JURY TRIAL IN SINGAPORE AND MALAYSIA: THE UNMAKING OF A LEGAL INSTITUTION

I. INTRODUCTION

THE main task of this article is to inquire into the reasons for the general decline and final abolition of the jury system [1] in Singapore.[2] It also seeks to discover why the decline and fall of a major legal institution aroused so little public debate, let alone outcry. To this end, the focus must necessarily be historical, but, in the context of a nation still in the process of discovering its legal heritage, it is hoped that the account which follows will contribute in some small way towards the development of our legal history.

The Malaysian position will also be looked at in order to reach, against the backdrop of the Singapore experience, a reasonable conclusion as to the projected fate of the institution there where one may now in fact detect recent rumblings of discontent with the system.[3] This will be the more current task of the article.

The writer's tentative results culled from a survey of the case-law (principally local in flavour) suggest that many convicted accused try and many do in fact manage to get their convictions reversed or quashed on appeal, or at least obtain fresh trials, on the basis of rather technical and legalistic grounds. This would lend additional support to critics of the jury system. The case-law will not, however, be discussed here since we will be concentrating on the root causes of the decay of the institution set in its historical context.

Local literature on the jury system is, however, virtually non-existent [4] so that out 'trek' must, in the main, encompass various

[1] Only the petit or common jury will be dealt with, *viz.* the ordinary jury for the trial of a criminal action (the petit jury was never introduced for civil actions). The duty of the grand jury, on the other hand, is primarily to receive complaints and accusations in criminal cases, hear the evidence adduced on the part of the State, and find bills of indictment in cases where they are satisfied a trial ought to be had. See, generally, *Black's Law Dictionary* (5th Edition, 1979). For an account of the grand jury in Singapore from its inception till its final abolition by Ordinance No. 6 of 1873 (entitled "An Ordinance to amend the law relating to Criminal Procedure"), see Y.K. Lee, "The Grand Jury in Early Singapore (1819-1873)", (1973) 46 JMBRAS 55.

[2] The Malaysian reader will, it is hoped, also find some useful material on his own system, *infra* p. 71 *et seq.*

[3] In fact, Malaysia is taking active steps to abolish the jury system — see the *Straits Times,* 5th May, 1983 at p. 13.

[4] Barring two articles: Chandra Mohan Shunmugam and Sukumaran Raman Kutty, "The Introduction and Development of Trial by Jury in Malaysia and Singapore", (1966) 8 MaL L.R. 270 and Molly Cheang, "Jury Trial: The Singapore Experience", (1973) West. Aust. L. Rev. 120. There has also been some material (mostly unpublished) from the Third and Fourth Malaysian Law Conferences which will be discussed in greater detail later.

sources, including Select Committee Reports, Parliamentary Debates and newspaper reports.[5]

At this juncture, a very brief overview of the introduction and characteristics of the jury system in Singapore and Malaysia might be useful, although the actual details will only be elaborated upon at relevant points in the ensuing discussion.

The jury system was imported *via.* the Charters of Justice for all offences. The Charters, however, governed only Penang, Malacca and Singapore which collectively formed the Straits Settlements from 1826 to 1946 (when the Straits Settlements was disbanded and Singapore became a separate Crown colony, with Penang and Malacca joining the other Malay States, both Federated and Unfederated, in forming the Malayan Union, which was later to become the Federation of Malaya).[6] Various Straits Settlements Ordinances maintained the general position after the repeal of the Charters of Justice.

The Federated and Unfederated Malay States,[7] however, did not apparently utilize the jury system initially. In the Federated Malay States, for example, although the Criminal Procedure Code contained provisions for jury trial since 1926, accused in capital offence cases were tried by a judge with the aid of two assessors between 1926 and 1958.[8] In the Unfederated Malay States, where there is an even greater dearth of historical material, it appeared that only judges tried capital offences until 1947 when the Federated and Unfederated Malay States combined (together with Penang and Malacca, *supra)* to form the Malayan Union in 1946, whereupon the assessor system prevailed until 1958.[9]

In 1958,[10] however, the jury system was introduced into the Federation of Malaya for all capital offences only, barring the states of Penang and Malacca which continued to be governed by the former Straits Settlements Code and therefore had jury trials for *all* offences until 1976 when jury trial was also restricted to capital offences only, thus ensuring uniformity in West Malaysia — the present position.

Soon after, in 1960, Singapore also restricted jury trial to capital offences and abolished the system altogether in 1970.

Sabah and Sarawak, the two East Malaysian States that joined Malaysia in 1963, never had the jury system although in 1976, amendments were effected so as to enable trial by jury to be introduced into these states at any time by resolutions from both Houses of the Malaysian Parliament.

5 As will also be the case for the Malaysian situation.

6 See Chandra Mohan Shunmugam and Sukumaran Raman Kutty, *op. cit., supra,* n. 4 at p. 270.

7 The Federated Malay States comprised Perak, Selangor, Negri Sembilan and Pahang. The Unfederated Malay States comprised Johore, Kedah, Perlis, Kelantan and Trengganu. See L.A. Sheridan, *Malaya and Singapore: The Borneo Territories* (1961) at pp. 6 to 9.

8 Chandra Mohan Shanmugam and Sukumaran Raman Kutty, *op. cit., supra,* n. 4 at p. 275.

9 *Ibid.* at p. 278.

10 For more details on the introduction of the jury system in the then Federation of Malaya, see *infra,* p. 71 *et seq.*

Unlike the English position, the jury here have always comprised seven members only,[11] although the trial may, in certain stipulated circumstances, continue with six jurors.[12]

Verdicts may be either unanimous or by a majority of not less than five to two, with the proviso that in a majority verdict of guilty, the court has to concur with the verdict or order that the accused be tried again before another jury.[13]

The qualifications for jury service are extremely basic. Every person who has attained the age of twenty-one years, is of sound mind and not afflicted with deafness, blindness or other infirmity is generally qualified and liable to serve as a juror.[14] However, certain categories of persons are disqualified from being jurors.[15] In addition, under the former Straits Settlements Criminal Procedure Code, certain other categories of persons were also entitled to exemption from serving as jurors. These included persons over fifty-five years of age, school teachers, veterinary surgeons and registered dentists.[16]

II. The Decline and Fall of the Jury System in Singapore

(A) *The Decline*

1. *The Criminal Procedure (Amendment) Bill 1959: First and Second Readings:*

The abovementioned bill received its first reading on 13th August, 1959.[17] Its aim *vis-a-vis* the jury system was clear: to remove the jury in all cases except those where the punishment authorised by law was death, *i.e.* capital offences.[18] Power, however, was still vested in the Chief Justice, with the approval of the Yang di-Pertuan Negara,[19] to order that the trial of all offences or of any particular class of offences before the High Court should be by jury.[20]

11 See s. 183 of the Straits Settlements Criminal Procedure Code (Cap. 132 of the 1955 Revised Edition) and s. 204(i) of the Malaysian Criminal Procedure Code (Cap. 6 of the 1935 Revised Edition of the Laws of the Federated Malay States).

12 See s.190(l) and s. 211(i) of the Straits Settlements and Malaysian Codes respectively. Further, any deficiency of jurors may be made up for by the procedure of "Praying a Tales": see s. 184(d) and s. 205(d) of the Straits Settlements and Malaysian Codes respectively. There is also provision made for "hung" juries which are generally discharged, with a trial before another jury conducted: see ss. 215 and 216 of the Straits Settlements Code and ss. 234 and 235 of the Malaysian Code.

13 See, generally, ss. 210 to 212 of the Straits Settlements Code and ss. 229 to 231 of the Malaysian Code.

14 See ss. 218 and 236 of the Straits Settlements and Malaysian Codes respectively.

15 See ss. 219(1) and 237 of the Straits Settlements and Malaysian Codes respectively.

16 See s. 219(2) of the Straits Settlements Code.

17 *Singapore Legislative Assembly Debates,* Vol. 11, Col. 382 (13th August, 1959).

18 See ss. 16 to 18 of the Criminal Procedure Code (Amendment) Act, 1960 (No. 18 of 1960). Other proposed amendments pertaining, for example, to police investigations are not relevant to our present discussion.

19 Singapore not being as yet an independent state; hence the appellation here.

20 *Supra,* n. 18: see s. 18 enacting a new s. 178(2).

The Prime Minister, Mr. Lee Kuan Yew, delivered the keynote speech during the second reading, stressing the premium the jury system placed on a lawyer's "skill and agility",[21] and the fact that trial by jury did not mean trial by one's peers but trial by the English-educated.[22] He did, however, admit that the jury trial as "a foreign implantation" worked "reasonably well", but required a "very high degree of skill from the Bar and the Bench" and witnesses who were in fact willing to come forward.[23] Justice was being thwarted on "pure technicalities" and reference was made to the Green Bus murder case.[24] Judges could make up their minds on facts as well as the jurymen could, and the amendment would bring our system into line with Malaya's.[25]

Mr. K.M. Byrne (then Minister for Labour and Law) went on to assure the members that it was *not* the intention that the jury system be abolished entirely.[26]

An opposition member, Mr. A.P. Rajah,[27] who was clearly in favour of retention of the jury system,[28] moved that the bill be referred to a Select Committee.

The Government's reasons are interesting, though rebuttable. The stress on a lawyer's glibness and oratory implies a singular incompetence on the part of the jury, but this bare assumption of incompetence, without more, is hardly persuasive. The other points were well answered by David Marshall[29] some ten years later[30] in a speech delivered at a Law Alumni meeting.[31] He pointed out that the concept of "trial by peers" was in contradistinction to trial by officers appointed by the King, adding, somewhat sarcastically, that trial by judges would be even more so a trial by the "English-educated elite". Emphatically endorsing the ability of both Bench and Bar, he pertinently pointed out that the courage or otherwise of witnesses had little relevance as

21 *Singapore Legislative Assembly Debates* (hereinafter referred to as *Debates*), Vol. 11, Col. 565 (2nd September, 1959). One wonders whether or not this included David Marshall's use of spectacles (which he did not require) as "part of his act in Court", the "heavy black frames" being "swept off an elegant nose with a famous gesture as he looked up at the judge or across at a witness to emphasise a telling point": Alex Josey, *The David Marshall Trials* (1981), p, 242. One might perhaps also note the Prime Minister's personal experience when he was assigned to defend four alleged murderers in a riot case; he got them acquitted by working on the weaknesses of the jury and felt "quite sick" for in discharging his professional duty, he had "done wrong". This incident, which was apparently related by the Prime Minister to a B.B.C. interviewer is, in turn, recounted in two of Alex Josey's books: *Singapore: Its Past, Present and Future* and *The David Marshall Trials.*

22 *Debates,* Vol. 11, Col. 566.

23 *Ibid.*

24 *Ibid*., where the conviction was quashed on appeal owing to a misdirection by the trial judge: *Ong Ah Too* v. *R*., (1955) 21 M.L.J. 247.

25 *Ibid*., Col. 567.

26 *Ibid*., Cols. 568 and 569.

27 Now a Supreme Court judge.

28 *Debates,* Vol. 11, Cols. 560 and 561.

29 The staunchest defender of the jury system in Singapore as will be seen in due course.

30 When ultimate abolition came up for debate.

31 Briefly reported in the *Straits Times,* 11th April, 1969 and reproduced wholly in the *Eastern Sun* of the same day. See also, a note by David Marshall in (1969) 1 LAWASIA 6.

to who was trier of fact. The Green Bus murder case was rejected as an irrelevant example for the jury was blameless.[32]

The argument centring on bringing our system in line with Malaya's merits a little more scrutiny. Prior to the Criminal Procedure Code (Amendment) Act 1957,[33] Malaya, barring the states of Penang and Malacca, had no jury trials whatsoever although the *machinery* for jury trials for *capital* offences existed. This was due, apparently, to the then inability of implementing such a "fundamental change".[34] What is more important to note, however, is the *attitude* towards implementation of the jury system, for it was hailed, *inter alia,* as a "most valuable safeguard in the administration of justice".[35] Indeed, there appeared to be much grassroots support for implementation of the system.[36] The proposed amendment in Singapore was thus an alignment with Malaya's position merely in *form* and not substance for whilst Malaya moved from a situation of *no* jury trial *towards* trial by jury for capital offences,[37] Singapore was moving *from* a situation of *general* jury trial to trial by jury for capital offences.

2. *The Select Committee Proceedings:*[38]

Only one lay member of the public gave evidence before the Select Committee — a medical practitioner, Dr. Baratham Ramasamy Sreenivasan.[39] He was not in favour of the curtailment of jury trial. His main arguments were that the people would, if curtailment was effected, not be allowed to participate in the administration of justice and that, generally, trial by jury was "a fairer way of exercising judicial matters."[40] As to general public apathy, the witness, whilst acknowledging its existence, pointed to the less than close affinity laymen had with the various statutes as well as the general lack of contact between the topic

32 Mr. Marshall had, earlier, on 24th October, 1968, in a talk to the Rotary Club of Singapore (see the *Straits Times,* 25th October, 1968 and (1969) Vol. 4, No. 1, Law Times, pp. 3 and 4 where the entire text of the speech is reproduced under the title "The Rule of Law") expressed similar views on the case. Nevertheless, the point made by the Prime Minister was that jury trial could give rise to convicted accused benefitting by resort to technicalities centring around misdirection by the trial judge, *supra,* n. 24.

33 No. 69 of 1957.

34 See the *Second Legislative Council, Debates, September 1957 to October 1958 (Third session)* at Col. 3468 *(per* Enche Sulaiman).

35 *ibid*., Col. 3467 *(per* Enche Sulaiman). See also, Cols. 3469 and 3472, although some comments were jocularly indifferent (Col. 3470 *per* Sir Douglas Waring).

36 *Ibid*., Col. 3469 *(per* Mr. K.L. Devaser).

37 Which position still exists today for virtually all the States in Malaysia, barring the East Malaysian states where jury trial may be introduced by resolutions from both Houses: the Criminal Procedure Code (Amendment and Extension) Act, 1976 (Act A324) which also abolished *general* jury trial that had hitherto existed in Penang and Malacca, thus achieving the uniformity desired. For more details on the jury system in Malaysia, see p. 71 *et seq.*

38 Only the salient arguments from the *Minutes of Evidence* and *Official Report, infra* n. 39, will be dealt with in this section.

39 See the *First Legislative Assembly, State of Singapore, Report of the Select Committee Report on the Criminal Procedure Code (Amendment) Bill, Minutes of Evidence* (hereinafter referred to as *Report, Minutes*), Cols. 1 to 25.

40 See, for example, his reference to the commonsense and safer numerical advantage of juries *(ibid*., Col. 5), and to the greater likelihood of at least one member understanding the accused's dialect and thus being able to discern misinterpretations by the court interpreter *(ibid*., Col. 8).

concerned and the daily lives of most of the public.[41] However, he acknowledged that there was "some substance"[42] in the apprehension that the jury may be swayed by flamboyant counsel.

Two lawyers attended individually to give evidence — Mr. Lim Kean Chye[43] and Mr. P. Coomaraswamy. The latter, however, dealt only with the other amendments which need not concern us here.

Turning, then, to Mr. Lim, we find, once again, the stress on the jury's commonsense and the participation of the public in the administration of justice.[44] He advocated a modified jury system whereby the accused had the option as to the mode of trial.[45] He had no effective answer, however, against the observation concerning public apathy,[46] but rejected the idea of the pivotal effect of defence counsel's flamboyancy, preferring to rely upon the basic presumption of innocence as a reason for acquittals.[47]

Only one group gave evidence — three representatives from the Singapore Bar Committee.[48] It was against the whittling down of trial by jury. Again, the main argument was participation by the public in the administration of justice. The danger of local prejudice coupled with the limited territorial area, however, prompted the suggestion of an option of trial before a single judge.[49] It was, however, after some resistance, conceded that there was less likelihood of a lawyer's histrionics influencing a judge than they would a jury.[50] It is, however, submitted that with the non-availability of empirical evidence, to attempt a conclusion on this point would be an exercise in imponderables and one must acknowledge that the number of such "flamboyant" counsel,[51] during the last few decades, must be negligible indeed.

The common thread was clear — retain the jury system,[62] the main reason being that it afforded the public an opportunity to participate in the administration of justice. At this juncture, it must be asked whether the relatively small number who could so participate rendered this reason an ideal on the far horizon. Yet, it could also be argued that to do away with even this modicum of participation would be to aggravate the problem, alienating the public totally.

However, the Select Committee remained unimpressed. During their final meeting to consider the bill clause by clause, only the lone dissenting voice of Mr. A.P. Rajah, then an opposition member of parliament, was heard. He decried the proposed curtailment of jury

41 *Report, Minutes,* Cols. 18 and 19.
42 *ibid*., Col. 21.
43 See, *ibid*., Cols. 35 to 47.
44 *Ibid*., Cols. 36 and 40.
45 *Ibid*., Col. 39.
46 *Ibid*., Col. 41.
47 *Ibid*., Cols. 43 and 44.
48 Messrs. M. Karthigesu, Tan Tee Seng and P. Coomaraswamy. See, *ibid*., Cols. 81 to 90.
49 *Ibid*., Cols. 81 and 85. And see the note on *P.P.* v. *Watts-Carter,* (1951) 17 M.L.J. xvii.
50 *Ibid*., Cols. 89 and 90.
51 And, of course, who invariably gets results!
52 Or at least provide an option to the accused.

trial as a "retrograde step".[53] He talked about the element of public participation and the distribution of responsibilities.[54] Mr. Byrne[55] then spoke of expedience and was countered by Mr. Rajah with the retort that: "Justice must proceed slowly, not speedily"[56] — but to no avail to the latter. The Committee adopted the amendment clause three to one (with three absentees).

3. *The Criminal Procedure Code.* (*Amendment*) *Bill 1959: Third Reading:*

The third reading and passing of the bill took only *four minutes*[57] with Mr. A.P. Rajah voicing the opposition's general disagreement.

4. *The Reaction:*

(a) *Before the Passage of the Bill:* Barring the Select Committee proceedings which were themselves limited in scope, the reaction was virtually non-existent. Just after the bill's second reading, the *Straits Times* on 4th September, 1959, carried an editorial entitled "Juries in Jeopardy" which extolled the virtues of the jury.[58]

The *Fajar,* a publication of the University of Malaya Socialist Club, defended the jury system as one which drew the ordinary man into the administration of justice.[59]

The editorial entitled "The Judge as Jury"[60] prior to the third reading strongly opposed the Government's move to curtail jury trial, stating, *inter alia,* that the Green Bus case weakened rather than strengthened the Government's contentions.[61]

(b) *After the Passage of the Bill:* By far, the most important reaction was by Buttrose J. who, although expressing a "personal opinion", was "very sorry to see the jury system disappearing to a large extent."[62]

But, the decline had begun. It should, however, be noted that the 1960 Amendment Act[63] dealt not only with jury trials but also with the reform of police investigations, the latter of which seemed of equal or perhaps more importance.[64] It is suggested that this fact, coupled with the low level of public interest generated, served to dull

53 *Select Committee Report, Official Report,* Col. 36.
54 *Ibid.*
55 The then Minister for Labour and Law.
56 *Supra,* n. 53, Col. 37.
57 *Debates,* Vol. 12, Cols. 391 and 392 (13th February, 1960). The Criminal Procedure Code (Amendment) Act, 1960 (No. 18 of 1960) came into force on 14th April, 1960.
58 So did the "Opinion" column of the *Free Press,* 5th September, 1959. "A Special Correspondent" in the 15th September, 1959 issue did likewise, but this was limited to only a few paragraphs. His tirade against the amendments with regard to police investigations formed the bulk of his article.
59 See the *Straits Times,* 23rd September, 1959.
60 The *Straits Times,* 3rd February, 1960.
61 See *supra,* n. 32 and the accompanying main text.
62 See the *Straits Times,* 20th April, 1960.
63 See, *supra,* n. 57.
64 A look at the proceedings of the Select Committee and the Legislative Assembly will furnish persuasive, if not conclusive, evidence of this.

the issue further. Further, in 1959, with a less educated population, it is not inconceivable that a large number of people were oblivious to or could not follow the proceedings.

(B) *The Fall*

1. *The Criminal Procedure Code (Amendment) Bill 1969: First and Second Readings:*

The abovementioned bill received its first reading on 8th April, 1969.[65] It dealt with only one matter — the abolition of jury trial in Singapore for all capital offences; the substitute mode of trial would be trial by a court of three judges and if the judges were unable to arrive at a decision, the accused might be acquitted or discharged and tried before another court.[66]

The second reading was spread out over two sittings. By now, Singapore, an independent nation state since 1965, had no opposition members in Parliament, and it was thus unlikely that the bill would be "blocked". It was clear that the continued survival of the jury system in its limited form lay, if at all, in the hands of the public; and it was, in the final analysis, the singular lack of mass public support which led to its ultimate demise. However, more of that later.

The Minister for Law and National Development, Mr. E.W. Barker, moved the second reading of the bill. He spoke of "the unreliability of the system of trial by jury", alluding to the results of recent cases and the fact that the Chief Justice and the other judges were in favour of the proposed amendment.[67] The amendment was sought to be introduced only after "considerable thought"[68] and was to be regarded as "a logical conclusion to the amendments introduced some nine or ten years ago".[69] At this juncture, one might remember the words of Mr. K.M. Byrne, the then Minister for Labour and Law, who assured the Legislative Assembly at the second reading of the 1960 Amendment Act that it was not the Government's intention that the jury system be abolished.[70] The apparent inconsistency was utilized to the hilt by David Marshall[71] but, it is submitted, such a ploy was rather unfair, for society changes with the years and a government in 1969 is not bound by the 'intention' of a government in 1959. In any event, one ought not to retain a system if it could be proved, on balance, to be detrimental to the administration of justice as a whole.

65 *Singapore Parliamentary Debates,* Vol. 28, Col. 858 (hereinafter referred to as *Debates*).

66 This last provision regarding another trial was criticised, *inter alia* by David Marshall and although it did not necessarily contravene Article 11(2) of the Singapore Constitution (1980 Reprint; date of reprint; 31st March, 1980) which protects the citizen against repeated trials, was later removed. Indeed, the situation where judges are unable to arrive at a decision may be likened to that of a "hung" jury for which trial before another jury is provided — see, *supra,* n. 12. See also, *infra,* n. 78 at p. 58.

67 *Debates,* Vol. 29, Col. 33.

68 *Ibid*., Col. 36.

69 *Ibid*., Col. 35.

70 *Supra,* n. 26.

71 See his speech delivered at a Law Alumni meeting, *supra,* n. 31, and his letter to the *Straits Times* on 10th April, 1969.

Two Members of Parliament then spoke in support of the bill.[72]

The Prime Minister, once again, delivered the keynote speech. He was of the view that if judges could not decide questions of fact better than jurymen, then "grievous harm" was being done every day when single judges and magistrates were sitting alone deciding questions of fact in civil and criminal cases.[73] Further, the jury seemed "overwhelmed with the responsibility of having to find a man guilty" when they knew that the death sentence was to follow.[74] Several miscarriages of justice had been committed in the past few years. He alluded to a murder trial which should have taken five days, but which dragged on for over thirty days as judge and prosecutor "leant over backwards to ensure the appearance of justice being manifestly done"; it was "overdone" — "Every visiting psychiatrist was called to give evidence, ending with the majority of jurymen being so impressed or confused" that they returned a verdict of culpable homicide not amounting to murder.[75] Other countries had, in fact, been doing well without jury systems.[76]

Mr. N. Govindasamy was the only member who expressed some misgivings. He thought that the lack of good prosecutors could have resulted in wrongful acquittals.[77] Further, there was, if three judges were utilized, a danger of shortage of judicial manpower, and also the danger of double jeopardy.[78]

But, Mr. E.W. Barker stressed the apparent concurrence of the man in the street,[79] and that it was inconceivable for the Government to "stoop so low" as to influence the judges who are in fact fully independent by virtue of the provisions of our Constitution.[80]

The bill was committed to a Select Committee.

72 Messrs. P. Selvadurai and L.P. Rodrigo — both were not only Members of Parliament but also lawyers, the latter of whom spoke about the removal of the "arduous and complex" task of directing the jury which would be the possible bone of contention on appeal *(Debates,* Vol. 28, Col. 44).

73 *Debates,* Vol. 29, Col. 52. See also, *infra.* n. 57 at p. 78. But see, *infra,* n. 27 at p. 75.

74 *Ibid.*, Col. 53. This is now a critical problem in Malaysia, *infra.*

75 *Ibid.*, Cols. 53 and 54. This was the Freddy Tan trial of which the report of proceedings at first instance may be traced in the *Straits Times* stretching from 28th May, 1968 to 13th July, 1968. The psychiatrists involved were as follows: *For the prosecution:* Dr. Harry Richard Bailey from Sydney and Dr. Paul William Ngui, Deputy Medical Superintendent of Woodbridge Hospital. *For the defence:* Dr. Wong Yip Chong, consultant psychiatrist to Woodbridge Hospital and Dr. John Ellard of Sydney.
The "debate" between the abovementioned two groups centred mainly around the defence of diminished responsibility, a defence crucial to the accused's case because he had admitted the actual killing. His appeal against his sentence of life imprisonment was dismissed by the Federal Court: *Freddy Tan* v. *P.P.,* [1969] 2 M.L.J. 204.
One must not also forget the conflicting testimony of the forensic pathologists who were called to give evidence.

76 *Debates,* Vol. 29, Col. 54.

77 *Ibid.*, Col. 55. This reason is difficult to understand as capital offences are relatively few in number and, in fact, were prosecuted, in the main, by the then Solicitor-General, a more than competent lawyer.

78 *Supra,* n. 66.

79 *Debates,* Vol. 29, Col. 57 — there was hardly "a groan or even a squeak" against the bill.

80 *Ibid.*, Col. 59.

2. *The Select Committee Proceedings:*

(a) *Written Representations by Persons Not Called to Give Evidence Before the Committee:*[81] The only substantial argument in the representation by Mr. G.J. Champion[82] was the fact that laymen could ensure that justice was "tempered with mercy".[83]

Mr. Amarjit Singh, a lawyer, in his representation,[84] advocated retention of the existing system of limited trial by jury, for such trial of capital offences with political overtones and especially in cases of treason would be invaluable.[85] In fact, the aim should be to harness more suitable persons for jury-duty and cut down on the exemptions which were taking away the very people who should be sitting as jurors.[86] If the jury system was indeed abolished, two judges would be sufficient and if they were unable to decide,[87] there ought to be an acquittal, as should also be the case even if three judges were to sit.

The University of Singapore Law Society urged the Government to "reconsider" its decision to abolish jury trials.[88] It stated, *inter alia,* that even judges would share the same restraint as a juryman in condemning another human to death,[89] that an unanimous decision of guilty instead of a majority one as proposed in the Amendment should be required[90] and that the offence of treason should still be tried by jury.[91] It added that it was "against good morals for a state of 2 million to delegate its right to decide on life and death to 6 individuals."[92]

Mr. S.W.H. Ashcroft, a lawyer who opposed abolition, delivered, in his memorandum,[93] a step by step criticism of the proceedings as reported in the Parliamentary Debates. His main points, it is submitted, were that not all judges approved of the proposed abolition,[94] that the

81 This sub-heading is necessary as, unlike the previous amendment proposed in 1959, not all the persons/groups who delivered written representations were called to give evidence before the Select Committee. Those who were called to give evidence will not be dealt with under this sub-heading but, rather, in the next, as their views were not only coincident with their written representations but also provided additional elucidation. In fact, the strength of their arguments can be gauged from their subjection to the touchstone of open debate.

82 *Report of the Select Committee on the Criminal Procedure Code (Amendment) Bill* (hereinafter referred to as the *Select Committee Report), Written Representations* at Appendix II, pp. Al to A2 (the aforementioned is hereinafter referred to as the *Select Committee Report, Written Representations*).

83 *Ibid*., p.A1.

84 *Ibid*., pp. A2 to A5, though such cases are likely to be very rare.

85 *Ibid*., p. A4— as judges are ostensibly appointed by the Government.

86 *Ibid*., p. A3. See s. 219 of the Criminal Procedure Code (Cap. 132 of the 1955 Revised Edition; Reprint No. RS(A) 1 of 1969), and, *supra,* notes 14 to 16.

87 *Ibid*., p. A4. This suggestion was apparently accepted with modifications, and trial by two instead of three judges was instituted for capital offences — see s. 3 of the Criminal Procedure Code (Amendment) Act 1969 (No. 17 of 1969).

88 *ibid*., pp. A5 to A10.

89 *Ibid*., p. A7.

90 *Ibid.,* p. A9.

91 *Ibid.*

92 *Ibid.*

93 *Ibid*., pp. A10 to A15.

94 *Ibid*., at p. A11, though he mentions no names.

concept of capital punishment should be reviewed,[95] and that pressure of divers sorts could be brought to bear on the judges.[96]

The next representation[97] was also by a lawyer, Mr. Lim Chor Pee, who suggested yet another modified jury system[98] where the jury comprises only very special members and whereby the trial judge recommends to the Court of Criminal Appeal the sentence and it is the latter which passes sentence after reviewing the appeal.[99] In this way, juries would not feel that they were sending the accused to the gallows directly. It is respectfully submitted, however, that this would merely be a change of form and not substance.

The Law Alumni's representation[1] hinged basically on the wealth of human experience of the juryman and the elucidation of facts *via* the judge's summing-up.[2] If the jury system was abolished, conviction by three judges, it said, should be unanimous.

T.F. Hwang, a Court Reporter, emphasised the ineptitude of the jury,[3] as did another layman, Mr. A.R.G. Rose.[4] To this approach, however, may be contrasted that of Mr. GJ. Champion[5] and the memorandum from the Singapore Regional Council of Churches of Malaysia and Singapore.[6]

A late representation by Mr. K.E. Hilborne, a lawyer,[7] castigated the jury as wasteful,[8] inefficient and which was capable of being corrupted or frightened into thwarting the ends of justice. In his view, a guilty man would opt for jury trial without hesitation for a judge would have the "greater ability to discern where the truth lies".[9]

(b) *The Evidence of Witnesses who Testified Before the Select Committee:* There were three main groups of witnesses.

(i) *The Jurors in the Peeping Tom murder case:*[10]

In the case itself, the accused was convicted by an unanimous verdict of culpable homicide not amounting to murder. The actual decision reached by the jury was, however, only a 4-3 verdict in favour of culpable homicide not amounting to murder, with three jurors being

95 *Ibid*., p.A13.
96 *Ibid*., p. A15.
97 *Ibid*., pp. A16 and A17.
98 For capital offences, with the accused having the option of being tried in this mode or by a court of three judges.
99 Assuming, of course, the accused appeals which will invariably be the case.
1 *Select Committee Report, Written Representations,* pp. A18 and A19.
2 Although, as will be seen, it is the judge's summing-up that is often the object of attack on appeal by a convicted accused.
3 *Select Committee Report, Written Representations,* pp. A19 to A22.
4 *Ibid*., pp. A24 to A27.
5 *Supra,* n. 82, the only other individual layman.
6 *Select Committee Report, Written Representations,* pp. A22 and A23.
7 *Ibid*., pp. A34 to A36.
8 Economically speaking though, this particular point has always been considered as being relatively unimportant where a person's life or liberty hangs in the balance.
9 *Select Committee Report, Written Representations,* p. A36.
10 Only the salient points will be dealt with. The reader will be referred to the appropriate columns in the *Minutes of Evidence* in the *Select Committee Report.*

in favour of returning a verdict of murder. Far from being an unanimous verdict, it did not even constitute a majority verdict under the law which required a 5-2 verdict.[11] This bizarre scenario was only discovered fortuitously, for the foreman, realising some kind of mistake had been committed, contacted the Registrar of the High Court and Chua J., confirming his mistake. Nothing could be done and it was fortunate that the jury had erred on the side of leniency.[12] The evidence given by the seven jurors offered a glimpse of the goings-on in a jury room, long a sacred sanctum. Interesting points emerge, and the first was that all but one of the jurors were of the view that laymen of the working class (like themselves) were not competent to sit on a jury as triers of fact; this was best left to the intellectuals.[13]

Three of the seven jurors expressly stated that the jury should be *abolished*.[14] Utter confusion as to the significance of the words "majority" and "unanimous" was manifested in the evidence of at least four of the seven jurors.[15]

The foreman himself raised two more pertinent points. First, he blundered because he was too caught up with the unanimity as to the accused's guilt and was not, when pronouncing the decision, conscious of the *offence* the accused was supposed to be guilty of.[16] Secondly, he was of the opinion that there was always the danger of a juror being related to the accused to the ignorance of both the judge and other members of the jury.[17]

The goings-on as summarised above may by no means be termed a comedy of errors, although errors abounded. In a trial of a capital offence where the accused's life hangs in the balance, it is submitted that any error by judges sitting alone could never be worse than the utter and professed ignorance of the jurors in this particular case (which, incidentally, could probably not, in the nature of things, be detected for correction on appeal).

(ii) *The 'Murder by Car' Case:*[18]

This case also manifested a chink in the jury system which was

[11] See s. lit of the Criminal Procedure Code in Cap. 132 of the 1955 Revised Edition (Reprint No. RS(A) 1 of 1969).

[12] Chua J. was reported as stating that the accused was "very, very lucky", *Select Committee Report, Minutes of Evidence,* Col. 21.

[13] *Ibid*., Cols. 26, 32, 37, 43, 49 and 56.

[14] *Ibid*., Cols. 17 to 20, 42, 55 and 57.

[15] *Ibid*., Cols. 7, 18, 48 and 52. This makes one wonder at the judgment of Thomson C.J. in *Lee Ah Chye* v. *P.P.,* (1963) 29 M.L.J. 347 where he opined that merely reading s. 84 of the Penal Code (dealing with the defence of insanity) to the jury was sufficient. Any first year student would probably testify to the intricate complexities generated by the section! Other cases have, fortunately, manifested a more realistic attitude towards the capability of the average juror. In *Loo Chuan Huat* v. *P.P.,* [1971] 2 M.L.J. 167, for example, it was held that it was insufficient merely to state the bare rule of law to the jury, and in *Liew Kaling & Ors.* v. *P.P.,* (1960) 26 M.L.J. 306, Thomson C.J. himself applied the decision in *Ismail bin Abdullah* v. *P.P.,* (1959) 25 M.L.J. 269 to the effect that the practice of quoting the actual words of the Evidence Ordinance was a dubious one!

[16] *Select Committee Report, Minutes of Evidence,* Cols. 13 and 23.

[17] *Ibid*., Cols. 20 and 21.

[18] The facts and charge is this case are, to say the least, unusual. The jealous accused had, while driving his car with two male passengers, spotted his some-

again revealed by sheer accident. A juror in this case was shocked on the trial judge, Winslow J., passing a sentence of death on the accused. Being deeply upset, he rang a fellow juror, but spoke to the juror's brother by mistake, telling him how upset he was, whereupon the brother wrote to both the accused's counsel and the Singapore Advocates and Solicitors Society, informing them of the incident.

When examined, the juror confirmed the incident and was adamant that the jury should be abolished.[19]

The implication is, of course, clear. Had the juror concerned known of the mandatory death sentence for murder, he would have voted to convict the accused of a lesser offence. This was at least some, albeit isolated, evidence to buttress the Government's assertion that juries were influenced by the irrelevant consideration of the penalty to be imposed.[20]

The then Deputy Registrar of the High Court was also examined as he was a friend of the foreman in the instant case and had in fact been approached by the latter for advice as to the discharge of his duties as a foreman. The witness confirmed Mr. T.F. Hwang's assertion[21] that many members of the jury could not even read the oath properly.[22] More importantly, he brought up the point with regard to superstition and illustrated it by reference to a superstition that one did not expect a pregnant woman to sentence a person to death while she was bearing a life in her womb,[23] and concluded that the jury system was unworkable here.[24] *This* point *vis-a-vis* superstition is a good one, for it is the writer's humble submission that, notwithstanding the increased level of literacy amongst our population, it

time girlfriend seated beside another man driving in a car ahead. The accused gave chase and there proceeded to be a race of sorts that finally resulted in the accused's car coming into contact twice with the other car. After the second impact, the accused's car became unsteady and zig-zagged diagonally to the right and came into a headlong collision with a motor cyclist who was travelling on his proper side of the road The motor cyclist died almost instantaneously. The accused was charged with having committed murder in that while driving his car he caused the death of the motor cyclist in such circumstances that he knew that his manner of driving was so imminently dangerous that it must in all probability cause death, or such bodily injury as was likely to cause death (see s. 299 read with the fourth clause of the definition of murder in s. 300 of the Penal Code, Cap. 103, Singapore Statutes, 1970 Revised Edition).

19 *Select Committee Report, Minutes of Evidence,* Cols. 119 and 120. The witness also confirmed his distress to the representatives of the Council of the Singapore Advocates and Solicitors Society: Cols. 69 to 71.

20 The juror would, of course, have been relieved to know that the accused was convicted of a *lesser* offence on appeal to the Court of Criminal Appeal: *William Tan Cheng Eng* v. *P.P.,* [1970] 2 M.L.J. 244. The accused sought to appeal against conviction for this lesser offence to the Privy Council; however, he was refused special leave to appeal: *Straits Times,* 23rd January, 1917. See also, the evidence of another juror, *infra,* n. 28 at p. 63.

21 A High Court newspaper reporter who submitted a written representation but who did not give evidence: *supra,* n. 3 at p. 60.

22 *Select Committee Report, Minutes of Evidence,* Cols. 123 and 124. This was even the case for *special* jurors: Col. 126. The witness reiterated this point when examined by representatives of the Council of the Singapore Advocates and Solicitors Society: Col. 140.

23 *Ibid*., Col. 124. The witness repeated this point when examined by representatives from the Council of the Singapore Advocates and Solicitors Society: Col. 144.

24 *Ibid*., Col. 125.

appears, from his own experiences, that a great many people, especially the Chinese, are still extremely superstitious. Perhaps the level of education is, on the average, not as high as it should be,[25] or it could, on the other hand, reflect the deep-rooted nature of certain superstitions,[26] or it may be a combination of both.

The foreman stated that he had noticed nothing untoward in the behaviour of his fellow jurors after the sentence was passed.[27] This was evidently not the case, having regard to the distress manifested by one of the jurors as described above and the evidence of *yet another* juror who revealed that he, too, was upset by the judge's decision,[28] which was in fact mandatory since the punishment for murder is the death penalty.

(iii) *The Representatives of the Council of the Singapore Advocates and Solicitors Society:*[29]

The two occasions on which the six representatives concerned gave evidence was marked by much heated debate, notably between the Prime Minister and Mr. David Marshall.

The Prime Minister referred to the Society's memorandum[30] as a "political essay".[31] He also referred to David Marshall's speech to the Law Alumni[32] and noted its similarities in style with the Society's memorandum. It was conceded by Mr. Hill that David Marshall had done the first draft.[33] It was further conceded by Mr. Hill that the Society's compilation of figures of trials for capital offences before the High Court between 1962 and 1968 [34] was inaccurate and that, in any event, "the figures do not prove much".[35]

The first real oral confrontation between the Prime Minister and David Marshall was not long in coming. In a rather lengthy exchange,[36] during which the Prime Minister spoke of a "political contest",[37] the Chairman[38] had to intervene to "cool" things down.[39]

25 Although the situation is improving with each passing year.
26 Those who practise them would, of course, prefer the term "beliefs".
27 *Select Committee Report, Minutes of Evidence,* Col. 130.
28 *Ibid*., Cols. 131 to 133. It is disappointing that the *rest* of the jurors were not called, for their revelations might have had an important confirmatory or disproving effect.
29 There were six representatives in all: Messrs. Graham Starforth Hill (the President), C.C. Tan, David Marshall, Rajaratnam Murugason, Stuart William Hatton Ashcroft and Kumar Lal. Again, only the salient points will be dealt with.
30 See the *Select Committee Report, Written Representations* at pp. A27 to A34.
31 *Select Committee Report, Minutes of Evidence,* Cols. 78 and 80.
32 *Supra,* n. 31 at p. 53.
33 *Select Committee Report, Minutes of Evidence,* Col. 80.
34 *Select Committee Report, Written Representations,* p. A32.
35 *Select Committee Report, Minutes of Evidence,* Col. 89.
36 *Ibid*., Cols. 159 to 161.
37 *Ibid*., Col. 95.
38 The Deputy Speaker of Parliament, Dr. Yeoh Ghim Seng (our present Speaker of Parliament).
39 *Select Committee Report, Minutes of Evidence,* Col. 100.

However, David Marshall did make some pertinent points. First, he doubted whether the evidence of the jurors examined was conclusive proof of the situation across the board,[40] and similar sentiments were also expressed by Mr. Hill.[41] He further suggested the setting up of a Commission of Inquiry on the matter.[42] At this juncture, it may be noted that while the claim as to the tentative nature of the jurors' evidence is taken,[43] Mr. Marshall's suggestion with regard to a Commission of Inquiry was wholly untenable, for it has been established since time immemorial that the deliberations of juries are *secret*,[44] and the evidence of jurors taken during the Select Committee Proceedings was the result of a fortuitous chain of circumstances.

Secondly, he asserted that judges were more open to executive pressure than a faceless group of jurors.[45] The Prime Minister took up this point and it was ultimately conceded, albeit not by Mr. Marshall himself, that it was easier to "get at" jurors than judges, at least under present circumstances.[46]

Thirdly, he suggested a *discretion* for judges as regards whether or not to pass the death sentence in a particular case so as to take the heat off the so-called soft jurors and added that compassion was not a quality to be sneered at.[47]

To the abovementioned points may be added Mr. Hill's assertion that our system of criminal justice was premised on the jury system; our rules of evidence, for example, were designed to keep away from the jury evidence which it was not capable of assimilating.[48] This point is debatable, but was not really considered by all concerned, although if the jury system *had* to be abolished, the answer would, of course, be to reform our rules of evidence.

The second major flurry of debate between the Prime Minister and David Marshall was as acerbic as the first.[49] During the exchange, we discover the interesting fact that of *over one hundred* murder trials, David Marshall had seen *only one* case ending in a conviction for murder. To the Prime Minister's point about the reluctance of the jury to convict because of the death penalty,[50] David Marshall repeated

40 *Ibid.* However, it is the writer's submission that this was probably the situation generally.

41 *Ibid*., Cols. 151 and 155.

42 *Ibid*., Col. 152.

43 Although as mentioned in n. 40 above, this argument is far from conclusive.

44 Any interference with the jury in this regard would constitute a contempt of court.

45 *Select Committee Report, Minutes of Evidence,* Col. 76.

46 *Ibid.,* Cols. 78 and 79. It is submitted that the arguments were equally tenable although, on balance, the Prime Minister's arguments seem more plausible.

47 *Ibid*., Cols. 106 and 107.

48 *Ibid*., Cols. 109 and 110.

49 *Ibid*., Cols. 159 to 161.

50 The Prime Minister referred to the evidence of the jurors in *William Tan's case, supra,* n. 18 at p. 61.

his points about giving the judge a discretion as to the sentence to be meted out and the element of compassion.[51]

One other point is of interest. There was discussion about trial by judge and assessors. The Society's representatives seemed equally divided on this point,[52] and little was made of it.

During its final meeting, the Select Committee was moved only by suggestions as to the number of judges made by the Bar representatives *after* they gave their evidence. There would now be a two-judge court where one judge would be the presiding judge who would have the casting vote with regard to procedural and evidentiary points of law, but, in regard to the question of guilt, unanimity was required for conviction. If the disagreement was as to the degree of guilt, the Court might return a verdict of guilty on a lesser offence with a special proviso as regards an accused who is found insane.[53]

3. *The Criminal Procedure Code (Amendment) Bill 1969: Third Reading:*

According to Mr. E.W. Barker, the evidence heard by the Select Committee "strengthened and confirmed" the Government's view that jury trial should be abolished.[54]

Only Mr. P. Govindaswamy opposed the bill. He felt that a person charged with a capital offence deserved at least to be judged by the common people; he was also apprehensive about possible executive pressure on *future* judges.[55]

The bill was read a third time and passed. The 'Fall' of the jury system had come to pass.[56]

51 *Select Committee Report, Minutes of Evidence,* Col. 160. He went on to say that: "…many murderers do become perfectly decent law-abiding citizens if they have served their term of imprisonment if they are not hanged. It is not the worst crime in the calendar that carries the heaviest punishment". (Col. 161).

52 Messrs. Murugason and C.C. Tan preferred the system whilst Messrs. Hill and Kumar Lal did not: *ibid*., Cols. 166 and 167. Fundamental difficulties with the assessor system precipitated, in part, the introduction of jury trial in Malaysia, *infra.* The role of assessors is not itself clear. Some cases have held that assessors are merely aiders and helpers of the Court (see *Ramanugrah Singh* v. *Emperor,* (1946) A.I.R. 151, P.C.; *P.P.* v. *Fong Ah Tong & Chong Chi Shen,* (1940) 9 M.L.J. 240; *P.P.* v. *Lau Kim Pau & 6 Ors.,* (1948) 14 M.L.J. 116), whereas at least one case has held that they are normally the sole judges of fact except in certain stipulated circumstances (see P.P. v. *Annuar Bin Ali,* (1948) 14 M.L.J. 38). See also, *Sulong bin Nain* v. P.P., (1947) 13 M.L.J. 138; *Goh Ah Yew* v. P.P., (1949) 15 M.L.J. 150; and *Suppan* v. P.P., (1954) 20 M.L.J. 111. The trial judge was, however, freed of any fetters whatsoever which might have been imposed by the opinions of the assessors and given full control over the verdict by the Criminal Procedure Codes (Amendment) Ordinance, 1954 (No. 8 of 1954). See, however, *Chai Wooi* v. P.P., (1957) 23 M.L.J. 234 and *Loh Kheng Meah & Ors.* v. *P.P.,* [1970] 1 M.L.J. 11 which illustrate that assessors still have a role, albeit a more limited one, to play.

53 *Select Committee Report, Official Report,* pp. D2 and D3. See, now s. 193 of the Criminal Procedure Code (1980 Reprint-Date of Reprint: 31st July, 1980).

54 *Debates,* Vol. 29, Col. 194 (22nd December, 1969).

55 *ibid*., Cols. 196 and 197.

56 *Vide* the Criminal Procedure Code (Amendment) Act, 1969 (No. 17 of 1969) which came into force on 5th January, 1970 (via. S11./1970).

4. *The Reaction:*

(a) *Before the Passage of the Bill:* Reactions were diverse although no real discernible response was available from those unconnected with the legal profession.

David Marshall's talk to the Rotary Club on 24th October, 1968 was apparently the first reaction.[57] He spoke of the danger of executive pressures on judges, the avoidance of too legalistic an approach to justice with regard to the accused and the educational process *vis-a-vis* the public.

The *Straits Times* of the 9th December, 1968 stated that many lawyers were opposed to the idea of abolition.[58]

Lord Diplock, on a visit here, was quoted in the *Straits Times* of the 10th April, 1969 as saying that trial by jury might not be "absolutely necessary" in Singapore although he would be against abolition of the system in England; he declined further comment as the move to abolish the system depended on local conditions.

The *Straits Times* of the same day carried a letter by David Marshall who claimed that the *Freddy Tan Case*[59] was merely an instance of reasonable disagreement on the facts of the particular case. The letter received a very terse reply from P. Selvadurai, a Member of Parliament.[60]

David Marshall was involved again when he delivered a speech at a Law Alumni meeting.[61]

The Democratic Club of the University of Singapore was reported as opposing abolition for it would destroy "an essential and indispensable feature of the modern democratic set-up."[62]

Lawyer H.E. Cashin, citing *in extenso* from Lord Devlin's book *Trial by Jury,* opposed abolition.[63]

This was followed by a letter from the President of the Law Alumni, Mr. Khoo Hin Hiong, who relied, *inter alia,* on the heightened elucidation of facts in the judge's direction to the jury which facts might otherwise be obscured at certain points in the situation where a judge sat alone.[64]

57 *Supra*, n. 32 at p. 54. This was prior to the introduction of the bill but when whiff of the proposed amendment was in the air.
58 This was also prior to introduction of the bill.
59 *Supra,* n. 75 at p. 58.
60 The *Straits Times,* 11th April, 1969. He claimed that Marshall represented himself, and suggested that he form a party and make the proposed abolition an issue for the 1973 General Elections.
61 *Supra,* n. 31 at p. 53.
62 The *Eastern Sun,* 13th April, 1969.
63 The *Straits Times,* 14th April, 1969.
64 The *Straits Times,* 15th April, 1969. A reply from the Deputy Secretary (Law Division), Ministry of Law and National Development which appeared in the *Straits Times,* 16th April, 1969, added little to the Government's arguments.

Neutral accounts of the jury system then followed.[65]

A University of Singapore Forum was held where Mr. Khoo Hin Hiong, Dr. S.M. Thio and Mr. Glenn Knight spoke in favour of the jury system.[66]

Then, the most vociferous attack on the bill to date was launched by David Marshall at a lunch-time meeting at Fullerton Square. The Press was assailed for its alleged reticence and while some cogent arguments were repeated, his speech will be remembered more for its political rhetoric and invective than anything else.[67]

However, David Marshall was not finished yet; he was reported as stating that one judge had mentioned to him socially that he was strongly against the bill although that was not the general impression conveyed.[68]

Finally, the *Straits Times* editorial dated 20th December, 1969 came out surprisingly strongly in favour of the jury system just two days prior to the bill's third reading.

(b) *After the Passage of the Bill:*

(i) *Public Reaction:* Public reaction was virtually non-existent although there was a letter to the *Straits Times* dated the 24th December, 1969 signed "Perplexed". It hit out at the allegation that the public was apathetic about the abolition of jury trial,[69] and claimed that persons refrained from writing to the Press because of its inability to publish anything which was remotely against the Government and also because whatever measure the Government proposed would invariably be enforced.[70]

The University of Singapore Law Society in yet another memorandum dealt with a mere technical point of law, that is, the definition of "lesser offence".[71]

65 Witness the speech of Mr. Graham S. Hill, president of the Singapore Advocates and Solicitors Society, to the Rotary Club of Singapore West as reported in the *Straits Times,* 25th May, 1969. The *Straits Times* editorial of 17th June, 1969 appeared neutral too.

66 The *Malay Mail,* 21st June, 1969. The three speakers were a lawyer, the then Dean of the Law Faculty and a senior law student respectively. Mr. Khoo spoke of the "common justice of the people" where the jury introduced their own justice. If the jury hesitated to convict, the Government ought also to look into the justification of continuing to have offences carrying the death penalty. Dr. Thio thought that in the context of Singapore, "the scale is slightly tilted for the retention of the jury system". Mr. Knight thought that where juries were reluctant to convict, it was because they had a reasonable doubt as to the accused's guilt; he also thought that the public were not in favour of the bill, although this last point is debatable.

67 The *Straits Times,* 17th December, 1969. He declared, *inter alia,* that "the last nail is being driven into the coffin of our basic freedoms — Parliament is about to pass the law abolishing all jury trials." He was later lambasted by two Members of Parliament for his remarks: see *Debates,* Vol. 29, Cols. 209 to 210.

68 The *Straits Times,* 18th December, 1969. See also, *supra,* n. 94 at p. 59.

69 Probably contained in the editorial dated 20th December, 1969, but this particular editorial was in fact pro-jury.

70 Though a pseudonym was used, the letter's language had a familiar ring about it.

71 The *Straits Times,* 10th January, 1970: the construction of what is now s. 193 of our Criminal Procedure Code, *supra,* n. 53 at p. 65.

(ii) *Two Cases:* The first no-jury murder trial was *P.P.* v. *Ng Kuay Tin*,[72] but the judges concerned[73] subsequently amended the charge to one of culpable homicide not amounting to murder,[74] so that, strictly speaking, this was not in fact the first non-jury *murder* trial. The accused was found guilty and imprisoned for ten years.[75]

The first case, however, where the accused was given the death sentence by two judges in a trial without a jury for a capital offence was *P.P.* v. *Teo Cheng Leong*.[76] At first instance, counsel for Teo sought to argue that the accused was still entitled to be tried by a jury because of the special circumstances which existed.[77] His argument was rejected by Winslow and Kulasekaram JJ.,[78] a decision which was affirmed on appeal by the Court of Criminal Appeal.[79]

(C) CONCLUSION

Thus ended the jury system after over one hundred and forty years of service. Yet, while its final demise came only in 1970, it is submitted that its real fate was sealed a decade earlier, for once jury trials had been curtailed for all but capital offences, the writing was on the wall, and though more voices were heard in 1969, they were much too late to save a system which they had earlier neglected, thus allowing much of it to be eroded away. Yet, even such voices as were heard were mainly, if not solely, from those connected with the legal profession. What of the rest of the public? It has been suggested that in 1959, a lower level of literacy and education could have been a factor, but, if this is correct, it must have been less so in 1969. The answer, it is submitted, lies in that oft-cited phrase "personal or vested interest". Very few, if any, people had any personal or vested interest in wanting the jury system to be retained for many did not and do not expect to commit crimes serious enough to warrant trial before a jury, an argument which applied *a fortiori* to the situation in 1969 when jury trial applied only to *capital offences.* In addition, jury service is seen by some, at least, as an interference with their jobs or businesses, and this lack of public interest and outcry was instrumental in sealing the fate of the jury system here.

What probably concluded the case against retention of the jury system as far as the Government and Legislature were concerned was, it is submitted, the evidence of the jurors concerned in the two cases

[72] Unreported. But see the *Straits Times* dated the 21st, 22nd, 23rd and 24th January, 1970.
[73] Winslow and Choor Singh JJ.
[74] See the *Straits Times,* 23rd January, 1970.
[75] See the *Straits Times,* 24th January, 1970.
[76] Unreported at first instance; but see the *Straits Times* dated the 18th, 19th, 20th, 24th and 25th February, 1970.
[77] The *Straits Times,* 18th February, 1970.
[78] The *Straits Times,* 19th February, 1970.
[79] *Teo Cheng Leong* v. *P.P.,* [1970] 2 M.L.J. 275 where Wee Chong Jin C.J. held that the accused had no accrued right to a trial by jury and that, even if he had, such right was clearly taken away by the Criminal Procedure Code (Amendment) Act 1969 (No, 17 of 1969) and was thus not saved by s. 16 of the Interpretation Act (Cap. 3, 1970 Revised Edition, Singapore Statutes) since a contrary intention had clearly been manifested by the Legislature. Other arguments with regard to the provisions of s. 179 of the Criminal Procedure Code (Cap. 132 of the 1955 Revised Edition; Reprint No. RS(A) 1 of 1969) had earlier been rejected.

discussed above — evidence which arose through purely fortuitous circumstances because, as mentioned before, deliberations in a jury room are secret.[80] Much valuable empirical research has been conducted in both the U.S.A.[81] as well as the United Kingdom,[82] but the non-availability of information *vis-a-vis* the nub of the matter, that is to say, deliberations in the jury room,[83] makes virtually all of these studies frustratingly incomplete. The cases tended, in the main, to show that juries were overwhelmed by the task of finding a person guilty when they knew the death sentence was to follow and that, in any event, there was a general inability on the part of the jury to grasp the proceedings at hand.[84] Further, persons who should be sitting as jurors were the very ones being exempted.[85]

In 1959, however, when the jury system came up for partial abolition, the reasons just noted were not the main focus of debate. There was in fact no indication that juries were in fact shrinking from delivering guilty verdicts, at least insofar as non-capital charges were concerned. As we shall see, the death penalty coupled with the lack of social responsibility in the delivery of verdicts are crucial factors threatening the very existence of the jury system in Malaysia.

The main arguments in Singapore in 1959 which secured partial abolition were that trial by one's peers was not a viable concept, the technicalities taken by convicted accused on appeal,[86] the abilities of adroit lawyers to sway juries, and the lack of social responsibility on the part of witnesses in volunteering relevant but crucial evidence. All these arguments prevailed over the argument that the public should be allowed to participate in the administration of justice.

80 Although occasional glimpses are to be had: see, *for example,* Ely Devons, "Service as a Juryman in Britain", (1965) 28 M.L.R. 561.

81 The pioneering and perhaps only work of its magnitude in this field must surely be *The American Jury* (1966) by Harry Kalven Jr. and Hans Zeisel, but, even a work such as this has been subjected to criticism with regard to, *inter alia,* methodology: see Michael H. Walsh, "The American Jury —a Reassessment", (1969) 79 Yale L.J. 142.

82 See Sarah McCabe and Robert Purves, *The Jury at Work* (1972) which studies a series of jury trials in which the defendant was acquitted. Interesting information includes an examination and analysis of "policy prosecutions" where the police are compelled, through various policy reasons like general deterrence, to initiate prosecutions, although there is little hope of obtaining a conviction. On a smaller scale is the study conducted by the Association of Chief Police Officers of England and Wales which tabulates a rather comprehensive statistical table of the number of persons committed to Assizes, Crown Courts and Quarter Sessions during 1965; an overall acquittal rate of forty per cent was discovered: see "Trial by Jury", (1966) New Law Journal, 928. See also, A.P. Sealey and W.R. Cornish, "Jurors and Their Verdicts", (1973) 36 M.L.R. 496 and, by the same authors, "Juries and the Rules of Evidence". [1973] Crim. L.R. 208. Recently, two writers, John Baldwin and Michael McConville, have conducted extensive studies; see, *for example,* "Doubtful Convictions by Jury", [1979] Crim. L.R. 230; "Juries, Foremen and Verdicts", (1980) 20 Brit. J. Criminol. 35; and "Does the Composition of an English Jury Affect Its Verdict?", (1980) 64 Judicature 133. Another recent interesting study, but conducted in the Trinidad context, is Ramesh Deosaran's "The Jury System in a Post-Colonial, Multi-Racial Society: Problems of Bias", (1981) 21 Brit. J. Criminol. 305.

83 See Glanville Williams, *The Proof of Guilt* (1963) at pp. 266 to 270.

84 Which is ironical simply because one of the main ideas behind the jury system is to let an accused be tried by his peers, though see *supra,* n. 22 at p. 53.

85 *Supra,* n. 86 at p. 59.

86 See, *e.g., supra,* n. 24 at p. 53 and n. 32 at p. 54 and the accompanying main text.

The spectre of the jury trial, however, still remains with us. Although the jury system has itself been abolished in Singapore, it has recently been utilized as a *conceptual* tool for redefining the standard of proof required at the end of the prosecution's case in *Haw Tua Tau* v. P.P.[87] Although some notes have been written on this case, many difficult problems have, with respect, not really been dealt with.[88]

However, the rationale for the procedural rule prohibiting the joinder of capital and non-capital charges cannot now in Singapore,

[87] [1981] 2 M.L.J. 49, P.C., especially at pp. 52 to 52, construing s. 188 of the Singapore Criminal Procedure Code *(supra,* n. 53 at p. 65) dealing with trials before the High Court. For trials before the subordinate courts, see s. 179(f) which is similar in terms. *Haw's case* follows the English position which is reflected in the recent case of *R.* v. *Galbraith,* [1981] 2 All E.R. 1060. See also, the Practice Note by Lord Parker C.J. in [1962] 1 All E.R. 448.

[88] K.S. Rajah, "Establishing a Prima Facie Case and Establishing a Case Beyond Reasonable Doubt", [1982] 1 M.L.J. xxxiii, and Ahmad Ibrahim, "Haw Tua Tau v. Public Prosecutor — Duty of Court at End of Prosecution Case — Must We Follow the Privy Council?", [1981] JMCL 223. Whilst these two notes contain an admirable historical account of the case-law, many problems are not considered. It is not, *for example,* considered how it is *realistically* possible for the trial judge, who has both the functions of trier of fact and law, to avoid altogether the weighing of the evidence at the close of the prosecution's case. Further, the Privy Council focuses upon the words "if unrebutted" but appears to ignore the words "would warrant his conviction" which implies proof beyond a reasonable doubt, the old law that was rejected by it. The possibility of "inherently incredible" evidence on the part of the prosecution is so rare (one must also note that prosecutions are only initiated on fairly firm grounds) that the accused will almost invariably be called upon to make his defence, which leads to yet another problem — that an already shaky case for the prosecution may be aided by cross-examination of the accused, thus enabling prosecution counsel to "fill in the gaps" at the expense of the defence (see *P.P. v. Lim Teong Seng & 2 Ors.,* (1946) 12 M.L.J. 108 at p. 109 and *P.P.* v. *Sihabduin bin Haji Salleh,* [1980] 2 M.L.J. 273 at p. 274). In fact, under the old law before jury trial was abolished, the Court could direct the jury to return a verdict of not guilty if there was no evidence that the accused committed the offence charged, but the *jury* could return a verdict of not guilty, either unanimously or by a majority of not less than five to two, *at any time* after the conclusion of the evidence for the prosecution, if they considered the case to be one in which they could not safely convict (see, generally, s. 194 of the Straits Settlements Criminal Procedure Code, Cap. 132 of the 1955 Revised Edition; Reprint No. RS(A) 1 of 1969). This would mean that the jury could theoretically return a verdict of not guilty *immediately after* the conclusion of the prosecution's case, a power that seems to be at variance with the English practice, *supra,* n. 87. A slight problem, however, arises since the Straits Settlements Court of Criminal Appeal in *R.* v. *Koh Soon Poh,* (1935) 4 M.L.J. 120 at p. 122 has held that defence counsel can only submit that the judge should draw the attention of the jury to their power mentioned above, but has no right to address the jury directly as to whether or not they should so exercise their power (thus dissenting from an opinion by Ebden J. in (1933) 2 M.L.J. iii). See also, Ahmad Ibrahim, *op.cit.* at p. 250. S. 173(g), which deals with the practice of the Subordinate Courts, should also be noted by analogy (Ahmad Ibrahim, *op. cit.* at p. 250). *Haw's case* has, however, been accepted *without question* in Malaysia (see *A. Ragunathan* v. *Pendakwa Raya,* [1982] 1 M.L.J. 139; *P.P. v. Muhamed bin Sulaiman,* [1982] 2 M.L.J. 320; and *P.P. v. Abdullah bin Ismail,* (1983) 1 C.L.J. 101; [1983] 1 M.L.J. 417). It also seems to be the law in Singapore now — *Abdul Ghani Mohamed Musapha* v. *P.P.* (unreported, but see the Editorial Note in [1983] 1 M.L.J. at cxiv). Lim Kean Chye's, "The Haw Tua Tau Case — A Footnote to K.S. Rajah's Article, [1982] 1 M.L.J. xxxiii", [1983] 1 M.L.J. cxiii contains some interesting comments — *inter alia,* the distinction drawn between the evidential and legal burdens of proof, although this does not lessen the danger of "gap filling" alluded to above. It is also this writer's submission that the "beyond reasonable doubt" test is indeed out. *Conceptually* speaking, the Court *cannot* make up its mind on the

at least, rest on the reason advanced in *Lee Chee Wan & Ors.* v. P.P.[89] to the effect that a "conflict" of the separate set of provisions in the Criminal Procedure Code dealing with jury trials and trials before a single judge respectively would arise.[90]

As a concluding note, we find that with the abolition of the jury for the trial of capital offences, juries in Coroners' inquests were likewise dispensed with soon after by the Criminal Procedure Code (Amendment) Act, 1970.[91]

III. THE MALAYSIAN EXPERIENCE-PROSPECT AND RETROSPECT

(A) *The Modern*[92] *Origins of the Jury System in Malaysia:*

The actual origins of the Malaysian system need not have overly concerned us in this article but for the fact that the very difficulties which prevented an initial attempt to introduce trial by jury into the country (as well as, it must be mentioned, arguments advanced during subsequent developments) bear a remarkable resemblance to many of the reasons that contributed to the abolition of the system in Singapore.

1. *The First Attempt (1954):*

It must be borne in mind that Malacca and Penang continued, until 1976, to have jury trials for all offences tried in the High Court,[93] and that Sarawak and Sabah had, and continue to have only trials with assessors.[94] It was therefore the move for introduction of jury trials in the Malay States[95] that engendered so much heated debate in

substantive effect of the prosecution's evidence at the close of its case. If the accused should nevertheless choose to remain silent on being called upon to make his defence, the Court would then consider the prosecution evidence accordingly to ascertain if the charge has been proved beyond all reasonable doubt. The artificiality generated in such a situation strengthens the case against the *Haw test.*

89 (1961) 27 M.L.J. 62. See also, *Khalid Panjang & Ors.* v. P.P., (1964) 30 M.L.J. 67, and *Lee Choh Pet & Ors.* v. *P.P.,* [1972] 1 MJL.J. 1.

90 *Lee Ah Cheong* v. *R.,* (1958) 24 M.L.J. 242 followed the English practice which suggests an implied utilization of s. 5 of the Criminal Procedure Code *(supra,* n. 53 at p. 65), although illustration (b) to s. 175 may pose some problems: Molly Cheang, "Framing of Charges", [1980] 1 M.L.J. xlviii at li.

91 Act No. 20 of 1970. See also, *Singapore Parliamentary Debates,* Vol. 29, Cols. 1274 and 1275.

92 We will not be concerned with the earlier but sporadic manifestations of the jury system. For a good overview, see Chandra Mohan Shunmugam and Sukumaran Raman Kutty, *op.* dr., *supra,* n. 4 at p. 50.

93 Being continued to be governed by the Settlement Code (Cap. 132 of the 1955 Revised Edition) until its repeal by the Criminal Procedure Code (Amendment and Extension) Act, 1976 (Act A324).

94 Formerly governed by the Criminal Procedure Code of Sabah (No. 4 of 1959) and the Criminal Procedure Code of Sarawak (Cap. 58 of the Laws of Sarawak, Revised Edition, 1958); the assessor system continues even after repeal of the aforementioned two codes by the Criminal Procedure Code (Amendment and Extension) Act, 1976 (Act A324).

95 By s. 7(1) of the Malayan Union Criminal Procedure Code (Amendment) Ordinance, 1947 (No. 13 of 1947), the Federated Malay States Criminal Procedure Code (Cap. 6 of the 1935 Revised Edition of the Laws of the Federated Malay States) was made applicable to *all* the Malay States. As recounted above, Malacca, Penang, Sabah and Sarawak continued to be governed by their respective codes until 1976.

early 1954 when rank dissatisfaction with the then existing assessor system[96] led, *inter alia,* to demands for introduction of trial by jury.[97]

The Criminal Procedure Committee,[98] in its Report,[99] suggested amendments to the assessor system but did not recommend introduction of the jury system into the Malay States for four principal reasons:[1]

First, the number of suitable English-speaking persons was extremely limited.

Secondly, the jury system did not operate with "notable success"[2] in either Penang or Malacca.

Thirdly, the fair incidence of disagreements between the trial judges and their assessors in various cases suggested that if the jury system had been operative, a very large number of acquittals would have occurred where convictions were recorded by a judge agreeing with only one assessor.

Fourthly, the possibility of retrials (which was the main bone of contention in the *Lee Meng Case*[3]) would not be avoided, in theory at least, by utilizing the jury system simply because where only a majority of the jury convicted, the trial judge could, if he disagreed, order a retrial.

The last mentioned point is a good one but was not capitalized upon by opponents of the jury system during the debates that followed.[4]

One other interesting point flows from the Report and further supports the abolition of the jury system in Singapore. In a memorandum,[5] the Deputy Registrar of the Supreme Court of Singapore remarked that there were difficulties in achieving an acceptable standard in the quality of jurors, a task complicated by the lack of an efficient and expedient method by which a proposed juror could be tested for his knowledge of English and intelligence.

96 This agitation stemmed from the controversial case of *Lee Meng*, where during the first trial, although both assessors found the accused innocent, the trial judge disagreed thus forcing, under the existing law, a retrial. During the retrial, although the assessors were divided, the judge exercised his powers under the existing law to find the accused guilty. See generally, Appendix 1 to the *Criminal Procedure Committee Report* (see *Minutes of the Legislative Council of the Federation of Malaya with Council Papers, March 1953 to January 1954* (*Sixth Session*), No. 59 of 1953).

97 The existing Criminal Procedure Code (F.M.S., Cap. 6, *supra* n. 95 at p. 71) did in fact contain provision for jury trial that could be implemented by executive action.

98 Set up on 22nd April, 1953 in response to the Lee Meng trial, *supra,* n. 96.

99 *Supra,* n. 96.

1 *Ibid*., pp. 7 to 8.

2 This point was pounced upon by Mr. Lim Khye Seng in the heated debates which followed: *Proceedings of the Legislative Council of the Federation of Malaya, March 1953 to January 1954* (hereinafter referred to as *Proceedings, March 1953 to January 1954*), Col. 1222; his point was that success was still being achieved with the jury system though it was not "remarkable".

3 *Supra,* n. 96.

4 Perhaps because, unlike trials under the assessor system, any retrial had to be *in favour* of the accused.

5 *Criminal Procedure Committee Report,* at Appendix 3.

The Select Committee[6] was more hesitant, preferring to "sit on the fence", so to speak. Whilst approving the amendments to the assessor system,[7] it sidestepped the question of jury trial by stating that the Government should give further consideration to the matter when "conditions are more favourable, and particularly when the number and character of capital cases are not affected by conditions arising from the Emergency".[8]

The stage was thus set for an extremely heated debate over the amendments to the existing assessor system and the possibility of introduction of trial by jury. For the purposes of this article, only the latter will be dealt with.

(i) *The Arguments Against Introduction of the Jury System:* The Attorney-General fired the first salvo by stressing the relative lack of civic responsibility in Malaysia where crime was concerned, which he hinted was probably due to the unusual conditions generated by the Emergency.[9] However, he did not close the doors completely, for he conceded that the matter might be "quite different in the future, possibly in the near future".[10]

He also stressed that one should not identify the jury system which concerns the administration of justice with the politics of self-government and democracy.[11] This was an obvious attempt at pre-empting any argument that public participation in the administration of justice was a healthy sign of democracy. Nobody would, however, deny that the argument for public participation was *per se* a valid argument which was in fact raised by supporters of the jury system.

Mr. Yong Shook Lin was the other main spokesman who at the outset stressed that one had to be "absolutely sure" in one's mind that the jury system would work,[12] an argument which, it is submitted, is of little moment since nothing can ever be guaranteed.

He did, however, give some interesting informal accounts of jury trials which, although unbuttressed by the calling and examination of witnesses (as happened in Singapore, *supra*), are nevertheless start-

6 Appointed on 3rd September, 1953 to consider the Criminal Procedure Code (Amendment) Bill, 1953: see the *Report of the Select Committee in Minutes of the Legislative Council of the Federation of Malaya with Council Papers, March 1953 to January 1954 (Sixth Session):* No. 97 of 1953.

7 Which, very simply, transferred the remaining power *vis-a-vis* the final verdict from the assessors to the trial judge.

8 *Select Committee Report,* at p. 2.

9 *Proceedings, March 1953 to January 1954,* Cols. 1159 and 1160. The Emergency which lasted from 1948 to 1960 was a period of Communist terrorism and insurgency. See also, *per* Enche Chik Mohamed Yusuf at Cols. 1225 and 1226 where he remarked: "This country... is where cold blooded murders can be committed in the day-time with nobody coming forward to testify." Similar remarks were made by Dr. Kamil Mohamed Ariff at Cols. 1229 and 1230.

10 *Ibid*., Col. 1161; see also, Col. 1162 and his reiteration of the point in his concluding speech: Cols. 1233 and 1234. See also, *per* Enche Chik Mohamed Yusuf at Cols. 1225 and 1226; *per* Raja Musa at Col. 1227; and *per* Dr. Kamil Mohamed Ariff at Col. 1232 where he drew attention to the Select Committee's recommendations, *supra,* n. 8. Mr. Lim Khye Seng, a supporter of the jury system, also reiterated this point at Col. 1215.

11 *Ibid*., Cols. 1163 and 1233. See also, *per* Mr. Yong Shook Lin at Col. 1185, and *per* Dr. Kamil Mohamed Ariff at Col. 1231.

12 *Ibid*., Col. 1177.

lingly similar, for example, to the 'Peeping Tom' and 'Murder by Car' cases.[13] These accounts were unchallenged,[14] and a moment's reflection would reveal glaring problems which were to surface a decade and a half later in Singapore; they included a jury which returned an erroneous verdict[15] and the inability to understand the difference between a majority and minority verdict.[16] There were also cases which, in the face of clear-cut evidence for the prosecution, resulted in verdicts of acquittal,[17] although, here again, we find a concession that jury trials might be feasible in the future when sufficient numbers of people who understood the English language were available.[18]

Dato Zainal Abidin stressed that it was easier to intimidate jurors because of their large number,[19] and the fact that the categories of persons who could not serve as jurors was very high,[20] arguments also canvassed in the Singapore context.[21]

(ii) *The Arguments for the Introduction of the Jury System:*[22] These were canvassed, in the main, by members who were later to form the first government of the independent Federation of Malaya, but who were then in a minority.

Tunku Abdul Rahman[23] led the campaign for introduction of the jury system. He criticised the Select Committee for fudging the issue.[24] Manpower posed no problem since there was already a substantial pool for the assessor system.[25]

There was yet another argument that was pertinent in the context in which it was uttered — that the peculiarities of the Asian people were not very well understood by the judges.[26] Many interesting examples were raised, but this reason was given in respect of expatriate judges who are no longer present in either Malaysia or Singapore.

13 *Supra,* p. 60 *et seq.*

14 Except by a mere assertion by Mr. Lim Khye Seng: *Proceedings, March 1953 to January 1954,* Col. 1217. See also, *per* Dato Zainal Abidin at Cols. 1194 and 1195 for another experience.

15 *Ibid*., Col. 1184.

16 *Ibid.* See also, *supra,* n. 15 at p. 61.

17 *Ibid*., Cols. 1184 and 1185. In one case, the judge was "thoroughly shocked". One may draw a parallel with Chua J.'s dismay in the "Peeping Tom" case, *supra,* n. 12 at p. 61.

18 *Ibid*., Col. 1183, This is a slightly different condition than that given by the Attorney-General, *supra,* n. 10 at p. 73.

19 *Ibid*., Col. 1195. See also, *per* Dr. Kamil Mohamed Ariff at Col. 1230.

20 *Ibid*., Cols. 1193 and 1194.

21 *Supra,* n. 86 at p. 59, and n. 45 and n. 46 at p. 64.

22 Arguments which amount to mere venal panegyric will not be examined here. See, *example,* the rather emotive remarks of Mr. Leong Yew Koh, *Proceedings, March 1953 to January 1954* Col. 1174.

23 Later to become the first Prime Minister of the Federation of Malaya and, subsequently, Malaysia.

24 *Proceeding, March 1953 to January 1954,* Col. 1168, although he was prepared to concede that jury trial might be inadequate for Emergency cases: Col. 1171.

25 *Ibid*., Col. 1165. Added to this was the fact that difficulties would only be encountered in the smaller states: *per* Mr. Leung Cheung Ling at Cal. 1172 and Mr. Yeap Choong Kong at Col. 1190. The opposing side, of course, argued that it was the *quality* of manpower which counted, a pertinent reply. See, *e.g*., *per* Mr. Yong Shook Lin at Cols. 1182 and 1183.

26 *Ibid*., Col. 1170. See also, *per* Mr. Lim Khye Seng at Col. 1220

It thus follows that this reason is no longer valid in the present Malaysian context.[27] There were a couple of other arguments made, although they may, it is submitted, be discounted.[28]

The jury's own "special brand" of justice was noted by Mrs. B.H. Oon who related an interesting case where the rigours of the law were tempered with the milk of human kindness.[29]

Members also spoke out against the anomaly between the Malay States and Penang and Malacca which had full jury trial,[30] and stressed the fact that the system itself was working satisfactorily in both Penang and Malacca.[31]

One main factor which though insufficient at the time, was, it is submitted, later to prove decisive, was the apparent support of the general public for introduction of the system. A petition, for example, with several thousand signatures collected from various towns in the Federation was laid before Parliament.[32] Constant references were made in the course of the debate to public support,[33] and even the Attorney-General had to concede that there were letters and articles in the Press as well as "monster meetings of 300 people" on the issue.[34]

The ultimate result, however, was a forgone conclusion — forty eight to fourteen, with three abstentions, for passage of the bill which only modified the existing assessor system.[35] The first attempt to institute the jury system had failed.

(iii) *Comments:* The arguments canvassed were analogous to the ones raised in the Singapore context. However, even at this juncture, one notes two salient differences.

27 It may, of course, be argued that judges are not in touch with the common crowd, although being unsupported, in the nature of things, by empirical evidence, such an argument must necessarily be somewhat speculative in nature (*cf*., *infra, p.* 83). However, one argument which is somewhat more persuasive was made by Mr. Lim Khye Seng thus: "Are we entitled to give unto one man the power of life and death just because we have given to a magistrate or a President of Sessions Court summary power to deal with petty cases?" *(ibid.,* Col. 1220). He also went through the Criminal Procedure Committee's reasons, *supra,* point by point: see Cols. 1221 to 1223.

28 The first was that there were other countries where people had less civic responsibility which embrace the jury system: *ibid*., Col. 1164. With respect, this argument is *non sequitur.* Secondly, in *Lee Meng's case, supra,* n. *96* at p. 72, the accused was tried twice. Again, this argument does not get round the problem that jury trial may also result in retrials, although one may argue that any retrial will be *in favour* of the accused: *supra,* n. 4 at p. 72.

29 *Ibid*., Col. 1196. But, to the Attorney-General, the amelioration of harsh laws was "a dangerous suggestion" since unduly harsh laws should be repealed; in his view, there "will be plenty of opportunity, in the sentence, to temper justice with mercy whenever that is necessary." (Cols. 1236 and 1237).

30 *Ibid*., at Cols, 1203 and 1204, *per* Mr. Au-Yong.

31 *Ibid.,* at Col. 1203, *per* Mr. Au-Yong; Col. 1212, *per* Mr. Koh Sin Hock and Col. 1222, *per* Mr. Lim Khye Seng. *Contra* Dr. Kamil Mohamed Ariff at Col. 1230 who stated that the jury system "works in fits and starts". As mentioned earlier, there is, unfortunately, no concrete proof either way.

32 *Ibid*., Cols. 1089 and 1090.

33 *Ibid*., *per* Tunku Abdul Rahman at Col. 1163; *per* Mr. Leung Cheung Ling at Col. 1172 and *per* Mr. Lim Khye Seng at Col. 1219.

34 *Ibid*., Col. 1147.

35 See the Criminal Procedure Code (Amendment) Act, 1954 (No. 8 of 1954).

First, although many of the usual arguments were raised, there was in fact no blanket rejection of the jury system. This was ironical inasmuch as the arguments centring around the incompetent workings of the jury system seemed, unlike the position in Singapore, to hold far less sway. The impression given is that the Emergency was the main reason for postponing introduction of trial by jury which was ultimately introduced, as we shall soon see.

Secondly, again unlike the situation in Singapore, there appeared to be substantial public interest and support for the jury system — a crucial factor which is the general moving force behind the viability of most, if not all, legal institutions.

2. *The Second Attempt: "Plain Sailing":*

Not long after the first attempt to introduce the jury system had failed, Malaya found itself deeply involved in the fight for independence. One of the "political war cries"[36] used by the Alliance Party was the promised introduction of the jury system. The Alliance Party (now replaced by the "Barisan Nasional") was as good as its word, and following a landslide victory in general elections and subsequent attainment of independence, a bill was moved to introduce trial by jury in the Malay States for capital offences.[37]

Unlike the heated debate produced almost four years previously, the passage of the instant bill was extremely smooth and trouble-free, not least because the political boot was now on the other foot.[38]

Enche Sulaiman introduced the measure as being "a most valuable safeguard in the administration of justice".[39] Instead of simply bringing the existing provisions of the Criminal Procedure Code pertaining to jury trial into operation by an order of the Yang di-Pertuan Agong wth the consent of the Chief Justice,[40] amending legislation was being utilized because "a fundamental change" was being effected and several consequential amendments to the existing Criminal Procedure were required.[41]

36 See the *Straits Times* dated 23rd July, 1970.

37 See also, *supra* p. 51.

38 *Second Legislative Council Debates, September 1957 to October 1958 (Third Session)* (hereinafter referred to as *Debates, September 1957 to October 1958*), Col. 3469, *per* Mr. K.L. Devaser who rose to support the bill. In apt political fashion, he remarked that the bill was a reciprocal manifestation of the Government's confidence in the people who had elected it into office. Another member, Mr. P.P. Narayanan was blunter. He noted that one of the leaders of the opposition which fought for introduction of jury trial four years ago was now the Prime Minister — "a very big change if nothing else". (Cols. 3471 and 3472).

39 *Ibid*., Col. 3467.

40 S. 1 of the Criminal Procedure Code (F.M.S. Cap. *6, supra,* n. 95 at p. 71).

41 *Debates, September 1957 to October 1958,* Col. 3468. Notable amongst the amendments was the deletion of the requirement (in s. 201) that if the accused is a European, the jury must also be European. There was also a measure of flexibility introduced whereby the Chief Justice, with the approval of the Yang di-Pertuan Agong, could order that all offences, or a particular class of offences, shall be tried by jury — somewhat similar to the Singapore position in 1960 *(supra,* n. 20 at p. 52), although, to be best of the writer's knowledge, no discretion was actually ever exercised.

The bill was declared to be[42] and hailed as[43] identifying the people "more closely than ever with the administration of justice". Again, the support of the people was noted,[44] although not all the members took the debate very seriously.[45]

Enche Sulaiman was also optimistic that the people would, after their new experience at the ballot box,[46] take a great interest in the administration of justice in the country.[47] More categories of people were also being made available (by, *inter alia,* the Government) for jury service.[48]

Thus, in a remarkable turn of events, trial by jury for capital offences was introduced into the Malay States.[49]

(B) *Uniformity and Decline:*

3. *The Abortive Attempt For Uniformity:*

The *status quo* was maintained until sometime in 1965 when a bill[50] was moved to, *inter alia,* amend the Straits Settlements Code in force in Malacca and Penang where, it will be recalled, jury trials were available for *all* offences tried in the High Court. The purpose of this particular amendment was, of course, to achieve uniformity. To this end, the bill sought to limit trial by jury to capital offences in Malacca and Penang as well.[51] The bill was referred to a Select Committee, but it was not until some two years later that the Report of the Select Committee was discussed in Parliament.

It appears that the pros and cons were vigorously debated at the Select Committee stage, but the issue was one "charged with social, political and emotional overtones".[52] For this reason, the Committee merely set out the various arguments in its Report, leaving Parliament to debate the issue fully. The expected heated debate never materialised as, owing to a heavy schedule, a more appropriate time was to be fixed for debate "on so important an issue as trial by jury".[53]

42 *Ibid*., Col. 3469, *per* Enche Sulaiman.

43 *Ibid*., *per* Mr. K.L. Devaser, and Col. 3472 *per* Mr. P.P. Narayanan.

44 *Ibid*., Col. 3469, *per* Mr. K.L. Devaser. See also, Mr. R. Ponnudurai's commentary on Mr. P.M. Mahalingam's paper on jury trials at the Fourth Malaysian Law Conference *(infra* n. 70 and n. 71 at p. 80) where he states that the jury system was "demanded and accepted by our society".

45 *Ibid.*, Col. 3470 *per* Sir Douglas Waring whose jocular remarks (see also, *supra,* n. 35 at p. 54) reflected little of the intensity of the previous debate.

46 Contrast the approach now (see, *supra,* n. 38 at p. 76) with the previous attitude some four years previously when the Attorney-General made some very contrary remarks! (see, *supra,* n. 11 at p. 73).

47 *Debates, September 1957 to October 1958* Col. 3472.

48 *Ibid.*

49 *Via* the Criminal Procedure Code (Amendment) Ordinance, 1957 (No. 69 of 1957) with effect from 1st January, 1958.

50 Curiously, the bills were published twice in the Federal Government Gazette in 1965 and 1966.

51 *Parliamentary Debates, House of Representatives, 26th May to 11th August, 1965,* Col. 1015, *per* the then Minister of House Affairs and Minister of Justice, Dato' Dr. Ismail bin Dato' Haji Abdul Rahman.

52 *Parliamentary Debates, House of Representatives, 13th February to 7th March, 1967,* Col. 6243, *per* the Minister of Home Affairs and Minister of Justice, Tun Dr. Ismail.

53 *Ibid*., Col. 6244.

It was therefore moved that the clause concerned be deleted[54] and the bill was, surprisingly, read a third time and passed[55] without achieving the uniformity desired.

It may, however, at this juncture, be asked why uniformity could not have been achieved by moving instead in the opposite direction as suggested by the then Federal Bar Council Chairman Mr. R.R. Chelliah who thought that *extension* of jury trial for *all* offences in the Malay States should be the appropriate move, and who described the instant move as a "retrograde step".[56] Indeed, the following pertinent remarks in a newspaper editorial merit quotation in full:[57]

> Logically, of course, if the jury system has proved satisfactory in trials which may end in depriving the prisoner of his life, it ought to be satisfactory in deciding where the truth lies in lesser although still important cases. And conversely, if the system is not to be extended to minor cases because it does not work very well, then juries ought not to be empanelled to try prisoners on the most serious charges of all.

One notes, finally, the "wheels" of public opinion turning in a rather contrary fashion now, for "… the public, as far as can be seen, is not very interested".[58] This shift in trend should be noted as it is submitted that it will, in the final analysis, have a decisive bearing on the ultimate fate of the jury system in Malaysia.

4. *The Judiciary Supports The Move Towards Uniformity:*

Some three years later, we still find, however, support by the Council of Judges for an uniform system of trial by jury for all capital offences throughout the whole of Malaysia.[59] But, the matter lay legislatively dormant for another six years.[60] In the meantime, the jury system received what were apparently the first express criticisms of its workings.

5. Dissatisfaction With The Workings Of The Jury System:

Edgar Joseph Jr. was able to state in a paper delivered at the Third Malaysian Law Conference[61] that since trial by jury was first

54 *ibid.,* Col. 6245.

55 As the Criminal Procedure Code (Amendment) Act, 1967 (No. 25 of 1967). The *Straits Times* editorial dated 7th March, 1967 commented on the absence of debate and criticised the Select Committee who "finally ducked the jury issue" (as did their counterparts some twelve years previously: *supra,* n. 8 at 73). It should be noted, however, that the Select Committee Report did show that the Lord President and Judges were consulted and that they supported the move, although the comment made was that the argument of uniformity was an "unimpressive" one.

56 The *Straits Times,* 9th September, 1966.

57 The *Straits Times* dated 12th September, 1966. An enthusiastic but rather insubstantial approbation of the editorial was made by Mr. R.P.S. Rajasooria (The *Straits Times,* 14th September, 1966).

58 *Ibid.*

59 See the *Straits Times* of 21st July, 1970 and the editorial dated 23rd July, 1970 which warned that the danger that jury trials might be abolished altogether had to be borne in mind.

60 See, *supra,* n. 37 at p. 54 and *infra,* n. 66 at p. 79.

61 Held in Kuala Lumpur from 13th to 15th October, 1975. The paper was entitled "Rights of Accused — Law and Practice".

introduced in Peninsular Malaysia, "… there has been no outcry for the abolition of the Jury and so, presumably, one may think the system has worked satisfactorily".

At the very same conference, however, we find a scathing attack[62] on the system by the then Solicitor-General, Tan Sri Datuk Mohamed Salleh bin Abbas who stated that juries were responsible for a number of murder trials resulting in the acquittal of guilty persons. It was very difficult to obtain a conviction in big towns where jurors hesitated to return a guilty verdict because they were afraid that the accused would be sentenced to the gallows. Juries often had a propensity to find lesser verdicts in apparently clear cases, and were not averse to pouncing upon the slightest suggestion of irrationality to find the accused legally insane. This brought about dissatisfaction among members of the victims' families. Further, juries might be bewildered by details of fact garnered through complicated rules of evidence. It was thus difficult to justify the change from the assessor system to the jury system "except on political grounds".[63] In his view:[64] "The only merit I can see of the system of jury trial is that it operates in favour of the accused person".

6. *Uniformity Achieved In Peninsular Malaysia:*

After an interval of about a decade, the Federated Malay States Criminal Procedure Code[65] became the sole code governing criminal procedure in the whole of Malaysia. Uniformity was finally achieved for the jury system insofar as the Straits Settlements Code (governing Penang and Malacca) was repealed so that both Penang and Malacca had, like the other states in Peninsular Malaysia, jury trials for only capital offences. The assessor system was, however, preserved in the East Malaysian states of Sabah and Sarawak, although it should be noted that Parliament may at any time by a resolution passed by both Houses declare that Chapter XXII of the Code (dealing with jury trials) shall apply to either or both of the states.[66]

The Law Minister and Attorney-General, Tan Sri Abdul Kadir, remarked that the limited form of jury system had "worked very well" and that "justice had been very clearly done", so that the uniformity now achieved would augur well for Malacca and Penang as well.[67]

7. *Developments Since 1976:*

The jury system has remained in the form achieved above till the present, that is trial by jury for only capital offences in West Malaysia with the East Malaysian states retaining the assessor system. This was in fact the position in Singapore in 1960 until the total abolition of the jury a decade later.

62 "Problems Facing the Administration of Justice in Malaysia", reproduced in [1976] 1 M.L.J. xlix.

63 A rather sweeping remark, if we accept the fact that the public was behind the move for other than emotive reasons.

64 [1976] 1 M.L.J. xlix at li.

65 F.M.S. Cap. *6, supra,* n. 95 at p. 71.

66 See the new s. 199A and s. 183A introduced by the Criminal Procedure Code (Amendment and Extension) Act, 1976 (Act A324).

67 See the *Straits Times* of 28th August, 1975.

As mentioned earlier, this position of limited jury trial is a rather precarious one which must surely raise the further issue as to whether or not the system should in fact be retained at all.[68] This further question has in fact arisen in recent years, and many of the arguments raised back in 1954 when the first attempt to introduce the jury system failed (and some new ones too) are now beginning to come into prominence again.[69]

(a) *The Fourth Malaysian Law Conference*:[70] A paper entitled "Should Jury Trials Be Abolished?" was delivered by Mr. P.M. Mahalingam, Senior President of the Sessions Courts in Kuala Lumpur. He set out some interesting figures. In Malaysia, less than twenty per cent of High Court cases were heard by juries and in West Malaysia, about thirty five per cent of cases tried by jury resulted in acquittals. The paper itself provided a fairly comprehensive historical account of the jury system generally, but certain salient points were made and will be discussed now.

Acquittals of seemingly guilty persons were, in his view, mainly attributable to inadequate investigation or inept prosecution or both.[71] Further, there was no empirical evidence that jurors would not find an accused guilty of a capital charge; on the contrary, it was good that a jury wished to be absolutely satisfied[72] on a serious charge. This last point shows just how evenly balanced arguments can be, depending on the viewpoint one takes! Take, again, the argument made that the multi-racial Malaysian jury "brings far more varied and richer experience to the understanding of witnesses". Could it not also be argued that there is also a possibility of the jury being unable to grasp concepts and proceedings, as was apparently the situaiton in Singapore, although admittedly, this would be a possibility with a so-called homogenous jury as well. The point, of course, is that there always are the proverbial two sides to the coin and it must, in the final analysis, be the overall balance which counts.[73]

A couple of new points on challenging the jury were made,[74] but, by far, one of the best points made was with regard to the functions

[68] See, *e.g.,* Wu Min Aun, *An Introduction to the Malaysian Legal System* (Revised Third Edition, 1982) at pp. 165 to 167.

[69] An early attack was made at the Third Malaysian Law Conference, *supra,* n.62 at p. 79.

[70] Held in Kuala Lumpur from 19th to 21st October, 1977.

[71] See, *supra,* n. 62 at p. 79, although no empirical evidence supports this assertion. Mr. R. Ponnudurai cites, in a commentary *(infra,* n. 78 at p. 81) the biased attitude of the legal service and police against the jury system as being attributable to their access to the investigation papers.

[72] *Quaere:* is this not imposing too high a standard of proof on the prosecution?

[73] As stressed by the author himself at the outset of his paper, although it is respectfully submitted that in merely setting out the pros and cons, he did not, in the final analysis, convince the writer, at least, of the conclusion reached.

[74] First, it was difficult to affect the composition of juries since so little basic information is given in the first place and this perhaps explained why there was no real direct interest in the attitudes of jurors. The right to cross-examine jurors is, under English law, at least, an extremely limited one: *Chandler,* (1964) 48 Crim. App. R. 143 and *Kray,* (1969) 53 Crim. App. R. 412. Secondly, the challenge is more important in the U.S.A. than in England because of the heterogeneous character of the American population. That this is no longer the case in England, see, *e.g.,* Alan Dashwood, "Juries in a Multi-Racial Society", [1972] Crim. L.R. 85, and John Baldwin and Michael McConville, "Juries, Foremen and Verdicts," (1980) 20 Brit. J. Criminol, 35 at p. 38. See also, the recent

which judges and juries best perform in their respective spheres. The jury are the best judges of primary facts, for, as regards the credibility or reliability of a witness, "… the impression made upon a mind of seven is more reliable". The trial judge and his appellate brethren, on the other hand, are better judges of secondary facts, since their training enables them to better draw the relevant inferences from the mass of facts which follows from the trial of each case.[75] Thus, in the context of first instance trials at least, the jury appear to have the edge in this regard.

There was a reminder, too, that juries can sometimes go beyond a point the law cannot: "The unique merit of the jury system is, that it allows a decision near to the *aequum et bonum* to be given without injuring the fabric of the law, for the verdict of a jury can make no impact on the law."[76]

This point is not a new one but the difficulty arises as to line-drawing, for even this paper acknowledged that juries do take the death penalty into consideration, a theoretically irrelevant consideration since their function is solely to ascertain the guilt or otherwise of the accused by applying the law to the facts which they determine. This, as we have seen, was a strong reason advanced for abolition of jury trials in Singapore. On the other hand, supporters of the jury also have a point since mitigating circumstances may, in a particular case, not merit the full rigours of the law. Yet, unbridled as this 'power'[77] vested in the jury must in its nature be, there is a potentially wider threat to the effectiveness of unpopular laws which may nevertheless be required for the benefit of society. On balance, therefore, it is submitted that this particular merit of the jury system must lose its initial superficial attraction.

Mr. Mahalingam concludes by arguing for retention of the jury system in Malaysia, citing the "overwhelming majority" in England in favour of the jury system.[78] However, this in itself is not a persuasive reason simply because, as the Singapore experience has shown, Malaysia is not England.

cases of *R.* v. *Binns,* [1982] Crim. L.R. 522 and *R.* v. *Danvers,* [1982] Crim. L.R. 680. Further, what about Malaysia itself which, as the author himself states, has a multi-racial society?

[75] The trial judge, however, decides what qualify as questions of fact in areas of ambiguity and this may, depending on the circumstances of the case, give him a tremendous control over the ultimate verdict reached At this point, the traditional dichotomy between the fact finding function of the jury and the law-determining function of the judge as reflected in the provisions of the Criminal Procedure Code and case-law (see, *e.g., Teh Peng Kim* v. *R.,* (1937) 6 M.L.J. 173) becomes blurred.

[76] See also, *supra,* n. 66 at p. 67 and n. 29 at p. 75.

[77] Whether or not this strength of the jury is effected by way of a "power" or under a "right", see Patrick Devlin, *The Judge* (1979), p. 117 *et seq.* But, see the recent and somewhat curious case of *P.P.* v. *Yap Siong,* [1983] 1 M.L.J. 415, where the trial judge held that the jury's verdict was perverse. It is respectfully submitted that the learned judge was wrong in invoking his inherent powers in the light of the clear wording of the Code.

[78] He adds that abolition of the system would be "retrogressive", and that although jurors may not always fully understand the law, to eliminate the system would be "too drastic a measure". The solution would be to improve the system, but he does not state *how.* A question format to be administered after selection but before the taking of the oaths was suggested in a commentary by Mr. R. Ponnudurai, but this is hardly an exhaustive solution.

The short commentaries by Mr. Upali Masacorale and Mr. R. Ponnudurai, however, support Mr. Mahalingam's stand. The former argued that opportunities for the layman to participate in the modern administrative state were few and far between and that therefore the jury system should be dispensed with "only if proven an unmitigated failure". Further, the jury system had "symbolic value" and to abolish it would be "to abandon yet another token of democracy." Thus, much more research and study had to be carried out lest the nation degenerate into a "racist and corrupt" one "devoid of humanitarian values".[79] The latter commentator, however, was pessimistic about the practical future of the jury system since under the Essential (Security Cases) Regulations, 1975,[80] the Attorney-General could certify, for example, an ostensible offence of murder as a security offence, thereby obviating trial by jury.[81]

(b) *More Recent Developments:* The *New Straits Times* carried a three-part series on the jury system from 23rd September, 1980 to 25th September, 1980 by Supriya Bhar.

The Law Minister had in fact announced in 1979 that the jury system would soon come up for critical review,[82] and the newspaper reports do reveal some interesting reactions and opinions.

One lawyer, for example, could not recall a single instance when a killing involving shooting had not been, since 1975, considered a security case triable under the controversial Essential (Security Cases) Regulations, 1975.[83]

The process of challenging jurors also revealed some intriguing but highly varied techniques by various lawyers (although the actual selection process usually takes about fifteen minutes!).[84]

A project paper was also cited;[85] it examined juries in Selangor between 1974 and 1979. It was found, *inter alia,* that jurors were most often between forty and sixty years old, with teachers and head-masters featuring often. Of thirty jury trials since 1977, only four women had been empanelled.[86]

The anti-jury attitude of the Attorney-General's Chambers was manifested yet again.[87] A Deputy Public Prosecutor related how in what he regarded as an "open and shut" case, he knew that the verdict

[79] Which should be considered by the jury, especially where a man's life or liberty was at stake.
[80] PU(A) 320/75 as amended by the Essential (Security Cases) (Amendment) Regulations (PU(A) 362/75).
[81] *Ibid.,* Regulation 2. In his reply, the Law Minister and Attorney-General Tan Sri Kadir Yusof stated that the Regulations would not be amended under threat from any organisation,
[82] The *New Straits Times* (hereinafter referred to as the *NST*) dated 23rd September, 1980.
[83] *Supra,* n. 80.
[84] The *NST* dated 23rd September, 1980.
[85] A B.A. project paper submitted by Harbans Kaur to the University of Malaya entitled "The Jury System in Peninsular Malaysia".
[86] It was only by the Criminal Procedure Codes (Amendment) Act, 1974 (Act A233) that women were allowed to sit on juries.
[87] See also, *supra,* n. 62 at p. 79. For contrary views, see *supra,* n. 71 at p. 80.

would nevertheless go against him when five of the seven jurors ordered vegetarian food for lunch; in his words:[88] "How can you expect five Buddhist vegetarians to hang a man?"

However, as the reader may have discerned by now, the Malaysian experience has, for a large part, been a "running battle" between the administrators of the legal system on the one hand and defence counsel on the other. To the arguments of the former may be added the considerably weighty opinion of the then Dean of the Law Faculty of the University of Malaya, Professor Datuk Ahmad Ibrahim. The basic thrust of the opponents of the jury system is simple — the jury unjustly acquits or finds under the lesser charge too often because it does not want to shoulder the responsibility of sending the accused to the gallows (bearing in mind that Malaysia (and West Malaysia at that) has jury trials only for capital offences).[89]

Defence counsel, of course, made their points too, arguing, as before, that the large number of acquittals was due to the inefficiency of the prosecution and police.[90] One lawyer even argued that the reluctance to convict signified an antagonistic approach towards the concept of capital punishment.

A *judge* "with many years of experience" thought that the heavy responsibility of finding a verdict, especially one of guilty, should be shouldered by the judge who, through his constant contact with people, is unlikely to lose his touch with the common crowd. There should, he added, also be justice for the victim and his family. Besides, jury trial was no longer a trial by one's peers since virtually only the older English-educated (who were mainly from the middle or upper-middle classes) participated. The jury system was "outmoded" and was supported, in the main, only by British-trained lawyers who felt a "sentimental attachment" to the system.[91]

By far, however, the most formidable opinion against the jury system came from Tun Mohamed Suffian himself. In an interview with the *Sunday* Star[92] given whilst he was still Lord President, his Lordship thought that jury trial was "on the way out" and he personally felt it to be a good thing, especially in Malaysia. In his opinion, the Malaysian people shrank from doing their duty; he remarked thus: "In a country where the public shrinks from doing its duty because it is unpleasant, jury trial will not work. And it has not worked in this country in my view".

The reasons for this lack of civic or social responsibility[93] appear to be fears of retribution or revenge. His Lordship, however, also seemed to suggest indifference as well as the innate inability to stand up for what one believed in. In his words, again: "We meekly suffer injustice in this country".

88 The *NST* dated 24th September, 1980.
89 *Ibid.*
90 See, *supra,* n. 71 at p. 80.
91 The *NST* dated 25th September, 1980.
92 Dated 24th January, 1982.
93 This alleged lack of social responsibility could not now be blamed on the Emergency, unlike during the debates held in 1954, *supra,* n, 9 at p. 73.

Although he admits that this attitude may be due to Asian upbringing, he condemns such behaviour as "stupidity".

8. *The Future of the Jury System in Malaysia:*

As matters now stand, the future of the jury system in Malaysia looks bleak.[94] The common threads which run through the arguments for abolition of the system boil down to two root causes.

First, there is the lack of social or civic responsibility. Whatever its causes, the results are clear — juries acquit or deliver verdicts for lesser offences whenever possible, something, it should be noted, quite different from "bending over backwards" to achieve a "just" result in the odd case. This was one of the main reasons for the ultimate demise of the system in Singapore, and although one notes that many of the other factors which figured prominently in the Singapore context (in both 1959 and 1969), whilst canvassed in Malaysia as well, have been overshadowed by this main cause, at least so far as Malaysia is now concerned. Certainly, a people does not deserve to participate in the administration of justice if its heart is not in the task at hand. Whilst it is conceded that the prosecution counsel and police may have overstated their case, a sufficient number of opinions, not least from the judges themselves, appear to settle the issue. Certainly, the opinion of Tun Suffian who has been in, and at the helm of, the Malaysian judiciary must carry the most pressing weight not only because of his vast legal experience but also because of his proven ability to attune himself to the "pulse" of his nation.

Secondly, the mood of the public has changed. Whilst enthusiastically supporting the introduction of the system almost three decades ago,[95] there was and is at present[96] an alarming air of indifference which, as was submitted earlier, was also a key factor for the decline and final abolition of the jury system in Singapore. And if a system introduced for the benefit of the people ceases to be an object of even a moment's reflection by the people themselves, what use is there in continuing to preserve it?

IV. CONCLUDING REFLECTIONS:

A curious point appears to suggest itself from the preceding discussion — that, in our local context at least, the jury system, if it is to have any chance of being viable, must, at the very minimum, be a *complete* one, as it were, applying across the board. If it exists in the more limited form of being confined to trials for capital offences only, there is an extremely strong likelihood of its being abolished in the due course of time because, for some reason or other, it appears that local

94 Jury trial, in any event, apparently applies solely to murder trials which can in fact come within the 1975 Regulations (*supra* n. 80 and n. 81 at p. 82). This is because offences under the Kidnapping Act, 1961 (No. 41 of 1961) are tried with the aid of assessors and offences under the Firearms (Increased Penalties) Act, 1971 (No. 37 of 1971) are, when transferred by the Public Prosecutor from the subordinate court to the High Court, tried by a judge sitting alone *(vide* the Firearms (Increased Penalties) (Amendment) Act, 1978 (Act A427)). See also, s. 41A of the Dangerous Drugs Act 1952 (Revised — 1980; Act 234), and the latest developments (*supra,* n. 3 at p. 50).

95 *Supra,* n. 33 and n. 34 at p. 75 and n. 44 at p. 77.

96 *Supra,* n. 58 at p. 78. See also, the *NST* dated 23rd September, 1980.

people are unwilling fully to discharge their duties as jurors, but choose, instead, to return verdicts of not guilty or lesser verdicts which will thus enable them (in their minds, at least) to avoid condemning the accused to the gallows. In Singapore, jury trial was limited in 1960 to trials for capital offences, and the system was ultimately abolished, as we have seen, in 1970. The greater part of Malaysia never had jury trial across the board but only had jury trials for capital charges and this is now effectively restricted to murder trials. This is now the situation for all West Malaysian states. As has been suggested above, the days of the jury system in Malaysia are numbered.

Whether or not public opinion might have saved the jury system we shall never know, for the exact opposite happened, with the lack of public interest and support sealing the fate of the jury system in Singapore and contributing to its general decline in Malaysia.

The preceding account is a clear example of a Western legal institution which came to be perceived as unsuitable to the Singapore and Malaysian legal systems.

Indeed, even in countries where the jury system is a strongly embedded tradition, occasional doubts arise,[97] although insofar as England at least is concerned, the jury system still appears alive and well in criminal cases.[98] Many countries without the jury system are

[97] See the Prime Minister's reference to the somewhat scathing letter by His Honour John Maude, Q.C., to the *Daily Telegraph:* [1970] 1 M.L.J. xxxv at xxxvi with the letter itself being published in full at xxxvii. And see also, Dale W. Broeder, "The Functions of the Jury: Facts or Fictions?", (1954) 21 U. Chicago L. Rev. 386; Edson R. Sunderland, "Verdicts, General and Special", (1920) 29 Yale L.J. 253; Marcus Gleisser, *Juries and Justice* (1968) at pp. 45 and 62, and Jerome Frank, *Law and The Modern Mind* (Sixth Impression, 1949), in an incisive but sardonic Part One, Chapter XVI (and Appendix V).

[98] The terms of reference, *e.g.,* of the Morris Committee on Jury Service was fairly *administrative* in nature only (see the Morris Report, Cmnd. 2627 which is not available in the N.U.S. Law Library but is noted in [1966] Crim. L.R. 337, (1965) 28 M.L.R. 577 and (1965) New Law Journal 313, these commentaries expressing general disappointment as to the narrow terms of reference). However, substantial developments have gone on apace since the Morris Report: see, *e.g.,* s. 13 of the Criminal Justice Act, 1967 (c. 80) which introduced into English law the concept of the majority verdict (now s. 17 of the Juries Act, 1974 (c.22); and see *R.* v. *Pigg,* [1982] 1 W.L.R. 762, C.A.; [1983] 1 W.L.R. 6, H.L.). Even Continental lawyers have expressed admiration for the system: see Eberhard Knittel and Dietmar Seiler, "The Merits of Trial by Jury", (1972) 30 C.L.J. 316. See also, the lavish praise by Lord Devlin in *Trial by Jury* (1956), especially at p. 164 and in *The Judge* (1979), Chapter 5, he criticises a couple of cases which appear to sully the purity of the jury system: *Stonehouse* v. *D.P.P.,* [1978] A.C. 55 and *Stafford* v. *D.P.P.,* [1974] A.C. 878. His criticisms have, it appears, gone unheeded, as the former case has been considered without criticism in *R.* v. *Penfold,* (1979) 71 Cr. App. R. 4, and the latter case has been treated likewise in *R. v. Wallace and Short,* (1978) 67 Cr. App. R. 291, and *R.* v. *Hamid,* (1979) 69 Cr. App. R. 324. He does, however, state in conclusion (at p. 176): "We must listen to our fears as well as our hopes, knowing that there is only one thing certain and that is that if we lose the jury in the twentieth century we shall not be given it back in the twenty-second. If allowed to crumble, it can never be rebuilt." Lord Denning, too, is an avid supporter of the jury: see *Freedom Under the Law* (1949) at pp. 38 to 39; "Legal Institutions in England Today and Tomorrow" in *Legal Institutions Today and Tomorrow* (1959; the Centennial Conference Volume of the Columbia Law School); and (1967) 41 Australian Law Journal 224 at p. 226 (address to the Fourteenth Legal Convention of the Law Council of Australia), although *cf.* his remarks in Part Two of his latest book *What Next In The Law* (1982). See also, Travers Humphreys, "Do We Need A Jury?", [1956] Crim. L.R. 457.

not feeling any ill-effects,[99] and in Singapore, the criminal process, slightly over a decade after abolition of the jury system, appears to be functioning extremely smoothly.[1]

Looked at in the context of the relative "youth" of both Singapore and Malaysia as independent nations, both countries have grappled with the problem with a remarkable sense of responsibility and urgency that augurs well for the continued development of their independent legal systems.

ANDREW PHANG BOON LEONG *

However, despite this relative strength of jury trial in criminal cases, there is at present a controversy of sorts with regard to "jury vetting": see *R.* v. *Sheffied Crown Court, Ex parte Brownlow,* [1980] 2 W.L.R. 892; *R.* v. *Mason,* [1980] 3 All E.R. 777, and the resulting new guidelines by the Attorney-General on jury checks (see the Note in [1980] 3 All E.R. 785). See also, Andrew Nicol, "Official Secrets and Jury Vetting", [1979] Crim. L.R. 284, and, Mark Findlay and Peter Duff, "'Jury Vetting' — Ideology of the Jury in Transition", (1982) 6 Crim. L.J. 138, the latter article of which interestingly points out that the concept of "jury vetting" is at variance with many of the fundamental values once central to the existence of the jury system.

[99] See, *e.g.,* Israel — Marcus Gleisser, *op.cit., supra,* n. 98 at p. 85

[1] David Marshall, in his speech at a Law Alumni Meeting, *supra,* n. 31 at p. 53, cited the Commonwealth Empire Law Conference 1955 as endorsing the jury system, with the exception of South Africa. But, he was speaking in 1969 about a *bare* conclusion in 1955 when only five papers were submitted (approximately one hundred and twenty delegates attended the session), a close perusal of which would reveal no very great depth of reasoning or argument. The facts as revealed by the "Record of the Commonwealth and Empire Law Conference, London, 20th-27th July 1955" show that the conclusion by the Chairman, Mr. H.J. Butler, New Zealand ("The Jury System-Report to the Final Plenary Session") at p. 253 with regard to juries in *criminal* trials is contained only in the second paragraph at the same page. The whole "report" actually comprised only *two* pages!

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