Imperialism before 1800*, ed. Paul Kratoska, London/New York 2001, 315–333. Borschberg argued in our discussion "it is true that Malacca had a hegemonic position in the straits, but it was not unquestionable" (Singapore, August 2014)

*hidup*) and “dead land” (*tanah mati*): “There are two kinds of land, first the ‘living land’; and second the ‘dead land’”. In regard to “dead land”, nobody owns it until there is a sign of someone cultivating it. If someone wants to grow rice on it—a *huma* or *landang* or *sawah* or *bendang*—no one can proceed against him.<sup>36</sup> This law does not deal with the sea and its association with the Strait. However, if one transfers the idea of “dead land” to the sea, the latter cannot be conceptualized in terms of ownership or property. If someone cultivates a certain part of area, he is entitled to own this part. However, this cannot be applied to the sea. In my opinion, Peter Borschberg compares the “dead land” to the jungle, equating wild animals with the ships on the sea.

However, this is a wrong interpretation, although there are similarities between a hunter chasing a wild animal and a ship. Both use the given spaces (the jungle and the sea) and, if appropriate, use their products such as animals and fish. However, looking at the *Undang undang Malakka* again, this excludes hunting as an indicator of human ownership of land as well as maritime traffic as evidence for owning the sea. Instead, owned space should be cultivated and made suitable for human settlement. It is also possible to think of a merchant walking through a jungle to get from one place to another, following Borschberg. Even if he cultivates his part of the jungle, he admittedly ‘changes’ the jungle. However, this change should not be classified as cultivation. According to the law, the jungle thus remains “dead land”, which means it does not belong to a human being.

To a certain extent, these considerations echo Serafim de Freitas’s (1570–1633) idea of the exploitation of the sea, which itself does not constitute any ownership.<sup>37</sup>

This corresponds with the legal understanding of the sultans of Malacca, as they only claimed rule over people. Neither a trade monopoly nor a legal claim on the sea or an official military fleet existed that ‘possessed’ the Strait. Therefore, precolonial Malacca cannot be classified completely as a thalassocracy, even though this has been alleged by several scholars.

35 “One surmises that traditional thinking held that ships are like wild beasts in the forest.” Peter Borschberg, *Malacca as a Sea-Borne Empire. Continuities and Discontinuities from Sultanate to Portuguese Colony (Fifteenth and Sixteenth Century)*, in: *Water and State in Europe and Asia*, ed. Idem and Martin Krieger, New Delhi 2008, 35–71, here 43 and 45.

36 Liaw, *Undang undang Melaka* (cf. n. 23), 111.

37 See Borschberg, *Malacca as a Sea-Borne Empire* (cf. n. 35), 39. On the term “thalassocracy” and its use for Malacca see Peter Wheatley and Kernial Sandhu, *Melaka. The Transformation of a Malay Capital, c. 1400–1980*, vol. 1, Kuala Lumpur 1983, Introduction and 129–130.

## The Portuguese Strait of Malacca

The precolonial *status quo* was changed by the inclusion of the Europeans in the local trading system. By imposing their maritime power, they exported the European idea of a trade monopoly to the region. When the Portuguese seized the city in 1511, they aimed at controlling both the local trading system and the trading routes towards Europe.<sup>38</sup> This implied the supervision of the ships travelling through the Strait via payment of duties—and thus the control of the entire Strait.

Therefore, I argue that these steps must be understood as the establishment of a monopoly by means of the Portuguese commercial law via military supremacy. On the one hand, the Portuguese intended to impose their claims regarding a monopolized trade of spices (especially pepper and cloves).<sup>39</sup> This claim was inter alia realized by the conclusion of treaties. The treaties theoretically excluded other powers from the trading system. These monopoly contracts geared at limiting the rights of authorized traders, e.g. the expulsion of Muslim merchants from the city. Peter Borschberg refers to the huge influence of the church and of the religious orders on the Portuguese trade and the *Estado da India* respectively.<sup>40</sup> Religious diversity and mission both occasionally dominated and limited Portuguese trade ambitions. On the other hand, the new authorities draconically punished those indigenous suppliers who traded with other European merchants such as the Dutch.<sup>41</sup>

38 Loureiro, Weapons, Forts and Military Strategies in East Asia (cf. n. 16), 79. Bailey Diffie and George Winius, *Foundations of the Portuguese Empire, 1415–1580*, Minneapolis 1978, 259. Gipouloux, *The Asian Mediterranean* (cf. n. 21), 120–121.

39 Dunn, Kampf um Malakka (cf. n. 16), 56.

40 Peter Borschberg, *Singapore and Melaka Straits. Violence, Security and Diplomacy in the 17<sup>th</sup> Century*, Singapore 2010, 197. “Estado da India” refers to an administratively consistent combination of all the areas that were ruled by governors under the head of a general governor based in Indian Goa. The governor was supported by an advisory council and a *capiato*. Five noble families occupied these governor positions until the end of the seventeenth century.

41 Johan Theodor Bry, *Achter Theil der Orientalischen Indien, begreifend erstlich Ein Historische Beschreibung der Schiffart, so der Admiral Jacob von Neck auß Hollandt in die Orientalische Indien von Ann. 1600. biß An. 1603 gethan. Darnach Ein Historia, so von Johan Herman von Bree, Obersten Handelsmann auff dem Schiff der Holländische Zaun genannt, in gleichmessiger Reyse von An. 1602. biß 1604. auffgezeichnet worden. Alles auß Niederländischer Verzeichnus in Hochteutscher Sprache beschrieben. Durch M. Gotthardt Artus von Dantzig. Auch mit schönen Kupfferstücken gezieret vnd an Tag geben durch Johan Theodor. vnd Johan Israel de Bry Gebrüder*, vol. 8/1, Franckfurt am Mayn 1606, S. 10–13.

Furthermore, the Lusitanian lords of Malacca forced all ships crossing the Strait to land at the city's port and to pay their dues.<sup>42</sup> They constructed several forts<sup>43</sup> that rapidly formed a network, and permitted the positioning of smaller naval units. Thereby, the Portuguese were able to block the Strait at any given time. The coastal forts marked a frontier which was extended to the sea by the ships.<sup>44</sup> Besides this, their military power even enabled the Portuguese to control Indian and Arab ships crossing the Indian Ocean. These had to pay certain tributes in order to receive the permission to sail into the Strait. Correspondingly, the Viceroy of Goa ordered the destruction of every ship that did not have such a permission (*cartaze*).<sup>45</sup>

As a result, the Malaccan law, the *Undang undang Malakka*, lost its validity in the process of the European conquest.<sup>46</sup> Being Islamic and Hindu laws, they were no longer allowed to be applied. From this time on, both the city and the Strait were structured according to European commercial law and, as a consequence, were subordinated to Christian European influences. The Portuguese law replaced the *Undang undang Malakka* and established a new administrative trade system. A coexistence of laws was not desired due to religious and economic reasons. Although both the *Undang undang Malakka* and the *Undang undang Laut* were still in use at some places, they rather played a subordinated or ideally a subsidiary role. The *Undang undang Malakka* was only applied in cases where the Portuguese were not involved. This concerned trading in groceries and therefore the inner Asian trafficking of goods. A transcultural entanglement between these trading cultures, however, cannot be assumed. The space-constituting impact of the Portuguese commercial law on the city, its port and large parts of the Strait clearly emerges when compared to its predecessors. Portuguese rule over the sea could be enforced successfully due to the

42 There is differing information regarding its amount: seven percent or one eighth of the value of the respective goods. Sometimes, up to nine percent was charged. Dunn, *Kampf um Malakka* (cf. n. 16), 88 and 250.

43 On the erection of these forts see: Loureiro, *Weapons, Forts and Military Strategies in East Asia* (cf. n. 16), 85–86.

44 On forts and ports as frontiers of European powers, characterized by architecture and technique, see Drost, *Grenzenlos eingrenzen* (cf. n. 16), 6.

45 Dunn, *Kampf um Malakka* (cf. n. 16), 88 and 111. Diffie and Winnius, *Foundations of the Portuguese Empire* (cf. n. 40), 321–322. John Villiers, *The Estado da India in South East Asia*, in: *South East Asia. Colonial History*, vol. 1, *Imperialism before 1800*, ed. Paul Kratoska, London / New York 2001, 151–178, here 156.

46 The *Undang undang Melaka* states in § 11: “Such is the law of God administered by everyone in the country.” Liaw, *Undang undang Melaka* (cf. n. 23), 83. This refers to the *Reconquista*. On the *Reconquista* in Portugal, see Diffie and Winnius, *Foundations of the Portuguese Empire* (cf. n. 38), 48–49.

geographical nature of the waterway. In contrast to its Asian predecessors, Portuguese law regulated the scope of economic actors by excluding those merchants who did not possess an official license. Hence, it created an enclosed space dominated by the Portuguese within the geographical area of the Strait, which had previously attracted merchants from all over the world due to its structural accessibility. The Portuguese justified their actions by referring to the Treaty of Tordesillas from 1494. Additionally, they argued according to the legal principle of *beati possidentes*. Nonetheless, the restriction and the dislocation of the old indigenous law led to the constitution of new legal spaces that both coexisted and competed within Portuguese Malacca. However, the outlined developments interrupted the trade between the commercial centers within the region of the Strait, thereby hindering its passing. The Portuguese way of acting separated the Strait into several coexisting legal spaces whose trading systems competed in an antagonistic way.<sup>47</sup> Due to the compulsive or voluntary migration of traders from the 1530s onwards, previously unimportant places such as Aceh in the North of Sumatra and Johor in the South successively became more important.<sup>48</sup> Closely drafted according to the *Undang undang Malakka* and the *Undang undang Laut*, the maritime and commercial laws compiled by the rulers of Aceh and Johor especially attracted Muslim merchants. From the North coast of Sumatra, the traders of Aceh sent their ships as far as the Red Sea.<sup>49</sup> Based on its geographical location, Aceh emerged as the “principal Muslim entrepôt in the Straits of Malakka” and thus became the starting and ending point of the Western Asian, Arab and Southeast Asian trade.<sup>50</sup> The Portuguese had difficulties in coping with this challenge. They were even incapable of controlling the local pepper trade, since the merchants of

47 Instead of building a mosque, a fort was built in Malacca and the Portuguese tried to re-establish trade with the city. Pires shades the facts and refers to the new legal situation: “The land began welcoming merchants, and many came. [...] Malacca cannot help but return to what it was, and [become] even more prosperous, because it will have our merchandise; and they are much better pleased to trade with us than with the Malays because we show them greater truth and justice.” Pires, *The Suma Oriental of Tomé Pires* (cf. n. 19), vol. 2, 281.

48 Reid, *Southeast Asia in the Age of Commerce* (cf. n. 23), 65. On the organisation of trade in Aceh and Banten see *ibid.*, 107, 116, 212–213. Borschberg, *The Singapore and Melaka Straits* (cf. n. 40); *Idem*, *The memoirs and Memorials of Jaques de Coutre* (cf. n. 6), 94–95.

49 Liaw, *Undang undang Melaka* (cf. n. 23), 13–14.

50 Sunil Amrith, *Crossing the Bay of Bengal. The Furies of Nature and the Fortunes of Migrants*, Cambridge 2013, 51–52. Amrith emphasizes, that Aceh followed the Ottoman Empire closely and used new sea routes via the Bay of Bengal to include pepper in the Levant trade.



Aceh simply avoided the Strait. Additionally, Aceh was supplied with weapons by the Ottoman Empire and consequently functioned as an oppositional military pole of Portuguese Malacca. Due to permanent military conflicts between the two cities that represented the Christian European and the Muslim powers respectively, the entire Strait became destabilized.

Johor as the main operating area of the expelled sultan also made the attempt to succeed Malacca. Most notably, the city tried to attract Chinese and Javanese merchants. Javanese merchants predominantly traded with groceries that were of special importance for Malacca.<sup>51</sup> Consequently, the city suffered several shortages of supply. Aceh and Johor successively became rivals, but nevertheless, a common enemy linked the two cities together: the Portuguese city of Malacca.<sup>52</sup> Its monopoly over the Strait had been established by territorial occupation, commercial jurisdiction and military control. This type of monopoly can be classified as commercial and thereby constituted the Lusitanian rule of the waterway. At times, however, the Portuguese failed to enforce their claims owing to high costs, indigenous resistance or the mere dimension of the Strait. The aspiration to control the Strait of Malacca completely ultimately led to the city's decline although the commercial center with its advantageous climatic conditions remained, at least from an external point of view, a desirable entrepot.

It has thus become clear that Peter Borschberg's assumption that the Portuguese sought to continue the monopolistic policies of the Sultanate, is not quite convincing. A monopoly could only be achieved by legal occupation as well as military control of the entire strait including the maritime traffic passing it. However, the sultans never raised such a claim.

## The Dutch Strait of Malacca

Though acting inconsistently with their own demands for a *Mare Liberum*, the Dutch sought to occupy the city of Malacca and the rest of the Strait and to remove Portuguese domination. Thus, they wanted to establish a base that would enable them to gain control over the local spice trade, and allow their convoys

<sup>51</sup> Malcolm Dunn, Pfeffer, Profit and Property Rights. Zur Entwicklungslogik des Estado da Índia im südostasiatischen Raum, in: *Portuguese Asia: Aspects in History and Economic History (16<sup>th</sup> and 17<sup>th</sup> Centuries)*, Stuttgart 1987, 1–36, here 7. Johor was occasionally a vassal of Aceh. Borschberg, *The Singapore and Melaka Straits* (cf. n. 40), 138.

<sup>52</sup> Gupta, *The Maritime Trade of Indonesia* (cf. n. 21), 91–125, 101. In 1615, a short peace was concluded between Malacca and Johor. Borschberg, *The Singapore and Melaka Straits* (cf. n. 40), 139.

to sail to Europe.<sup>53</sup> Admiral Matelieff de Jonge (1569–1632) signed two treaties on behalf of the Dutch with the Johor sultans ‘Alā’uddin Ri‘āyat Shah III (1597?-1615) and ‘Abdullāh Ma’ayat Shah (Raja Bongsu) (1615–1623) in the early summer of 1606. The treaty of May 17<sup>th</sup> 1606 urged the sultans to become vassals of the States General of the Netherlands.<sup>54</sup> Furthermore, Malacca would be legally assigned to the sultan while the Dutch were granted the right to rule the suburb Kampung Kling, which was located outside the fortified city walls. The Dutch enjoyed a commercial law of all traded goods—at prices they fixed. At the same time, and in contrast to the Portuguese practice, trade had to remain in the hands of the established merchant communities, regardless of the individual trader’s origin or religion. According to this ruling, the contracting parties aimed to stimulate the flow of trade between the city and its hinterland. However, the local trade was subject to the constant control of the Dutch and was thereby aligned to their profit concerning import and export duties, passport charges and port dues.<sup>55</sup> Anyhow, since the VOC did not succeed in wresting the city from the Portuguese, the treaty was never implemented.

Nevertheless, the VOC tried to conquer Malacca, once again besieged the city and caused a complete closure of the Strait between 1615–1620 and 1633–1641 respectively. In this context, the waterway, due to its limited space, was turned into a prime battleground.<sup>56</sup> Seen from a sociological point of view, social life within the strait was predominantly based upon transit traffic that was nearly abandoned in these phases. Usually the strait was a lively region due to maritime traffic, which was widely disrupted during the conflicts between the Dutch, the Portuguese and the Spanish armada respectively. This

<sup>53</sup> This was planned before the establishment of Batavia. Borschberg, *The Singapore and Melaka Straits* (cf. n. 40), 122.

<sup>54</sup> The contractual practise between the Dutch and the peoples of South East Asia consisted of appointing them to “getrouwe[n] vasallen des Coninck van Hollandt oder von den Heeren Staten Generael.” See Jan Ernst Heeres, *Corpus Diplomaticum Neerlandico-Indicum. Verzameling van Politieke contracten en verde verdragen door de Nederlanders in het Oosten gesloten, van Privilegebrieven, aan hen verleend, enz.*, vol. 1, 1596–1650, ‘s-Gravenhage 1907, 34 (XV), Treaty with the island of Oma, 1605, 131 (LV), Treaty with Ambon, 1617, 306 (CXXV), etc. See Jörg Fisch, *Krieg und Frieden im Friedensvertrag. Eine universalgeschichtliche Studie über Grundlagen und Formelemente des Friedensschlusses*, diss., Stuttgart 1979, 173. Borschberg, *The Singapore and Melaka Straits* (cf. n. 40), 124–125. Grotius referred to the Roman Stoics while talking about the theory of treaties and the practice of treaties with non-European communities. See van Ittersum, *Kein Weiser ist ein Privatmann* (cf. n. 9), 80–81.

<sup>55</sup> Dunn, *Kampf um Malakka* (cf. n. 16), 189–190.

<sup>56</sup> Borschberg, *The Singapore and Melaka Straits* (cf. n. 42), 143–176. On strategical spots to occupy within the Strait of Malacca chosen by the Dutch see Borschberg, *The Singapore and Melaka Straits* (cf. n. 40), 174.

European conflict caused the occupation and destabilization of the Strait of Malacca and forced Asian as well as Portuguese merchants to change their routes.<sup>57</sup> It was only in 1641 that the Dutch succeeded in conquering Malacca and subsequently implemented the terms of the above-mentioned treaty of 1606.<sup>58</sup>

Hugo Grotius claimed that the Portuguese, as a mere occupying power of the city, did not have any right to impose trade prohibitions on the sultan of Johor. Rather, they were to be obliged to show respect for his sovereignty<sup>59</sup> and subordinate themselves to his law:

[...] *nec vero aequum esse, ut illi sibi, quid suo in regno facere deberet praescriberent: imo rectius Lusitanos, ut qui Malaccam tenerent, (nam et hanc avito jure rex ille sibi vindicat, etsi possessione detrusus) suis legibus parituros.*<sup>60</sup>

Without making specific reference to either the prevailing law of Malacca or to the *Undang undang Malakka*, these lines can be read as a Grotian plea for the recognition of indigenous rights and laws. By guaranteeing the continuation of indigenous trade, especially with regard to the inner-Asian areas, the acceptance of the existing law indeed constituted a significant advantage for the Dutch. Therefore it was necessary for the VOC to accommodate the applicable indigenous law with both their own ideas of commercial law and their interest to establish a trade monopoly.<sup>61</sup>

<sup>57</sup> Another strategy by the Portuguese was the reloading of goods on smaller ships that crossed the Strait during the night. They also chartered English and Danish ships. Borschberg, *The Singapore and Melaka Straits* (cf. n. 40), 177 and 179–182.

<sup>58</sup> The vassalage of the surrounding communities of Malacca was stated in the Treaty of Malacca in 1641: *D'voorschreven capiteijn en outsten, mitgaders d'jnwoonders van Naningh, zoo Manicaber als Maleijers, blijven gehouden van de rijssvellden ende alle andere vruchten ande Generale Oost-indische Compe te geven de thiende dersellver. Item van betele ende peper thuijnen jaerlijcx soodanige rente [...]. [...] do thuijnen onder den anderen vercoopende, sullen gehouden gewesen aen de Compe offte hare gemaghtigens te betalen den 10n dersellver in contant, gelijk voor dese costumelijck.* Heeres, *Corpus Diplomaticum Neerlandico-Indicum* (cf. n. 54), vol 1, 350–351 (CXXXVIII). Treaty with Malacca from 1641.

<sup>59</sup> The acceptance of the sovereignty of the Asian sultans made it possible to conclude treaties and contracts. Therefore, the monopoly treaty of the VOC with Johor was legitimate. According to Hugo Grotius, sovereignty was divisible. See Urte Weeber, Hugo Grotius' Völkerrechtskonzeption – ein spezifisch europäisches Instrument im Handel mit außereuropäischen Gemeinwesen?, in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Germ. Abt.* 127 (2010), 301–312.

<sup>60</sup> Hugo Grotius, *De Jure Praedae Commentarius: Texte Latin, publié pour la première fois d'après le manuscrit autographe par Ger. Hamaker*, The Hague 1869. De Freitas, *Do justo Império* (cf. n. 14), 202 (chap. XI).

Being contractually allied trading partners of the Dutch, Aceh,<sup>62</sup> Perak and Kedah were permitted to engage in trade with Javanese, Chinese, Malayan and Arab communities according to the rules of both the *Undang undang Malakka* and their own old-established laws—provided that they purchased the necessary permission in advance. This was a strategy of the VOC, —whose agents respected the traditional rights on the one hand, but insistently aspired to assert full control over those fields of action that were conceded to them by these very rights on the other hand. They were eager to establish a tight network of factories in certain provinces, such as in Aceh.<sup>63</sup> The Dutch aimed at the regional dominance of Malacca by insisting on a certain legal continuity for strategic reasons while they subordinated the compilation of rights to their own idea of commercial law.

The simultaneous acceptance of both the old local authorities and the new controlling power had a space-constituting and space-structuring effect on the Strait of Malacca. It neutralized the hostile and competitive coexistence of the Strait's trading centers and paved the way for a trading system that both functioned according to the usual procedures and was orientated towards the interests of the VOC.

This resulted in the coexistence of two legal areas that were contractually bound, although one of them depended on the other in a unilateral manner. With this in mind, the Dutch controlled the Strait—as a space included in a network—and reunited and stabilized the area to a certain extent. Moreover, this specific legal practice supports the argument by Jörg Fisch, who stated that

“die eine Seite [the VOC] es vermochte, das Recht für sich zu vereinnahmen, es zum Werkzeug für eigene Ziele zu machen. Sie [war] nicht mehr nur Partei, sondern [vermochte] sich zugleich als Richter aufzuspielen.”<sup>64</sup>

This not only concerned their own commercial law but also the indigenous law, whose general application and validity was grounded on acceptance and protection by the Dutch—as long as it did not work against the interests of the

61 Dunn, *Kampf um Malakka* (cf. n. 16), 187.

62 When the Dutch conquered Malacca the Muslim sultanate in Aceh became a leading trade power. The weakening of Aceh caused by losing Malacca and a female ruler (Ratu Sa'fiyyat ud-Din Taj al-'Ālam (ca. 1636–1675)) was seen as the reason for the treaty between Aceh and the VOC. See Merle Calvin Ricklefs, *A History of Modern Indonesia since c. 1200*, Basingstoke 2001, 40–41.

63 An illustration of the factory of the VOC in Aceh can be found in Borschberg, *The Singapore and Melaka Straits* (cf. n. 40), 147.

64 Fisch, *Krieg und Frieden im Friedensvertrag* (cf. n. 54), 479.

VOC. This means, that the indigenous law was sometimes applied to the benefit of the Dutch.

Their way of acting corresponded to Grotius's roughly formulated call to acknowledge existing foreign laws. From the perspective of the VOC, this procedure did not ignore the Dutch demand for the establishment of a *Mare Liberum*.<sup>65</sup> Hugo Grotius saw the negotiation of treaties as a natural law of human beings. Their results had to be accepted by a third party, e.g. if two parties agreed on a monopoly for one of them:

*C'est la force de la raison naturelle qui ne vous permet pas de nier que celui auquel on a promis de delivrer certaine marchandise a droit d'empêcher que celui qui l'a promis ne le delivre à quelqu'aoltre. [sic!]*<sup>66</sup>

Only by the accord of both parties could the monopoly and the treaties of the VOC be revoked: *Ce qui est fait par le consentement de deux parties ne se peut deffaire par la vollonte d'un seule, pacis[c]i est libertatis stare pacto necessitatis*.<sup>67</sup> The trade monopoly of the VOC was well established by the treaties with the sultan of Johor, which could not be revoked. Unlike the Portuguese, the dominance of the Dutch was built on the 'voluntary' agreement of the indigenes and recorded in a treaty.

Due to such voluntariness of Southeast Asian rulers the Dutch could claim that they did not restrict the freedom of the sea by establishing and implementing their monopoly, which was heavily doubted by the English. These doubts were expressed at a conference held between 1613 and 1615 to decide on the

<sup>65</sup> *Quod cum quidam Indorum principes ac nationes fecerint nobis solis aromatum venditionem promittendo nihil est aequitati naturali iurique gentium convenientius quam pacta illa conventa, imo foedera publica, servari.* The memoranda of the negotiations in 1613 and 1615 are published in: George Norman Clark and Willem Jan Marie Jonkheer van Eysing, *The Colonial Conferences between England and the Netherlands in 1613 and 1615*, vol. 1, Leiden 1940), 41–42., 101 (Mémoire néerlandais du 20 avril 1613).

<sup>66</sup> *Ibid.*, 205 (Troisième mémoire néerlandais du 13 mars 1615).

<sup>67</sup> *Ibid.*, 203 (Troisième mémoire néerlandais du 13 mars 1615). The contract with Ternate from May 26<sup>th</sup> 1607 can be seen as an example, as § 10 regulates the Dutch monopoly on the trade of cloves: "Sollen [die Ternater] keine Gewürznelken verkaufen dürfen, egal an welche Nation oder Volk, als nur dem Faktor, der wegen der Herren Staaten in Ternate wohnen wird, und das zu solchem Preis wie die Herren Staaten anordnen und mit dem König akkordieren werden." ("The people of Ternate are not allowed to sell any cloves to any person, but only to the factory of the States-General, depending on their chosen prize and accordance with the king"). Alexander Drost, Vertrag von Ternate mit der Vereinigten Ostindischen Kompanie (VOC) (26. Mai 1607), in: *Themenportal Europäische Geschichte*, URL: <http://www.europa.clio-online.de/2013/Article=613>, 2 (accessed 30 August 2015)

prospective relationship between the VOC and the EIC regarding trade in Southeast Asia. The English asked:

“And do not the Hollanders deny this argument propounded by the Spaniard, and declare themselves in the behalf of free Trade, and to all nations, with as much liberty and freedom as *mare liberum*?”<sup>68</sup>

The Dutch, as mentioned above, had already expressed their argument.

In sum, it can be said that the VOC contractually secured its trade monopoly in an intelligent way against the Sultan of Johor and other regional powers that were unable to void the contracts unilaterally. In strong contrast to the Portuguese way of executing power in the region, the Dutch (re)produced their dominion over the Strait of Malacca by means of the ‘voluntary’ contractual agreement with the indigenous people, without in principle violating the legal provisions regarding the politics of the *Mare Liberum* policy.

## Conclusion

In this article, I have focused on law as a specific practice both constituting and structuring social spaces. In this context, the main question was whether and how the various actors used the law in order to shape the social geography of the Strait of Malacca and transform it into a legal space or subspace that consequently could be transferred into ownership.

Originally the traditional Hindu customary law and the newly introduced islamic commercial law had been applicable side by side in precolonial Malacca. Such coexistence was caused by the conversion of the ruling dynasty to Islam. In the *Undang undang Malakka* both legal systems have been merged which enabled a stronger integration of the city into the islam-dominated trading area of the Indian Ocean. The legal imperfection resulting from this process was compensated by the *Undang undang Malakka*, which created a direct connection between the different law systems and, due to its written form, provided a certain level of transparency. The combination of applied Islamic commercial law and Hindu commercial law can be seen as a hybrid, which, however, only affected the spatial constitution of the city and was explicitly not applied to the waterway, i.e. the sea. On the one hand, it transformed the city of Malacca into a legal space, making it more manageable, secure and transparent. On the other

<sup>68</sup> Clark and Jonkheer van Eysing, *The Colonial Conferences*, 120 (Rapport des délégués anglais au Conseil Privé du 10 mai 1613). See Christoph Driessen, *Die kritischen Beobachter der Ostindischen Compagnie. Das Unternehmen der “Pfeffersäcke” im Spiegel der niederländischen Presse und Reiseliteratur des 17. Jahrhunderts*, Bochum 1996, 65.

hand, it extended the space constituted by the Islamic commercial law to the whole geographical area of the Strait. At the same time, Malacca as a trading center (space) was embedded into the trading and legal space of the Indian Ocean and to the south to the islands of the Indonesian archipelago. However, this hybrid law did not produce any statutory basis with regard to ownership of certain parts of the sea.

In the aftermath of their occupation of Malacca and its port, the Portuguese aimed to neutralize the applied laws and consequently intended to replace them by their own legal concepts. These functioned as an instrument for the occupation of the terrestrial and maritime space associated to the Strait. The occupation was accompanied by the attempt to establish a trade monopoly. This effort led to the emigration of many indigenous merchants and finally resulted in a translocation of the established spaces of commerce and law. Henceforth, Portuguese Malacca had to face strong commercial rivals like Aceh, whose market systems functioned in accordance to customary laws.

The Portuguese aspired to establish a new, unified judicial area which was to be controlled by them. This configuration, however, was not only completely separated from the Islamic commercial area that encompassed large parts of the Indian Ocean but also had a fragmenting effect on the latter.

By controlling the area's important maritime routes, the Portuguese at least intermittently succeeded in occupying parts of the sea. Since they were not capable of enforcing their claims permanently and comprehensively—their aspired monopoly failed—the Strait temporarily showed an unintentional legal pluralism in the sense of a competitive coexistence. This example shows how both the application of legal categories of ownership of the sea and the idea of maritime boundaries were prerequisites for conceptualizing the Strait as an enclosed space.

Hugo Grotius defined property by physical possession.<sup>69</sup> Along these lines, the VOC kept their property by possessing the laws. This rather nebulous expression refers to the skillful integration into their tactical repertoire of obtaining trade monopolies and linking indigenous powers to their own commercial law. The law served them as an economic and political instrument and likewise functioned as a legitimation of their actions. Correspondingly, the Dutch maintained precolonial legal structures and used them for their own purposes. They applied the same strategy to the *Undang undang Laut*: the local indigenous commercial law remained unaffected as long as it served the interest of the Dutch. This was an important part of shared sovereignty. Consequently, the trading places within the area of the Strait controlled by the Dutch can be considered a mixed legal space that was based on toleration. Notably,

69 Van Ittersum, *Kein Weiser ist ein Privatmann* (cf. n. 9), 91.

these phenomena particularly referred to the sea. It has to be kept in mind that no effective linkage of European and indigenous laws can be proven in the analyzed period. These laws rather coexisted in a hierarchical and tolerated manner or indigenous law was ultimately replaced by European law. The *Undang undang Laut* was modified during the colonial period in the seventeenth century,<sup>70</sup> a transformation which is currently being analyzed by scholars at the Australian National University (NUS) in Canberra. To what extent elements of law favouring the VOC were included has yet to be answered.

The enforced and alleged monopoly of the Dutch provoked criticism in the United Provinces, too. Both Laurens Reael (1536–1601) and Steven van der Hagen (1550–1620) raised the legal question as to whether the Dutch were legally entitled to prevent others from approaching ports and thus to curtail their trade with the Asian peoples. Both authors saw such measures as a control of the sea.<sup>71</sup>

During the precolonial period, the Islamic law, as shown above, had had a direct space-constituting impact only on the city itself. In contrast, the European colonial laws constituted the sea of the Malaccan Strait as a new legal space that was dominated by the Portuguese and the Dutch respectively. By means of their colonial laws, the European powers territorialized the Strait and established borders which were independent of the coast lines and thus detached from the geographical boundaries of the sea. Keeping this in mind, trade monopolies and their enforcement can be highlighted as a specific European cultural technique carving the sea up and creating law in strong contrast to Islamic law and to the law codes that originated in Malacca. By ways of indentation, the notion of property of the sea was established.

In principle, both the pre-colonial Strait of Malacca and that same area under Portuguese and Dutch domination can be seen as a ‘readable place’<sup>72</sup>, formed by the respective law systems or their parallel existence. The written codes of the *Undang undang Malakka* and the *Undang undang Laut* bridged the geographical proximity of the trading centers of the Indian Ocean and the Strait of Malacca and thereby particularly created new semantics of spatial dis-

<sup>70</sup> See Borschberg, *The Singapore and Melaka Straits* (cf. n. 40), 206.

<sup>71</sup> Arasaratnam, *Monopoly and Free Trade in Dutch-Asian Commercial Policy* (cf. n. 34), 316–317.

<sup>72</sup> Gerhard Neumann and Sigrid Weigel, *Lesbarkeit der Kultur. Literaturwissenschaften zwischen Kulturtechnik und Ethnographie*, München 2000. Doris Bachmann-Medick, *Kultur als Text: die anthropologische Wende in der Literaturwissenschaft*, Tübingen 2004. Jeremy Brotton, *Trading Territories. Mapping the Early Modern World*, London 1997. See also Vitorino Magalhães Godinho, *Mito e mercadoria, utopia e prática de navegar* (séculos XIII–XVIII), Lisboa 1990.



tance and order within it. Under Portuguese control, these configurations of order were semantically reshaped, geographically connected to the Portuguese spheres of influence and seen as property, while the Dutch, or the VOC respectively, created a ‘readable place’ by tolerating indigenous law featuring semantical parallels. However, this ‘readable place’ was contractually dependent and controlled by the monopoly of the VOC. The claim of control over this ‘readable place’ was not raised legally but rather created through dependencies and symbolically suggested by the *wagenspoor*.

Ownership of the sea was heavily discussed in Europe as the European powers consistently tried to claim parts of it. In 1795, the German philosopher Immanuel Kant (1724–1804) demanded in the third Definitive Article in his work “Perpetual Peace”:

“[...] ein Besuchsrecht, welches allen Menschen zusteht, sich zur Gesellschaft anzubieten, vermöge des Rechts des gemeinschaftlichen Besitzes der Oberfläche der Erde, auf der, als Kugelfläche, sie sich nicht ins Unendliche zerstreuen können, sondern endlich sich doch neben einander dulden zu müssen, ursprünglich aber niemand an einem Orte der Erde zu sein mehr Recht hat, als der andere. Unbewohnbare Teile dieser Oberfläche, das Meer und die Sandwüsten, trennen diese Gemeinschaft, doch so, daß das Schiff, oder das Kamel (das Schiff der Wüste) es möglich machen, über diese herrenlose Gegenden sich einander zu nähern, und das Recht der Oberfläche, welches der Menschengattung gemeinschaftlich zukommt, zu einem möglichen Verkehr zu benutzen.”<sup>73</sup>

<sup>73</sup> Immanuel Kant, *Immanuel Kant’s sämtliche Werke in chronologischer Reihenfolge*, ed. Gustav Hartenstein, vol. 6, Leipzig 1868, 424–425. For an English translation see Immanuel Kant, *Practical Philosophy*, transl. and ed. Mary Gregor, Cambridge 1999, 329: “But the right to visit; this right, to present oneself for society, belongs to all human beings by virtue of the right of possession, in common, of the earth’s surface on which, as the sphere, they cannot disperse infinitely but must finally put up with being near one another; but originally no one had more right than another to be on a place on earth. Uninhabitable parts of the earth’s surface, seas and deserts, divide this community, but in such a way that ships and camels (ships of the desert) make it possible to approach one another over these regions belonging to no one and to make use of the right to the earth’s surface, which belongs to the human race in common, for possible commerce.”

