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Safeguarding Substantive Judicial Independence? A Comparative Analysis of Lay Participation in the Judicial Systems of Ghana and Poland

INTRODUCTION

The protection of fundamental human rights is perhaps the greatest hallmark of constitutionalism. As international recognition of human rights increased during the twentieth century, so too did the number of constitutional systems throughout the world, and the focus of constitutions generally.[1] While constitutions serve many obvious purposes as the bedrock of a nation's legal system, they also undeniably serve a symbolic function to citizens: the adoption of a constitution is often viewed as an everlasting guarantee of protection from the government to its people.[2] Some of the most prevalent and universally accepted protections these constitutions offer pertain to the fairness of the criminal justice system, and the broader independence of the judiciary. The legal protections enshrined in a constitution cannot be legitimized if they are not both procedurally afforded to citizens at trial and faithfully applied by an independent judiciary. The International Covenant on Civil and Political Rights (ICCPR) recognizes the right to a fair trial and affords great attention to ensuring fair judicial procedures.[3] However, while so many countries prescribe to these values in their constitutions, they vary greatly in the way they structure the judiciary and the administration of justice. One particular issue that the ICCPR does not explicitly

[1] *See* Wayne Sandholtz, *Human Rights Courts and Global Constitutionalism: Coordination through Judicial Dialogue*, 10 GLOBCON 439, 440 (2021) ("Modern constitutions, especially since World War II, thus build not just on the will of a people but on the freedoms and rights of each person."); *see also* Zachary Elkins, Tom Ginsburg, & James Melton, *New Constitutions*, NEW YORK: CAMBRIDGE UNIVERSITY PRESS (2016), https://comparativeconstitutionsproject.org/ccp-visualizations/.

[2] MARCELO NEVES & KEVIN MUNDY, SYMBOLIC CONSTITUTIONALISM 39 (2022) ("[M]odern constitutionalism emerges from the bourgeois revolutions of the eighteenth century with a semantic framework that points to the constitution as both normative and 'rule-constituting', 'comprehensive', and 'universal'.").

[3] *See* International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter I.C.C.P.R.].

resolve, but the majority of constitutional systems do address, is the role of lay persons in the administration of justice.[4]

Beyond the procedural guarantees that are afforded to citizens, constitutions must also establish safeguards to ensure these procedures are carried out in an inherently fair way. Lay participation in the judicial system, though it takes a variety of forms, is a prominent way of protecting the independence of the judiciary and making sure that the judicial decision-making process is consistent with constitutional rights.[5] For instance, jury trials are a pillar of the United States Constitution, and deeply entrenched in English and Western European history.[6] Citizen participation in judicial decision-making is thought to promote democratic principles by involving the peers of the accused in the legal process, thereby bolstering the substantive fairness of the resulting legal decisions by placing more legal influence in the hands of the governed.[7] While these Western countries may view jury trials as fundamental to liberal democracy and human rights protections, only a minority of constitutional systems in the world actually adopt juries, and many countries that once utilized them due to colonial influence have since abolished them.[8] Many nations without juries, particularly civil law systems, still constitutionalize and implement citizen participation in the judicial system through "mixed court" systems that feature collaboration between professional and lay judges.[9]

This paper will seek to resolve the tension between the common conception of lay participation as essential to fair criminal trials and the fact that many countries, even those who affirmatively constitutionalize it, scarcely utilize it in practice. Part I will track the origins and history of citizen

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[4] *See* Sanja Kutnjak Ivkovic and Valerie P. Hans, *A Worldwide Perspective on Lay Participation*, *in* JURIES, LAY JUDGES AND MIXED COURTS: A GLOBAL PERSPECTIVE 323, 334 (Ivkovic, Diamond, Hans & Marder ed., 2021).
[5] MARIJKE MALSCH, MARK FINDLAY & RALPH HENHAM, DEMOCRACY IN THE COURTS : LAY PARTICIPATION IN EUROPEAN CRIMINAL JUSTICE SYSTEMS 2 (2009) ("[J]uries are considered to be a safeguard against the power of the state or against other biases of appointed judges or corrupt officials. It is held that juries inject democratic values into the legal process and function as a source of 'common sense'.").
[6] *See* Alexander Hamilton, *The Federalist No. 83*, *in* FEDERALIST 558, 562 (Cooke ed. 1961).
[7] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 522 (Reeve ed. 2009) ("Now the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.").
[8] Toby S. Goldbach & Valerie P. Hans, *Juries, Lay Judges, and Trials*, 122 CORNELL LAW FACULTY WORKING PAPERS 1, 3 (2014).
[9] *Id.* at 1.

participation in judicial systems, namely the evolution of the English common law jury system, and the leading theories that have driven the continued prevalence of lay participation in criminal justice systems throughout the world. It will also address the ICCPR's guidance on the human right to a fair trial and demonstrate how, theoretically, lay participation bolsters the strength of this right. Part II will then conduct a detailed history and analysis of citizen participation in the judicial system of Ghana, which adopts a version of the traditional common law English jury system in its constitution, to examine both the benefits and dangers of the jury's role in the country, as well as the public's perception of that role. Part III will examine the unique constitutional history of Poland, which presents an example of a civil law nation that employs a mixed court system but constitutionalizes and organizes it in an extremely unique way. With these systems analyzed, Part IV will directly compare the two systems and their costs and benefits in preserving judicial independence, as well as the advantages and disadvantages of how they appear in the text of their respective constitutions. This will lead to conclusions about if lay participation is a right worth constitutionalizing in the first place, and how it must be tailored to effectuate its normative purpose in a given constitutional system.

PART I: BACKGROUND

Lay participation in the judicial system has become highly emblematic of democratic ideals in constitutional systems throughout the world.[10] It is important to track how citizen participation gained its perception as integral to the fairness and independence of the judicial system, and why so many constitutions therefore account for some form of lay participation in criminal trials.[11] While there is no uniform definition for a concept as broad as judicial independence, the general concern is simple: for a legal system to truly serve its citizens, the government actors interpreting and applying the law must do so fairly and impartially.[12] As scholars have established, this entails two forms of independence: institutional

[10] *See* Malsch, Findlay & Henham, *supra* note 5, at 20 ("As such, it can be expected that there also is an association between lay involvement in a legal system and democracy. It has been contended that such lay involvement would substantially increase democratic legitimacy of the legal system.") (citations omitted).
[11] *See* Ivkovic & Hans, *supra* note 4.
[12] Ernest Owusu-Dapaa, *An Exposition and Critique of Judicial Independence under Ghana's*

judicial independence and substantive judicial independence.[13] Institutional independence concerns legal controls that formally insulate the judiciary from the influence of the other branches of government, otherwise described as separation of powers.[14] Substantive independence, on the other hand, concerns the actual judicial decision-making process itself, and the procedural protections afforded to citizens to ensure they are not unjustly deprived of their rights by judges abusing their discretion.[15] Put simply, institutional controls mitigate outside influences on the judiciary, mainly from other political branches, to ensure the institutional integrity of the judiciary. Substantive controls, however, acknowledge that those influences will never be fully mutable, and implement further procedural safeguards to ensure judges make fair judgments and faithfully apply the law in given cases. While these two concepts are inherently intertwined,[16] lay participation is better classified as protecting substantive independence. No matter how independent the judiciary is perceived to be, judges are ultimately government actors, and giving lay persons a role in the decision-making process theoretically serves as a check on government power and protects the impartiality of the decisions.[17]

All forms of judicial lay participation derive their constitutional value from this need to maintain an independent judiciary. This not only helps ensure the integrity of the legal system generally, but also bolsters the guarantee of a right to a fair trial to individual citizens. This highlights some of the most central concerns pertaining to the legitimacy of a constitution generally: lay participation helps safeguard the general fairness and integrity of the overall legal system that the constitution establishes, as well as the affirmative constitutional rights of citizens, by promoting judicial fairness and responsiveness to those citizens.[18] The core purposes of constitutionalizing lay participation are vividly illustrated by the world's

1992 Constitution, 37 COMMW. L. BULL. 531, 541 (2011) ("The presence of an independent Judiciary bolsters public confidence in the Judiciary as the sole and impartial arbiter of what their individual rights and duties are in a given situation.").
[13] *Id.* at 532-33.
[14] *Id.* at 536.
[15] *Id.* at 537.
[16] *Id.* at 544 ("[T]he main reason for institutional independence is the need to ensure reliable decisional independence of the Judiciary.").
[17] Sophie Turenne, *Fair Reflection of Society in Judicial Systems*, *in* FAIR REFLECTION OF SOCIETY IN JUDICIAL SYSTEMS- A COMPARATIVE STUDY 1, 3-8 (Turenne ed. 2015).
[18] *Id.*

oldest formal written constitution: the United States Constitution.[19] The right to trial by jury is affirmatively guaranteed to citizens across the Sixth and Seventh Amendments of the United States Constitution, and is documented as the only fundamental right that all states shared in their respective constitutions when they came to the Constitutional Convention.[20] As Alexander Hamilton wrote in Federalist No. 83, and former Supreme Court justice Antonin Scalia quoted in *Neder v. U.S.*, "[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government."[21] However, while trial by jury is absolutely essential to the English tradition and the United States legal system, this is far from a uniform truth across the rest of the world.[22] It is important to examine the origins of this form of lay participation before examining the current ways in which constitutions address the issue today.

The history of the modern jury system, and the justifications for lay participation in general, traces back to the country of England. While the Magna Carta of 1215 is often thought to be the landmark enshrinement of the jury system, it did not affirmatively guarantee a right to trial by jury as it is presently understood.[23] Rather, the Magna Carta was a symbol of the increasing role of lay persons in the judicial system, and that role ultimately evolved into what resembles the modern adversarial jury system today.[24] This evolution, however, was a product of societal circumstances specific to the country of England. In

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[19] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed…"); see also U.S. CONST. amend.VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); *see also The Constitution of the United States: Fast Facts,* NATIONAL CONSTITUTION CENTER https://constitutioncenter.org/education/classroom-resource-library/classroom/constitution-fast-facts

[20] *See* Hamilton, *supra* note 6.

[21] 527 U.S. 1, 31 (Scalia, J., dissenting) (quoting Alexander Hamilton, *The Federalist No. 83*, 426 (M. Beloff ed. 1987)).

[22] *See* Goldbach & Hans, *supra* note 8, at 1.

[23] *See* Thomas J. McSweeney, *Magna Carta and the Right to Trial by Jury*, *in* MAGNA CARTA: MUSE & MENTOR 139, 157 (Holland 2014).

[24] *Id.* at 153-54.

their early form, juries functioned as tools of the state, first as independent factfinders who simply investigated crime within their respective communities and brought suspected criminals to be charged.[25] Even when juries first assumed a larger role in criminal trials shortly after the Magna Carta, they were not the independent beacons of judicial fairness as they are popularly conceptualized to be today.[26]

Jury trials first presented themselves as a last alternative for defendants to secure an acquittal before they had to resort to a trial by ordeal or trial by battle.[27] Even as these medieval methods of trial faded from society, the increased role of juries did not result in an increase in judicial independence for several centuries.[28] Trials were inquisitorial, meaning that while juries served a factfinding function, this factfinding was conducted outside of the courtroom, with no real chance for the defendant to plead their case.[29] Juries entered the courtroom with full pre-determined notions of the culpability of defendants, and simply aided judges through providing facts.[30] More significantly, even as witness testimony began to dominate trials and juries assumed a factfinding function in the courtroom, juries were still subject to the state's control.[31] Judges were observing the exact same testimony as the jurors and could heavily fine members of the jury if they did not render a verdict consistent with what the judge believed should happen.[32] However, the landmark opinion in *Bushell's Case* ending judges' ability to arbitrarily fine or imprison jurors,[33] along with the continuous introduction of the adversarial system, or "lawyerization" of

[25] *Id.* at 146 ("[J]uries served not so much as protect against royal power, but as extensions of it. The jury of presentment was a method the crown used to keep tabs on the country with its limited resources by compelling members of the local community to work for the king.")
[26] *Id.*
[27] Sanjeev Anand, *The Origins, Early History and Evolution of the English Criminal Trial Jury*, 43 ALTA. L. REV. 407, 410-15 (2005).
[28] *Id.* at 417-19.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 427-28
[32] *Id.* at 428 ("However, even under the altercation trial the jury suffered some constraints. Because judges heard the same witnesses as the jurors, judges began to exercise significant powers of control over the jury to prevent and/or correct what they saw as jury error.").
[33] Kevin Crosby, *Bushell's Case and the Juror's Soul*, 33 J. LEGAL HIST. 251, 263 (2012) ("As Vaughan has already shown, the jury must be granted this functional independence from the judge if juries are to exist in any meaningful way. So if, as Vaughan believed, the attaint and the judicial fine could not coexist, either the judicial fine must give way or the jury must cease to exist.").

trial,[34] juries began shifting into their modern role: independent, impartial factfinders that limit the scope of judicial power. This gave rise to the concept of jury nullification as a check on judicial tyranny and built the foundation for the central role that juries are perceived to play to a democratic society today.[35]

This brief history of juries in England illuminates two concepts that are crucial to understanding the role of lay participation in legal systems generally. First, while lay participation dates back centuries and was technically formalized in the text of the Magna Carta, juries were not originally conceived in the form they are generally perceived to take today.[36] The text of the Magna Carta merely established an individual's right to a "judgment of his peers", not a 12-person independent body of citizens with no legal training to make factual determinations and render verdicts.[37] Rather, juries took this form through centuries of adaptation to the modern ethical values of society that particular legal systems are designed to safeguard.[38] This illuminates the second point, which is that a country's approach to lay participation, both in its constitution and in practice, should always be a product of societal circumstances.[39] In England's case, the development of jury was fueled by the need for judicial independence in the common law system. Lay participation generally evolves in accordance with the values and needs of the people, and there has never been one "magic" answer as to how lay participation should intersect with the right to fair trial. As Part II will illustrate, Ghana is an example of a country that adopted a jury through what scholars have labeled as "legal transplant": English colonial influence led to the imposition of an English jury system.[40] The implications of transplanting a form of lay participation from one country into the

[34] *See* Anand, *supra* note 27, at 430-31
[35] *See* Daniel Epps & William Ortman, *The Informed Jury*, 75 VAND. L. REV. 823, 826 (2022).
[36] *See* McSweeney, *supra* note 23, at 157.
[37] *See* McSweeney, *supra* note 23, at 157.
[38] *See* R. Mochziker, *The Historic Origin of Trial By Jury,* 70 U. Penn. L. R. 1, 5 (1921) ("The historians fail to agree, but the most tenable theory is that the present system represents a gradual development of ancient customs, brought to England by the earliest invaders, upon which, most likely, the Norman influence wrought material changes, and that subsequent developments kept pace with the increasing complexity of society.").
[39] *See* Turenne, *supra* note 17, at 9 ("The form and impact of lay participation are narrowly shaped by history and the particular political or social context.").
[40] Valerie P. Hans, *Trial by Jury: Story of a Legal Transplant*, 51 L. & SOC'Y REV. 471, 471 (2014) ("[A] legal transplant is the common phenomenon of one country adopting, in whole or in part, another country's established law, legal procedure, legal institution, or legal system. Some see this as the single most important phenomenon in the development of law…").

constitution of another, rather than tailoring it to the specificities of that country's history and circumstances, will be considered extensively. Meanwhile, Part III will examine the history and development of lay participation in Poland, a country of civil law tradition that has also has a turbulent history with national independence, and has adapted lay participation to its own circumstances throughout that history.

While the English common law tradition is integral to the United States legal system, as well as many countries that were subject to English colonization, the majority of countries in the world do not have juries.[41] The grandiose conceptions of lay participation that have been outlined to this point are far from uniformly accepted across all constitutional systems. First, in civil law traditions, mixed courts consisting of both professional and lay judges are utilized to incorporate citizens in the administration of justice.[42] When a judge's only role is to apply codified law to fact, it makes little sense to embrace the risks of bias and deficient training that a system like the common law jury poses. Further, even if lay participation does serve a meaningful role in preserving substantive judicial independence generally, it does not come without serious drawbacks in both common law and civil law traditions. Incapacity and bias are the two central concerns that underlie any form of judicial lay participation.[43] These concerns have played a role in the trend away from lay participation in many countries, namely Ghana and Poland.

It is believed that 125 countries adopt some form of lay participation, which takes two basic forms: citizens participate as either jurors or lay judges.[44] Of the countries that adopt some form of lay participation, 56 (44.8%) of them have juries, while 71 (56.8%) have mixed tribunals composed of professional and lay judges working collaboratively.[45] This illustrates that countries slightly favor the mixed tribunal system as opposed to the jury system, and that there is, in rare cases, some overlap between the two when countries employ both systems to some extent. However, while it is important that

[41] *See* Goldbach & Hans, *supra* note 8, at 1.
[42] *See* Goldbach & Hans, *supra* note 8, at 8.
[43] *See* Goldbach & Hans, *supra* note 8, at 11-12.
[44] *See* Ivkovic & Hans, *supra* note 4, at 334.
[45] *See* Ivkovic & Hans, *supra* note 4, at 338-39.

these constitutions affirmatively acknowledge lay participation, the scope of the cases in which it is utilized is often quite narrow.[46] Many countries limit the scope of lay participation based on the stakes of the case, or mention it without fully guaranteeing it in any specific set of circumstances.[47] For instance, Colombia's constitution establishes a jury system, but does not affirmatively guarantee a jury trial in any given scenario.[48] Meanwhile, El Salvador establishes jury trials for "common crimes", but leaves the precise scope of which specific crimes that language entails to be "determined by the law".[49] The implications of the different approaches to constitutional language as it pertains to lay participation will be examined in Part IV.

Additionally, while so many constitutional systems employ lay participation, it is not affirmatively recognized by international law as essential to the right to fair trial. The ICCPR, in Article 14, enshrines extensive protections pertaining to the right to fair trial as essential to international human rights, and makes no mention of lay participation.[50] However, supplemental comments on the application of Article 14 affirmatively acknowledge the prevalence of jury systems, and more centrally, articulate fairness of procedure as the core purpose of Article 14.[51] These comments explicitly appeal to the fairness and independence of the judicial decision-making process, and associate the existence of jury system with

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[46] Elkins, Zachary and Tom Ginsburg. 2022 "Characteristics of National Constitutions, Version 4.0." *Comparative Constitutions Project.* Last modified: October 24, 2022. Available at comparativeconstitutionsproject.org.
[47] *Id.*
[48] *Id.*; *see also* COLOMBIA CONST. OF 1991 art. 116.
[49] *See* Elkins & Ginsburg, *supra* note 46; *see also* EL SALVADOR CONST. OF 1983 art. 189.
[50] *See* I.C.C.P.R., *supra* note 3 and accompanying text ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.").
[51] *See* I.C.C.P.R., *supra* note 3, *General Comment on Article 14*, no. 25 ("Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive… Expressions of racist attitudes by a jury that are tolerated by the tribunal, or a racially biased jury selection are other instances which adversely affect the fairness of the procedure."); *see also* I.C.C.P.R., *supra* note 3, *General Comment on Article 14*, no. 26 ("Article 14 guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal. It is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality. The same standard applies to specific instructions to the jury by the judge in a trial by jury.").

those principles.[52] Thus, while lay participation is not guaranteed by the ICCPR, the established normative justifications for lay participation generally are directly present in the ICCPR's normative justifications for the implementation of Article 14, and the ICCPR's conception of the meaning of fair trial.[53] This, along with the international prevalence of lay participation in constitutional systems, indicates lay participation is integral to the modern concept of fair trial, and more broadly, judicial fairness and independence. Ghana and Poland have both adopted the ICCPR, and both adopt a form of lay participation.[54] Part II will examine the how the traditional English jury model was transplanted into Ghana, the role that juries have played in Ghana's legal history, and the current concerns that Ghanaians have about the jury system. Part III will look to Poland's constitutional history of using juries , and their ultimate decision to ambiguously address the issue of lay participation in their 1997 Constitution. With these systems illustrated, Part IV will compare their effectiveness in safeguarding substantive judicial independence and draw general conclusions about the issue of addressing lay participation in a constitution.

PART II: TRIAL BY JURY IN GHANA: A STORY OF LEGAL TRANSPLANT

The nation of Ghana has conducted jury trials for the entire 150-year history of its central legal system; but not by choice. On July 24, 1874, the parliament of England formally established the "Gold Coast" as one of its colonies through the Judicature Act of 1874, and imposed the English common law tradition on the new colony.[55] This was one of many similar pieces of legislation that England passed in the 1870's to "transplant" their legal tradition in the foundation of their African colonies, which included the implementation of the jury system by the Criminal Procedure Ordinance of 1876.[56] While English law

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[52] *Id.*
[53] *Id.*
[54] Office of the United Nations High Commissioner for Human Rights*, ICCPR Ratification Status by Country*, OHCHR, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en.
[55] Samuel K. B. Asante, *Over a Hundred Years of a National Legal System in Ghana – A Review and Critique*, 31 J. AFR. L. 70, 70 (1987) ("The 'received' law comprising English common law, doctrines of equity and statutes of general application in force on 24 July, 1874, and also English statutes specifically declared to be applicable to Ghana since 1874. (24 July, 1874 marks the formal establishment of the Gold Coast as a colony).").
[56] *Id.*; *see also* Richard Rathbone, *A Murder in the Colonial Gold Coast: Law and Politics in the 1940s*, 30 J. OF AFR. HIST. 445, 450, n. 17 (1989) (mapping the colonial history of the criminal jury system).

ceded to customary law in some areas, such as property or familial claims, it governed many essential facets of life, such as economic, commercial, and criminal disputes.[57] Transplanting their system was not just about colonial influence; England sought to maintain control and exploit the economic resources of the Gold Coast, and colonists were able to utilize the legal system to do so for decades.[58] While jury trials existed by law throughout this period, their role in safeguarding the independence and integrity of the judiciary is not particularly relevant, as judges had ample legal mechanisms to circumvent jury verdicts they did not agree with, such as ordering a re-trial or a different mode of trial.[59] Further, it was far from a guarantee these juries would be representative of Ghanaian society at all, as the legal system was largely dominated by European colonists.[60] While the day-to-day lives of many Ghanaians was still mostly governed by customary law and societal norms and understandings, this large-scale English legal revolution was the foundation of the future Ghanaian legal system once they attained independence.

It should be no secret that introducing an entirely foreign common law tradition, which was tailored to the specific intricacies of English society for centuries, into Ghanaian society was deeply insensitive to the nation's culture and history. This was a tendency of post-colonial constitutions across the African continent in the twentieth century, and raised serious concerns about how national identity and citizenship were to be conceptualized as nations emerged from decades of colonial rule.[61] In Ghana, it is fair to say these issues were not easily addressed. As Samuel Asante writes, "[i]ndeed no express juridical authority is required for the self-evident proposition that a body of laws transplanted into another

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[57] *See* Asante, *supra* note 55, at 71 ("The cumulative effect of the conflict rules enunciated by the various court ordinances and the decisions of the Ghanaian courts was that English law was made generally applicable to court procedure, commercial transactions in the new sophisticated cash economy, civil claims in respect of tortious acts, the regulation of criminal conduct, and transactions between non-Ghanaians, including the Government and companies or between non-Ghanaians and Ghanaians, marriages contracted under the Marriage Ordinance, 1884, and certain aspects of intestate succession in respect of parties to, or issue of, such marriages. For the bulk of Ghanaians, property, succession, family and interpersonal relations were governed by customary law with some admixture of English juristic ideas.").

[58] *See* Asante, *supra* note 55, at 71-72.

[59] *See* J. H. Jearey, *Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: I*, 4 J. AFR. L. 133, 141-43 (1960).

[60] *Id.*

[61] *See generally* Bettina Ng'weno & L. Obura Aloo, *Irony of Citizenship: Descent, National Belonging, and Constitutions in the Postcolonial African State*, 53 L. & SOC'Y REV. 141 (2019).

political, social and economic context must necessarily be reshaped and modified."[62] Unfortunately, the judiciary in Ghana did not do any of this reshaping or modifying.[63] Whether through strict adherence to freedom of contract in instances of dramatically lopsided bargaining power, or plain rejection of arguments about criminal intent based on Ghanaian cultural beliefs that the English did not share, English law remained largely unaltered, and was applied steadfastly.[64] On a deeper level, Asante highlights how the individualist, "laissez-faire" ideals underlying English legal principles are completely at odds with the social backbone of Ghanaian society: "[w]ith respect to the law governing interpersonal relations, I need hardly point out that these excesses of individualism are totally inappropriate to social ideas and conditions in Africa. Our traditional value system proclaims the paramountcy of the group interest."[65] In a society built on community, where dignity and rights are recognized through adherence to group interest, the English implemented a legal tradition fueled by social considerations that completely to the contrary. This particular point has massive implications on the feasibility of the jury system in Ghana, as the individualistic nature of English society is central to the justifications for the modern jury system's conception in the first place.

Ghana officially gained independence in 1957 and enacted its first republican constitution just three years later in 1960.[66] When the Constituent Assembly put the draft of the constitution to a vote of the people, it was overwhelmingly approved, and claimed by the Committee to be "… designed to meet the particular needs of Ghana and to express the realities of Ghana's constitutional position."[67] In reality, however, while the symbolic value and intent behind the constitution was clear, it was woefully deficient in ensuring separation of powers. The executive branch created by the Constitution of 1960 was quite authoritarian in nature, with powers such as permission to act at his own discretion without being

[62] *See* Asante, *supra* note 54, at 73.
[63] *See* Asante, *supra* note 55, at 75 ("[T]he established practice of judiciary in Ghana over the past hundred years has been one of blind adherence to the substance of English law and, what is even more significant, unquestioning acceptance of the principles of English legal reasoning.")
[64] *See* Asante, *supra* note 55, at 75.
[65] *See* Asante, *supra* note 55, at 77.
[66] Egon Schwelb, *The Republican Constitution of Ghana*, 9 AM. J. COMP. L. 634, 636-39 (1960).
[67] *Id.* at 634.

constrained by any other branch, and significant influence over the removal of judges and the judicial branch.[68] Sure enough, the nation fell into authoritarian rule under first president Kwame Nkrumah, who was named the first President in the text of the 1960 Constitution,[69] and the coup d'état that overthrew his regime was followed by decades of political turmoil and military rule.[70] In the period between the Constitution of 1960 and the present Constitution of 1992, two other constitutions were enacted, neither of which were legitimized by the public, or clearly by those fighting for power.[71] While much can be said about the institutional failures of this period, and how they impacted the 1992 Constitution, there are two principles most relevant to lay participation in the judicial system: the renewed focus on both separation of powers and human rights protections.[72] The executive remained strong in the 1992 Constitution—a criticism the document still receives today—but additional safeguards were put in place to protect the institutional independence of the judiciary, such as judicial salary protection and enhanced removal procedures.[73] Moreover, the 1992 Constitution demonstrated an enhanced prioritization of human rights that had been undermined in the period of conflict, largely through executive capture of the judicial branch. It is important to note that the 1992 Constitution, and the transition to democratic rule generally, was facilitated by President Jerry Rawlings, who sought to keep himself in power throughout the process.[74] While this power struggle was underlying the drafting of the fourth republican constitution, the 258-member Consultative Assembly with representation of dozens of political and ethnic groups included much more explicit language pertaining to separation of powers and affirmative rights of citizens.[75] Thus, while the 1992 Constitution does reflect progress, it was also designed in a context defined by political tension and competition for power. Rawlings explicitly directed for it to be modeled after the nation's

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[68] *See* GHANA CONST. OF 1960, art. 9, 44 (1960).
[69] GHANA CONST. OF 1960, art. 10 (1960).
[70] Julia Selman Ayetey, *Ghana's Jury Crisis: Implications for Constitutional Human Rights*, 20 OX. UNIV. COMMW. L. J. 1, 6 (2020).
[71] *Id.*
[72] Owusu-Dapaa, supra note 12, at 543.
[73] Owusu-Dapaa, supra note 12, at 545, 553-55.
[74] *See* David Abdulai, *Rawlings "Wins" Ghana's Presidential Elections: Establishing a New Constitutional Order*, 39 AFR. TODAY 66, 66-67 (1992).
[75] *See generally Constitution Writing & Conflict Resolution: Ghana 1992*, PRINCETON, https://pcwcr.princeton.edu/reports/ghana1992.html.

past constitutions, which helps explain the persistence of both strong executive authority and, more relevantly, the jury system.[76]

With this brief constitutional history established, the motivations behind constitutionalizing the right to trial by jury, and the persistent criticisms that the jury system has faced, become far more clear. The existence of trial by jury is enshrined in Article 19, Section 2 of the Constitution, which requires a jury trial for all criminal offenses punishable by death or life imprisonment, with the exception of high treason, and requires the jury verdict to be unanimous only when the pending punishment is death.[77] This is not the entire scope of jury trials, however, as the Criminal Procedure Act of 1960 establishes that all criminal trials "on indictment" shall be tried by jury, which encompasses a separate but overlapping class of criminal offenses in the High Court.[78] Before examining the intricacies of the scope, selection process, and effectiveness of the jury system, it is important to note that the jury appears in an extremely unique way later in the Constitution. Article 125, Section 2 reads, "Citizens may exercise popular participation in the administration of justice through the institutions of public and customary tribunals and the jury and assessor systems."[79] It is immediately preceded by Section 1, which states, "Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this Constitution."[80] While these provisions reside in the judiciary section of the constitution as opposed to within the human rights provisions, the drafters appear to have found it imperative to affirmatively assert the independence of the judiciary. These provisions function to ensure

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[76] *See* Abdulai, *supra* note 74, at 66-67.
[77] *See* GHANA CONST.OF 1992 art. 19, § 2 ("A person charged with a criminal offence shall- in the case of an offence other than high treason or treason, the punishment for which is death or imprisonment for life, be tried by a judge and jury and-where the punishment is death, the verdict of the jury shall be unanimous; and in the case of life imprisonment, the verdict of the jury shall be by such majority as Parliament may by law prescribe; in the case of an offence triable by a Regional Tribunal the penalty for which is death, the decision of the Chairman and the other panel members shall be unanimous.").
[78] GHANA CRIM. PROC. ACT OF 1960, §204 [hereinafter C.P.A.]; *see also* Dennis D. Adjei, Ghana's Jury System on Trial (March 23, 2014) (M.A. Thesis, Duke University) (on file with Duke Law Scholarship Repository) ("[O]ffences that are tried on indictment are: (1) offences punishable by death, including murder and smuggling of gold and diamonds; (2) offences declared to be first-degree felonies by a statutory enactment, including rape or the use of an offensive weapon, and; (3) if the enacting law specifies indictment.").
[79] GHANA CONST.OF 1992 art. 125, § 2.
[80] GHANA CONST.OF 1992 art. 125, § 1.

citizens that the judiciary is accountable only to the people, and affirmatively grant citizens the ability to participate in the judiciary themselves. This makes the 1992 Constitution unique as it pertains to lay participation: the drafters frame the jury not only as a matter of procedure to protect substantive judicial independence, but also as an affirmative right, and maybe even obligation, of the citizen to participate in the administration of justice. However, this seemingly broad grant of power to participate is quite limited in practice.

While much about the legal landscape of Ghana has changed from the first republican constitution of 1960 to the present day, the core structure of lay participation, and criminal procedure in general, remained largely unaltered. The Criminal Procedure Act of 1960 still governs the procedures that Ghana employs and establishes the structure of lay participation in the nation. The Ghanaian jury is comprised of a panel of seven members,[81] with plenty of exclusions on participation. Section 207 of the Act excludes a wide range of people from serving on a jury, including obvious categories of citizens like legal experts, but also rather specific categories such as schoolteachers and newspaper editors.[82] People convicted of a felony, treason, or another "offence involving dishonesty" are also disqualified from jury service by Section 208.[83] While there are distinct arguments to be made for each category of excluded citizens, the sheer amount of exemptions employed by the Act, particularly those targeted at highly-educated citizens, is a big source of criticism for the system. The only baseline requirement for jury service is that a citizen must be between the ages of 25 and 60 and be able to understand the English language.[84] All eligible citizens within a four-mile radius of particular courts are assembled on a running list, and names are randomly selected from that list whenever a jury is needed.[85] It is important to highlight that the Constitution provides for an alternate form of lay participation in criminal trials, "trial by assessors", in which lay persons give oral opinions to the judge, but ultimately only have persuasive

[81] C.P.A. § 244.
[82] C.P.A. § 207.
[83] C.P.A. § 208.
[84] C.P.A. § 205.
[85] C.P.A. § 209.

weight.[86] However, these trials are exceedingly rare, as they only exist as an alternative to a jury trial, and defendants must choose to invoke them, which they almost never do.[87] Even still, the availability of this alternative, and its inclusion in the law, is relevant to the concept of lay participation in the country.

While there is a plethora of criticisms of the jury system, and active calls to abolish it altogether, it is first necessary to establish the justifications for its continued existence. In the words of the Constitution of 1992, the jury system provides a vehicle for "popular participation in the administration of justice."[88] When the Constitution was drafted, the central goals of the consultative assembly were to strengthen the protection of both human rights and separation of powers.[89] Trial by jury, on the surface, is a tool to accomplish both goals. While it was introduced into Ghanaian society as a matter of pure legal transplant of an entirely foreign tradition, it does theoretically provide a procedural safeguard for substantive judicial independence. Juries serve as a check on the government generally, as if the judiciary is to become controlled by the executive, there are citizens of the nation able to directly nullify potentially oppressive outcomes. If nothing else, the jury has symbolic value for these reasons. The institution provides a role for citizens to play in the justice system and feel as if they retain some level of control over the fairness of legal outcomes in their democracy. However, if improperly executed in practice, the jury system can accomplish the complete opposite. The specific circumstances of Ghanaian cultural history indicates that the jury may not serve any positive function at all.

Look no further than the comments of Ghanaian scholar A.N.E. Amissah: "I have never heard a judge describe our jury as the bulwark of our liberties nor as part of our tradition."[90]As time has passed, Ghanaian society has seemed to have trouble reconciling all the valid criticisms of the jury system with its justifications. There are three primary arguments against the jury system in Ghana: deficient juror competence, delay of trial, and biased jurors.[91] These arguments are common to essentially any form of

[86] *See generally* C.P.A. § 227-30.
[87] *See* Ayetey, *supra* note 70, at 8-9.
[88] GHANA CONST.OF 1992 art. 125, § 2.
[89] Owusu-Dapaa, supra note 12, at 543.
[90] A. N. E. Amissah, *The Machinery of Criminal Justice in Ghana*, 1 U. GHANA L. J. 80, 91 (1964).
[91] *See* Ayetey, *supra* note 70, at 12-15, 17-23.

lay participation but are particularly relevant in the context of Ghana.[92] First, it is argued that due to the particular selection procedures and restrictions, Ghana facilitates the appointment of uninformed, and sometimes even uneducated, jurors.[93] The jury procedures established in the Criminal Procedure Act are also argued to facilitate the inefficiency of the judicial system by hindering the speed of trial.[94] Lastly, and most significantly, revisiting the mismatch between the laissez-faire ideology underlying the English tradition and the community-based values underlying the Ghanaian cultural tradition shows that juries may be inescapably biased in their current form in Ghana.[95]

In 2011, Ghanaian High Court judge Efo Kosi-Kaglo testified to parliament and advocated for abolishing the jury system on the basis of widespread juror incompetence.[96] He felt that in many cases, the legal guidance he gave to the jury was completely futile, as many jurors were incapable of understanding the legal issues at hand.[97] While the will of the jury restraining the will of the judge is not a cause for concern conceptually, it is still imperative that jurors at least have some basic level of competence. If jurors are to render a different verdict than the judge would, that verdict ought to be substantively fair to the accused. While expecting jurors to be learned in the law contradicts the entire purpose of lay participation, it is undeniably problematic if they render verdicts that judges consider unsupported by the law. As just one prominent example, in the 2015 trial for the murder of Adams Mahama, just one of the two defendants was found guilty of conspiracy to commit murder, despite the offense requiring more than one conspirator by definition.[98] The general outcry against the competence of jurors in Ghana can be traced back to the lenient requirements for participation exclusions in the Criminal Procedure Act.[99] First, the Section 205 age restriction to citizens between the ages of 25 and 60 seems

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[92] *See* Adjei, *supra* note 78, at 21-32.
[93] *See* Ayetey, *supra* note 70, at 22.
[94] *See* Ayetey, *supra* note 70, at 12.
[95] *See* Ayetey, *supra* note 70, at 17-18.
[96] A. Kofoya-Tetteh, *Abolish by Trial Jury – Kosi-Kaglo*, MODERN GHANA (OCT. 25, 2011), https://www.modernghana.com/news/357554/abolish-trial-by-jury-kosi-kaglo.html.
[97] *Id.*
[98] Justice Agbenorsi, Ghana's Jury System Reform: Prioritising Jury Sequestration Key to Balancing Wheels of Justice, GRAPHIC ONLINE (May 29, 2023), https://www.graphic.com.gh/features/features/ghana-news-ghanas-jury-system-reform-prioritising-jury-sequestration-key-to-balancing-wheels-of-justice.html.
[99] C.P.A. § 205.

entirely arbitrary, and excludes a rather large portion of the Ghanaian population that is educated and fully able to contribute, particularly citizens above the age of 60.[100] These restrictions are coupled with the fact that Article 207 exempts 15 different categories of citizens from jury service, many of which are citizens with advanced educational degrees completely distinct from the field of law, such as medical practitioners, pharmacists, and active schoolteachers.[101] In a country that lags behind the global average in literacy to begin with,[102] it is easy to see how having such extensive exemptions for some of the nation's most highly educated and experienced citizens would be adverse to the competence of the jurors.

Further, Section 257 of the Criminal Procedure Act provides that if a juror is absent, the trial must be postponed, and if that juror's presence cannot be procured within a reasonable time, a new trial will commence, either with a new individual juror or an entirely new jury.[103] There is no greater example of the practical effects of this provision than the recent jury strikes.[104] Throughout 2023, most prominently in the trial of 14 individuals for the murder of a Ghanian mayor, many jurors initiated strikes, citing the costs of participation without compensation from the government and even personal safety risks.[105] The tangible effect of a strike is not just a message of protest: pursuant to the Act, the trial must be adjourned and restarted if even one juror is no longer able to continue their participation for any reason.[106] While strikes are an extreme example of the problem, jury trials in Ghana commonly take several years due to this provision, and the challenges pertaining to participation greatly hinder the efficiency of the legal system.[107] The justifications for the strikes also provide insight into further criticisms of the jury system, and the reason why so many trials are restarted or adjourned due to absent jurors. First, not all jurors have

[100] C.P.A. § 205.
[101] C.P.A. § 207.
[102] *Literacy Rate by Country 2024*, WORLD POPULATION REVIEW (2024) (reporting Ghana has an adult literacy rate of 80%, behind the international average of 83.41%.); *see also* Asante, *supra* note 55, at 77 (expressing concerns with English legal tradition as it perceived many of the "pre-literate" social beliefs and realities of Ghana in the twentieth century).
[103] C.P.A. § 257.
[104] Charles Owusu Kumi, *Jurors Strike in Accra over Unpaid Allowances, Ill-Treatment*, CNR (Oct. 31, 2023) https://citinewsroom.com/2023/10/accra-high-court-jurors-on-strike-over-unpaid-allowances/.
[105] *Id.*
[106] C.P.A. § 257.
[107] *See* Ayetey, *supra* note 70, at 21 ("[J]ury trials often occur over an extended period of time. It is not uncommon for some to take up to several years to conclude.").

access to transportation, and the burden is on the state to facilitate participation and avoid delays.[108] More notably, jurors taking part in the strike feel that they assume personal safety risks by virtue of merely being selected as a juror.[109]

The fact that jurors feel they are risking their lives by participating highlights the animating reason behind the third major criticism of the jury system, and that is the deeply personal nature of the jury in Ghana.[110] The geography and community-based values of Ghana, along with the jury selection process being very centered around geography pursuant to Section 209 of the Criminal Procedure Act, enhance the risk of outside biases entering the courtroom.[111] Very often, the jurors know the parties to the dispute. Jurors are therefore, whether implicitly or explicitly, basing decisions off personal nations of the parties from outside the courtroom, as well as the potential implications that their verdict could have on their personal lives and communities.[112] These biases completely contradict the entire justification for the jury system in the first place. Juries are designed to safeguard impartiality and ensure that unbiased peers of the accused play a role in fairly evaluating the evidence presented in the courtroom, resulting in a substantively fair and reasoned verdict. In Ghana, outside bias is essentially unavoidable given the structure of not only the jury selection process, but of Ghanaian society in general.[113] Thus, the jury system in Ghana may have an extensive history of use, but it is clear from the pitfalls of the jury that Ghanaians have never viewed juries with the sensationalism that other countries do. While the entire purpose of including the institution in a constitution, or a legal system at all, is to enhance the fairness and impartiality of criminal trials and add an additional layer of democratic protection against the government, one could argue that it has accomplished nearly the exact opposite in Ghana. In sum, the jury

[108] *See* Owusu Kumi, *supra* note 104.
[109] *See* Owusu Kumi, *supra* note 104.
[110] *See* Ayetey, *supra* note 70, at 21 ("It is commonly accepted amongst lawyers and court registrars that '…in many small towns most people know one another. The accused's relatives or friends can easily identify the jurors and threaten or otherwise intimidate them'.").
[111] *See* Ayetey, *supra* note 70, at 21.
[112] *See* Ayetey, *supra* note 70, at 22.
[113] *See* Ayetey, *supra* note 70, at 22.

has never fit the tradition of Ghana, and transplanting the jury system into Ghana has not brought the virtuous safeguards that lay participation is conceptualized to bring to a legal system generally.

PART III: THE EVOLUTION OF CONSTITUTIONALISM AND LAY PARTICIPATION IN POLAND

Poland is a nation with a turbulent history of political turmoil and oppressive foreign occupation, which produced a fascinating constitutional history and ultimately led to the present Constitution of 1997.[114] To understand the current legal system of Poland, and the role lay participation plays in that system, it is imperative to briefly examine the complex legal history of the country. Poland's Constitution of 1791 is one of the world's first written constitutions, but it is not regaled like many of the foundational European constitutions that emerged from the Enlightenment era: it lasted for less than two years before the Second Partition of 1793, which began over a century of foreign occupation of Poland.[115] After centuries of monarchical rule, Poland underwent a political identity crisis in the mid-to-late eighteenth century, ultimately making them a vulnerable target for partition.[116] The invading neighboring powers of Russia, Prussia and Austria found justification from the notion that Poland was, "in a state of anarchy and that it refused to impose order on its internal affairs."[117] Perhaps the largest motivation for the growing opposition to the legitimacy of the Polish government by its citizens was the influence of enlightenment democratic values, particularly those proffered in the works of Wawrzyniec Goslicki.[118] The Polish Constitution of 1791 embodies a societal shift in focus, and an increased consciousness of the value of human rights and the proper role of government in society. As scholars note, even if the legal structure of the Constitution of 1791 did not leave much of a mark on Polish society, its sheer enactment certainly did,

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[114] *See generally* Daniel Cole, *Poland's 1997 Constitution in Its Historical Context*, 589 ARTICLES BY MAURER FACULTY 1 (1998), https://www.repository.law.indiana.edu/facpub/589.
589. https://www.repository.law.indiana.edu/facpub/589
[115] Marek Zebrowski, *History of the 3 May 1791 Polish Constitution*, UNIVERSITY OF SOUTHERN CALIFORNIA (Apr. 2008), https://polishmusic.usc.edu/research/publications/essays/zebrowski-marek-history-polish-constitution/.
[116] *Id.*
[117] *Id.*
[118] *Id.*

and the legacy of the Constitution of 1791 is as a symbol of national strength, identity, and unity against tyrannical rule.[119]

While the legal principles and governmental structure of the 1791 Constitution was largely outdated by the time Poland regained independence in 1918, the spirit of the old Constitution set an essential foundation for the March Constitution of 1921. The Preamble to Poland's 1791 Constitution explicitly states the enactment of a constitutional system was motivated by, "having by long experience learned the inveterate faults of our government, and desiring to take advantage of the season in which Europe finds itself and of this dying moment that has restored us to ourselves."[120] This was a symbol of commitment to the restoration and preservation of a national identity, and the Polish citizens held on to this symbolic value throughout the 125 years of occupation. When drafting their new constitution in 1921, Poland had not forfeited its national identity to occupying powers, and the nation's triumph in gaining independence paved the way for an innovative, democratic constitution.[121] The March Constitution drew more inspiration from the French Constitution than it did the Polish 1791 Constitution, and committed to completely rejecting monarchial government in favor of a representative democracy with a strong, accountable parliament and a weak executive.[122] Polish society's deep fear of an overpowering executive ultimately fueled the demise of the March Constitution, as the way it separated powers led to an unstable government emerging from the years of conflict the nation had just endured.[123] However, this fear did reflect a desire for an independent judiciary, and the general principle that the government derives its power from the people. As part of this desire, Article 83 of the March Constitution established trial by

[119] *See* Cole, *supra* note 114, at 19 ("Over the centuries, the 1791 Constitution has become a document of great importance for Poland, not so much for the values it incorporated as for what it came to symbolize: Poland's national identity on the brink of partition."); *see also* Zebrowski, *supra* note 115 ("Recognized as an expression of remarkable political will in times of great adversity, the memory of the 1791 Constitution nurtured political aspirations of many successive generations of Poland's citizens.").
[120] POLAND CONST. OF 1791 preamble.
[121] *See* Cole, *supra* note 114, at 21.
[122] *See* Cole, *supra* note 114, at 21-22.
[123] *See* Cole, *supra* note 114, at 21-22.

jury for, "cases of felonies entailing more severe punishment, and cases of political offenses."[124] This demonstrates a broad association of the jury with representative democracy and democratic values.[125]

However, the life of the Polish jury, although heavily limited to begin with, formally ended just 14 years later with the enactment of the 1935 Constitution. The rebuilding nation had quickly become dissatisfied with economic stagnation, and the weak central government was the clear target for animosity. Poland fell into authoritarian rule, and the 1935 Constitution completely shifted the focus away from the democratic spirit of 1921.[126] This Constitution makes no mention of lay participation, which could signify the value associated with the jury system, given the underlying motivation of the drafters was to tailor the constitution to a strong authoritarian ruler.[127] Ultimately, however, the horrors of World War II quickly dismantled the ever-changing Polish government once again, and the country did not have another stable Constitution until 1952.[128] This constitution, however, was essentially drafted by the Soviet Union, which would continue to occupy Poland until 1989.[129] While the Constitution was more a reflection of Soviet values than the will of the Polish citizens, it did make a significant change to lay participation in the judicial system, and affirmatively constitutionalized the participation of "lay assessors" in certain trials.[130] Lay assessors were common to socialist regimes, as they represented the devolution of state power into the hands of the working class.[131] Nonetheless, as Daniel Cole highlights, this document was hardly a constitution beyond the fact it was referred to as one, as its provisions had to be implemented by the Communist Party through statute.[132] Thus, the period of Soviet occupation was not

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[124] POLAND MARCH CONST. OF 1921 art. 83.
[125] See Cole, supra note 114, at 21 ("What was new was the broader democratic focus: the 1921 Constitution was the first in Poland's history to reject monarchy altogether and establish participatory democracy based on proportional representation regardless of social class.").
[126] *See* Cole, *supra* note 114, at 24-25.
[127] POLAND APRIL CONST. OF 1935 art. 64-71.
[128] *See* Cole, *supra* note 114, at 25-26.
[129] *See* Cole, *supra* note 114, at 24-25.
[130] CONST. OF THE POLISH PEOPLE'S REPUBLIC 1952 art. 49-50.
[131] Sanja K. Ivković, Ears of the Deaf: The Theory and Reality of Lay Judges in Mixed Tribunals, 90 CHI.-KENT L. REV. 1031, 1038 (2015).
[132] *See* Cole, *supra* note 114, at 26 ("Not only was the Constitution intended to create the mere illusion of democracy, it was itself a legal illusion. The 1952 Constitution was not a constitution in the liberal-democratic sense of "the highest law of the land." In fact, it was hardly a legal document at all. The various powers it created and the rights and liberties it purportedly guaranteed were not self-executing.").

one in which a constitutional system was functionally employed, but it is the source of Poland's shift from a jury system to a mixed court system, and established the foundation for how the 1997 Constitution would ultimately treat lay participation. It is important to note that this shift was not a product of Polish values, but rather one of Soviet influence, and the socialist conception of judges as civil servants rather than technical experts.[133]

By the time Poland gained back its independence in 1989, it was an extremely divided nation from a political and ideological standpoint.[134] Thus, the government took immediate, short-term measures to decentralize power and create a semblance of a democratic system while they worked on developing a formal written constitution.[135] After years of fierce debate and compromise between the many different political parties on the Constitutional Committee, the 1997 Constitution passed by an unprecedentedly narrow margin of the public vote in its referendum: it received approximately 53 percent approval from the public, and less than half of the eligible voting public even participated in the referendum.[136] The low levels of public approval can be primarily attributed to the fact that Polish elites drove the process, and there was even a "citizen draft" that the parliamentary committee essentially refused to meaningfully consider and incorporate.[137] While the Constitution created by these elites was ultimately approved, the high level of public disagreement about approval shows that there was far from a consensus that the 1997 Constitution reflected the values of Polish society. Nonetheless, the legitimacy of the 1997 Constitution continues to endure the test of time, and is the source of Poland's guarantee of lay participation. Article 45 explicitly establishes the right to fair trial "…before a competent, impartial and independent court."[138] Later in the Constitution, Article 182 addresses lay participation: "A statute shall specify the scope of

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[133] Michal Bobek, *Judicial Selection, Lay Participation, and Judicial Culture in the Czech Republic: A Study in a Central European (non) Transformation*, *in* FAIR REFLECTION OF SOCIETY IN JUDICIAL SYSTEMS- A COMPARATIVE STUDY 121, 122-25 (Turenne ed. 2015).
[134] *See* Emilia T. Kowalewska, *Between Civic and Legal Constitutionalism: Dynamics of Poland's Constitution-Making Projects of the 1990s*, 10 ONATI SOCIO-LEGAL SERIES 903, 912 ("Major challenges affecting the constitution-making processes included problems of legitimacy – particularly for the (post-)communists, as well as volatility, fragmentation and plurality of the political scene."); *see also* Cole, *supra* note 114, at 29-30.
[135] *See* Cole, *supra* note 114, at 31.
[136] *See* Cole, *supra* note 114, at 32-33.
[137] *See* Kowalewska, *supra* note 134, at 913, 917-19.
[138] POLAND CONST. OF 1997 art. 45.

participation by the citizenry in the administration of justice."[139] Poland's approach to constitutionalizing citizen participation in the justice system is unique; it reflects that the issue is important enough to be included in the text, while also declining to commit to a specific form of lay participation. Thus, there were many ways in which this provision could have turned out in practice.

The first question posed by the textual method that the drafters took to implement lay participation is whether it is even guaranteed from the language of the 1997 Constitution. While not completely clear from the provision on its face, Article 182 does affirmatively establish that citizens are to play some role in the administration of justice, and precludes the possibility of the public being excluded entirely.[140] Further, Article 4 of the Law on Common Courts Organization (C.C.O.) provides that citizens will participate by acting as lay judges, with the same rights as professional judges.[141] This means the opinion of the lay judge will hold equal weight to that of the professional judge. Given the fact that lay judges participate either on a three-judge panel comprised of one professional judge and two lay judges, or a five-judge panel with two professional judges and three lay judges,[142] this section has considerable implications on the ability of the lay judges to effectively nullify the opinion of the professionals. However, Poland does not simply grant such great power to ordinary citizens that would, for instance, be eligible to participate on a jury in other countries: Article 160 of the C.C.O. implements an election process by which lay judges are voted in by a council of communes.[143] Articles 158 and 159 establish heightened criteria to be eligible for such consideration, which includes that the candidate be between the ages of 30 and 70 and have at least a secondary education, while excluding categories of citizens such as legal experts, police officers and politicians.[144] Elected lay judges serve four-year terms,

[139] POLAND CONST. OF 1997 art. 182.
[140] Mariola Adamiec-Witek, *Restricting the participation of lay judges in adjudicating civil cases - as a violation of democracy*, 27 ASEJ Sci. J. 56, 56-57 (2023) ("It is correct to believe that the wording of art. 182 shows that it is neither possible to completely exclude citizens from exercising this function (of the judiciary), nor to narrow it down to a symbolic extent.").
[141] ACT OF JULY 27, 2001, art. 4, § 1-2 [hereinafter C.C.O.] ("Citizens participate in administering justice by acting as lay judges in hearing cases before courts of first instance, unless acts provide otherwise. … When settling a case, lay judges are vested with the same rights as judges and deputy judges.").
[142] POLISH CODE OF CRIMINAL PROCEDURE art. 28-29 [hereinafter C.C.P.].
[143] C.C.O. art. 160.
[144] C.C.O. art. 158-59.

and Article 166 vests the power to remove them in the same council of communes that elected them, for reasons such as failure or inability to perform duties, as well as "instances of conduct which harms the authority of the court".[145] Lastly, in terms of the scope of cases which lay judges participate in reviewing, the use of mixed courts has decreased throughout time. Pursuant to the Code of Criminal Procedure, lay judges essentially only participate in three instances: felony cases with a potential prison sentence of three years or more, death penalty cases, and cases of special complexity.[146] While lay judges used to participate in over half of all criminal proceedings, it is believed that they now hear less than one percent of all criminal cases in Poland.[147] While the Code of Civil Procedure originally conceptualized lay judges as key to hearing civil cases, their role has essentially been completely eliminated from civil cases.[148]

The constitutional treatment of lay participation in Poland, as well as the colossal decline of its role in the administration of justice, raises significant questions about the value of the mixed court system and its legitimacy to the people of Poland. Before considering these questions, however, it is important to consider the conceptual value of the system, and why it is guaranteed by the 1997 Constitution in the first place. In her discussion of the potentially unconstitutional restriction of lay participation that has occurred throughout the past two decades, scholar Mariola Adamiec-Witek offers the following conceptualization of the value lay judges bring: "…collegiality of the court has two functions. The first - obtaining the most accurate and thus fair decision possible, and the second - obtaining social acceptance for it."[149] Just as it is in a jury system, the participation of the citizenry in judicial decision-making is viewed as integral to the fairness of those decisions. It can be argued that lay judges give the common citizen an even stronger voice in legal decisions by having their opinions on legal questions be weighed equally to those of the judge. In this way, lay judges can be seen as not only bolstering judicial independence, but also supervising judicial conduct. The present system theoretically enables lay judges to unite and override the

[145] C.C.O. art. 166.
[146] C.C.P. art. 28-29.
[147] Dariusz Kuzelewski, *The Election of Lay Judges and the Principle of Participation by Citizenry in the Administration of Criminal Justice*, 20 BIALSTOCKIE STUDIA PRAWNICZE 143, 144 (2016).
[148] Adamiec-Witek, *supra* note 140, at 60.
[149] Adamiec-Witek, *supra* note 140, at 61.

opinion of the professional judge by a bare majority, which serves as a powerful protection against potential judicial overreach. Lay judges bring a unique perspective, representative of the common citizen's conception of justice, and utilize that perspective to ensure the substantive fairness of some of the most consequential legal decisions in Polish criminal law. Given the fact this role could be viewed as even more significant than that of a jury, Poland also implements measures to guarantee the competence of lay judges.[150] Heightened education requirements, and the requirement of elections generally, ensure that lay judges will not only be competent, but also will adequately represent the values of the citizenry. Conceptually, the mixed court system gives the public a more direct role in protecting judicial independence and the fair application of the law, while also limiting lay participation to people that are exceedingly qualified by both objective and subjective criteria.

However, as implied from the sharp decline in the utilization of lay judges in Poland, this system clearly is not viewed as a bulwark of liberty and judicial independence in the eyes of Polish citizens; many, including the lay judges themselves, do not care much for the prospective value that lay participation could bring to the judiciary.[151] There is a common conception that lay judges are nothing more than "vases", serving a decorative function more than anything else.[152] Their mere existence reflects the implementation of Article 182 and involvement of citizens in the adjudication process, but it does not lead to any tangible difference in the fairness of those adjudications. In practice, professional judges often open deliberations with their own opinions and analysis, and lay judges weigh in to potentially tweak certain aspects of the opinion, but ultimately lack the capacity to override the legal determinations of a professional judge.[153] Thus, while there is not much concern that lay judges cause legally unsupported decisions, there is concern that they play no meaningful role in checking judicial independence.[154] There

[150] *See* Stanislaw Pomorski, *Lay Judges in the Polish Criminal Courts: A Legal and Empirical Description*, 7 CASE W. RES. J. INT'L L. 198, 200 (1975); *see also* Dariusz Kuzlekewski, *Lay Judges in Criminal Proceedings: A Lay Judge's Perspective* 105-06 (2014).
[151] *See* Turenne, *supra* note 17, at 7 (explaining many lay judges are perceived as uncommitted to their duties, and participate with the primary motivation of financial gain.)
[152] *See* Kuzlekewski, *supra* note 150, at 109-10.
[153] *See* Kuzlekewski, *supra* note 150, at 111-12.
[154] *See* Kuzlekewski, *supra* note 150, at 111-12.

are additional concerns particular to the requirements that Polish law imposes for eligibility to become a lay judge, and the scope of their jurisdiction. Given the requirements for candidacy, lay judges are not always representative of society, as the only people with the requisite time and standing to hold the position for four-year terms are older, often retired citizens.[155] This reality raises concerns about age and its implications not only on capacity, but also on the diversity of viewpoints in the courtroom. While elections and defined terms of service are theoretically are meant to increase capacity, they may do so at the cost of representing society in a fair way. Finally, while lay judges are limited to an extremely small class of cases, they are cases with some of the heaviest implications and highest levels of publicity in society. This could potentially reinforce the mere symbolic form that lay participation currently takes, or could raise concerns about the legal reasoning of professional judges being distilled in cases where it must be the most precise.

Despite the arguments for and against the utilization of lay judges to preserve judicial independence, there is a factual trend in Poland: judicial independence is dwindling, and lay participation is dwindling with it. When the "Law and Justice Party" took power in 2015, the judicial independence of Polish courts was compromised through manipulation of the appointment process and disciplinary actions against judges.[156] As a result, hundreds of politically motivated judges were placed into power by the ruling party, and as this happened, the prominence of lay participation continued to narrow.[157] In 2020, in a move that purportedly responded to the safety concerns of the COVID-19 pandemic, Poland eliminated lay judges from the civil process entirely, citing the safety implications of three judges sitting together to hear a case rather than just one.[158] While direct causation is not entirely clear, there is still a notable correlation between the fall of judicial independence and the decline of lay participation. Regardless of the underlying motivations, lay judges have effectively been reduced to a symbolic presence in the Polish

[155] *See* Kuzlekewski, *supra* note 150, at 109-10.
[156] John Macy & Allyson K. Duncan, *The Collapse of Judicial Independence in Poland: A Cautionary Tale*, 104 JUDICATURE INT'L 41, 41-43 (2021).
[157] *Id.*
[158] Adamiec-Witek, *supra* note 140, at 60.

legal system. It is debatable whether the current use of lay participation is deficient enough to constitute a violation of Article 182, but it can also be argued that the language of the provision enabled lay participation being reduced to this extent. While lay judges could pose high theoretical value to the preservation of judicial independence, the presence of lay assessors in Poland in the first place is a result of decades of Soviet occupation rather than one of traditional Polish values. The devolution of lay participation through time may indicate that this system is not well-suited for those values, or the constitutional system generally.

PART IV: COMPARATIVE ANALYSIS OF CONSTITUTIONAL VALUE

Given the vastly distinct and essentially incomparable social and cultural history of Ghana and Poland, there is very little utility in drawing general conclusions about whether a jury system or mixed court system is a "better" form of lay participation. However, much can be learned from comparing the arguments for and against including each system in a constitution, and how each country has tailored lay participation to meet their specific needs. Further, beyond how the systems are structured in the text of the law, it is important to compare how each system carries out the purported functions of lay participation in practice. Both countries have lost confidence in the value of lay participation over time, and despite the vastly different forms that it takes in each country, the sentiments underlying these trends are quite similar. Examining these trends in two dramatically different constitutional systems illuminates broader conclusions about the value that constitutionalizing lay participation brings to a system generally.

In assessing the constitutional value of each system, the most important place to start is the plain text of the Ghanaian and Polish constitutions. Interestingly, just as these nations take entirely different approaches to the structure of lay participation, they also take different approaches to constitutionalizing public participation in the administration of justice. The only true similarity between the two nations is the mere inclusion of the issue in the text to begin with. Both countries were highly concerned with the decentralization and separation of government powers when they underwent their constitutional processes, with a particular consciousness of curtailing the power of the executive and maintaining the

independence of the judiciary.[159] Ghana takes a far more direct, explicit approach by not only affirming the existence and prevalence of jury trials in Article 19, but also affirmatively guaranteeing public participation in the administration of justice in Article 125.[160] Meanwhile, Article 182 of the Polish Constitution merely defers both the form and extent of lay participation to be determined by statute.[161]

The positive and negative implications of each approach are both clear from how the perception of each system has devolved in recent decades. In Poland, the Law and Justice Party was able to circumvent the obstacle of lay participation quite easily in its attempt to politically capture the courts, simply by decreasing the prevalence of lay judges by statute.[162] Additionally, the Constitutional Committee had to clarify that Article 182 even guarantees public participation in the administration of justice, as on its face, it is ambiguous whether the parliament could simply eliminate it by statute.[163] Meanwhile, in Ghana, establishing the jury system specifically, while also affirmatively guaranteeing public participation in the judicial system, appears to have made lay participation more of a burden than anything else.[164] As a result, in questioning and undermining the legitimacy of the jury system, Ghanaian society is simultaneously challenging the legitimacy of the constitution. This illustrates how constitutionalizing a form of lay participation from which the citizens derive no value can diminish the legitimacy of the constitutional framework as a whole. On the other hand, declining to address the form and scope of lay participation directly in a constitution can reduce it to mere symbolic value, as in Poland. Ultimately, however, the fact that lay participation is weakening in both countries is evidence that there are clearly many more factors at play than the plain text of the constitutions.

The legitimacy of these systems is impacted not primarily by their constitutional provisions pertaining lay participation, but by the history of each country's legal system. While the specific circumstances of Ghana and Poland are entirely distinct, there are general commonalities that can be

[159] *See supra* notes 74-76, 134-37 and accompanying text.
[160] GHANA CONST. OF 1992 art. 19, 125.
[161] POLAND CONST. OF 1997 art. 182.
[162] Adamiec-Witek, *supra* note 140, at 60.
[163] Adamiec-Witek, *supra* note 140, at 60.
[164] *See supra* notes 90-113 and accompanying text.

extracted from their respective histories. First, both constitutions are deeply influenced by long periods of foreign occupation. Both nations share concerns about the traditions enshrined in their constitutions being a product of foreign influence, largely inconsistent with the actual history of the nations themselves. One of the core purposes for even adopting a constitution in the first place is as a symbol of national unity, and a way to engrave the values and customs of a country into a foundational legal document. When that document reflects the values of an entirely different country, questions of legitimacy will naturally arise. In Ghana, the constitutionalization of the jury system can clearly be attributed to colonial rule, and the transplant of the English legal tradition.[165] Not only is the individualistic conception of the impartial jury at odds with the community-centric structure of Ghanaian society, it also serves as a looming legacy of colonial oppression.[166] The citizens clearly do not value the jury system as central to protecting judicial independence, and this perception can potentially be attributed to the origin of lay participation in the first place. Somewhat similarly, while Poland implemented a jury system during its brief period of independence in the early twentieth century, the ultimate shift to a system of lay assessors can be directly attributed to Soviet occupation and influence.[167] Mixed court systems are intertwined with socialist values, and foreign socialist influences are the only reason why this system made its way to Poland in the first place, as a civil law judge's traditional role is that of a technical expert, not a public servant.[168] Poland's continued preservation of the lay judge system can likely be attributed not primarily to a return to Polish values, but rather to the silent acceptance of the system of lay participation that existed at the time the constitution was written. Thus, the continued reduction of the use of lay judges may be a reflection of their relative non-existence in the roots of the Polish tradition prior to Soviet occupation.

Given the realities of why each system exists in its current form, it is still valuable to assess how each system achieves the constitutional goal of safeguarding substantive judicial independence. One similarity between the two systems is the scope of lay participation, meaning the instances in which the

[165] *See supra* Part II and accompanying text.
[166] *See supra* Part II and accompanying text.
[167] *See supra* notes 129-33 and accompanying text.
[168] *See supra* notes 129-33 and accompanying text.

public participates in the administration of justice. In both systems, despite lay participation being quite limited generally, lay persons are still specifically required to participate in the adjudication of the criminal cases with some of the heaviest looming sentences. This reflects a view that judicial impartiality is of the utmost importance in these cases, and public participation in the decision-making process protects the substantive fairness of that process. Thus, from a theoretical and symbolic standpoint, it can be argued that Ghanaian juries and Polish mixed courts both have similar normative value. However, in practice, their value is questionable. This is potentially more understandable in the Polish system, as although lay judges are technically empowered with equal authority to judges in deliberations, the opinion and reasoning of the judge will always dominate and guide the proceedings in practice. Meanwhile, Ghanaian juries have proven ineffective not because they cower to the will of the judge, but because the participants simply do not invest themselves into the process. When the jurors themselves do not embrace the importance of their role in protecting the impartiality of the court, and are often biased to begin with given the realities of Ghanaian society,[169] the abstract theory behind the jury's existence is reduced to just that. Thus, while the mixed court and jury systems entail very different roles for citizens in the judicial decision-making process, they are meant to serve the same normative goals. However, for their own unique reasons, they leave much to be desired in the context of Ghanaian and Polish law.

Lastly, it is fascinating to compare the criticisms that both systems face from the public, as people of both countries engage in discourse about abolishing lay participation entirely. Given the distinct structure of the respective systems, they face distinct criticisms. In Ghana, the focus is on competence and efficiency; there is no utility in having a jury if the jurors are both incapable of and unwilling to fulfill their duties. These criticisms are not necessarily tied to the structure of the law as it pertains to the selection and implementation of the jury system, but rather the societal attitude towards the legitimacy and value of juries. On the other hand, most of Poland's criticisms of lay judges are rooted in the selection process and structure of the mixed court system. Poland's requirements purport to increase competence,

[169] *See supra* Part II and accompanying text.

but not without forfeiting the possibility of lay judges embodying a fair representation of the population. Having elections, and heightened baseline requirements for participation in those elections, distances lay judges from the general population, which contravenes the core justification for making lay persons a part of judicial decision-making in the first place. Ultimately, both systems do share the criticism of elongating the judicial process, and the costs of implementation simply paling in comparison to the benefits of lay participation

CONCLUSION

The theoretical value that lay participation offers to a constitutional system is undeniable. Incorporating public representation into judicial decision-making serves as a constitutional protection of both the rights of the people and the independence of the judiciary. However, as England's history clearly illustrates, this conception of lay participation evolved with time in a particular set of circumstances, and no one form of public participation in the judiciary is inherent to the principles of fair democracy. Additionally, lay participation does not even garner mention in some modern conceptions of judicial independence, and is notably omitted Albert Blaustein's famous "Constitutional Checklist", which represents a modern approach to constitution-building through a Western lens.[170] Thus, the international constitutional focus seems more tailored to broadly safeguarding judicial independence and the right to fair trial, while viewing lay participation as a tool to potentially bolster these safeguards, but not as a necessity that is inherent to them. Examining the state of lay participation in Ghana and Poland shows that there is limited utility to addressing lay participation in a constitution without firm historical footing to do so. Enshrining lay participation in a constitution has both legal and symbolic effects. Legal systems and outcomes are practically shaped, at least to some extent, by lay participation. Additionally, constitutionalizing lay participation sends a message of devotion to judicial independence and the substantive fairness of judicial decisions, and also assigns value and legitimacy to a specific form of citizen participation. Ghana, for instance, binds itself to the jury system in its constitution, and thus

[170] *See* ALBERT P. BLAUSTEIN, FRAMING THE MODERN CONSTITUTION: A CHECKLIST 4-16 (1994).

criticisms of the jury become inherently intertwined with the legitimacy of the entire legal framework of the country.[171] Meanwhile, in Poland, it is clear that simply stating citizens will participate in the administration of justice does not provide almost any value to the legal system in itself, but at least serves a symbolic purpose.[172]

Lay participation does not derive practical value from its mere existence in the law; it derives value from public commitment, and the extent to which it instills the public with a sense of confidence in the judiciary.[173] Thus, the form of lay participation a country implements in a constitution must be carefully tailored to that country's history and culture, if it is included at all.[174] Just like any provision of a constitution, lay participation should represent values important to the particular society, and should not be adopted simply because it has worked somewhere else. As seen in Ghana and Poland, when the basis for lay participation is the influence of another country, it creates a climate of confusion and criticism. The English jury is not "the very palladium of free government"[175]; it is the "the very palladium of free government" *in the English tradition*. There is a reason why international law does not take an affirmative stance on lay participation, and why many countries do not address the issue in their constitutions, and that is because its value in one tradition cannot be seamlessly transplanted into other traditions.[176] While the normative justifications for lay participation implicate it as a safeguard of the right to fair trial and the general concept of judicial independence, it will not play such a role in certain forms and contexts. As Ghana and Poland demonstrate, focusing more on these abstract normative justifications than on the history and tradition of the country itself will result in lay participation causing more conflict than it serves justice in a constitutional system.

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[171] *See supra* Part II and accompanying text.
[172] *See supra* Part III and accompanying text.
[173] *See* Turenne, *supra* note 17, at 19-20 ("[I]n order to account for judicial impartiality and judicial independence, any discussion on the need for a fair reflection of the community in the judicial institution would seem better addressed not by reference to 'representation' but by reference to public confidence in the judiciary.")
[174] *See* Turenne, *supra* note 17 and accompanying text.
[175] *See* Hamilton, *supra* note 6 and accompanying text.
[176] *See supra* Part I and accompanying text.