

Introduction

GENERAL

The year 1492 signaled a fundamental turning point in global and, more particularly, maritime history. It marked the expulsion of the Naṣrid dynasty (636–898 AH/1238–1492 CE) from Granada, the last Islamic stronghold in Spain, and the beginning of the great age of Christian maritime discoveries across the two shores of the Atlantic and Indian oceans. On August 3, 1492, Christopher Columbus embarked on a westward voyage to the Indian Ocean in search of alternative maritime routes that would circumvent traditional trade passages through Islamic territories to the Spice Islands. On a similar mission, the Portuguese navigator and explorer Vasco da Gama set sail from Lisbon on July 8, 1497, leading a flotilla of four fully equipped vessels; although, instead of following the steps of Columbus, da Gama sailed southward and circumnavigated Africa. After a lengthy journey with various stops in trading centres on African coasts, da Gama landed at Malindi, Kenya, on April 15, 1498; there he managed to secure a well-versed Arab *mu'allim*, who guided the Portuguese fleet across the Arabian Sea, finally arriving in Kappadu (Kappad), near Calicut,¹ on May 20, 1498.²

¹ Calicut (Arabic Qāliqūt), the modern city of Kozhikode in the province of Kerala, was the premier port on the Malabar Coast during the fifteenth century. Muslim travelers and envoys described Calicut as a large cosmopolitan center and trading hub, which attracted merchants from China, Java, Ceylon, the Maldives, Yemen, and Persia. Ibn Baṭṭūṭa stated that its “port is considered one of the largest in the world.” Pepper, ginger, cinnamon, cardamom, tamarind, precious stones, seed pearls, cotton cloths, and porcelain were among its principal exports. See Abū ‘Abd Allāh Muḥammad ibn ‘Abd Allāh ibn Baṭṭūṭa, *Riḥlat Ibn Baṭṭūṭa: Tuḥfat al-Nuẓẓār fī Gharā’ib al-Aṣṣār wa-‘Ajā’ib al-Asfār* (Beirut: Dār Iḥyā’ al-‘Ulūm, 1407/1987), 572, 575; Kamāl al-Dīn ‘Abd al-Razzāq ibn Ishāq al-Samarqandī, *Maṭla‘ al-Sa’dayn wa-Majma‘ al-Baḥrayn (The Dawn of Two Auspicious Planets and the Meeting of the Two Seas)*, in *India in the Fifteenth Century: Being a Collection of Voyages to India*, ed. and trans. R. H. Major (London: Hakluyt Society, 1857), 13–14; Anup Mukherjee, “Calicut,” *Encyclopedia of World Trade from Ancient Times to the Present*, ed. Cynthia C. Northrup (London: Taylor and Francis, 2015), 1:137–139; Robert Wolf, “Da Gama’s Blundering: Trade Encounters in Africa and Asia during the European ‘Age of Discovery,’ 1450–1520,” *The History Teacher* 31 (1998), 300.

² Ḥasan Ṣ. Shihāb, *Al-Nūniyya al-Kubrā ma‘ Sitt Qaṣā’id Ukhrā Nazm Shihāb al-Dīn Aḥmad Ibn Mājīd* (Muscat: Wizārat al-Turāth al-Qawmī wa’l-Thaqāfa, 1413/1993),

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The Portuguese circumnavigation of Africa and penetration of the Indian Ocean also marked a new chapter in maritime legal history.³

18–21; Abbas Hamadani, “An Islamic Background to the Voyages of Discovery,” in *The Legacy of Muslim Spain*, ed. Salma K. Jayyusi (Leiden: E. J. Brill, 1992), 298; R. Sengupta, “History of Oceanography of the Indian Ocean,” in *New Trends in Indian Art and Archeology*, ed. B. U. Nayak and N. C. Ghosh (New Delhi: Aditya Prakashan, 1992), 402–403; Ranabir Chakravarti, “An Enchanting Seascape: Through Epigraphic Lens,” *Studies in History* 20 (2004), 306.

³ Aḥmad ibn Mājid (823–914/1421–1509), the famous Arab pilot of the Indian Ocean, witnessed the eventual arrival of the Portuguese in the eastern seas and sensed the beginning of the end of the peaceful oceanic navigation therein. In several places in the *Sufāliyya* (*Sufāla* or *Sofala*, present-day Mozambique) poem he alluded to the prospective serious impacts and adverse effects of the Portuguese on the overseas trade and freedom of navigation, stating:

- (27) [And the Franks] arrived at Calicut to acquire profit
 in the year nine-hundred and six (AH), even later
 (28) There they sold and bought, and displayed their power,
 bought off the Zamorin, and oppressed the people
 (29) Hatred of Islam came with them
 and the people were afraid and anguished
 (30) And the land of the Zamorin was snatched away from that of Mecca,
 and Guardafui was closed to travelers.

See Shihāb, *Al-Nūniyya al-Kubrā*, 19; Ibrahim Khoury, *As-Sufāliyya: The Poem of Sofala: Arabic Navigation along the East African Coast in the 15th Century* (Coimbra: Junta de Investigações Científicas do Ultramar, 1983), 89–90; Edward A. Alpers, *The Indian Ocean in World History* (New York and Oxford: Oxford University Press, 2014), 69–74; Robert B. Serjeant, *The Portuguese off the South Arabian Coast: Ḥaḍramī Chronicles* (Oxford: Clarendon Press, 1963), 24. Apart from Ibn Mājid’s testimony, foreign merchants in Calicut were alarmed at the first appearance of the Portuguese. With the Portuguese arrival in India, Muslims, who had carried out and mastered the transoceanic trade unchallenged for many centuries, felt threatened by the emerging Christian sea power from the Iberian Peninsula. The Muslims’ suspicious attitude toward the Portuguese was projected in 1498 before Vasco da Gama himself touched the shores of Calicut. When the Portuguese fleet dropped anchor off the coast of Calicut, the first person ashore was the recent Jewish convert and convict Juao Nomez, the expedition’s interpreter, who spoke Spanish, Portuguese, Hebrew, and Arabic. He was taken by two North African merchants from Tunis, who greeted him in Castilian Spanish with the curse: “May the Devil take thee! What brought you hither? They asked what he sought so far away from home, and he told them that we came in search of Christians and of spices.” Álvaro Velho, *A Journal of the First Voyage of Vasco da Gama 1497–1499* (London: Hakluyt Society, 1898), 48–49; Bernard S. Cohn, “The Past in the Present: India as Museum of Mankind,” *History and Anthropology* 11 (1998), 1; Charles R. Boxer, *The Portuguese Seaborne Empire 1415–1825* (London: Hutchinson and Co., 1969), 37; Ram P. Anand, *Origin and Development of the Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 1982), 47. The Portuguese carried with them a deep antipathy to Islam and Muslims, and apparently the two Tunisian traders predicted the prospective consequences of the Portuguese penetration into the Indian Ocean. They envisioned the Portuguese shifting their colonial strategies and ambitions to the Indian Ocean as they

Contrary to the westward explorations, which revealed to the Spaniards hitherto unknown pre-Columbian cultures, da Gama introduced a new maritime passage to the western European nations, which led to the already known sources of spices and other luxurious commodities from Southeast Asia that previously had made their way to the West solely through the Muslim world. The Portuguese incursion into the Indian Ocean, followed by similar intrusions of other European sea powers, undermined the Muslim-run maritime trading system, disturbed the flow of spices from Calicut to the Red Sea, and produced new forms of naval strategies and powers.⁴ Commanded by the viceroy Dom Francisco de Almeida, the Portuguese naval fleet surprised its Egyptian-Ottoman rival and defeated it in Diu on February 3, 1509;⁵ this engagement is regarded

had done in Morocco from 1415 onward, when they took control of most of Morocco's Mediterranean and Atlantic ports through a combination of warfare and political and economic incentives offered to local rulers and nobles. For that reason the Maghribī merchants preferred the French and Venetian Christians over the Spaniards and Portuguese, who fueled the spirit of the Crusades in the West and subsequently expelled the Muslims from the Iberian Peninsula. For the Portuguese conquests on the North and Western coasts of Africa, see al-Ḥasan ibn Muhammad al-Wazzān (Leo Africanus), *Waṣf Ifriqiya* (Beirut: Dār al-Gharb al-Islāmī, 1983), 309–319; Jocelyn Hendrickson, "Muslim Legal Responses to Portuguese Occupation in Late Fifteenth-Century North Africa," *Journal of Spanish Cultural Studies* 12 (2011), 311–312; Barbara Fuchs and Yuen-Gen Liang, "A Forgotten Empire: The Spanish-North African Borderlands," *Journal of Spanish Cultural Studies* 12 (2011), 261–273.

⁴ Charles H. Alexandrowicz, "Freitas *versus* Grotius," *British Yearbook of International Law* 35 (1959), 163; Walter J. Fischel, "The Spice Trade in Mamluk Egypt: A Contribution to the Economic History of Medieval Islam," *Journal of the Economic and Social History of the Orient* 2 (1958), 172–174; Frederic C. Lane, "Pepper Prices before Da Gama," *Journal of Economic History* 28 (1968), 590–597; Wan K. Mujani, "Some Notes on the Portuguese and Frankish Pirates during the Mamluk Period (872–922 A.H./1468–1517 A.D.)," *Jurnal Pengajian Umum Asia Tenggara* 8 (2007), 18–20. In addition to the Portuguese naval superiority, the flow of spices, pepper, textiles, sugar, and various luxury goods was partly interrupted by pirate raids carried out by European privateers against commercial fleets sailing to the Near East and Mediterranean countries.

⁵ Deriving its name from the Sanskrit word "Dvipa" Diu/Div or al-Dyyb/Diyab, in Arabic and Geniza documents, Diu is a leading port lying at the mouth of the Gulf of Cambay in the union territory of Daman and Diu, western India. The city owes its importance to its strategic position on the trade routes of the Arabian Sea in the Indian Ocean. For further details on the role of Diu in domestic and international trade and its military importance, consult Edward D. Ross, "The Portuguese in India and Arabia between 1507 and 1517," *Journal of the Royal Asiatic Society of Great Britain and Ireland* 4 (1921), 547–557; Michael N. Pearson, "Brokers in Western Indian Port Cities: Their Role in Serving Foreign Merchants," *Modern Asian Studies* 22 (1988), 466–468; Ranabir Chakravarti, "Nakhudas and Nauvittakas: Ship-Owning Merchants in the West Coast of India (C. AD 1000–1500)," *Journal of the Economic and Social History of the Orient* 43 (2000), 44–45,

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as one of the most decisive naval battles in the maritime and legal history of the Indian Ocean.⁶

The Portuguese penetration into the Indian Ocean ended the system of peaceful oceanic navigation that had been such a notable feature of that arena. Prior to this incursion, merchants at sea feared only pirates and natural hazards. Now, however, they were subject also to the threat of these new intruders, who imported the eastern Atlantic and Mediterranean models of trade and warfare and ended freedom of navigation in the eastern hemisphere. The Portuguese encroachment altered certain of the existing networking systems of maritime trade, as attested to by Sheikh Zayn al-Dīn al-Ma‘barī al-Malībārī in 993/1583:

Now it should be known, that after the Franks had established themselves in Cochin and Cannanore (Kannur) and had settled in those towns, the inhabitants, with all their dependents, became subject to these foreigners, engaged in all the arts of navigation, and in maritime employments, making voyages of trade under the protection of passes from the Franks; every vessel, however small, being provided with a distinct pass, and this with a view to the general security of all. And upon each of these passes a certain fee was fixed, on the payment of which the pass was delivered to the master of the vessel, when about to proceed on his voyage. Now the Franks, in imposing this toll, caused it to appear that it would prove in its consequences a source of advantage to these people, thus to induce them to submit to it; whilst to enforce its payment, if they fell in with any vessel, in which this their letter of marquee, or pass, was not to be found, they would invariably make a seizure both of the ship, its crew, and its cargo.⁷

52, 55; Shelomo D. Goitein and Mordechai A. Friedman, *India Traders of the Middle Ages: Documents from the Cairo Geniza* (Leiden: E. J. Brill, 2008), 316, f. 24.

⁶ Mujani, “Some Notes on the Portuguese and Frankish Pirates,” 22; Malyn Newitt, *A History of Portuguese Overseas Expansion* (New York: Routledge, 2005), 70; Patricia Risso, *Merchants and Faith: Muslim Commerce and Culture in the Indian Ocean* (Boulder, CO: Westview Press, 1995), 78–80; Kirti N. Chaudhuri, *Trade and Civilization in the Indian Ocean: An Economic History from the Rise of Islam to 1750* (Cambridge: Cambridge University Press, 1985), 68–69; Kirti N. Chaudhuri, “The Portuguese Maritime Empire, Trade, and Society in the Indian Ocean during the Sixteenth Century,” *Portuguese Studies* 8 (1992), 57–70; Ross, “The Portuguese in India and Arabia between 1507 and 1517,” 545–562; Edward D. Ross, “The Portuguese in India and Arabia between 1517 and 1538,” *Journal of the Royal Asiatic Society of Great Britain and Ireland* 4 (1922), 1–18.

⁷ Aḥmad ibn ‘Abd al-‘Aziz ibn Zayn al-Dīn al-Ma‘barī al-Malībārī, *Tuḥfat al-Mujāhidīn fī Ahwāl al-Burtughāliyyīn* (Beirut: Mu‘assasat al-Wafā’, 1405/1985), 250. The English translation, which preserves the meaning of the original Arabic text, is quoted from Michael N. Pearson, *Merchants and Rulers in Gujarat: The Response to the Portuguese in the Sixteenth Century* (Berkeley: University of California Press, 1976), 40.

Sanctioned by Alexander VI's papal bull *Inter Caetera Divinae* (May 4, 1493),⁸ the Portuguese tried to enforce a royal monopoly on trade in the East Indies by patrolling the ocean from strategic points in Hormuz, Goa, Ceylon, and Malacca, and assuming sovereignty over major trunk routes; ships navigating the main shipping lanes between the Indonesian archipelago and the Persian Gulf were required to obtain *cartazes*.⁹

⁸ Shortly after the discovery of the new world, the Spanish-born Pope Alexander VI (in office from August 11, 1492 to his death on August 13, 1503), being an instrument in the hands of King Ferdinand and Queen Isabella, promulgated the first bull *Inter Caetera Divinae* granting the Spanish monarchs exclusive jurisdiction over all lands discovered and to be discovered westward. The Spanish–Portuguese diplomatic negotiations over sovereignty of the newly discovered lands outside Europe culminated in the Treaty of Tordesillas (June 7, 1494). For further details, consult H. Vander Linden, “Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493–1494,” *American Historical Review* 22 (1916), 1–20; Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 2nd ed., trans. G. L. Ulmen (New York: Telos Press Publishing, 2006), 88–89; Wilcomb E. Washburn, “The Meaning of ‘Discovery’ in the Fifteenth and Sixteenth Centuries,” *American Historical Review* 68 (1962), 1–21; Alison Reppy, “The Grotian Doctrine of the Freedom of the Sea Reappraised,” *Fordham Law Review* 19 (1950), 251–254; Tatiana Waisberg, “The Treaty of Tordesillas and the (re)Invention of International Law in the Age of Discovery,” *Journal of Global Studies* 47 (2017), 1–12.

⁹ The “protection of passes” described by Zayn al-Dīn al-Malibārī is known in Portuguese as *cartaz*. The word *cartaz* is derived from the Arabic *qirtās* or *qartās*, which is originally derived from ancient Greek *χάρτης* (*chártēs*) denoting a writing, book, scroll, document, paper cone, or cornet. Some philologists and linguists argue that the word *qirtās* (Qir-Ṭā-S) was borrowed and Arabized by Arab sailors from the Hakka Chinese term Chi-Tan-Tsz, signifying paper memo or a merchant's paper/s. The term *qirtās* occurs respectively twice in the Qur'an in *sūra* 6. Its seventh verse reads as follows: “لَوْ نَزَّلْنَا عَلَيْكَ كِتَابًا فِي قِرْطَاسٍ (If We had sent unto thee a written (Message) on parchment (*qirtās*)), so that they could touch it with their hands, the Unbelievers would have been sure to say ‘this is nothing but obvious magic’).” Verse 91 of the same *sūra* states: “وَمَا قَدَرُوا اللَّهَ حَقَّ قَدْرِهِ إِذْ قَالُوا مَا أَنْزَلَ اللَّهُ عَلَىٰ بَشَرٍ مِّن شَيْءٍ قُلْ مَنْ أَنْزَلَ الْكِتَابَ الَّذِي جَاءَ بِهِ مُوسَىٰ نُورًا” (No just estimate of God do they make when they say: ‘Nothing doth God send down to man (by way of revelation),’ Say: ‘Who then sent down The Book which Moses brought? A light and guidance to man: But ye make it into (separate) sheets (*qarātīs*) for show while ye conceal much (of its contents).’” Whereas the former refers to an imaginary book sent from Heaven, the latter is mentioned in relation to the scrolls (*qarātīs*) of the Jews. On the whole, the word *qirtās* has always been used for papyrus, parchment, and paper. See Abū Maṣṣūr Mawḥūb ibn Aḥmad ibn Muḥammad al-Jawālīqī, *Al-Mu'arrab min al-Kalām al-A'jamī 'alā Hurūf al-Mu'jam* (Damascus: Dār al-Qalam, 1410/1990), 529; Abū al-Faḍl Jamāl al-Dīn Muḥammad ibn Mukarram ibn Manzūr, *Lisān al-'Arab* (Beirut: Dār Ṣāder, 2003), 12:73–74; Ary A. Roest-Crollius, *The Word in the Experience of Revelation in Qur'an and Hindu Scriptures* (Rome: Università Gregoriana Editrice, 1974), 87; S. Mahdihassan, “Chinese Words in the Holy Koran: Qirtas, Meaning Paper, and Its Synonym, Kagaz,” *Journal of the University of Bombay* 24 (1955), 149–151, 161; Federico Corriente, *Dictionary of Arabic and Allied Loanwords: Spanish, Portuguese, Catalan, Gallician and Kindred Dialects* (Leiden:

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The Portuguese monopoly not only affected the indigenous peoples and foreigners, both Muslims and non-Muslims, but it also aimed to deprive

E. J. Brill, 2008), 80; Sebastião R. Dalgado, *The Influence of Portuguese Vocables in Asiatic Languages*, trans. Anthony X. Soares (Baroda: Oriental Institute, 1936), 82; Edward W. Lane, *An Arabic–English Lexicon* (Cambridge: Islamic Texts Society Trust, 1984), 2:2517–2518; Benjamin Jokisch, *Islamic Imperial Law: Harun al-Rashid’s Codification Project* (Berlin: Walter de Gruyter, 2007), 401.

The *cartaz* was in effect a trading license or *navicert* issued by the Portuguese commissioner or competent authority to ships sailing in the Indian Ocean in an attempt to control the trade carried out by local people in Asian waters and to finance the Portuguese Empire in Asia. It was used as a means by which a maritime power enforced its jurisdiction and protection of vessels on oceanic routes. According to the Portuguese practice, the process of issuing a ship’s *cartaz* by a particular maritime power started with a detailed search of the foreign ship in question. If the inquiry carried out in a harbor was satisfactory and the relevant authority concluded that the ship’s intended voyage would be undertaken in good faith, a safe-conduct was granted protecting the vessel from interference on her voyage. Sailing without it gave rise to the risk of being stopped, captured, and deprived of property, freedom, or life. The *cartaz* also served as a *navicert*, particularly in times of naval warfare in the Indian Ocean and Arabian Sea. A typical *cartaz* contains details regarding the name of the vessel and her tonnage, the place of origin of the cargo, the vessel’s destination, types of shipments, identity of crews, shippers, and passengers, the approximate date of departure, the name of the issuing authority and Portuguese writer/s, and the document’s date of issue. It should be noted that the *cartaz* was designed solely to protect shippers, crews, and shipowners from the Portuguese themselves, but not from other maritime actors in the Indian Ocean. Charles H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford: Clarendon Press, 1967), 71–73; Alexandrowicz, “Freitas versus Grotius,” 176–180; Anand, *Origin and Development of the Law of the Sea*, 60–62; Heather Sutherland, “Geography as Destiny? The Role of Water in Southeast Asian History,” in *A World of Water: Rain, Rivers and Seas in Southeast Asian Histories*, ed. Peter Boomgaard (Leiden: KITLV Press, 2007), 38–39; Pius Malekandathil, *Portuguese Cochin and the Maritime Trade of India, 1500–1663* (New Delhi: Manohar, 2001), 125–126; Pearson, *Merchants and Rulers in Gujarat*, 40–43, 70; Dalgado, *Influence of Portuguese Vocables*, 82; Mohammed H. Salman, “Aspects of Portuguese Rule in the Arabian Gulf, 1521–1622,” (PhD diss., University of Hull, 2004), 132–137; Kuzhippalli S. Mathew, “Trade in the Indian Ocean and the Portuguese System of Cartazes,” in *The First Portuguese Colonial Empire*, ed. Maly D. Newitt (Exeter: University of Exeter Press, 1986), 69–84. Nearly a century earlier, King Manuel I (1469–1521) of Portugal promulgated a royal decree ordering the Moors who arrived at and departed from his coastal possessions in Morocco to be equipped with the permission of the Portuguese authorities when traveling by sea. Hendrickson, “Muslim Legal Responses to Portuguese Occupation,” 313. It is plausible to hypothesize that the sixteenth-century *cartaz* may possibly owe its legal roots to the thirteenth-century Iberian safe-conduct (*guidaticum*), which apparently emerged from the Islamic *amān*. However, unlike the *amān*, which was free of charge, the Iberian *guidaticum* could be purchased by anyone for a given time, or permanently with an annual fee to ensure the safety of the vessels, their crews, and their shipments. On the basis of legal similarities between the Portuguese *cartaz* and the *guidaticum*, it is sensible to contend that the legal roots of the former might be attributed to the Spanish safe-conduct. Daniel J. Smith, “Heterogeneity and Exchange: Safe-Conducts in Medieval Spain,” *Review of Australian Economics* 27 (2014), 190–192.

the newly arrived European Christian merchants from other states of the highly profitable Southeast Asian trade.¹⁰

The late fifteenth-century papal bull, as mentioned, which partitioned the new world between the Spaniards and the Portuguese, also denied other European nations rights of navigation and access to the newly discovered territories and maritime routes in the Atlantic and Indian oceans. In defence of the seizure of the Portuguese cargo vessel *Santa Catarina* on February 25, 1603, by three ships of the Dutch East India Company (*Vereenigde Oostindische Compagnie*, VOC) in the Singapore Strait,¹¹ and in response to the unjustified maritime claims of Spain and Portugal, the Dutch lawyer and humanist Hugo Grotius (1583–1645) wrote the *De Jure Praedae* (*On the Law of Prize and Booty*), wherein Chapter 12 deals with the freedom of the seas (*Mare Liberum/The Free Sea*).¹² Relying heavily on the Justinianic *Institutes* and *Corpus Juris Civilis*, from which he derived his legal references,¹³ Grotius argued: (a) since the seas are open to all nations by command of the Law of Nations, the Portuguese have no valid title to confine access to the East Indies to themselves;¹⁴ (b) the seas are not subject to appropriation by persons or states but are available to everyone for navigation, and therefore neither Portugal nor other nations can have exclusive rights of navigation whether through seizure, papal grant, prescription, or custom;¹⁵ (c) non-Christians (“infidels” as termed by the author) cannot be divested of public or private rights of ownership merely because they are infidels, whether on grounds of discovery,

¹⁰ Alexandrowicz, “Freitas *versus* Grotius,” 178. Save for its monopolistic aspect, the *cartaz* system can be seen as an instrument of the Portuguese jurisdiction assumed in the Indian Ocean under their quasioccupation, and as a navicert assuring safety to vessels at sea during the Portuguese continuous crusade against the Muslim world.

¹¹ Peter Borschberg, “The Seizure of the *Sta. Catarina* Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch–Johor Alliance (1602–c.1616),” *Journal of Southeast Asian Studies* 33 (2002), 31–36. For a deeper insight into the capture of *Santa Catarina* and the judicial consequences and judicial debates that ensued, refer to Martine J. Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies* (Leiden: E. J. Brill, 2006), 1–52.

¹² Hugo Grotius, *The Free Sea*, trans. Richard Hakluyt, ed. David Armitage (Indianapolis: Liberty Fund, 2004); Hugo Grotius, *The Freedom of the Seas, or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, ed. and trans. Ralph V. Magoffin (New York: Oxford University Press, 1916).

¹³ Robert Fredona, “Angelo degli Ubaldi and the Gulf of the Venetians: Custom, Commerce, and the Control of the Sea before Grotius,” in *New Perspectives on the History of Political Economy*, ed. Robert Fredona and Sophus A. Reinert (New York: Palgrave Macmillan, 2018), 30–31.

¹⁴ Grotius, *Freedom of the Seas*, 7–10. ¹⁵ Grotius, *Freedom of the Seas*, 15–60.

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papal grant, or war;¹⁶ and (d) no people can acquire a monopoly on commerce with any overseas country.¹⁷ Following Grotius's contention, contemporaneous European lawyers sparked a legal debate, some challenging and others concurring with his position, leading to further scholarly contribution to the law of the sea. Both advocates and opponents of the freedom of navigation were inspired either by the natural law enshrined in the Justinianic *Institutes* and *Corpus Juris Civilis*, or the Hebrew Bible's concept of sovereignty on the open sea. British legal theoretician John Selden mentions both in his 1635 *Mare Clausum, Sive de Dominio Maris (The Closed Sea, or the Dominion of the Sea)*.¹⁸

As mentioned earlier, freedom of navigation in the Indian Ocean was common practice until the arrival of the Portuguese in the eastern maritime arena. By the beginning of the seventeenth century and the appearance of the Dutch East India Company the concepts of *mare liberum* and freedom of commerce between littoral countries along the Indian Ocean were no longer confined to locals and Asians. The ocean, which was common to the peoples of Southeast Asia and the Near East, was now shared with the European naval powers, so that in 1615, the Makassarese sultan 'Alāuddīn Tumenanga ri Gaukanna (1002–1049/1593–1639) asked the Dutch East India Company not to interfere with the ships of the Makassarese Kingdom of Goa on the high seas, declaring, "God made the earth and the sea, has divided the earth among mankind and given the sea in common. It is a thing unheard of that anyone should be forbidden to sail the seas."¹⁹ By this statement, the sultan acknowledged that in

¹⁶ Grotius, *Freedom of the Seas*, 22–44, 65, 66.

¹⁷ Grotius, *Freedom of the Seas*, 69–76; Helen Thornton, "Hugo Grotius and the Freedom of the Seas," *International Journal of Maritime History* 16 (2004), 21–33.

¹⁸ John Selden, *Of the Dominion or Ownership of the Sea* (London: William Du-Gard, 1652); Jonathan Ziskind, "International Law and Ancient Sources: Grotius and Selden," *Review of Politics* 35 (1973), 537–559; Abraham Berkowitz, "John Selden and the Biblical Origins of the Modern International Political System," *Jewish Political Studies Review* 6 (1994): 27–47; Mónica B. Vieira, "Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas," *Journal of the History of Ideas* 64 (2003), 361–377; Charles Leben, "Hebrew Sources in the Doctrine of the Law of Nature and Nations in Early Modern Europe," *European Journal of International Law* 27 (2016), 79–106.

¹⁹ Gertrudes J. Resink, *Indonesia's History between the Myths: Essays in Legal and Historical Theory* (Amsterdam: Royal Tropical Institute, 1968), 45; Leonard Y. Andaya, *The Heritage of Arung Palakka: A History of South Sulawesi (Celebes) in the Seventeenth Century* (The Hague: Martinus Nijhoff, 1981), 45–46; Ram P. Anand, "Maritime Practice in South-East Asia until 1600 A.D. and the Modern Law of the Sea," *The International and Comparative Law Quarterly* 30 (1981), 446; Zakaria M. Yatim, "The Development of the Law of the Sea in Relations to Malaysia," *Malaysian*

contrast to land, Islamic law considers the boundless sea to be the common heritage of mankind. No governing authority or nation could either claim proprietorship over it, or exclusive right of navigation; however, he did not elaborate on how the Islamic Law of Nature entitles human beings to share the sea and enjoy equal rights of exploration and exploitation of its natural resources. It may be assumed that the sultan was referring to the traditional freedom of navigation which had existed in the Indian Ocean on the eve of the European colonial era. Before the appearance of the European navies in the sixteenth century, the politics around the Indian Ocean had enjoyed the natural right to conduct maritime trade and navigate the vast ocean without molestation.

HUMAN RIGHTS AND THE ISLAMIC CUSTOMARY LAW OF THE SEA

Numerous studies have been written on human rights and freedom in Islamic law, few of which have touched on the issue of legal rights and the obligations of shipowners, crews, shippers, and passengers at sea with special reference to private commercial laws.²⁰ The issue of human rights is best and most succinctly addressed by the fourth Shiite *imam* and Prophet's great-grandson Zayn al-ʿĀbidīn ʿAlī ibn al-Ḥusayn ibn ʿAlī ibn Abū Ṭālib (38–95/659–713) in his *Treatise of Rights (Risālat al-Ḥuqūq)*.²¹ Canonically, Islam does not draw a distinction between

Management Journal 1 (1992), 88; Philip E. Steinberg, *The Social Construction of the Ocean* (Cambridge: Cambridge University Press, 2001), 48; Philip E. Steinberg, “Three Historical Systems of Ocean Governance: A Framework for Analyzing the Law of the Sea,” *World Bulletin* 12 (1996), 8; Sutherland, “Geography as Destiny,” 27; William Cummings (ed.), *The Makassar Annals* (Leiden: KITLV Press, 2011), 35, 315; William Cummings, “Islam, Empire and Makassarese Historiography in the Reign of Sultan Alaʿuddin (1593–1639),” *Journal of Southeast Asian Studies* 38 (2007), 207. Sultan ʿAlāuddīn’s declaration was the result of the maritime conflict that took place on Rabi al-Awwal 28, 1024/April 28, 1615, between the VOC and the Makassarese, when the former captured the Malay harbor master Anciq Using and other notables resulting in a long period of simmering hostilities between the two rivals.

²⁰ Hassan S. Khalilieh, *Admiralty and Maritime Laws in the Mediterranean (ca. 800–1050): The Kitāb Akriyat al-Sufun vis-à-vis the Nomos Rhodion Nautikos* (Leiden: E. J. Brill, 2006), 45–84; Hassan S. Khalilieh, *Islamic Maritime Law: An Introduction* (Leiden: E. J. Brill, 1998), 42–57, 162–176; Hassan S. Khalilieh, “Legal Aspects from a Cairo Geniza *Responsum* on the Islamic Law of the Sea,” *The Jewish Quarterly Review* 96 (2006), 180–202.

²¹ Zayn al-ʿĀbidīn ʿAlī ibn al-Ḥusayn ibn ʿAlī ibn Abū Ṭālib, *Risālat al-Ḥuqūq (Treatise of Rights)*, narrated by the prominent Shiite traditionists Abū Jaʿfar Muḥammad ibn ʿAlī ibn al-Ḥusayn ibn Bābawayh, *Man lā Yaḥḍuruhu al-Faqīh* (Qumm: Jamāʿat al-Mudarrisīn fī

10 Introduction

rights and obligations on land and at sea, but places them on an equal footing.²² Human rights, as prescribed by law, are classified into three major categories: the rights of God, the rights of the individual toward himself (*al-nafs*), and the rights of humans or individuals (*'ibād*); each of the three is further divided into subcategories.

Of interest are the rights of individuals and the community at large that define the relationship between individuals of the same or different religions and nationalities inter se, and those that define the relationship between the individual and the community and state. Among these rights 'Alī ibn al-Ḥusayn counts the rights of superiors,²³ rights of dependents,²⁴ rights of relatives,²⁵ rights based on personal relationships,²⁶ and most importantly as far as this study is concerned, rights based on financial, judicial, and social relationships; these latter rights cover, among other things, topics associated with the rights of partners, associates, creditors, wealth, claimants, and defendants.²⁷

Human rights laws cannot be separated from the customary law of the sea because the two overlap in many ways. One may consider, for instance, the right to life. Since time immemorial, rendering assistance to persons or ships in distress or danger on the high seas or in the territorial sea of a coastal state has been accepted as a common humanitarian norm. Providing assistance to ill-fated individuals at sea is considered by Islamic law to be a moral duty and a religious obligation; the law commands Muslims to render assistance insofar as the rescuers do not compromise their own safety.²⁸ The rights of individuals apply to the personal safety of

al-Ḥawza al-'Ilmiyya, 1404/1983), 2:618–625, 3:3–4; Abū Ja'far Muḥammad ibn 'Alī ibn al-Ḥusayn ibn Bābawayh, *Al-Khiṣāl* (Qumm: Jamā'at al-Mudarrisin fi al-Ḥawza al-'Ilmiyya, 1416/1995), 2:564–570. In addition to Ibn Bābawayh's narration, this treatise is also narrated by the fourth-century Shiite traditionist Abū Muḥammad al-Ḥasan ibn 'Alī ibn al-Ḥusayn ibn Shu'ba al-Ḥarrānī, *Tuḥfat al-'Uqūl* (Qumm: Jamā'at al-Mudarrisin fi al-Ḥawza al-'Ilmiyya, 1404/1983), 255–272.

²² The Umayyad Caliph 'Umar ibn 'Abd al-'Azīz (99–101/717–720) was quoted as saying, “dry land and sea belong alike to God; He hath subdued them to His servants to seek of His bounty for themselves in both of them.” Abū Muḥammad 'Abd Allāh ibn 'Abd al-Ḥakam, *Sīrat 'Umar Ibn 'Abd al-'Azīz 'alā mā Rawāhu al-Imām Mālik Ibn Anas wa-Aṣḥābibi* (Beirut: 'Ālam al-Kitāb, 1404/1984), 86–87.

²³ Ibn Bābawayh, *Man lā Yaḥḍuruhu al-Faqīh*, 2:620–621.

²⁴ Ibn Bābawayh, *Man lā Yaḥḍuruhu al-Faqīh*, 2:622.

²⁵ Ibn Bābawayh, *Man lā Yaḥḍuruhu al-Faqīh*, 2:621–622.

²⁶ Ibn Bābawayh, *Man lā Yaḥḍuruhu al-Faqīh*, 2:622–623.

²⁷ Ibn Bābawayh, *Man lā Yaḥḍuruhu al-Faqīh*, 2:623–625; 3:2–4.

²⁸ Qur'ān 5:32: “مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا (if anyone slew a person – unless it be for murder or for spreading mischief in the land – it would be as if he slew the whole people. And, if anyone saved a life, it would be as if