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TABLE OF CONTENTS

<i>Diemut Majer: Peter Saladin (1935–1997)</i>	2
<i>Christoph Schmetterer: Der strafrechtliche Schutz von Kaiser und Kaiserhaus in Österreich von 1848–1918</i>	12
<i>Astrid Lorenz: Parties and Rules. Constitution-making in the East German Länder after 1990</i>	28
<i>Andrew Watson: Victorian Jury Court Advocacy and Signs of Fundamental Change</i>	36
<i>Patrizia Resta: The Revenge of Soghomon Tehlirian</i>	45
<i>Javier Belda Iniesta: The Pleasure of Privacy: Confession and Inquisition as Means to Cause the Correction of Sinful Consciences around the IV Lateran Council</i>	54
<i>Rudransh Sharma: History of Legal Profession in India</i>	60
<i>János Jusztinger: Dogmatics of Criminal Law and the Roman Jurisprudence</i>	73
<i>József Benke: The Remembrance of ‘Praetor Paulus’ in Mid-Tudor England</i>	79
<i>Csaba Cservák: Development Span of the Hungarian Governmental Forms (in an International Comparison)</i>	85
<i>Ibolya Katalin Koncz: Divorce and Undeserving of Permanent Alimony according to the Practices of the Hungarian Royal Curia</i>	91
<i>Iván Halász: The Development of Czechoslovak, Polish and Hungarian Foreign Affairs Administration between the Two World Wars (1918–1939)</i>	96
<i>Dávid Klemm: An Attempt to Establish the European Army: The Plevan Plan</i>	105
<i>Przemysław Dąbrowski: The Structure and Powers of the Councils of State in the Kingdom of Poland between 1815 and 1867</i>	110
<i>Maria Lewandowicz: On the Universalist Heritage in the Codification of Private Law in Poland and Switzerland in the 19th and 20th Century</i>	115
<i>Lenka Šmídová Malárová: „Causa legitimae absentiae“ in Legal Praxis of the Medieval Town Law in Moravia</i>	125
<i>František Emmert: The Expansion of so-called Reich Citizenship in the Czech Territories during the War Years and its Post-war Consequences</i>	130
<i>Johan Schwegl: The Fundamental Events within the Development of Central Banking in the Czech Lands</i>	135
<i>Miriam Laclavíková, Andrea Olšovská: Besondere Arbeitsbedingungen von Frauen im Hinblick auf den Schutz vom Wert der Mutterschaft auf dem Gebiet der Slowakei – Vergangenheit vs. Gegenwart</i>	140
<i>József Szalma: Einfluss der deutschen Willens- und Erklärungstheorie auf europäische zivilrechtliche Kodifikationen und Theorie über die Willensgeschäfte - mit besonderer Berücksichtigung des serbischen Privatrechts</i>	146
<i>Dunja Pastović: “Defect of Sex”: Exclusion of Women from Jury Service in Istria 1873–1918</i>	155
<i>Arijana Kolak Bošnjak: The Flip Side of Freedom. The Attitude towards Pro-Hungarians in Banal Croatia in 1848/49</i>	172
<i>Engjëll Likmeta: Some Reflections on the Delicts of the First Criminal Code of the Republic of Albania</i>	178
<i>Marina A. Baratova: The Evolution of Russian Housing Law during the 20th Century</i>	186
<i>Oleksandr Gavrylenko, Oksana Skryl: Legal Regulation of Civil Contracts in Ancient City-States of the Black Sea Northern Coast</i>	190

READERS REACT

- Gedanken zum „Recht auf die Heimat“
- 201

BOOK REVIEWS

Allerlei Rechtsgeschichten - von Hammurabi bis zum Code civil. Ein Blick auf die Schriftenreihe des Rechtshistorischen Museums Karlsruhe	204
Das ABGB im Spiegel der rechtshistorischen Literatur	207
<i>Guy Burak: The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire</i>	210
<i>Wilfried Hartman, Kenneth Pennington: The History of Byzantine and Eastern Canon Law to 1500</i>	216
<i>Julian Lubini: Die Verwaltungsgerichtsbarkeit in den Ländern der SBZ/DDR 1945–1952</i>	217
<i>Gerhard Strejcek: Erlerntes Recht. Zur Ausbildung von Juristinnen und Juristen an der Wiener Universität 1365–2015</i>	219
Guidelines for authors	220

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“Defect of Sex”: Exclusion of Women from Jury Service in Istria 1873–1918*

Dunja Pastović**

Abstract

Upon adopting the institution of jury from English Common Law, European continental legislation also took the view according to which jury service was reserved exclusively for men. The exclusion of women from jury service was also adopted by the Austrian legislator who explicitly prescribed male sex among the prerequisites for performing jury service. Legal theorists did not offer any explanation for such a decision. Only with the expressing of demands for the introduction of jury service for women at the beginning of the twentieth century did the opponents of these demands start to express arguments against the idea of female jurors. This paper will give a brief overview of the legal and social status of women in Istria and their potential impact on the ability to perform jury duty. Emphasis will be placed on showing the reasons and opinions (expressed in legal literature, parliamentary debates and the press) why women were considered incapable of performing jury service until the collapse of the Austro-Hungarian Monarchy.

Key words: women; jury service; Istria; Austrian legal system; criminal procedure; period from 1873 to 1918.

1. Introduction

The history of women and jury service is one of the systematic exclusion, reflecting the exclusion of women from civic and political life and dating back to the English common law. Sir William Blackstone, in his famous eighteenth century *Commentaries* on the common law of England, gave his famous rationalization for women’s disqualification as jurors. Blackstone defined a jury as consisting of “twelve free and lawful men” (*liberos et legales homines*) and continued to explain that: “Under the word *homo* also, though a name common to both sexes, the female is however excluded, *propter defectum sexus*”.¹ Accordingly, women were disqualified from jury service “on account of the defect of sex”, that is, their sex was a legal defect that made them intrinsically ineligible for jury service. The exception to women’s exclusion from the jury was the “jury of matrons” which could be empanelled when a possible pregnancy affected an inheritance claim or the scheduling of a female prisoner’s execution.²

During the period of Austro-Hungarian rule, the Margraviate of Istria was part of the Austrian Littoral (together with Princely County of Gorizia and Gradisca and the city of Trieste)

and encompassed the Istrian peninsula as well as the islands of Krk, Cres and Lošinj. The October Diploma of 1860 and February Patent of 1861 granted Istria a separate diet (the Istrian Provincial Diet) that elected representatives for the Imperial Council in Vienna until 1873, after which representatives were elected directly. After the introduction of the jury into the criminal procedure in 1873, only one jury court was active in Istria – the one at the Regional court in Rovinj. It had jurisdiction over the entire territory of Istria save for four northern districts which were under the jurisdiction of the jury court in Trieste. The requirements for performing jury service were prescribed in the § 1 Jury List Compiling Law of 23 May 1873³, which directly stated that only literate men at least 30 years of age with local citizenship in one of the municipalities of the Austrian part of the Monarchy and at least one year of domicile were fit for jury service. The last two requirements were determined alternatively: paying a certain amount of direct taxes (tax census) or possessing a certain level of education and belonging to a certain profession (intellectual census).⁴

Since the Austrian legislator explicitly excluded women from performing jury service without providing any explanation for it, the goal of this paper will be to determine the reasons for

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¹ BLACKSTONE, William, *Commentaries on the Laws of England. Book the Third*. The fifteenth edition, with the last corrections of the author; and with notes and additions by Edward Christian, London, 1809, pp. 351, 362.

² FORBES, Thomas R., *A Jury of Matrons, Medical History*, Vol. 32, Iss. 01, January 1988, pp. 23-33; OLDHAM, James, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries*, 2006, New York, pp. 80-114.

³ Gesetz vom 23. Mai 1873, betreffend die Bildung der Geschwornenlisten, *Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder*, Jhrg. 1873., St. XLII., Nr. 121., Wien, 1873, pp. 503-508.

⁴ The mentioned intellectual census determined that jury service, regardless of the amount of taxes paid, can be performed by attorneys, notaries, professors and high- and middle-school teachers as well as people who have attained a PhD at one of the universities in the Monarchy.

such a decision and to show the influence this exclusion had on the position of Istrian women regarding their intellectual, economic, legal and political capabilities in the period from 1873, when jury was introduced as a general institution into criminal procedure, until the Italian occupation of Istria in November 1918. The first part of this paper will present the legal and social framework which determined the position of women in Istria with emphasis on the prospects of their education and employment, taking into account literacy as well as the tax and intellectual census as the prescribed requirements of performing jury service. The second part of this work will present a detailed analysis of the position of women envisioned in the criminal procedure and the rights and roles which could be afforded to them despite their exclusion from jury service. Here we shall also touch upon certain characteristics of the functioning of the Istrian jury in cases when the accused was a woman. The third and central part of the paper is devoted to a discussion of women's jury service within the Austrian legal system from the beginning of the 20th century. By analyzing legal literature, stenographic records of parliamentary debates and newspaper articles, we reveal the main arguments presented by the supporters and opponents of women's jury service. In addition, we shall try to draw conclusions on the effect the debate over women's jury service had within the frame of the traditional Istrian society.

2. The limitations on women's legal and social position in Istria

The legal status of women in Istria was more precisely defined by the Austrian Civil Code, which came into force there in June 1815.⁵ The Austrian Civil Code was the most progressive of its time, securing women a high degree of economic independence, which they had already enjoyed since the late Middle Ages thanks to the Istrian marriage pattern.⁶

According to the Austrian Civil Code there was no fundamental guardianship of men over women, married women didn't lose their legal capacity, and there was no difference in legal status between married and unmarried women. The Austrian Civil code conferred married women full legal rights, separately from those of their husbands. In addition, Istrian women retained property rights over estates upon marriage. Married

women also had the legal capacity to contract and to take legal action. Despite personal legal subjection to her husband regarding herself and matters of mutual concern (the Austrian Civil Code declared the husband to be head of the family, with full rights of guardianship over the children), a wife did not hand her property over to her husband when she married. An unmarried woman enjoyed, for the most part, the same rights and responsibilities in the private sphere as men; she was an independent legal actor who could manage her possessions by herself and was capable of suing or being sued.⁷ Despite the general legal equality of women and men according to Austrian Civil Code, this Code also contained discriminatory provisions: for example, women couldn't be the guardians of their children or witnesses in wills, land registry documents, and to the simplest legal documents.⁸ To conclude, the Austrian Civil Code, in its treatment of women, was unsurpassed in contradictions and presupposed a world split into gendered domains, where the husband was the family's public representative, while his wife was constricted to the boundaries of their home.

In continental Europe women also suffered from a restriction regarding what were called "virile offices". These were activities that might involve a person if not in public life then at least in life outside the domestic sphere.⁹ According to this line of thinking, the political nature of the jury helps explain why women could appear in court as litigants and as witnesses, but not as judges, attorneys, or jurors. All the offices in the judicial branch of the public service formed an immediate delegation of sovereignty and their holders were direct representatives of the monarch, in whose name they dispensed justice. Consequently no judicial office could be accessible to women. The question of the admissibility of women to a jury received the same answer as the question of their appointment to the judicial office.¹⁰

It should be noted that some Istrian women possessed the right of municipal vote and the right to vote for the Istrian Provincial Diet. In accordance with the laws relating to municipal councils (from 1849 on) and provincial diets (from 1861 on), which based representation by curiae on property, income and higher education, women were allowed to vote, although only by male proxy, if they paid a certain amount of taxes on real estate. Indeed, Istrian women of full legal age and capacity could vote for the curia of great landowners in the Istrian provincial

⁵ Patent vom 21ten Januar 1815., *Seiner Majestät des Kaisers Franz Gesetze und Verfassungen im Justiz-Sache. Für die Deutschen Staaten der Oesterreichischen Monarchie. Von dem Jahre 1812 bis 1817*, Nr. 1126, Wien, 1819, p. 257.

⁶ The Istrian marriage pattern had considerable influence on the position and role of women in marriage, family, and society in general. The Istrian marriage pattern considered women to be equal to men regarding economic rights, which meant that women were protected after the husband's death: the woman was the owner of one-half of the house and one-half of the goods, and thus her basic existential needs were guaranteed. A woman was protected in such a marriage, although her legal competence was only partial; she could decide what to buy or sell only with her husband's agreement. However, the husband could not sell without his wife's agreement either (not even his own property which he had inherited from his parents) so that his wife could not have ended up in debt because of his extravagance. MOGOROVIĆ CRLJENKO, Marija, *The Position of Woman in «Istrian Marriage Pattern» (Istria in the 15th and 16th Centuries)*, in: BELLAVITIS, Anna; FILIPPINI, Nadia Maria; PLEBANI, Tiziana (ed.), *Spazi, poteri, diritti delle donne a Venezia in età moderna*, Verona-Bolzano, 2012, pp. 21-30.

⁷ DERENČIN, Marian, *Tumač k oběmu austrijskomu građanskom zakoniku*, Knjiga I., Zagreb, 1880, pp. 137-138, 142-144, 167-168; UNGER, Joseph, *System des österreichischen allgemeinen Privatrechts*, Erster Band., Leipzig, 1856, pp. 279-281.

⁸ For more information on the position of women according to the Austrian Civil Code, see: PITTER, Viktor, *Die rechtliche Stellung der Frau in Österreich. Eine Zusammenstellung der wichtigsten, die besondere Stellung der Frau im privaten und öffentlichen Rechte betreffenden Vorschriften*, Wien und Leipzig, 1911.

⁹ FRAISSE, Geneviève; PERROT, Michelle (ed.), *A history of women in the West. IV. Emerging Feminism from Revolution to World War*, Belknap Press of Harvard University Press, 2000, p. 87.

¹⁰ OSTROGORSKI, Moisei, *The Rights of Women. A Comparative Study in History and Legislation*. Translated under the author's supervision, London, 1893, pp. 131, 136-138.

diet.¹¹ This curia was founded upon the old-fashioned conceptions which considered property as the principal source of all rights whilst almost ignoring the personality of its possessors. So the enjoyment of the electoral right was recognised in the class of great landowners as belonging to all its representatives, whoever they were, corporations as well as individuals, and especially women as well as men. It means that the legislator was far from regarding this electoral right as a first instalment of the political suffrage for women.¹²

3. Educational and employment opportunities for Istrian women

When considering the question of women's participation in trials by jury, the intellectual capability of women was also brought into question. The intellectual capabilities of a person were mostly judged on the basis of their education. Especially from the nineteenth century on, the importance of education

grew since it became the prerequisite for advancement and the attainment of a desirable social status. For women, education, or better said the lack of it, became the precondition for the resolution of the so-called women's question, especially because the promotion of education represented an important step towards the attainment of political rights for women; that is, educated women achieved a certain degree of economic and social independence.

The level of education required for jury service was the ability to read and write and, even were they able to be jurors in spite of their sex, it is doubtful that Istrian women could have fulfilled this prerequisite. Namely, illiteracy was one of the basic problems of the Istrian populace; for example, in 1880 it encompassed as much as 77% of the population. The numerical data points to the fact that illiteracy was higher among women than among men which can be seen from the following table.¹³

Year	Can read and write		Can only read		Cannot read or write	
	men	women	men	women	men	women
1880	28,03 %	18,34%	2,87%	3,07%	69,10%	78,59%
1890	37,27%	27,05%	2,16%	3,00%	60,57%	69,95%
1900	49,53%	39,14%	1,63%	2,05%	48,84%	58,81%
1910	65,18%	51,80%	1,06%	1,57%	33,76%	46,63%

Data on the literacy of the population from 1880, 1890 and 1900 encompassed all inhabitants of Istria over 6 years of age, since compulsory school attendance was introduced for all children at that time. However, since it was difficult to expect that 6-year-old children would know how to read and write at the very beginning of their education, the minimum age for the census was raised to 10 years in 1910. Therefore, the significant increase of literacy among Istrians should also be ascribed to this factor. Should we also take into account the national component, it becomes apparent that more than half the illiterate women in Istria in 1910 were Croats (58.82%), followed by Italians (24.65%), and finally by Slovenians (14.82%), who were also the least numerous in Istria.¹⁴

The causes of the illiteracy of female children in Istria include the neglect of a large number of parents, who regarded the need for their children to regularly attend school indifferently and with a lack of enthusiasm, the fact that schools were usually far away from the homes of children, and the loss of manpower in agriculture. Education was not seen as economically

productive for girls but rather as a luxury only the rich could afford. For example, in the school year 1904/1905, only 18,827 of 25,865 girls for whom school attendance was compulsory actually went to school.¹⁵ The main reason for this was the lack of schools in many settlements, mostly those inhabited by Croats. Another factor was the Provincial School Council in Istria, which interpreted § 59 of the Imperial Elementary School Law of 1869 as relieving children who lived over 4 km from the school from compulsory school attendance, rather than encouraging the construction of necessary schools.¹⁶ Consequently, illiteracy was highest in the inland part of Istria, which was populated by Croats, as opposed to the littoral area, which was populated by Italians and which had a more extensive network of primary schools. Therefore, ethnicity played a significant role in the educational and employment opportunities for women in Istria.¹⁷

In Istria, all children of both sexes from the ages of six to twelve had to attend public primary school, followed by evening repetition classes until the age of 14 („Abend-

¹¹ BARBALIĆ, Fran, *Prvi Istarski sabori (1861.-1877.)*, Rad Jugoslavenske akademija znanosti i umjetnosti, knjiga 300, Zagreb, 1954, p. 286.

¹² OSTROGORSKI, 1893, pp. 70-76, 196.

¹³ Table created according to: *Oesterreichische Statistik*, XXXII. Band, 1. Heft, Wien, 1892, pp. XXI-XXII; *Österreichische Statistik*, LXIII. Band, 2. Heft, Wien, 1903, pp. XLV-XLVI; *Österreichische Statistik. Neue Folge*, 1. Band, 2. Heft, Wien, 1914, pp. 40-41.

¹⁴ *Österreichische Statistik. Neue Folge*, 1. Band, 3. Heft, Wien, 1914, pp. 88-89.

¹⁵ *Die Unterrichtsanstalten für die weibliche Bevölkerung der im Reichsrat vertretenen Königreiche und Länder der österreichisch-ungarischen Monarchie*, Verlag des Bundes österreichischer Frauenvereine, Wien, 1908, p. 4.

¹⁶ In accordance with the provisions in effect, attendance was compulsory if the school was within 4 km of one's place of residence. DEMARIN, Mate, *Hrvatsko školstvo u Istri*, Zagreb, 1978, p. 60; WIGGERMANN, Frank, *K. u. K. Kriegsmarine und Politik. Ein Beitrag zur Geschichte der italienischen Nationalbewegung in Istrien*, Studien zur Geschichte der Österreichisch-ungarischen Monarchie, Band XXVIII., Wien, 2007, p. 127.

¹⁷ BEUC, Ivan, *Istarske studije. Osnovni nacionalni problemi istarskih Hrvata i Slovenaca u drugoj polovini XIX i početkom XX stoljeća*, Zagreb, 1975, pp. 41-42.

Wiederholungsschule“).¹⁸ The minimum eight-year school education encompassed five grades of public primary school („Volksschule“), which were followed by three more grades of junior secondary school, that is, „citizens’ school“ („Bürger-schule“). The „citizens’ school“ was conceived as the terminal school for the great majority and was designed to blend in with the first years of apprenticeship in a craft. Rural primary schools frequently offered mixed classes without arousing much protest because poor rural Istrian municipalities could barely afford the expense of even one school.¹⁹ Separate schools for boys and girls could be found only in larger towns populated by an Italian minority. For example, there were a total of 265 public primary schools in Istria at the end of 1914, including 23 boys’ schools, 21 girls’ schools and as many as 221 mixed schools. There were four junior secondary schools: one for boys (145 pupils) and three for girls (216 pupils).²⁰

Gender differences were probably less significant at the level of elementary education than at the level of secondary or higher education. Minimal public support was given to secondary education for girls. Girls’ education beyond the elementary level relied on parental self-help. It is clear that girls were not expected to attend public school beyond the elementary level.²¹ This can also be seen from the fact that there was only one girls’ lyceum on the entire territory of Istria, founded in Pula in 1902 and at which classes were held in Italian.²² The establishment of a girls’ lyceum which aimed at the higher and broader education of women and which covered almost the same ground as the boys’ gymnasiums represented a big step forward. In the school year 1913/1914, this lyceum was attended by only 181 pupils.²³ In addition, certain boys’ gymnasiums in Istria (there was a total of six of them) started accepting girls as guest students („Hospitantinnen“) during the first decade of the 20th century. For example, there were 20 female guest students enrolled at the Croatian gymnasium in Pazin in 1912²⁴, and 19 female guest students at the German gymnasium in Pula in 1913.²⁵

A very important achievement was the admission of girls to higher education institutions and, finally, universities: in 1897 to the humanities and in 1900 to medicine and pharmacy, but to legal studies only in 1919. The schools where matriculation examination for Istrian girls could be held included the state gymnasium in Trieste (in German) and the state gymnasium in Koper (in Italian).²⁶ In 1914, the percentage of female students at the universities in the Austrian part of the Monarchy was only 8.19%, or 2,275 students. Since the demands for founding a university in Trieste with Italian where classes would be held in Italian were not met, Istrian students (who were few in number) attended universities in the Austrian part of the Monarchy, which led to increased studying expenses. For example, in the summer semester of 1914, only 233 Istrian students attended university, most of them in Graz, followed by Vienna, then Prague, and finally Innsbruck.²⁷ In addition, there existed the possibility of attending the university in Zagreb – there were 37 Istrians studying in Zagreb in 1907/1908.²⁸ These numbers should make it clear that it was very difficult to obtain a university education, not only for Istrian women, but also for the entire population in Istria at the beginning of the 20th century. Therefore, the number of women possessing a university education in Istria was negligible.

As follows from the above, the opportunities for girls to gain higher or even basic education were so much less than those for boys so that the proportion of women among the educated population of Istria was quite low. So, it should be noted at the outset that the number of women who were, as practical matter, excluded from jury service solely because of their sex was probably very small when we take in consideration the other legal requirements for it.

Regarding employment opportunities, Istria was, according to occupational statistics from 1910, a mostly rural province where as much as 61.81% of the population worked in agriculture.²⁹ While the developed European countries were by 1910

¹⁸ Gesetz vom 4. April 1870, wirksam für die Markgrafschaft Istrien, womit auf Grund des Artikels 75 des Reichsgesetzes vom 14. Mai 1869 die Absätze 1 und 3 des Artikels 21, der Absatz 2 des Artikels 22 und die Artikel 28 und 38 des bezogenen Gesetzes abgeändert werden. *Gesetze und Verordnungen der Landesbehörden für das österreichisch-illirische Küstenland*, Jhrg. 1870., St. XI., Nr. 23., Triest, 1870, pp. 88-89.

¹⁹ In the observed period, mixed education was perceived as a threat to morality even when boys and girls had plenty opportunity to mingle outside the classroom. There was compulsory gender segregation in junior secondary school. However, an effort was made already in public elementary school to separate boys’ and girls’ classes, if the availability of teaching staff made it practical. Coeducation, i.e. the simultaneous education of girls and boys in the same classroom, was allowed in smaller and poorer municipalities. *Die Unterrichtsanstalten für die weibliche Bevölkerung der im Reichsrat vertretenen Königreiche und Länder...*, 1908, pp. 2-3.

²⁰ *Österreichische Statistik. Neue Folge*, 17. Band, 3. Heft, Wien, 1919, pp. 173, 175.

²¹ JACOBI, Juliane, *The Influence of Confession and State: Germany and Austria*, in: ALBISETTI, James C.; GOODMAN, Joyce; ROGERS, Rebecca (ed.), *Girls’ Secondary Education in the Western World: From the 18th to the 20th Century*, New York, 2010, pp. 41-58.

²² MILANOVIĆ, Božo, *Hrvatski narodni preporod u Istri, Knjiga II (1883-1945)*, Pazin, 1973, p. 384.

²³ *Österreichische Statistik. Neue Folge*, 17. Band, 3. Heft, Wien, 1919, p. 180.

²⁴ Sa hrvatske gimnazije u Pazinu, *Naša sloga*, No. 42, Pula, 17 October 1912, p. 2.

²⁵ *Programm des k. k. Staatsgymnasiums in Pola für das Schuljahr 1913/14.*, XXIV. Jahrgang, Pola, 1914, pp. 55-57.

²⁶ A notable circumstance was that there was no possibility of holding matriculation exams in Croatian on the territory of the Austrian Littoral, despite the fact that Croatian was the native language of two-thirds of the population of Istria. Therefore, the candidates had to travel to Split, Dalmatia to take the exam in Croatian, as a state gymnasium was situated there. MARTINAK, Eduard, *Frauenstudium*, in: MISCHLER, Ernst; ULBRICH, Josef (ed.), *Österreichisches Staatswörterbuch. Handbuch des gesamten österreichischen öffentlichen Rechtes*, Zweite wesentlich umgearbeitete Auflage, Zweiter Band. F.-J., Wien, 1906, pp. 146-147.

²⁷ *Österreichische Statistik. Neue Folge*. 17. Band, 3. Heft, Wien, 1919, p. 5.

²⁸ Statistika istarskog sveučilišnog djništva 1907-08., *Naša sloga*, No. 8, Pula, 20 February 1908, p. 3.

²⁹ Only 16.22% of the population worked in the industry and crafts, 9.08% in trade and transportation, while 12.89% were employed in public and military service or free professions. *Österreichische Statistik. Neue Folge*. 3. Band, 6. Heft, Wien, 1915, pp. 2-6.

already undergoing or had completed the main phases of the Second Industrial Revolution, the major part of Istria had only begun to experiencing significant effects brought about by modernization, industrialisation, and urbanisation. The objective economic backwardness of the rural population of Istria was aggravated by its social backwardness and reflected the economic and political dependency of the Croatian element upon the economically more advanced Italian element.³⁰

According to occupational statistics from 1910, agriculture in Istria accounted for the employment of 63.17% of all economically active women. The percentage of women employed in industry was only 15.73%. On the eve of the First World War, there were around 20 factories in Istria, where women worked mostly as cheap unqualified workers in fish processing, the manufacture of textiles, wax, soap, alcoholic beverages, construction materials, or in the tobacco factory in Rovinj.³¹ A total 9.58% of economically active women employed in trade and transportation, while 11.52% were employed in public and military service or free professions. In Istria as well as in the rest of Europe, the career of teacher in girls' schools was the first to become open to women. Later this was extended to boys' primary schools, and partly also to the first forms of schools for intermediate education. In 1910 the percentage of women employed in the educational system was as high as 62.04%. Outside the sphere of public education, women obtained access to subordinate situations in the postal, telegraph, and railway departments.

All the above mentioned facts about the employment opportunities of Istrian women suggest that property-ownership requirements (concretely the payment of a certain amount of direct taxes) also disqualified a great majority of the adult female population from becoming jurors.

4. Gender and crime: the position of Istrian women in criminal procedure law 1873–1918

Although doubts about their capacity were expressed in many areas, women were generally not considered incapable of committing crimes and answering for them in court.³² The Austrian Criminal Code of 1852 was in force in Istria during the examined period, and it classified crimes into three categories: felonies, misdemeanours, and petty offenses.³³ Felonies and misdemeanours committed through the press, political felonies and misdemeanours and severe felonies punishable by more than five years in a dungeon were under the jurisdiction of jury courts.

The provisions of the Criminal Procedure Law of 23 May 1873,³⁴ which came into force in Istria on 1 January 1874, same as in the other kingdoms and principalities represented in the Imperial Council, were principally formulated to be gender neutral. In contrast to civil procedure, women in criminal procedure had the same rights as men. The legal institution of legal guardianship of women by a male did not exist in criminal procedure. However, a more detailed analysis of its provision allows one to notice certain deviations from the principle equality of men and women.

Therefore it is possible to argue that a woman's legal status within the framework of criminal procedure was twofold because, on one hand, she could represent herself during the procedure in cases of facultative formal defence, where it is important to note that a formal defence was mandatory in cases which were within the purview of the jury.³⁵ Furthermore, in cases of offences that were not prosecuted *ex officio*, a woman could act as a private plaintiff.³⁶ A woman could act as a private plaintiff in cases of felonies and misdemeanours committed through the press. At

³⁰ DUKOVSKI, Darko, Uvod u procese i procesi modernizacije u Istri na prijelomu stoljeća (1880.-1910.), *Acta Histriae*, Vol. 16, Iss. 3, 2008, pp. 241, 257.

³¹ BENUSSI, Bernardo, *Storia documentata di Rovigno*, Trieste, 1888, p. 10-11, 248-250, 387; *Die österreichisch-ungarische Monarchie in Wort und Bild. Das Küstenland.* (Görz, Gradiska, Triest und Istrien.), Wien, 1891, pp. 348-355.

³² FRAISSE; PERROT, 2000, p. 92.

³³ Kaiserliches Patent vom 27. Mai 1852, wodurch eine neue, durch die späteren Gesetze ergänzte, Ausgabe des Strafgesetzbuches über Verbrechen und schwere Polizeiübertretungen vom 3. September 1803, mit Aufnahme mehrerer neuer Bestimmungen, als alleiniges Strafgesetz über Verbrechen, Vergehen und Uebertretungen für den ganzen Umfang des Reiches, mit Ausnahme der Militärgrenze, kundgemacht, und vom 1. September 1852 angefangen in Wirksamkeit gesetzt wird, *Allgemeines Reichs-, Gesetz- und Regirungsblatt für das Kaiserthum Oesterreich*, Jhrg. 1852., St. XXXVI., Nr. 117., Wien, 1852, pp. 493-591.

³⁴ Gesetz vom 23. Mai 1873, betreffend die Einführung einer Strafproceß-Ordnung., *Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder*, Jhrg. 1873, St. XLII, Nr. 119, Wien, 1873, pp. 397-501.

³⁵ § 39-41 of Criminal Procedure Code of 23 May 1873.

³⁶ § 46 of Criminal Procedure Code of 23 May 1873. The Criminal Code on Felonies, Misdemeanours and Petty Offenses of 27 May 1852 prescribed which misdemeanours could be prosecuted only on the basis of a private lawsuit of the injured party. These were the following offences: thefts and fraud made between spouses, parents, children, brothers and sisters who live in the same household, only on the demand of the head of the family („das Haupt der Familie“; § 463); misdemeanours against literary and artistic property, on the demand of the injured party (§ 467); defamation of character, on the demand of the injured party (§ 495); public insults and abuse, on the demand of the injured party (§ 496); reproach for a served or commuted sentence, on the demand of the injured party (§ 497); adultery, on the demand of the injured party (§ 503); fornication of a female servant with a minor son or cousin who lives in the house of the employer's family, on the demand of a parent, relative, or guardian (§ 505); and the drunken behaviour of craftsmen or wage earner who works on roofs or scaffolds and work with items which can cause fires as well as servants due to whose negligence a fire could easily break out, on the demand of the artisan or employer (§ 524). MITTERBACHER, Julius, *Die Strafproceßordnung für die im Reichsrathe vertretenen Königreiche und Länder der österreichisch-ungarischen Monarchie vom 23. Mai 1873 und deren Einführungsgesetz*, Wien, 1882, pp. 82, 87.

the main hearing before a jury court, a private plaintiff was particularly entitled to peremptory challenge of the same number of jurors as the accused, to demand a change of question or the posing of an additional second question to the jurors, and to demand the legal instruction the presiding judge gave the jurors be noted in the records of proceedings.³⁷ Research has shown that there were no cases where a woman appeared as private plaintiff or accused in press-related offences heard before the jury court in Rovinj in the period from 1873 until 1918.³⁸ Here it should be stressed that, according to the Austrian Press Law of 17 December 1862, women were capable of holding the office of responsible editor of periodicals and therefore there were no barriers to women appearing as the accused before the jury.³⁹

In cases of felonies or misdemeanours which were prosecuted *ex officio*, a woman as the injured person could file a private law application and thus become a “private participant”. A private participant had the following rights: providing the state attorney and investigating judge the information which served to sentence the defendant or to determine the compensation claim; the right to access the court files during the investigation; the right to attend the main hearing and freely pose questions to the accused, witness and judicial expert; the right to speak during the main hearing for the purpose of making other remarks. Furthermore, at the end of the hearing, after the closing argument made by prosecution, a private participant immediately received the word to point out his claims and to justify them, and also to file those applications which he wanted to be co-decided in the main sentence.⁴⁰

In the part where it standardized investigation and expertise, the Criminal Procedure Code of 1873 also explicitly prescribed that, in cases where it is necessary to examine the body of a female person and in line with the circumstances, that assignment could be entrusted only to male midwives (“Geburtshelfer”) or, in less important cases, female midwives (“Geburtshelferinnen”) instead of physicians or surgeons.⁴¹ This allowed women to perform the service of judicial expert, albeit in a very limited capacity. In § 16 of the Instruction for Midwives of 1874 it was determined that a midwife who was called upon by the judicial authority to perform an examination is always obliged to do so according to her best knowledge and to precisely state what she had determined by her examination in that specific

case.⁴² However, due to the significantly lower level of medical and surgical knowledge among midwives, judges were advised to avoid using the mentioned option if possible. It was considered more acceptable to appoint a midwife as a second judicial expert, where a physician, as the first judicial expert, could give her instructions, pointers, and supervision.⁴³

Naturally, a woman could also act as a witness during criminal procedure, where the probative value of a female witness’s testimony wasn’t brought into question, nor did it differ from the probative value of male witnesses. Consequently, the testimony of a woman in criminal procedure was equal to that of a man’s.

On the other hand, we can also find some discriminatory provisions. For example, in cases where the defendant was underage or under guardianship, only the father or male guardian could appoint a defence lawyer against his will⁴⁴ – the exclusion of the woman as mother is readily apparent here. However, the legislator wasn’t consistent in this matter because he then prescribed that a nullity appeal in favour of an accused minor can be filed against his will only by his or her parents or guardian,⁴⁵ where the word “parents” clearly included the mother. The mentioned provisions were justified by the need for taking special care of accused persons who were not of adult age or who were mentally or physically handicapped, and therefore the law allowed their legal representatives to perform acts for protecting the interests of the will of the accused.⁴⁶

Further, women could not be court witnesses who were supposed to be present during certain enquiries, such as conducting judicial inspections or searching homes or people, because the law explicitly prescribed that only respectable adult men (“Männer”) uninvolved in a given criminal case could fill this role.⁴⁷ Accordingly, the following could not appear as court witnesses: all female persons; men younger than 24; people who due to their criminal records or currently being the subject of a court investigation, or who due to other facts from their private or family lives weren’t held as respectable in the municipality; persons who were involved in a given criminal case; and persons who were not allowed to be sworn in as a witness according to § 170 of the Criminal Procedure Code of 1873. The duty of court witness was to be performed by inhabitants of the municipality where the investigation was being conducted.⁴⁸

³⁷ § 308, 316, 325 of Criminal Procedure Code of 23 May 1873.

³⁸ PASTOVIĆ, Dunja, *Porotno sudenje u Istri od 1848. do 1918. godine* (Unpublished doctoral dissertation), Zagreb, 2012, pp. 273-288.

³⁹ OSTROGORSKI, 1893, p. 175.

⁴⁰ § 47 of Criminal Procedure Code of 23 May 1873.

⁴¹ § 133 of Criminal Procedure Code of 23 May 1873.

⁴² Verordnung des Ministeriums des Innern vom 25. März 1874, mit welcher eine Instruction für Hebammen erlassen wird, *Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder*, Jhrg. 1874, St. IX, Nr. 32, Wien, 1874, pp. 31-33.

⁴³ Normally, two judicial experts were supposed to participate in the judicial inspection. Exceptionally, in cases of lesser importance or when it was dangerous to wait for the arrival of the second judicial expert for the purpose of examination, the judicial inspection could be performed by only one judicial expert. MAYER, Solomon, *Commentar zu der Oesterreichischen Strafproceß-Ordnung vom 23. Mai 1873. Des Handbuchs des österreichischen Strafproceßrechtes II. Band. Zweite Lieferung und Schluß des ersten Theiles des Commentars. § 42-206.*, Wien, 1881, pp. 460-461.

⁴⁴ § 39, Section 2 of Criminal Procedure Code of 23 May 1873.

⁴⁵ § 282 of Criminal Procedure Code of 23 May 1873.

⁴⁶ MAYER, Solomon, *Commentar zu der Oesterreichischen Strafproceß-Ordnung vom 23. Mai 1873. Des Handbuchs des österreichischen Strafproceßrechtes III. Band. Zweiter Theil §. 207-296.*, Wien, 1884, pp. 579-580; MITTERBACHER, 1882, pp. 68, 463-464.

⁴⁷ § 102 of Criminal Procedure Code of 23 May 1873.

⁴⁸ MAYER, 1881, pp. 382-384.

Permission to be present at the execution of a death penalty could, aside from those persons whose presence was necessary according to law, also be granted to honourable male persons (“achtbaren Männern”).⁴⁹ The death penalty was performed by hanging within prison walls or in another closed space, in the presence of a court commission (which consisted of three court members and a clerk), a state attorney, a legal physician, and a priest. The condemned’s attorney and the head and representatives of the municipality where the execution was to take place were informed about the place and time of the execution so that they could be present. Besides them, the execution could be attended by court functionaries, representatives of the state attorney’s office and law enforcement authorities, and the condemned’s closest relatives. If there was adequate space, the execution could also be attended by distinguished male persons.⁵⁰ Therefore, women were excluded from being present at the execution of a death penalty. Namely, by the turn of the eighteenth century, the presence of women at the execution of a death penalty was beginning to clash uncomfortably with an idea that was gaining currency at that time, according to which women were naturally more sensitive and sympathetic than men, and that they were inherently incapable of taking pleasure in the suffering of others.⁵¹ This was in accordance with the then-popular perception of women as the embodiment of domesticity and sentimentality, as keepers of morality and virtue. It was believed that women’s attendance at executions could harm their female delicacy.

Regarding the death penalty, the official statistics note that the number of death sentences rose significantly from 1874, i.e. when jury courts were introduced in Austria.⁵² The main reason for this significant increase of death sentences isn’t the increased number of crimes that were punishable by death, but the fact that the Criminal Procedure Law of 1873 introduced the principle of free evaluation of evidence and more verdicts were pronounced solely according to the evaluation of the jurors, which was based on conscientious assessment of all evidence. Accordingly, when deciding on the defendant’s guilt, there existed a greater possibility that they would interpret the facts as the characteristics of a crime punishable by the death penalty. On the basis of their verdict, the court would issue the prescribed death penalty. Official statistics of the jury court in Rovinj reveal that 49 death penalties were issued from 1881 until 1912, of which only five were applied to women. This isn’t surprising since the total number of women brought before the court was generally significantly lower than the total number of women among the population. This can also be seen in the fact that only 28 women were sentenced for felonies in Istria in 1912, compared to 261 men.⁵³ Although women committed far fewer murders than men, there was less variation regarding the circumstances in which the crime was committed. In all cases, the victim was a person from the convict’s family (e.g. spouse, illegitimate offspring, mother-in-law, father-in-law) and the murders were committed under a strong situational pressure. The following table contains data on female convicts sentenced to death by the jury court in Rovinj during the 1881 – 1912 period.⁵⁴

Year	Crime for which female convict was sentenced to death penalty	Age of female convict	Marital status and occupation of convict	Previous criminal record	Replaced by imprisonment for period of
1883	spousal murder	22	married, farmer’s wife	without previous criminal convictions	18 years
1896	murder by suffocation (by holding victim’s nose and mouth closed); victim was perpetrator’s illegitimate child born after her marriage and whom she considered a barrier to a happy married life	22	married, peasant woman	without previous criminal convictions	8 years
1897	murder (by obstructing the airway); victim was perpetrator’s illegitimate child which had been born the day before	29	unmarried, wage earner	offence of concealment of birth, insult of honour	12 years
1899	murder qualified as treacherous or by stealth (by cutting arteries of victim’s neck); victim was a 65 year old mother-in-law hated by the perpetrator	38	married, hairdresser’s wife	without previous criminal convictions	18 years
1901	incitement to murder qualified as treacherous or by stealth; victim was perpetrator’s father-in-law and the motive was to prevent changes to a will	34	widow, landowner	without previous criminal convictions	life imprisonment

⁴⁹ § 404 of Criminal Procedure Code of 23 May 1873.

⁵⁰ RULE, Friedrich, *Der österreichische Strafprozess unter Berücksichtigung der Rechtsprechung des Cassationshofes*. Dritte durchgesehene Auflage., Prag-Wien-Lepizig, 1895, pp. 244-245.

⁵¹ FRIEDLAND, Paul, *Seeing justice done. The age of spectacular capital punishment in France*, Oxford, 2012, p. 157.

⁵² For example, while only 836 criminals were sentenced to death in the period from 1854 until 1873 (104 of these sentences were executed), 2169 people were sentenced to death in the period from 1874 until 1898, and 74 of these sentences were executed. *Oesterreichische Statistik*, L. Band., 3. Heft, Wien, 1898, p. XXXIII; *Oesterreichische Statistik*, LXI. Band., 3. Heft, Wien, 1902, p. XXXIII. The same conclusion can be found in: *Österreichische Statistik*, LXIX. Band., 3. Heft, Wien, 1903, p. XXV.

⁵³ *Österreichische Statistik. Neue Folge*, 13. Band., 2. Heft., Wien, 1916, pp. 84, 130.

⁵⁴ Table created according to: *Oesterreichische Statistik*, XI. Band., 3. Heft., Wien, 1887, p. XX; *Oesterreichische Statistik*, LIII. Band., 3. Heft., Wien, 1900, p. XXIX; *Oesterreichische Statistik*, LVIII. Band., 3. Heft., Wien, 1902, p. XXVIII; *Österreichische Statistik*, LXIX. Band., 3. Heft., Wien, 1903, p. XXXIX; *Österreichische Statistik*, LXXI. Band., 3. Heft, Wien, 1904, p. LXXIX.

Furthermore, if the convict was pregnant at the time the death penalty or a prison sentence was to be executed, the execution of the sentence would take place when the condition ended. However, even a pregnant woman could be sentenced to jail in the case that her time in custody would be longer than the duration of her sentence.⁵⁵ The exemption of pregnant women from the death sentence was in line with earlier legislation and was justified by the desire to avoid ending another innocent life. It was not normally permissible to strip a pregnant woman of her freedom since it was believed that the physical state of a woman during pregnancy was abnormal and made her more susceptible to serious physical or mental ailments, with portentous consequences to the unborn child.⁵⁶

Some historians argue that juries acquitted a far higher proportion of accused women than of accused men because jurors were all males. This traditional male gallantry or chivalry towards women was reinforced by new “scientific” ideas that females, because of their peculiar psychological and biological weakness, were less often responsible for their crimes than were men. This led to the assumption that a woman should be treated more leniently than a man. Accused women were frequently seen as having acted from feminine emotions that were beyond their control, especially when they committed “crimes of passion”.⁵⁷ Attitudes of chivalry and paternalism towards female offenders can be seen in the following criminal case: on 6 December 1898 a court hearing against Marija Smocovich was held before the jury court in Rovinj. She was 22, from the village of Galizane, resident in Pula, who made a living by ironing clothes. She was accused for attempted murder qualified as treacherous of her long-time lover Ferdinand Triches. The facts can be surmised as follows: the convict and her victim had been having a liaison for five years, during which a child was born and died soon after birth. During this entire time, the victim was promising the accused he would marry her, but kept putting it off due to military service. In addition, the perpetrator was giving financial support to the victim during this entire time. After the victim broke off the liaison, the perpetrator decided to take revenge and fired three shots at him using a revolver, but missed. After that, she drank acid in an attempt to kill herself, but was saved through medical attention. In this case, despite the fact that the perpetrator completely admitted her deed and guilt, the jury acquitted her. It is obvious that the jury were influenced by sentimentality and the prevailing image of the female offender as a “fallen woman” who was physically

and emotionally weak and erratic, naive and easily manipulated. This is also visible from the fact that Smocovich’s attorney held a brief but touching speech after the main hearing (“una breve ma commovente arringa”).⁵⁸ The mentioned case is also an example of an unjust jury verdict (“ungerechtfertigte Freisprechung”) which was delivered against the expectations of the professional legal public and in a case where the guilt of the accused had been proven beyond doubt at the main hearing, even when the accused had confessed to her crime. The reasons for ungrounded acquittals can be ascribed to the jury’s uncertainty as to the sentence the court would pronounce in case the accused was found guilty, as well as to the jury’s belief that the penalty prescribed for the committed crime is too strict. Therefore, the jury would acquit the accused even though it believed her guilty, because it believed the sentence pronounced by the court would be unjust and too harsh.⁵⁹

5. Debate over women’s jury service in the Austrian legal system

While the initiative to secure women the right to perform jury service was exceptionally strong in England and the USA and was in the manifestos of numerous suffragette movements, Austrian suffragettes didn’t give much attention to this matter. Therefore, we can conclude that the early debate over women’s jury service was part of a more general discussion of women’s participation in the public sphere which focused on the issue of women’s suffrage. Women’s suffrage first became an issue in the lands of the Austrian crown during the revolution of 1848-49, in which demands for a democratic constitution respecting civil liberties as well as social and national rights were voiced. A period of political repression followed the revolution, until a constitution was developed in the 1860 s. In this following “liberal era”, issues of social reform and women’s employment began to be discussed. The year 1866 saw the emergence of the women’s movement, which at first involved itself only in the question of adequate education and occupational opportunities for women of all classes, and did not begin to discuss the right to vote until the late 1880.⁶⁰ The Social Democrats were the only party represented in the central parliament in Vienna which embraced women’s political rights as part of their platform. In 1892 they included the demand for women’s suffrage in their program, and began to introduce appropriate bills regularly from 1907 on, after universal and equal parliamentary suffrage for men had been introduced.⁶¹

⁵⁵ § 398 of Criminal Procedure Code of 23 May 1873.

⁵⁶ MAYER, Salomon, *Commentar zu der Oesterreichischen Strafproceß-Ordnung vom 23. Mai 1873. Des Handbuchs des österreichischen Strafproceßrechtes IV. Band. Dritter Theil §. 297-494. (Schluß des Commentars.)*, Wien, 1884, pp. 544-546.

⁵⁷ DONOVAN, James M., *Juries and the transformation of criminal justice in France in the nineteenth and twentieth centuries*, Chapel Hill, The University of North Carolina Press, 2010, pp. 17-18, 178; CURRY, Theodor, The benefits and penalties of gender for criminal justice processing outcomes among adults and juveniles, in: GARTNER, Rosemary; McCARTHY, Bill (ed.), *The Oxford Handbook of Gender, Sex and Crime*, Oxford, 2014, pp. 552-554.

⁵⁸ Sessione d’ Assise, *Idea Italiana*, No.102, Rovinj, 10 December 1898, pp. 3-4.

⁵⁹ BAYER, Vladimir, *Problem sudjelovanja nepravnik u savremenom kaznenom sudovanju*, Zagreb, 1940, pp. 146-147; Zur Anwendung der Strafproceßordnung. LVIII. (J.v.W.) Wo liegt die Gefahr für die Zukunft der Schwurgerichte?, *Allgemeine österreichische Gerichts-Zeitung*, Jhrg. XXVIII, Neue Folge Jhrg. XIV, Nr. 4, Wien, 12 January 1877, pp. 13-14.

⁶⁰ BADER-ZAAR, Brigitta, Gaining the Vote in a World in Transition: Female Suffrage in Austria, in: RODRIGUEZ RUIZ, Blanca; RUBIO-MARÍN, Ruth (ed.), *The Struggle for Female Suffrage in Europe: Voting to Become Citizens*, Leiden, 2012, p. 191.

⁶¹ BADER-ZAAR, Brigitta, Women in Austrian Politics, 1890-1934. Goals and Visions, in: GOOD, David F.; GRANDNER, Mary; MAYNES, Mary Jo (ed.), *Austrian Women in the Nineteenth and Twentieth Centuries: Cross-disciplinary Perspectives*, Providence-Oxford, 1996, pp. 62-63.

The first serious discussions on whether women should be allowed to perform jury service in Austrian legal circles can be found in the first decade of the twentieth century. We shall examine newspaper articles, legal-professional journalistic discussions and parliamentary debates from the early twentieth century in order to investigate the understanding of women jurors. These sources are a solid basis for analyzing the gendered assumptions and impressions of the public and legal profession about women as jurors. For example, in 1901 the magazine *Dokumente der Frauen*, the official organ of the General Austrian Women's Association, published the translation of a French article entitled "Women and Jury".⁶² The writing of this article was inspired by a court hearing before a French jury when a victim unexpectedly also took on the role of the accused, while the actual accused was eventually acquitted. This caused great discontent, especially among women, since the victim was a woman and the accused a man who was acquitted by a jury which consisted exclusively of men. The feminist movement therefore demanded the introduction of a mixed-gender jury consisting of men and women of proven competence and equal powers. The drafting of this law was to be entrusted to Gustav Adolf Hubbard, a French politician, freemason, and freethinker. The question was raised whether such a mixed jury is even possible and will it contribute towards the better execution of justice. It is stated that there exists no valid reason why women should be excluded from the jury, and that women have the same intellectual capacity of answering the factual question on the guilt of the accused as men. Another prominent argument for including women in juries was that every criminal defendant must be tried by a jury of his peers. Without women jurors, female defendants could not face a jury of their peers and would, therefore, be treated differently from male defendants. Women were needed in the criminal justice system in order to make it representative of the community.⁶³

The legal-professional journal *Gerichtshalle* clearly stated its opposition to the possibility of women becoming jurors or lawyers in 1906.⁶⁴ Women's capability to serve as jurors challenged discourses of separate spheres for women and men, with the central assumption that a woman's sphere was the home. This dominant ideology of separate spheres, according to which the public sphere and politics were the preserve of men, was advocated by the powerful Catholic Church and had proved to be a major impediment for the suffrage movement.⁶⁵ Because most women were confined to the domestic sphere of

the household during the eighteenth and nineteenth centuries, opponents of women's jury service argued that women lacked the worldly experience necessary to make informed decisions as jurors. There was also an apparent fear that a public woman would no longer have time for the domestic duties that were her higher and finer calling. Time spent in performing jury duty would, moreover, be a pollutant for women who were supposed to inhabit an ideal world of nurturance and tenderness; it was considered that women should be kept apart from contact with the rough and brutal phases of life. The reasons for excluding women from jury service reflected a male-dominated system that sought to protect women. Reasons ranged from the practical (that the court simply did not have accommodations for both men and women) to the protective – that the offences were violent and repulsive.

In May 1908 Bohemian Social Democrat representative Leo Winter filed a bill in the House of Representatives of the Imperial Council concerning the compilation of jury lists, according to which "persons" ("Personen") over 30 years of age and who had domicile rights in one of the Austrian crown lands could be called to perform jury service.⁶⁶ It was considered that the term "persons" also encompassed women, so this bill actually included women in the jury service. Those explicitly deemed unfit for jury service were persons who couldn't perform the duties of a juror due to a mental or physical handicap as well as all those who had been sentenced for a crime motivated by gain or against morality. The only requirement regarding education was the ability to read and write. The rationale behind the draft of this bill was that the exclusion of broader segments of the population from performing jury service represents the greatest flaw of the Austrian jury system, and which therefore needed to be removed. Winter's proposal that women should be allowed to perform jury service was fully approved by attorney Isidor Ingwer, another social democrat, who believed that in cases where the accused or victim is a woman, the jury should be at least partially comprised of women because they could judge more competently and with more understanding in cases of certain crimes such as rape or infanticide. The aforementioned bill was not adopted.⁶⁷

The outbreak of the First World War produced an important shift in the political and cultural landscape and provided a discursive opportunity for some jury activists. These jury activists came to understand that arguments for women on juries could be linked to the war.⁶⁸ It is important to note here that the

⁶² PRÉVOST, Marcel, Die Frauen und die Jury, Deutsch von Laura Feil, in: FICKERT, Auguste; LANG, Marie; MAYREDER (ed.), *Dokumente der Frauen*, Bd. 6, Nr. 16, Wien, 1901, pp. 460-465.

⁶³ PRÉVOST, 1901, p. 462.

⁶⁴ DOLENC, Method, Die Verfassung der österreichischen Strafgerichte und das Laienrichtertum, in: MITTERMAIER, W.; LIEPMANN, M., (ed.), *Schwurgerichte und Schöffengerichte. Beiträge zu ihrer Kenntnis und Beurteilung*, Band II., Heft 4., Heidelberg, 1910, p. 577.

⁶⁵ BADER-ZAAR, 1996, pp. 61, 66.

⁶⁶ Antrag der Abgeordneten Dr. Winter, Dr. Renner, Dr. Diamand, Pittoni, Wityk und Genossen, betreffend die Abänderung des Gesetzes vom 23. Mai 1873, R. G. Bl. Nr. 121, in: *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten des österreichischen Reichsrates im Jahre 1908*. XVIII. Session. VI. Band. 63. bis 82. Sitzung (S. 4217 bis 5442), Wien, 1908, pp. 5082, 5270; 955 der Beilagen zu den stenogr. Protokollen des Abgeordnetenhauses. - XVIII. Session 1908.

⁶⁷ DOLENC, 1910, pp. 577-578.

⁶⁸ „Die Frauenfrage hat durch den Krieg an Wichtigkeit und Bedeutung gewonnen, und das Verständnis für die Notwendigkeit politischer Berechtigung ist in allen Schichten der Bevölkerung erwacht. In Staat, Land und Gemeinde verlangen die Frauen ihren Anteil an allen staatsbürgerlichen Rechten und Pflichten. Nicht nur in die Geschworenenlisten, auch in die Wählerlisten in Staat, Land und Gemeinde...“ E. v. F., Frauen als Geschworene, in: *Zeitschrift für Frauen-Stimmrecht. Organ für die politischen Interessen der Frau*, Jg. 7, Nr. 8, Wien, 1917, p. 3.

central government suspended the activities of jury courts on the entire territory of the state, including Istria, on 29 August 1914, due to the outbreak of the First World War.⁶⁹ The suspension of jury courts would be extended by imperial decree three times and would last until 6 July 1917.⁷⁰ The formal justification for the suspension was given only in 1917, when the Imperial Council convened after being postponed due to the war. On this occasion the government requested the Imperial Council to sign the mentioned decree on the suspension of jury courts, but it declined. One of the reasons mentioned in the government's suspension of the jury courts is the shortage of men available for jury panels which emerged because men were required to fight in the war.⁷¹ Jury proponents argued that this problem could be easily solved by allowing women to serve on juries because that would mean having the requisite number of jurors.⁷²

An article published in 1916 in the Viennese journal *Neues Frauenleben* was dedicated entirely to women's capability to be judge and juror. Referring to the two forms of judicial office (jurors and professional judges), the article stated that the jury embodies commonsense justice and reflects what ordinary people think is just and fair; it is both the symbol and institution of social legal will and as such it does not require finished legal studies. On the other hand, professional judges in no way represent the community of individual comrades-in-the-law ("Rechtsgenossen"), but, on the contrary, represent state sovereignty. It was stressed that legal areas related to the family, women and children require special female knowledge. Healing and child-rearing occupations have been women's jobs since time immemorial, so women's entry into the medical profession actually represented the reclaiming of what was considered women's innermost and most ancient area of work. Therefore, allowing legally educated women to perform the duty of judge in cases of guardianship, fosterage and juvenile criminal law would be accepted as something reliable and necessary by the male part of the population. It is claimed that there will certainly be no shortage of harsh critics of the introduction of jury service for women, since they will see the feminisation of criminal justice as a threat to society. These complaints could be addressed by noting that even the current institution of the jury consisting exclusively of men is affected by sentiment and non-uniformity of verdicts. The expansion of jury duty onto new social strata, including women, is in line with democratic principles and would contribute towards the desired blood renewal and strengthening of the jury. In addition, in order to secure a more appropriate space for tougher and stricter members, there existed the right to exercise peremptory challenges

by prosecution, which was to be limited only in those cases where the perpetrators were women and youths. In addition, it was stated that women were to be guaranteed a broad right to decline jury service by making it voluntary for them, rather than required.⁷³

The question of the reasons for women's exclusion from performing jury duty was also posed while analysing a specific case in which the Court of Cassation sentenced a poor woman from a Galician village to death for killing her own four-day-old child, where the circumstances of the crime were completely ignored (the poverty and unemployed status of the mother as well as action arising from a state of extreme necessity due to inability to feed the child). On that occasion it was stressed that the spiritual life of a woman who is a mother or about to become one can best be understood by women who are themselves mothers. This applies to all cases concerning women, children, and youths. Next, it is stated that women can be more susceptible to the influence of emotions and can therefore affect the working of the jury court. However, apart from this danger, one should take into account the benefits of including women in juries: the women would bring to the juries an element of sincerity, honesty and righteousness which was not present before to the same extent.⁷⁴

The reactivation of jury courts prompted an intense discussion on the ability and capacity of women to serve as jurors. On 14 July 1917 Lower Austrian representative in the Imperial Council's House of Representatives Julius Ofner (who was lawyer and a notable supporter of women's emancipation and served as an important link to the parliament) while speaking on the need for the democratization of jury composition demanded that women be allowed to perform jury service. He went on to state that the constantly present fear that the admission of women would cause disruption in the administration of justice and public life is completely baseless. He considered that jury service should be a woman's right rather than a duty. He also emphasized the importance of women's role in the family and household: a woman was still regarded as the centre of the home and family life. Since women's jury service would not bring only harm to domestic life and children (because jury service could require women to be away from home for long periods of time) he suggested that the law on compiling lists of jurors include married women and their spouses among those who can request exemption from performing jury service in cases when the woman's presence was indispensable at home. The rationale for this proposal was that women's family responsibilities should not make jury service a hardship. According to Ofner, the inclusion of women on jury lists does not necessarily result

⁶⁹ Verordnung des Gesamtministeriums vom 29. August 1914 über die Einstellung der Wirksamkeit der Geschwornengerichte, *Reichsgesetzblatt für die im Reichsrat vertretenen Königreiche und Länder*, Jhrg. 1914, St. CXXVI, Nr. 228, Wien, 1914, p. 973.

⁷⁰ Verordnung des Gesamtministeriums vom 6. Juli 1917 über die Außerkraftsetzung der kaiserlichen Verordnungen vom 25. Juli 1914, R. G. Bl. Nr. 156, vom 4. November 1914, R. G. Bl. Nr. 307, und vom 27. Dezember 1916, R. G. Bl. Nr. 427, *Reichsgesetzblatt für die im Reichsrat vertretenen Königreiche und Länder*, Jhrg. 1917, St. CXIX, Nr. 284, Wien, 1917, p. 701.

⁷¹ HOKE, Rudolf, Strafrechtspflege und Terrorismus im alten Österreich. Betrachtung zum Gesetz betreffend die zeitweise Einstellung der Geschwornengerichte vom Jahre 1873, in: VALENTINITSCH, Helfried (ed.), *Recht und Geschichte. Festschrift Hermann Balil zum 70. Geburtstag*, Graz, 1988, pp. 336-337.

⁷² BEER, Richard, Die Frau als Richterin und Geschworene, *Neues Frauenleben*, XVIII. Jahrg., Wien, May 1916, No. 5, p. 106.

⁷³ BEER, 1916, pp. 104-107.

⁷⁴ OFNER, Julius, Ein Todesurteil, *Neues Frauenleben*, Jhrg. XVIII., Wien, August-September 1916, No. 8-9, pp. 170-174.

in their representation on jury panels. It would only mean that women should be included at each stage of the jury selection process, from the drawing up of the annual list, to the session list, and finally selecting the jury box. At the end of this process, after the selection was made, there would remain an adequate number of women. Even if only one or two women would be in the jury box, this would in no way threaten the security of the judiciary; on the contrary, women would bring „a new vivid impact into the minds of jurors“.⁷⁵ Namely, in addition to arguments about the potential effects of women’s jury service on the household, there was also debate over what effects women’s different nature would have on their service as jurors.⁷⁶ The earliest arguments promoting jury service for women were premised on the notion that women, as a gender class, have something to offer that is different from what men bring to the jury room, so that female jurors were portrayed as contributing a valuable perspective to the process of jury deliberations.⁷⁷

The proposal that women be allowed to perform jury service was denied by the judiciary committee. The reasons behind such a decision are included in a report that was read out in the Imperial Council’s House of Representatives in the name of the judiciary committee and will be presented in more detail further on. The report states that the committee did not disregard that equal rights should correspond to equal duties and responsibilities, so one of the important goals of social development is to achieve as broad equality between female and male citizens as possible. It is further noted that the sexes had already been made equal in matters of private law a long time ago, and that the novelties of the Austrian Civil Code introduced during the war had got rid of the backwardness related to guardianship, participation in will-making etc. However, family law provisions are based on the principle that the husband is the head of the family and therefore the legal position of women is subject to various limitations. It is stated that political equality of female and male citizens hasn’t yet been introduced and that allowing women to perform the very responsible duty of juror would mean skipping the first step. This first step should entail women acquiring the knowledge necessary to act as jurors and decide upon the guilt of the accused in political and other offences by first participating in the political life of the state. Due to their upbringing and the fact that they primarily perform household tasks, women are naturally poorly acquainted with precisely those areas of life which are usually the subject of criminal offences. In contrast, men pos-

sess a more complete insight into the way human society functions. To the objection that the aforementioned doesn’t apply in cases of infanticide and similar crimes which was voiced by one of the representatives, it was replied that men are usually well-acquainted with all aspects of life and that women, in line with the “traditional concept of true womanhood”, cannot, as a rule, better understand infanticide and similar crimes than an experienced man.⁷⁸ Furthermore, it is stated that experience is one of the most important qualities of a judge and that jury service doesn’t serve to give a right to the invited jurors, but to secure a more reliable basis for the trial.⁷⁹ It was stressed that women, due to their constitution, weren’t up to the strains of jury hearing, which can sometimes last up to several weeks and lead to the loss of the equanimity necessary for performing judgeship. As it is well known, the mental life of woman is not always completely uniform. Therefore, it is impossible to sort according to individual status groups which women are capable of performing jury service and which aren’t since several factors come into play, including upbringing, customs, etc. So, in order to make women capable of performing the taxing jury duties, it is first necessary to change the position of women in society in general. It was believed that allowing women to become jurors without prior preparations would present a risk and an experiment, which cannot be allowed because of the need to protect the interests of the accused. It is also emphasized that there exists no practical necessity to extend jury service to women and that it actually presents a hardship for most of them. Finally, it is claimed that the foundation of the existing social order is the family, which is based on a certain sort of idealism and views of life. It is impossible to reconcile this idea with a woman being separated from her family for a longer time due to her jury duties and exposed to profanity, obscenity and the detailed narration of the immoral acts and doings of the lowest type of humanity as well as the possibility to contribute towards the issuing of a death penalty and thus the destruction of a person’s existence. It was then concluded that the goal of almost every female person is to enter into married and family life, and the belief that the woman was fitted for the private or domestic sphere and the man for the public or civic and political arena was expressed.⁸⁰ Many experts of the time wrote about how such a division was natural; rooted in the nature of each gender. Those women who sought places in the public sphere often found themselves identified as unnatural. It was difficult for women to express themselves in the public domain because

⁷⁵ Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten des österreichischen Reichsrates im Jahre 1917*, XXII. Session, I. Band, Wien, 1917, pp. 1035-1036.

⁷⁶ WEISBRÖD, Carol, Images of the Woman Juror, *Harvard Women’s Law Journal*, Vol. 9, 59 (1986), p. 68.

⁷⁷ FOWLER, Lucy, Gender and jury deliberations: the contributions of social science, *William & Mary Journal of Women and the Law*, Vol. 12 (2005-2006), Iss. 1, October 2005, pp. 4, 14. Available at <http://scholarship.law.wm.edu/wmjowl/vol12/iss1/2/>

⁷⁸ The cult of true womanhood, also known as the cult of domesticity, is a term identifying a nineteenth-century ideology which posited that women’s nature suited them especially for tasks within the home. It sought to assert that womanly virtue resided in piety, purity, submissiveness, and domesticity: these values assigned women to specific behaviour and roles in the society, which were restricted to the domestic sphere. The private sphere of domesticity was peddled as the true realm for women. In European societies the cult began to gain influence at the turn of the twentieth century. TIERNEY, Helen (ed.), *Women’s Studies Encyclopedia*. Revised and Expanded Edition. A-F, Westport, 1999, pp. 321-324.

⁷⁹ From this it is evident that the judiciary committee explicitly rejected the principle that jury duty was a right of the citizen. Rather, it was regarded as a public function that should be confined to those with absolute independence and sufficient intelligence. DONOVAN, 2010, p. 112.

⁸⁰ Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten...*, 1917, pp. 1037-1038.

the very notion of the public woman was becoming incompatible with respectability. Namely, notions of respectability rested upon a woman's reputation within the private sphere, as a wife and mother.⁸¹

After rejecting the proposal to allow women to perform jury service, one of the representatives proposed (as a sort of compensation to women) that the government secures the participation of women as guardians, orphanage nurses, representatives, and assistants as well as their participation in the protective supervision and preservation of youth in the bills on youth welfare and juvenile criminal law.⁸² This shows the belief that women were considered essential for certain cases, such as those involving children as victims or offenders, because of their maternal care and moral superiority, so often displayed in the domestic sphere.⁸³

Among the arguments used as justification for excluding women from jury service was the claim that jury service presents a very heavy and delicate burden, both on a psychological and physical level; it was claimed that participation in jury hearings cannot be considered easy because such hearings are complex and last much longer than normal hearings (they normally lasted for several days, sometimes stretching long into the night)⁸⁴; the subject of hearings were usually felonies, and their outcome was of the greatest importance for the accused. In addition, the contribution of women as jurors in jury courts was considered problematic since women were more prone to passing judgement under the effect of mood or emotion than men. Trial by jury was supposed to represent the voice of lively sense of justice of the people, and it was claimed that there was a great difference between a lively sense of justice and sentimental empathy. The proponents of jury service for women answered by emphasizing that women would comprise a minority at the jury box and thus their influence would not be a decisive factor.⁸⁵

Among the proponents of jury service for women in the House of Representatives of the Imperial Council was the Bohemian representative Oswald Hillebrand, also a member of the Social Democrat Party. In his speech he referred to the main arguments of the opponents of jury service for women, whom he described as "voices from the grave, arguments which were more appropriate to a period several hundred years in the past".⁸⁶ To claims that women had until then been kept away from public life and were therefore insufficiently mature for jury service, he answered that this is a standard complaint which can be heard regarding every democratic advancement. He posed the question about whether the fact that women had been kept away

from public life until now was their own fault and whether they should continue to be punished for an injustice that was done to them. He then warned that there existed a duty to correct this old injustice and introduce legal equality for all. He stressed that men and women can be comparably competent in any given matter, on the condition that they are allowed to participate on equal terms. Therefore, if they wish to have competent female jurors, it is necessary to allow them to perform jury service under the same conditions as men. He then cautioned about the irrationality of the existing system, according to which a man with only one year of completed primary school education can be a juror provided he can read and write, but the same position is not available even to women with a university education. Regarding the arguments that women are more susceptible to emotions and that they lack the sense for statutory law, he referred to the general function of the institution of jury courts: their founding was meant to guarantee the independence of the judiciary from the executive government, but also to provide for the natural accommodation of the rigor of a law through public feeling and community awareness that lies in the jury. To the objection that women are too soft-hearted, he replied that perhaps it is precisely female jurors who would have more of an ear for the voice of humanity in offences against property committed in circumstances of poverty or desperation, in contrast to peasant jurors who showed severe tenacity and heartlessness in cases of arson. On the other hand, the objection that some women would judge too strictly in cases of certain offences, he replied that the same could be said of all members of court martial, since they usually gave harsh judgements. According to Hillebrand, jury service was not just a woman's right, but primarily a duty, but also the right of a female accused to have women among the jurists, in order to better assess the motives of her act. Furthermore, he answered the complaint that women are the weaker sex and thus unable to endure the great physical demands of jury service by pointing out that women are nonetheless considered strong enough to work in factories, to drag heavy ammunition and to work as unskilled labourers, endure hunger and grief. Regarding the argument that women should be excluded from jury service due to their psychological peculiarity and nervousness (which was considered a typically female ailment), Hillebrand brought into question its seriousness and pointed out there were also nervous men who could then be excluded from performing jury service. He then addressed the final argument mentioned during the judicial committee's discussion: men pay the state "blood tax". Not wishing to compare this blood tax with the tax "paid" by every woman

⁸¹ ABRAMS, Lynn, *The Making of Modern Woman: Europe 1789-1918*, London, 2002, pp. 152, 214.

⁸² Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten...*, 1917, p. 1036.

⁸³ LENTZ, Susan L., Without Peers: A History of Women and Trial by Jury. Part Two - The Law of Jury Service in the Twentieth Century, in: *Women and Criminal Justice*, Vol. 11 (4), 2000, p. 87.

⁸⁴ For example, in 1901, 34 days were needed to hold 13 main hearings at the jury court in Rovinj. We can also find cases where jury hearings continued into the weekend, even the small hours on Sunday. *Österreichische Statistik*, LXXI. Band, 3. Heft, Wien, 1904, pp. 138, 166; Sessione d' assise, *Idea Italiana*, No.103, Rovigno, 17 December 1898., p. 3.

⁸⁵ Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten...*, 1917, pp. 1040-1041, 1049-1051.

⁸⁶ Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten...*, 1917, p. 1055.

at birth, Hillebrand concluded that all men unfit for military service should then also be excluded from jury service. Currently, by being excluded from jury service, women were treated the same as persons with mental handicaps, spendthrifts, alcoholics, users of the financial support for the poor, and convicts: all categories of persons who were excluded from performing jury service by law.⁸⁷

After the House of Representatives rejected Ofner's proposal to allow women to perform jury service, the women of Vienna staged two big protests, organized by The League of Austrian Women's Associations and Social Democratic Women.⁸⁸ In addition, the question was posed about what is more appropriate for judicial, and therefore jury service: „military discipline“ or „feminine sentiment“ and it was demanded that half the jury be composed of women in cases where the accused was a woman or in offences where the victims were women or children.⁸⁹

It should be noted that none of the six Istrian representatives in the Imperial Council's House of Representatives participated in the mentioned discussion.⁹⁰ Apart from their lack of interest for this matter, the reasons for this can be found in the fact that the suspension of juries in Istria had remained in force due to the state of war and the significant number of Italians in the entire population.⁹¹ The question of female jury service wasn't explored even in the Istrian press. However, since the political nature of the jury helps explain why women could appear in court as litigant and as witness, but not as judge, attorney, or juror (all three roles were viewed as public, i.e., political offices),⁹² a conclusion on the dominant attitude in Istria towards women as jurors can be extrapolated from the attitude towards another important political right that was being considered: women's suffrage. In 1905, the Istrian politician Ivan Zucco, an attorney by profession, while speaking about the movement to introduce universal and equal suffrage which spread throughout all the Austrian lands claimed that all men should be given the right to vote, but not every woman. He claimed that this was „an area of exclusively male activity, while women were accorded the role of good wife, mother and housekeeper and that they have the right to be the helpers, consolers, and supporters of men in all aspects of life“.⁹³ A similar attitude towards the

participation of women in politics was expressed in a newspaper from Pula, which claimed that „political life represents a hell for men and it is frightening to think what would happen should women enter into it.“ In addition, it was claimed that the inclusion of women in politics would harm their marital and family life due to their inability to perform household tasks.⁹⁴ These negative attitudes towards women's suffrage were in line with the rural character of Istria and the traditional way of life which was still dominant there.

In August 1917 an article titled „Women as Jurors“ was published in the legal journal *Juristische Blätter*, written by already mentioned Julius Ofner. He stressed that there exist no further barriers for women to become jurors, especially since women could now be physicians, clerks, professors, artists and artisans. However, his proposal met with harsh criticism and opposition. As was already mentioned, the exclusion of women from performing jury service was justified through „psychological barriers“ that made women more susceptible to outside influences due to their more developed sense of empathy; it was claimed that there was a danger that women would, upon giving a verdict, be guided by their emotions rather than exclusively by the guidelines given by the law. Under the separate spheres ideology, women were suspect reasoners because they were seen as overly emotional („emotional“ representing the opposite of „reason“). Aside from this, domestic duties represented a further obstacle for married women, since they would necessarily be neglected during the performance of jury service.⁹⁵

Changes would only take place after the collapse of the Austro-Hungarian Monarchy, when at the beginning of 1919 the Austrian provisional National Representative Assembly revised the Jury List Compiling Law of 23 May 1873 in several points. The most significant change was that women were for the first time allowed to perform jury service.⁹⁶ This change would not however affect Istria since that area was occupied by the Italians in November 1918. The multinational character of the Habsburg Empire can be considered one of the reasons why women achieved political rights and full equality with men relatively late. According to this interpretation, ethnic conflict made cooperation among feminists of different nationalities ex-

⁸⁷ Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten...*, 1917, pp. 1056-1058.

⁸⁸ Rundschau, *Neues Frauenleben*, Jhrg. XIX., Wien, August - September 1917, No. 8-9, p. 184.

⁸⁹ KULKA, L., „Militärische Disziplin“ oder „weibliches Gefühl“, *Neues Frauenleben*, Jhrg. XIX., Wien, August - September 1917, No. 8-9, pp. 161-166.

⁹⁰ The Istrian representatives at the Imperial Council's House of Representatives were: Italian liberals Viktor Candussi-Giardo and Lodovico Rizzi, Italian Peoples' Party member Pietro Spadaro, and Croato-Slovenian Club members Matko Laginja, Matko Mandić and Vjekoslav Spinčić. I. Teil, Personenregister, 2. Abteilung, Mitglieder des Hauses der Abgeordneten, *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten...*, 1917, pp. 89, 207, 233, 287, 322, 324-325.

⁹¹ This follows from § 4 of the Order on Compiling Jury Registers for the rest of 1917 and 1918, in which it is specified that this order doesn't apply to the Princely County of Gorizia and Gradisca, the Margraviate of Istria, the Free Imperial City of Trieste with its surroundings, and the areas of jurisdiction of the county courts in Trient and Rovereto. Verordnung des Ministers des Innern und des Leiters des Justizministeriums vom 27. Juli 1917 über die Bildung der Geschwornenlisten für den Rest des Jahres 1917 und für das Jahr 1918., *Reichsgesetzblatt für die im Reichsrate vertretenen Königreiche und Länder*, Jhrg. 1917., St. CXXXIII., Nr. 317., Wien, 1917, p. 762.

⁹² CORNETT, Judy M., Hoodwink'd by Custom: The Exclusion of Women from Juries in Eighteenth-Century English Law and Literature, *William & Mary Journal of Women and the Law*, Vol. 4 (1997-1998), Iss. 1, 1997, p. 13. Available at <http://scholarship.law.wm.edu/wmjowl/vol4/iss1/2/>

⁹³ Skupština političkog društva za Hrvate i Slovence u Istri. (Konac.), Prilog broju 51. „N.S.“, *Naša sloga*, No. 51, Pula, 22 December 1905, p. 3.

⁹⁴ „La vita politica é un inferno per uomini - immaginiamo che sarebbe se ci entrassero le donne! É orribile solo il pensarlo.“ Il votto alle donne, *Il Giornaleto di Pola*, No. 2091, Pula, 1 April 1906, p. 2.

⁹⁵ OFNER, Julius, Frauen als Geschworene, *Juristische Blätter*, Jhrg. XLVI, Nr. 33, Wien, 19 August 1917, pp. 385-386.

⁹⁶ SADOGLI, Alice, *Thesen zur Geschworenengerichtbarkeit - historische Aufarbeitung und Perspektiven*, Linz, 2007, p. 76.

tremely difficult and caused non-German feminists to subordinate their goals to the nationalist movements.⁹⁷ Bitter ethnic antagonism also existed in Istria between the powerful Italian urban minority and the more numerous Croatian peasantry, so the national political question occupied this entire period and all of its social structures. Therefore, although the beginning of the 20th century was marked by an increasingly intensive struggle for women's basic economic and political rights, Istria was all but completely excluded from this process. At the beginning of the 20th century, there were no noteworthy women's professional associations in Istria.⁹⁸ One exception was the activity of the socialist Giuseppine Martinuzzi, according to many the most renowned Istrian woman of this period, whose political work was mostly related to the issue of women in that time's society.⁹⁹

6. Conclusion

The Austrian Jury List Compiling Law of 23 May 1873 named male sex as being one of the conditions for performing jury service, thereby explicitly excluding women. The inability of not only Istrian women, but women from the entire Austrian legal area to become jurors should therefore come as no surprise. Even in states with a long tradition of trial by jury, such as England, women remained barred from the jury until the 20th century.

The basic characteristic of Istria in the examined period is its low level of economic development, which was closely related to its social backwardness. The consequence of this was the domination of the rural, traditional and patriarchal life in Istria, which had a strong effect on the position of women in society and their professional opportunities. Most women were of peasant origin, illiterate, employed in agriculture or as unqualified workers in one of the few Istrian factories. Therefore, even if we disregard the exclusion of women from jury service on basis of their sex, the vast majority of Istrian women couldn't fulfil the remaining prescribed requirements for performing jury service, such as literacy and the tax and intellectual census. The exclusion of women from jury service actually represented a natural consequence of the position of women in the society of that time, which was characterised by political inequality, the lack of economic emancipation, that is, absence of complete equality for a woman before civil law in the disposal of her person and property, the free use of all her abilities and means as well as the lack of intellectual emancipation – in other words, failure to provide a woman equal opportunities for basic and higher education as a man.

Regarding the position of woman in the criminal procedure law, it was determined that the provisions of the Criminal Procedure Law of 23 May 1873 were principally formulated to be gender neutral, and that women had the same rights as men

in criminal procedure. However, a more detailed analysis of its provision showed certain deviations from the principle equality of men and women: in cases where the defendant was underage or under guardianship, the woman as mother could not appoint him a defence lawyer against his will; women could not be court witnesses who were supposed to be present during certain enquiries; women could not get permission to be present at the execution of a death penalty; if a female convict was pregnant at the time the death penalty or a prison sentence was to be executed, the execution of the sentence would take place when the condition ended. Some historians even argue that juries acquitted a far higher proportion of accused women than of accused men because jurors were all males. This was explained by traditional male gallantry or chivalry towards women, and substantiated by providing examples from the working of the jury court in Rovinj.

The early debate over women's jury service in the Austrian legal system was part of a more general discussion of women's participation in the public sphere which focused on the issue of women's suffrage. The first serious discussions on whether women should be allowed to perform jury service in Austrian legal circles can be found in the first decade of the twentieth century. In 1901 the magazine *Dokumente der Frauen*, the official organ of the General Austrian Women's Association, published the translation of a French article entitled "Women and Jury", referring to the question of introducing mixed juries. The legal-professional journal *Gerichtshalle* clearly stated its opposition to the possibility of women becoming jurors or lawyers in 1906. In May 1908 Bohemian Social Democrat representative Leo Winter filed a bill in the House of Representatives of the Imperial Council concerning the compilation of jury lists, according to which "persons" over 30 years of age and who had domicile rights in one of the Austrian crown lands could be called to perform jury service. It was considered that the term "persons" also encompassed women, but the aforementioned bill was not adopted. The outbreak of the First World War produced an important shift in the political and cultural landscape and provided a discursive opportunity for jury activists, who came to understand that arguments for women on juries could be linked to the war. An article published in 1916 in the Viennese journal *Neues Frauenleben* was dedicated entirely to women's capability to be judge and juror.

The reactivation of jury courts prompted an intense discussion on the ability and capacity of women to serve as jurors. On 14 July 1917 Lower Austrian representative in the Imperial Council's House of Representatives Julius Ofner while speaking on the need for the democratization of jury composition demanded that women be allowed to perform jury service. This proposal was denied by the judiciary committee. Among the proponents of jury service for women in the House of Repre-

⁹⁷ ALBISETTI, James C., Female Education in German-Speaking Austria, Germany, and Switzerland, 1866-1914, in: GOOD, David F.; GARDNER, Margarete; MAYNES, Mary Jo (ed.), *Austrian Women in the Nineteenth and Twentieth Centuries: Cross-Disciplinary Perspectives*, Providence - Oxford, 1996, p. 40.

⁹⁸ HAINISCH, Marianne, Die Geschichte der Frauenbewegung in Oesterreich, in: LANGE, Helene; BÄUMER, Gertrud (ed.), *Handbuch der Frauenbewegung*, I. Teil: Die Geschichte der Frauenbewegung in den Kulturländer, Berlin, 1901, p. 185.

⁹⁹ DUKOVSKI, Darko, *Svi svjetovi istarski ili još-ne-povijest Istre prve polovice XX. stoljeća*, Pula, 1997, p. 118; VORANO, Tullio, Martinuzzi, Giuseppina (Maria Sandra), in: *Istarska enciklopedija*, Zagreb: Leksikografski zavod Miroslav Krleža, 2005, p. 473.

sentatives of the Imperial Council was also the Bohemian representative Oswald Hillebrand. The separate spheres ideology represented a dominant cultural force in the debate over the women's jury service. According to this ideology, the home was regarded as a private, affective, female sphere that should be set

apart from the public, economically productive male sphere of life. Actually, the debates over suffrage and jury service represented part of the debate over the extent to which gender differences and family obligations influenced women's entrance into the public sphere.

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