Hans-Jürgen Richter, Die Rechtsspaltung im malaysischen Familienrecht, zugleich ein Beitrag zur "gestuften" Unteranknüpfung im internationalen Privatrecht. Frankfurt am Main: Verlag für Standesamtwesen, 1978, pp. XXII, 217.

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The title of Richter's dissertation may best be translated as "Legal pluralism in Malaysian family law with special reference to conflict rules." As the introduction, which reports and considers a German court case, indicates, this book is addressed in the first place to practitioners. It covers three aspects of family law: marriage, divorce, custody and guardianship.

In the chapter on personal laws in East and West Malaysia the author adopts the following pattern for examining various systems of family law: After a short introduction of the specific system, the rules concerning its recognition and its fundamental contents are discussed, followed by a determination of the factors which govern its application. For West Malaysia the family law of the Muslims, Chinese, Christians and Hindus is considered; for East Malaysia native law is also dealt with.

The chapter on conflict rules is systematically worked out. Differences and similarities between private international, interterritorial and interpersonal law are shown in detail. Richter ultimately develops a four-step method for finding the governing law ("graded" suballocation) which he illustrates with a concrete example: "If the German conflict of law rule refers to the governing law, then it is necessary, with regard to a possible renvoi, to consider the Malaysian private international law on the first level. As a result of the territorial division of the Malaysian private international law - the second level - the governing territorial law is determined with the assistance of an appropriate suballocation rule. Thus, the territorial conflict rule states whether there will be a renvoi or not. On the third level, it is necessary to determine the applicable territorial substantive law by applying the suballocation rule of the selected interterritorial conflict law. Lastly, on the fourth level, the interpersonal conflict rule refers to the conclusive personal law by means of further suballocation." (p. 217).

In my view, Richter's method is unnecessarily complicated. The third level, interterritorial law, could have been omitted. As Richter himself says, the common law does not make a distinction between private international law (second level) and interterritorial law (third level). This is probably due to the fact that the common law determines a person's civil status by his domicile. Furthermore there cannot be conflicts between interterritorial and private international law in divorce and custody and guardianship cases, as the lex fori will be applied. The few exceptions conceived of by the author can be resolved either by applying personal (e.g. Islamic) law or by private international law principles. The notion of an interterritorial law is foreign to the character of Malaysia's legal system. Thus, its introduction is not justified and, from a practical point of view, superfluous.

Richter describes rather than analyzes most aspects of his two main topics: personal law and conflict of laws. This method gives practitioners an easier access to the complex Malaysian family law. A close perusal has been made, for example, in two fields of conflict: 1. Difficulties can arise between general (common) law and personal law. 2. It is not easy to find a solution, if private international law and personal law clash. In his discussion of these problems the author appears to favour dogmatic solutions. It can be questioned whether this does justice to the legal situation in Malaysia. To illustrate these fields of conflict two cases can be considered.

A Muslim man wishes to marry a Jewish woman in West Malaysia. According to Islamic law there is no way in which he can marry her. The author affirms the possibility of a common law marriage, because in his opinion common (general) law cannot admit modification by Islamic (personal) law. Sec. 3(1)a of the Civil Law Act 1956 states that the common law is modified so far as "circumstances" in West Malaysia (various bodies of personal law different from English family law) require. But is the modification rule in this case inapplicable because common law cannot accept such a modification? As Choa Choon Neo v. Spottishwoode (1869) 1 KY 216 states, modification is permitted when "necessary to prevent the common law from operating injustly and oppressively" against Muslims. "Thus in questions of marriage....it would be impossible to apply our (English) law to Mohamedans....without the most absurd and intolerable consequences, and it is therefore inapplicable to them." Would not there be "intolerable" social and political consequences if common (Christian) law denies the right of a religious community (umma) to have rules which guarantee its existence and continuance?

The rule that a Muslim cannot marry a non-Muslim woman in West Malaysia could be so regarded and the modification therefore "necessary." Consequently the Muslim could not marry. The author on the other hand argues that Re Penhas v. Tan Soo Eng (1953) A.C. 304 would be binding. There it was held that a common law marriage is an exceptional form of marriage for a Jew and a Chinese woman, if no other form applies. At first glance it appears to fit the first case - marriage between a Muslim and a Jewish woman. In both cases they are not allowed to marry by their respective personal laws, which do not allow such mixed marriage. However, it could be said that the modification rule (Choa v. Spottiswoode) must be examined first, before reference can be made to common law (Re Penhas). For special personal law precedes (general) common law, if the modification can be accepted. In such a case Re Penhas would not be binding.

Another aspect of the case of a Muslim-Jew marriage has been left untouched by Richter. After independence (1956) the situation has changed insofar as Islam, a religion based on legal principles, has become the only state religion (art. 3(1), Constitution of Malaysia). Could not there be a conflict between the received common (general) law and the constitution? If Islamic law replaces common law as the general family law for Muslims, Re Penhas would not be binding for a Muslim.

The Hertogh case is a good example of the conflict between private international law and personal law. Maria Hertogh was brought up in Singapore by foster parents. Her father, whose domicile was in Holland, had to leave her in Indonesia after the Japanese invasion in 1941. Later he traced her to Singapore. At that time she was 15 years old, according to Dutch law a minor, and married to a Muslim. There was no doubt that she was a Muslim, too. The Singapore High Court declared the marriage a nullity. If Islamic conflict rules were applied, the marriage would be valid, because the law of her "residence" would govern the case and under the Islamic law of Singapore she had the capacity to sign a contract of marriage. The High Court, however, applied international private law principles. Here the "domicile" of her father turned the scale. The author's opinion that private international law precedes in this case can be questioned. Hooker suggests "a selective application" of conflict of law principles. There is already a considerable amount of precedent which would support such a view. (Hooker 1976: 13). Obviously a systematic and just solution cannot be given. My critical remarks therefore are not directed against Richter's interpretation as such but rather against its dogmatic character. They also do not affect the general conclusion that

Richter's book will help in most cases to find a path and solution in the Malaysian family law "jungle."

REFERENCE

Hooker, M.B. 1976 The Personal Laws of Malaysia: An Introduction. Kuala Lumpur: Oxford University Press.