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Dangerous Liaisons?: A Feminist and Restorative Approach to Sexual Assault¹

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The appropriateness of restorative justice (RJ) for gendered violence offences such as domestic violence and sexual assault has always been and still is highly contested. This paper focuses on the appropriateness of RJ measures in addressing sexual assault, primarily with reference to experience of restorative dialogues as practiced at the Centre for Victims of Sexual Assault in Copenhagen, and it takes a feminist approach to the application of RJ measures to sexual assault. Within this framework, the paper tackles two issues in particular: the privacy element of RJ versus the public aspect of the criminal justice system (CJS), and the intersection of the CJS and RJ in cases of sexual assault. In relation to the relationship between CJS and RJ, the authors argue that RJ could be used for victims of sexual assault, not primarily as part of diversion programmes, but when offered apart from and/or parallel to the CJS. In relation to the private/public debate, the authors argue that while RJ encounters, by taking place in highly confidential settings, might have a negative impact on efforts by women's movements to move violence against women out of the private and into the public realm, creating high standard alternatives for individual women who are in need of support and constantly generating public debate about gendered violence is a good feminist response to this complex issue.

Keywords: *sexual assault, restorative justice, victims, women's movement.*

¹ Although rape and sexual assault are sometimes used interchangeably in the literature, rape has a more legal connotation, whereas sexual assault refers to a continuum of behaviour that includes rape, but also encompasses any unwanted physical contact of a sexual nature. We will therefore use the term sexual assault to denote assault of a sexual nature perpetrated against adult women either by strangers or acquaintances and family members.

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Setting the stage

The appropriateness of restorative justice (RJ) for gendered violence offences such as domestic violence and sexual assault has always been highly contested. Daly and Stubbs (2006) have summarised the debate taking place between the proponents and opponents of applying RJ to domestic and sexual violence cases. The main arguments put forward by the proponents are: the opportunity for victims to participate and engage in the process and receive validation for their own story, for the offenders to take due responsibility for their actions, and for the 'community' to have its relationships repaired. Opponents caution against the compromising of victims' safety, the potential manipulation of the process by the offender, the pressure on the victims to participation and agreement, and the (perceived) incompatibility of RJ with the women's movement goal of establishing violence against women as a public crime.

This paper will focus on the appropriateness of RJ measures in addressing sexual assault (domestic violence needing additional careful analysis)². Being part of both the feminist movement and RJ movement, we will approach the issue from both these perspectives. The paper relies mainly on the experience with restorative dialogues as practiced at the Centre for Victims of Sexual Assault in Copenhagen, therefore the point of view is necessarily partial. The paper is concerned only with the impact of sexual assault and RJ interventions on victims (mainly women), although RJ aims to benefit offenders as well as victims (as is also the case in the restorative dialogues practice at the Centre for Victims of Sexual Assault). Within our approach we focus on two specific issues in particular: the privacy of RJ versus the public aspect of the CJS and the intersection of the CJS and RJ in cases of sexual assault.

Justice and victims of sexual assault: contextualising the debate

Theo Gavrielides (2007) in his book *Restorative Justice Theory and Practice: Addressing the Discrepancy* has summarised the main six fault-lines of conflicts within the RJ movement as being debates around: a) definitions of RJ – emphasising outcomes versus process, b) involvement of stakeholders

² For research on domestic violence cases see: Pelikan, C. (2000) and Pelikan, C. (2002).

– how many people should participate, c) implementation of RJ – within or outside the CJS, d) whether RJ is a new paradigm or a complementary model of justice, f) whether it is an alternative punishment or an alternative to punishment, and finally e) what are the principles of RJ and their flexibility.

Another fault-line debate taking place at the intersection of the RJ and feminist movements is the appropriateness of RJ for different types and ranges of crime, including gendered violence cases. Daly and Stubbs (2006) have analysed and summarised five areas of feminist engagement with RJ as being: a) theories of justice, b) the role of retribution in criminal justice, c) studies of gender (and other social relations) in RJ processes, d) the appropriateness of RJ for partner, sexual or family violence, and f) the politics of race and gender in making justice claims. They point out that feminist engagement has focused almost exclusively on the appropriateness of RJ for sexual, partner or family violence. In this debate participate the proponents of RJ for all types of crimes, women's movement activists who are against the application of RJ in cases of gendered violence, and also a more nuanced group of researchers and activists who take seriously both the positive results and the concerns about applying RJ to these cases.

On the one hand, the main arguments against the application of RJ to gendered violence cases are that these types of crime are too serious to be dealt with by RJ measures. Instead, the most severe of measures should be taken (Lewis et al., 2001), and response to sexual assault should 'combine elements of meaningful censure of the behaviour and protection of the victim against further abuse, alongside measure to reduce the likelihood of reoffending and reintegrate the offender into society (Hudson, 2002: 626). Opponents also caution against the compromising of the victims' safety after the mediation process (Zellerer, 1996), the potential manipulation of the process by the offender due to inequality of power, potential for future abuse, and the pressure on the victims to participation and agreement (Hughes, Mossman, 2002). Although traditionally there have been concerns that RJ approaches like mediation (especially conferencing) following sexual offences creates too great a risk of re-victimisation, as Kathleen Daly (2002) notes, a conference can provide satisfaction for the victim because it means that the offender has made an admission as to what has taken place. Daly is right to argue that, 'one can neither fully endorse nor disparage RJ processes in responding to sexualized violence or other gendered harms' (Daly, 2002: 85). As with other crimes of serious violence, the expertise of the facilitator and those involved in the pre-

conference phase, as well as follow-up, will largely determine whether the risk of further harm is too great. Another serious argument against the application of RJ is the concern that if these cases go from the private realm of home or similar familiar environments into the private and confidential realm of RJ, then the entire struggle of the women's movement "the private is political" will be endangered (Coker, 2002; Shroeder, 2005).

On the other hand, the arguments in favour of applying RJ to cases of gendered violence are several. The main argument focusing on outcomes is the failure of the CJS to provide good solutions for such cases. This failure includes low prosecution rates, low conviction rates and re-victimisation (or secondary victimisation) of women during proceedings. The failures of CJS in the case of gendered violence are well documented (Dobash, Dobash, 1992). On a more ontological level, Catherine MacKinnon (1989) and Carol Smart (1989, 1995) have argued that law is fundamentally male in structure, and therefore always on the side of power. Smart (1995) reviews the construction of rape in law as phallogocentric, as based on the unquestionable existence of the sexual male drive and women's ability to control it. This reveals the dependence of the law on stereotypes of male and female sexual roles and therefore its obsession with issues of provocation (did the woman provoke the man), consent (was the woman willing to have sex) and resistance (did the woman struggle against it) (O'Donovan, 1993). In other words, to obtain a conviction, women must become the 'ideal victim' (Christie, 1986) (read: sober, asexual, virgin, married, religious, modest, non-provocative and so on).

Many women feel that police and court procedures contribute to creating a continuation of the powerless and passive position in which they were already put by the offender. While acknowledgment of guilt by the offender would be an important step for an assaulted woman's healing process, the features of the trial system work constantly against it. The system is by definition concerned with the offence committed and the person who committed the offence, and not with the damage done to the woman. The woman suddenly becomes a witness to the crime, not the target of the crime. Once her testimony has been given, the system takes over and she has no more say and no power to influence the outcome of the case. In fact, her credibility is often questioned to such an extent that she feels she is the suspect and not the victim. The crime is regarded as a violation of the law and the state, not a violation of her (Christie, 1977), and therefore justice focuses on determination of guilt, not on restitution of the assaulted woman (Zehr,

1990). It comes not as a surprise than the fact that many victims experience the trial process of cross-examination as re-traumatising (Mossman et al., 2009; Kelly et al., 2005; Temkin, Krahé, 2008).

An additional argument in favor of RJ measures, is that such crimes are more effectively addressed within family units and small communities, where participants are not bound by rules of evidence and criminal procedure. Alison Morris (2002) argues that extended families are better placed than professionals to prevent the recurrence of abuse, to arrange networks of support and surveillance, and to represent a disapproval of criminal behaviour. Judith Herman (2005) found that victims of sexual assault wanted condemnation for the offence, which they recognized as an attempt to degrade and dishonor. What they were looking in the aftermath was therefore 'the restoration of their honor and reestablishment of their own connections with the community' (Herman, 2005; 585). Nevertheless, Morris raises the concern that families might trivialise abuse, be unsupportive and blame the victim, and the fact that some families are inclined to protect their men at the expense of their women and children. For this reason, the involvement of a family violence expert in a group conference is essential.

Women are currently reporting rape more often than before, and the police and CJS are improving the ways in which they deal with women complainants. Nevertheless, although the CJS has overall become more respectful of victims and has slowly been changing its gender stereotypes, the fact remains that it will always demand proof beyond reasonable doubt before punishing an offender. However, in sexual assault cases there are most often no independent witnesses to sexual assault and no physical evidence to support a victim's claim. In most western jurisdictions, improvements in the system and an increase in the number of women reporting the crime have not been reflected in a corresponding rise in convictions (Lea et al., 2003; Kelly et al., 2005).

It is therefore a logical conclusion that another response and an alternative approach are required. Many facets of RJ would seem to be of immediate benefit in sexual assault cases. Research world-wide point to good results on the matter. For example, evaluations of the South Australia Juvenile Justice Project (SAJJ) found that conferences seem to be particularly useful for sexual offences between a victim and offender where there is (was) a relationship (Daly, 2002). Similarly, Morris and Gelsthorpe (2000) have argued that RJ as practiced in family violence cases can address power imbalances but ensuring procedural fairness and by explicitly challenging the power of

the male partner. Another program with adult sex offenders, has been until recently, the Arizona RESTORE program (Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience). Research shows, that many cases resulted in an agreement to reparation for the victim, including compensation, community service, and a formal apology, where appropriate treatment for the offender, and supervision by a community board of the agreement, a breach of which resulted in referral back to prosecution (Koss et al., 2003). As mentioned above, there are also several concerns about the application of RJ to sexual assault cases. In the following section we will propose a framework in which to do so, albeit through addressing only two of the main concerns of the feminist movement.

Restorative justice and sexual assault cases: proposing a framework

The integration of RJ philosophies and gendered violence is not an easy one. We will here only address two main issues: the privacy of RJ versus the public aspect of the criminal justice system³ and the intersection of the criminal justice system and RJ in cases of sexual violence.⁴

On the one hand, RJ settings are very important for the victims of sexual assault because the RJ process is private and confidential, and concerns of privacy have very high priority in reasons given by women for not reporting sexual assault. In other words, given that most sexual assault victims choose not to deal with the police and courts, such a programme could potentially be a viable option for a large group of sexual assault victims.

On the other hand, the same reasoning can turn against women, because if we apply RJ to these cases outside the CJS, then privatisation of gendered violence occurs (Weinstein, 1996; Coker, 2002; Schroeder, 2005). We must be mindful of the women's movement struggle to bring violence against women from the private sphere of home and family to the public sphere of the CJS (Schroeder, 2005). In other words, women need constant acknowledgement that the harms suffered in domestic and familiar environments or intimate

³ For an expanded paper and detailed debate on the risks and benefits of the 'privatisation' of justice see Schroeder, A. (2005).

⁴ For a very interesting analysis of the relationship between restorative justice application in cases of sexual violence and abolitionist movement see Hudson, B. (1998).

relationships are 'crimes', and as such must be dealt with and be validated by robust processes of justice (Hudson, 2002; Benhabib, 1992). Furthermore, there is the risk that RJ might be encouraged by states to shift responsibility from their own neglect of sexual and other social inequalities, leaving individuals alone to deal with societal problems (Coker, 2002; Hudson, 1998, 2002, 2006). At the same time, RJ might fail to address societal interests and to generate adequate social change (Schroeder, 2005).

Other feminists have challenged feminist uses of criminalisation strategies of harsh penalties, which rest on naive beliefs that criminal law has the capacity to bring about social change and that imprisonment promotes a safer society (Snider, 1998; Martin, 1998). They raise concerns that feminist reforms of the 1970s and 1980s have not empowered women. While women's groups have successfully lobbied for legal reform, especially in cases of gendered violence, these legal reforms have failed to be translated into implementation. The results in these cases world-wide are low rates of reporting, charging, prosecution, and conviction on the one hand, and increased convictions of racial and other minorities on the other (Snider, 1998; Koss, Bachar, Hopkins, 2003; Koss, 2006; Daly, Stubbs, 2006).

It is therefore of paramount importance to keep these issues in mind while mediating or facilitating cases of gendered violence in the private realms of RJ. Despite the confidentiality code, the mediators should bear in mind the societal interest, especially efforts by the women's movement to make these cases public – not necessarily concrete cases, but statistics must be generated regularly and shared publicly. There is indication that broader (than mediation) models of RJ like conferencing or circles may be better at including community and representing therefore society's interest on the matter. The harm caused is understood better through using discursive processes, such as victim impact statement at a trial and RJ conferencing in the presence of the offender's community (Hudson, 2002). At the same time, while protecting the identity of the women, human stories can be shared through research writing, presentation in conferences, media interviews, or interaction with civil society and government. Some of the practitioners with an interest in writing and research have also been very helpful in sharing their work with the academic sphere and civil society in general (see Madsen, 2004, 2005, 2007, 2009; Gustafson, 2005).

The second issue, strongly related to the first one, is how should the two systems interact? Comparison between RJ and the CJS, and emphasis on the

advantages of the former with regards to gendered violence cases, sounds easy – particularly in light of the failure of the latter. We would nevertheless like to caution against easy and general statements that RJ works magically in all these cases. Practitioners in the field know how difficult this process is (Umbreit, 2001). Indeed, we would argue that extreme attention must be paid to the standards and methods employed in such mediation cases given the complexity of the issue. In her paper on RJ and gendered violence, Hudson (2002) concludes that questions of range of crime dealt with by RJ programmes and questions of standards cannot be dealt with in isolation. At the same time, the wider the range of offences dealt with by RJ, the more it may merge with the CJS. Daly (2002), in her review of cases from the South Australia Juvenile Justice programme, says that in these cases the aim cannot be diversion from court, but a better offer of whatever the court is offering (retribution, rehabilitation, individual and public protection). It is important to bear in mind that RJ mechanisms can also be used independently of the legal system (Gustafson, 2005; Madsen, 2004, 2009) – for example, mediation can take place during all the stages of a crime, even when a sentence has already been issued.

Based on these arguments, we can therefore reason that mediation should not take place as diversion from the court but parallel to it, and, instead of criticising the CJS, RJ should inform its revision of practice and improved implementation, especially in cases of gendered violence. Women who find the courage to report and demand prosecution of the offender should be granted the right to prosecution leading to a criminal trial, alongside mediation or conferencing. Mediation or conferencing would be offered only in case the victim expresses openly the desire for it, after a fully informed session on its advantages and disadvantages. Clearly, both the prosecution and the mediation team would be informed by a specialised team, including medical and welfare staff. The combination of the two (trial and RJ approach) could be a good measure of control against secondary victimisation and could allow the woman a forum in which to narrate her story outside the legal and standard framework, while clearly pursuing her need for a public denunciation and prosecution of the crime. On the other hand, women who do not want to report the case and go through the whole system (police, court, prosecution) should have the option to deal with the matter in another way, the restorative way. In the following we will introduce the way in which the Centre for Victim of Sexual Assault in Copenhagen deals with these cases.

Restorative dialogues in sexual assault cases: making things happen

The Centre for Victims of Sexual Assault is a one-stop centre situated at the University Hospital of Copenhagen. The Centre was set up in 2000 by parliamentary resolution – after many years of political pressure from women’s organisations – in order to provide a coherent and interdisciplinary service for women and men (from the age of 15) who had been exposed to rape or attempted rape.⁵ Annually, approximately 250-300 women (and a few men) contact the Centre; 60% of the women are below the age of 25 years, 65% are acquainted with the offender prior to the assault and one third of the women report the assault to the police (Center for Voldtaegtsofre 2005, 2006, 2007, 2009).

A team of doctors, nurses, psychologists and social counsellors provides medico-legal examination, medical treatment in the acute phase followed up by short- or long-term psychological treatment and social counselling. The Centre works independently, but in collaboration with the Institute of Forensic Medicine and the police in cases where the assault has been reported. By offering professional and skilled medical and psycho-social treatment immediately after the traumatic experience, the Centre aims to help the women regain power and control over their lives and to reduce the risk of further victimisation.

In 2002 restorative dialogues were introduced as a response to several requests from women wanting to face the offender (Madsen, 2004). Facilitated restorative dialogues were implemented as a part of the psycho-social treatment and rehabilitation scheme. On an annual basis, approximately 15 women who contact the Centre are referred to a facilitator.⁶ Since the possibility of restorative dialogues after a sexual assault has become public, the Centre also receives calls from women outside the hospital. One third of the women eventually have a face-to-face dialogue with the man who assaulted them.

Based on a report (Madsen, 2005) about restorative dialogues for 16 cases referred to the facilitator during 2004, we have seen that 11 of the 16 women

⁵ The Centre only takes in persons exposed to sexual assault within 72 hours after the assault.

⁶ The facilitator is a trained victim-offender facilitator employed at the Centre, in charge of public relations and training.

who considered a restorative dialogue had not reported the assault to the police; 15 women reported that they had been exposed to either/or vaginal, anal and oral rape, while one woman had been exposed to attempted rape. The majority of the women were between 15 and 24 years old, three women were between 30 and 49 years old. Each woman was acquainted with the man who had assaulted her.

Methodology

The Centre, being in the health sector and therefore outside the CJS, offers certain possibilities and certain limitations. One limitation is that the Centre is not allowed to contact the offender directly in order to suggest a dialogue. This can only be done by the 'patient' – the woman herself. Writing a letter or sending a text message is the most common way to make contact.

An essential part of the assessment undertaken by the facilitator is in anticipating the vulnerable situation of the woman 'inviting' the offender to a dialogue and the possibility of getting a rejection. Taking this initial step towards a dialogue is, however, a very empowering step for the woman, even if the journey, as can happen, ends here. No response from the offender is of course a great disappointment for the women, but the satisfaction of having done what was in their power to do remains with them.

"I felt a sense of inner tranquillity when I sent that letter, and if he doesn't answer at least I know that I took action. I can look myself in the mirror and say that I did something. Just knowing that is a huge help. It's a change in my normal pattern of emotional reaction and I feel really good about it."

If the offender agrees to meet the woman, a lengthy journey of preparation begins. The facilitator has several separate meetings with the woman and the offender, assessing the possibility of a face-to-face meeting and clarifying the motivations, interests and needs of both. At victim-offender meetings within the CJS, guilt has already been established and confessed to; however, this is not always the case when the restorative meeting takes place outside the CJS. This calls for clarification of the purpose of the restorative meeting. The parties will be realistically prepared for what can be achieved and what might not be possible to achieve at a meeting where accounts may differ and the question of guilt might have to be negotiated. The role of the

facilitator, emphatic and impartial, will be made clear, as will the overarching aim of the facilitator, which is to ensure that no further harm is done.

In these circumstances, women and men who, by their own choice, engage in the unpleasant process of facing each other – and agree to undertake lengthy preparation with the facilitator – seem motivated, in the words of Howard Zehr (1990), ‘to make things right’ or to do the right thing. Mostly for themselves.

What makes the women want a dialogue?

Women who have been sexually assaulted have needs that in many ways resemble the needs of other victims of violent acts: questions to ask, anger to show. They want their suffering to be recognised and validated by the one who has caused it. They want an apology, or justification. They want what happened to them not to happen to anyone else. They want to get on with their lives, to live no longer in ‘his’ shadow. They want to feel free and safe again. They want to add another narrative to the story of the assault and restore their dignity.

“I wanted a whole lot of answers. I felt as though I knew nothing. I just thought, why did this happen?... I hope that this will make him be more honest with me and tell me why it happened. Was it me giving off the wrong signals that made him just ... Of course you can’t help but think that you were probably partly to blame yourself.” (Nana)

“It may be selfish, but I want him to feel what I’m feeling. I want him to have just one sleepless night so that he can get an idea of what it’s like.” (Camilla)

“I want him to know what he’s done to me. That he’s hurt me all the way in there where I thought I was invulnerable. He can’t feel my pain, but he needs to understand the way it has affected me.” (Cecilie)

“I’m interested in this not happening again. I want to ask him what the hell he’s going to do about it. I want to hear if he’s planning on living a life of celibacy or showing genuine regret and remorse in some way.” (Josefine)

Outcome

Do women achieve a sense of justice by participating in a restorative process and a face-to-face meeting? Some women (in the 2004 sample) expressed that they felt justice whether wholly or partly had been done. Others were left with a feeling that there had been no reasonable consequences for what they had been through. Meanwhile, the fact that none of the women regretted embarking on the restorative dialogue process, coupled with the satisfaction expressed with the process, indicates that the option of a restorative dialogue – regardless of the outcome – gave the women a good feeling merely by participating in the process.

The procedure provides women with a platform from which to address the men who assaulted them, directly or indirectly, while validating their desire for retribution and rehabilitation. Forgiveness and reconciliation is not the aim of the restorative dialogue, nor does it take place. The narratives that are exchanged, the questions asked and answered, the emotional expressions (of all kinds) that surface during the meeting do promote conciliation with what happened. It is however important to recognise that the restorative dialogues are not a way to end or reach closure of a traumatic experience, nor an option for all women. But it is a step that some women find helpful to take in regaining meaning and dignity in their lives after a sexual assault.

Conclusion

In this paper we argued that we should be open to taking a broader view of possible responses to sexual violence. While advocating RJ as a good option for these cases, we point out that these justice processes can take place in many legal contexts (instead of reporting an offence; after an offence has been dropped by the police/prosecution; parallel with a court process; and post-sentence). We presented a model and a framework in which RJ can be practiced mainly with women who have not reported the offence. In such cases, we argued that practitioners of RJ should make an active effort to bear in mind the women's movement struggle to make the private political, and therefore make statistics available and find ways to share the human stories while protecting women's privacy.

We furthermore argued that when the offence has been reported, the case should be followed in tandem by both systems instead of being diverted; this will protect the women's efforts to obtain justice from the validated and public CJS, while keeping rates of re-victimisation low by offering a non-legal forum in which to narrate the story through RJ. The way in which these parallel efforts would work in practice is not immediately self-evident, but needs further debate in specific contexts and legislations.

We also argued that, given the complexity and sensitivity of the matter, RJ must deal with these cases with extreme care and attention in ways that are appropriate for sexual assault cases. As with other crimes of serious violence, the expertise of the facilitator and those involved in the pre-mediation or conference phase, as well as follow-up, will be of key importance. Here we presented experience from the Centre for Victims of Sexual Assault in Copenhagen, where lengthy preparation is required when approaching these cases on a one-to-one basis, making a thorough assessment of each woman's needs.

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Opasne veze?: Feministički i restorativni pristup seksualnom nasilju

Adekvatnost restorativne pravde za krivična dela vezana za rodno bazirano nasilje, kao što su nasilje u porodici i seksualno nasilje, oduvek je bila i još uvek je veoma osporavana. Ovaj rad se fokusira na adekvatnost restorativne pravde u pristupu seksualnom nasilju, prvenstveno sa osvrtom na iskustva restorativnih dijaloga koji se praktikuju u Centru za žrtve seksualnog nasilja u Kopenhagenu i uz feministički pristup primeni mera restorativne pravde u slučajevima seksualnog nasilja. U ovom okviru, rad se specifično bavi sa dva pitanja: elementom privatnosti restorativne pravde naspram javnog aspekta krivičnog sistema reagovanja i međusobnim ukrštanjem krivičnog sistema i restorativne pravde u slučajevima seksualnog nasilja. Kada je u pitanju odnos krivičnog sistema i restorativne pravde, autorke tvrde da bi restorativna pravda mogla da se koristi u slučajevima žrtava seksualnog nasilja, ne primarno kao deo programa diverzije, već onda kada je ponuđena nezavisno od ili paralelno sa krivičnom procedurom. U odnosu na debatu privatno/javno, autorke tvrde da dok susreti u okviru restorativne pravde, koji se obavljaju u visoko poverljivim uslovima, mogu imati negativan uticaj na napore ženskog pokreta da izmeste nasilje nad ženama iz privatnog u javni domen, dotle kreiranje alternativa visokih standarda za žene koje imaju potrebu za podrškom i konstantno podsticanje javne rasprave o rodno zasnovanom nasilju predstavljaju dobar feministički odgovor na ovo kompleksno pitanje.

Ključne reči: seksualni napad, restorativna pravda, žrtve, ženski pokret.