



UNIVERSITÀ
DEGLI STUDI
FIRENZE

DOTTORATO DI RICERCA IN
*"Teoria e Storia del Diritto-Teoria e Storia dei Diritti
Umani"*

CICLO XXV

COORDINATORE Prof. Paolo Cappellini

*The Restorative Justice Apparatus. A
problematization of socio-historical
explanations and theoretical justifications of
the Restorative Justice*

Settore Scientifico Disciplinare IUS/20

Dottorando

Dott. Maglione Giuseppe

Tutore

Prof. Santoro Emilio

Coordinatore

Prof. Cappellini Paolo

Anni 2010/2012

*To Krisztina,
My lightful place*

*I destroy the work before I make it.
But I get a lot of pleasure from jeopardizing my own career,
my own way of thinking things, I think it has to do with reinventing myself.*
Felix Gonzalez Torres

ACKNOWLEDGMENTS

A number of people and institutions have contributed, directly and indirectly, to the development of this work. To great extent, the idea to write about the Restorative Justice, sprung up from my long-lasting collaboration with the organization 'L'altro Diritto-ONLUS'. Volunteering for almost ten years as legal advisor in two Italian prisons has been a critical incentive to 'reinvent' myself and to reorder the priorities of my professional and private life. Furthermore, being part for seven years of the 'AdirMediazione' victim-offender mediation's team, has directly contributed to raise the main questions addressed by this thesis. Antonella, Caterina, Cristina, Federica, Francesca, Irene, Paola, and Valentina are great practitioners and wonderful persons, from whom I've learned a lot. To share that experience with them has been a true honor.

More recently, I have truly benefited from the discussions with Michael Kilchling at Max Planck Institute in Freiburg, Ian Loader at Oxford University and particularly Nils Christie at the University of Oslo. I've also got insightful suggestions by two conferences' audiences I presented the provisory findings of my research in early 2013. At the XXIX post-graduated course in Victimology at Interuniversity Center, Dubrovnik, I shared my thoughts with a wide and multicultural audience. Elmar Weitekamp, Jeanne Hulsman and many others, provided me with valuable comments and questions, helping me to further streamline my research. During the summer, I presented at the Post-Graduate conference in Criminology at Oxford University. Beside Ian Loader, countless other questions and criticisms from the highly qualified colleagues, offered me thought-provoking insights. A special acknowledgement is due to the Department of Public and International Law, University of Oslo and to the Sosialforsk, University College of Oslo and Akershus. I spent the last year of my PhD as visiting researcher at these academic institutions, benefited immensely from the library resource available through them.

Needless to say, my supervisor, Emilio Santoro, has played a crucial role in the development of my ideas leading to the thesis. Moreover, he has been, throughout the last ten years, an essential figure for my growth as a researcher and human being. I will never forget his trust, passion and teachings.

My family, blindly believing in me, has helped to nurture my dreams to an extent which is impossible to describe as it is impossible to thank them enough.

Finally, Krisztina has lately been my life-saving support, my daily challenge as well as the 'lightful' place where everything makes sense.

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INTRODUCTION

“*A philosophical problem has the form: ‘I don’t know my way around’*”

Problematizing the Restorative Justice

The Restorative Justice (hereafter RJ) is commonly described by its proponents as a tangle of multifaceted discourses informing a growing range of practices applied in various human environments (criminal reform, school, community policing, etc.)². Explanations, interpretations and practical accounts on the RJ look like a relentlessly conflicting, overlapping, contradicting range of positions. Perhaps, there is not even a thing like ‘the’ RJ, but many different versions of it, often each other incommensurable. The broad variety of theoretical views, goals and operational strategies seems to be a worldwide taken-for-granted ‘trademark’ of the RJ. Given such a scattered landscape, this work starts out with an eccentric move. *We do have* authoritative stances in the field of the RJ, made possible by processes which extensively define and mark the conceptual and epistemic boundaries of this field, what is relevant, marginal or illegitimate knowledge within it, of course with tensions, paradoxes and inconsistencies. To re-construct the conditions of possibility of those versions, drawing the processes which produce the taken-for-granted truths on the RJ (which often end up conditioning our work on it, eluding an accurate critical reflection) is the main goal of this work. The methodological viewpoint adopted, is a specific reformulation of the Michel Foucault’s *problematization*, understood as a critical and historical ontology of our ‘truths’. It aims at discursively analyzing ‘true’ discourses, historically re-constructing the conditions of their emergence. It tentatively shows, with a de-familiarizing attitude, that the discourses which define the taken-for-granted horizons of our present are indeed contingent and local, placing them in wider political contexts, opening spaces for self-critical and counter-hegemonic accounts.

What is the ‘Restorative Justice’? Meanings and approaches

I propose to understand the RJ as a historically stratified *discursive field*, i.e. the combination and juxtaposition of *all* the discourses on the history, concepts, and practices of the RJ. They have been accumulated over the last forty years across western democracies in a virtual space mainly represented by the ‘textbook’ literature on the RJ. ‘Discourse’ here means *discursive practice*³. According to this perspective, discourses are more than pure linguistic entities which passively describe the reality. They do not refer to texts, in a narrow sense, but to “*the ensemble of phenomena in and through which social production of meaning takes place, an ensemble which constitutes a society as such*”⁴. Discourses are the ‘substance’ of subjectivities, political struggles, epistemic structures and power relations. Among the wide range of discourses which compose the field of the RJ, only some can be qualified as ‘authoritative’. The research focus is thus placed on the authoritative historical explanations, theoretical conceptualizations and procedural accounts of the RJ, i.e. on the discursive

¹ Wittgenstein, L. (1968). *Philosophical Investigation*. Oxford: Blackwell, § 123 (or.ed. Wittgenstein, L. (1953). *Philosophische Untersuchungen/Philosophical Investigation*, translated by G.E.M. Anscombe. Oxford: Blackwell).

² Zernova, M. (2007). *Restorative Justice: Ideals and Realities*. London: Ashgate.

³ Foucault, M. (1981). The order of discourse. In R. Young (Ed.), *Untying the text: a post-structural anthology* (pp. 48-78). Boston: Routledge & Kegan Paul.

⁴ Laclau, E. (1980). Populist Rupture and Discourse. *Screen Education*, 34, 87-93, p. 89.

practices which have reached over the time, a ‘privileged’ status in the discursive field of the RJ. They constitute the qualitative hardcore of that field, the taken-for-granted truths on ‘why’, ‘when’ and ‘how’ the RJ is like, emerges and is applied. I call the combination of these discourses the *archive* of the RJ, whose drawing up is elected as the first step of this work. The main issue then, is to identify the conditions of possibility of the authoritative discourses, i.e. the processes which set the conditions for knowing, saying and doing *legitimately* within the RJ field. This second phase concerns the “*grey and meticulous*”⁵ exam of the basic units of the authoritative discourses (or elementary components the archive), looking into their historical ‘surfaces of emergence’. To treat the archive in this way means to elaborate the *discursive formation* of the RJ, the ‘dynamic’ side of the archive as the system of what can be ‘said and thought’ about the RJ, in a given period. But a history which aims at being critical needs to further look at the political rationality which ‘embeds’ the discursive formation of the RJ, and whose in turn RJ is a tool of actualization. Using a *governmental* approach, the discursive formation of the RJ will be linked to the *ethopolitics* as neo-liberal political rationality⁶. I will scrutinize the specific technologies which inscribe in the collective and individual ‘bodies’, social and political identities supported and supportive of the discursive formation of the RJ, also looking at how they may become incorporated in specific strategies of governance. While at a collective level I will examine the technologies of securitization, refeudalization and psy-individualization, at the individual level I will examine the processes of ‘restorative’ *subjectivation*, as a ‘sample’ of the ethopolitical micro-technologies. I will namely focus on how the subject positions of ‘victim’, ‘offender’ and ‘community’ (as emerging from the archive of the RJ), are mobilized through the Victim-Offender Mediation (as authoritative procedural discourse on the RJ), re-constructing the ‘restorative’ subject as a projection of the ethopolitical post-social citizen. The last phase of this work consists in looking back to the achievements of the problematization. The RJ *apparatus* is as much a conceptual construct and a methodological tool. It represents a new object of research characterized by the re-configuration of the RJ as a matter of power-knowledge structures, as well as a way ‘to cut’ the problem(s) of the RJ in new ways, sublimating the problematization’s goals, procedures and accomplishments, producing new problems and opening up new paths of investigation. The conviction which sustains such a scholarly effort is that this specific way of writing about the RJ, might open up counter-intuitive spaces for self-critical accounts on it. The systematic doubt on the authority of our present and the consequent proliferation/diversification of interpretations are driving research *values*, and as such, the axiological foundation of this work. Additionally, making the ‘true’ present more questionable is thought as a way of rendering it more available to be changed and improved.

Problematizing the Restorative Justice: reasons, values and implications

This work is not a history of the RJ as such, how it has emerged, justified and practiced over time. Actually, this is an historical reconstruction of the

⁵ Foucault, M. (1984). Nietzsche, genealogy, history. In P. Rabinow (Ed.), *The Foucault Reader* (pp. 76-100). New York: Pantheon Books, p. 76 (or.ed. Foucault, M. (1971). *Nietzsche, la genealogie, l'histoire*. In S. Bachelard et al. (Eds.), *Hommage à Jean Hyppolite* (pp. 145-172). Paris: Presses Universitaire de France).

⁶ Rose, N. (2006). *The Politics of Life Itself: Biomedicine, Power, and Subjectivity in the Twenty-first Century*. Princeton: Princeton University Press.

conditions of the main, 'taken-for-granted' discourses about the RJ. Accordingly, my research questions are: how situated discourses have achieved the status of authoritative and 'true' histories on rise, justification and application of the RJ? Which expertise and authorities are involved? From what the truths on the RJ stem and how are they structured? Are these connected with power-knowledge relationships? To which political rationality the RJ responds? Do they condition human subjectivity? How? The Foucault's tools of research are as charming as problematic, always subject of 'unintended consequences', or unthinkable developments. Here, this rich reservoir is thought as a range of tracks set along two lines, deeply interwoven: a research *ethos* and some specific heuristical devices. The foucauldian *ethos* expresses itself in the attitude to "*multiply lines of investigations and possibilities for thought*"⁷ from neglected viewpoints, valuing local, partial, contextual and counterintuitive knowledges against authoritative and taken-for-granted narratives on our *present*. It is an ethos which looks for contingencies, when the meanings of practices and institutions are predicated as 'natural' and 'essential'. In this work such ethos inspires the will of historicizing truth-making processes, to challenge the distinction between discursive and non-discursive realms and the attention drawn to the productivity of power-knowledge relationships. As far as the specific research tools are concerned, I argue for a particular interpretation of the foucauldian *problematization*. The history of problems (and responses to them), here entails the functional integration (and then the overcoming) of archeological and genealogical approaches in order to 'diagnose' the contingencies of 'one' present. In the problematization, which is more a style of reasoning than a methodology, there is no space for the search for static origins or causal explanation, neither for the use of universals-a-priori grids of intelligibility. This approach, deliberately unable to create *grand récits*, allows only for dynamically reconstructing the life-course of given 'true' discourses: from singular, humble contingencies to authoritative, taken-for-granted narratives. It makes only possible to chart their trivial evolution, describing their 'groundedness', challenging their status of non-questionable products of a progressive history. Of course, the possibility of constructing and supporting new truths by criticizing old ones is implicit in this project. At the end, this work just aims at introducing "*a significant difference in the field of knowledge, at the cost of a certain difficulty for the author and the reader, with, however, the eventual recompense of a certain pleasure, that is to say of access to another figure of truth*"⁸. To exercise a kind of 'pyrrhonian' skepticism about the RJ, does not mean to be external to it. The systematic doubt on what we take for granted as a condition for multiplying and diversifying lines of interpretation on the RJ, is as such the 'truth' I deliberately aim at constructing. The RJ appears in this perspective, a tangle of accounts (some of which authoritative) embedded in power-knowledge relationships whose 'naturalness' is only the surface of broader phenomena. By reconstructing the conditions of the authority and of the truth-claims of the RJ, it is hopefully possible to see them as contingent, contextual and partial. This new 'truth' is meant to stimulate new interpretations and more self-critical actions in this field.

⁷ Rabinow, P., Rose, N. (2003). Foucault Today. In P. Rabinow, N. Rose, (Eds.), *The essential Foucault: selections from the essential works of Foucault, 1954-1984* (pp. VII– XXV). New York: New Press, p. VII.

⁸ Foucault, M. (1991). Des Travaux. In M. Foucault, *Dits et Ecrits: 1980-1988*, Vol. 4 (Edited by Daniel Defert et al.). Paris: Gallimard, p. 567.

CHAPTER 1

RE-WORKING THE MICHEL FOUCAULT'S META/THEORIES: TOWARD THE PROBLEMATIZATION

"If a lion could talk we could not understand him"⁹

1.0. Introductory remarks

Foucault's intellectual project can be broadly described as an attempt to 'use' the past, looking into its most peripheral sides, to gain access to that 'familiar stranger' represented by our present, its beliefs, practices and institutions which reach the state of uncontested truths. In this perspective, the past, rather than a mere object of research or end-point, is a medium for interrogating the present, while the history rather the recording-activity of a progressive and continuous flow of events, is the *history of the present*, the historicization of our truths¹⁰. Likewise Foucault himself argued about the influence of Nietzsche in his own work¹¹, the only valid way of using Foucault's thought is to stretch it, to generate other kinds of questions and problematize it without considering the possible faithfulness to any 'official' Foucault. My intention accordingly, is to work out, revising (and maybe distorting) the research devices elaborated by Foucault -the archaeology and the genealogy- claiming their 'normative' complementarity, justified on the ground of specific heuristic aims and ethical values. The goal is to elaborate a *meta/theory*¹² able to make intelligible the inner dynamics of truth-production, to make contingent the authoritative 'present' of the RJ, opening up for alternative understandings and interpretations. A further introductory remark to be made at this point, is to highlight that one of the features of Foucault's work is the striking challenge to the 'positivistic' boundary between theory and meta-theory, between objects and knowledge. Therefore, to choose the problematization implies the choice to pursue a knowledge of specific phenomena, specific dimensions of the human realm which are in turn interwoven with the knowledge about them. Choosing and debating a foucauldian-inspired approach, is not only to select and discuss bodies of techniques for the historical investigation of social phenomena, for acquiring new knowledge, or correcting and integrating previous knowledge. It is indeed, as Martin Saar argues, to decide to 'construct' the phenomena researched according to specific preferences, to privilege objects whose 'meaning' and validity are affected by revealing their historicity and which come to be within the frame represented by those viewpoints¹³. In this way, the boundaries between 'what it is' and 'how to know it' are irremediably blurred.

1.1. Archeology

Foucault himself associates his idea of archaeology with Immanuel Kant's philosophical archaeology, as analytical attempt to 'discover' the condition of the possibility and the condition of the existence of knowledge: "*Kant used this word [archaeology] in order to designate the history of that which renders necessary a*

⁹ Wittgenstein, L. (1968). *Philosophical Investigation*, cit., II, XI, p. 223.

¹⁰ See Roth, M.S. (1981). Foucault's "History of the Present". *History and Theory*, 20(1), 32-46.

¹¹ Foucault, M. (1980). Prison Talk. In C. Gordon (Ed.), *Power/Knowledge: Selected Interviews & Other Writings 1972-1977 By Michel Foucault* (pp. 37-54). Brighton: Harvester Press, pp. 53-54.

¹² Throughout the text I adopt the sign 'meta/theory', referring to the foucauldian-inspired approach adopted. 'Meta/theory' expresses the mutual implication as well as the tensions between 'what it is' and 'how to know it', between theory and meta-theory.

¹³ Saar, M. (2002). Genealogy and Subjectivity. *European Journal of Philosophy*, 10(2), 231-245, p. 232.

*certain form of thought*¹⁴. Foucault, of course, does not follow Kant in his endeavor to determine the conditions of the possibility of *all* possible experience and the principles governing the progress of philosophy in history. Foucault seeks only to understand the effects of that order on historical forms of knowledge. The common interest that these two great scholars share, is therefore in the way *a priori* principles affect the historical forms of knowledge¹⁵. The question is *how* to identify and *where* to look for the *a priori* principles which make historically possible specific forms of knowledge. Foucault found his answer since the 1960s in the constitutive and governing role of discourse in the social and historical contexts where truth, knowledge, power and authority are used. For Foucault, our discourses shape what can appear to us as knowledge and truth. Objects of knowledge and truths are not just simply ‘out there’ waiting for the right representational language: our discourses systematically form the objects of which they speak. In the foucauldian (archaeological) view, the discourse is analyzed excluding anything lying beneath it or hidden within it, focusing only on the level of its basic, operative existence, intended as a set of emerging and transforming statements (and their relations), instantiated in historical “*positivities*”¹⁶. In this perspective, instead of referring the discourse back to the unifying function of a transcendental subject or by recourse to a psychological subjectivity¹⁷, the focus is on what Foucault calls “*discursive formations*”¹⁸. The archaeologist must identify, analyze and question from a detached position, these trans-individual ensembles of statements, with a specific inner economy, starting from their ‘site’, the *archive*. Discursive formations are the economics of the 19th century or the analysis of wealth of the 18th, the general grammar or the natural history. The archaeological analysis provided in *Madness and Civilization*¹⁹, *The Birth of the Clinic*²⁰, and *The Order of Things*²¹, are nothing but the attempts to individualize and describe discursive formations²², their historical changes, ruptures, discontinuity, tracing back the conditions of the emergence and transformation of their statements, as basic units of the discursive formations. Archeology then, does not describe history through discourse; it describes the history of discourse. Thus, discourse is not just a set of articulated propositions, the *simulacrum* of hidden psychology or universal historical idea; it is the set of relations within which historical forms of knowledge, truth and authority gain their sense, becoming possible. In sum, archeological analysis seeks to profile the history of specific discourses, the set of ‘things said’ in all their interrelations and transformations as processes occurring at a very specific

¹⁴ Foucault, M. (1971). Monstrosities in Criticism. *Diacritics*, 1(1), 57-60, p. 60.

¹⁵ McQuillan, C. (2010). Philosophical archaeology in Kant, Foucault and Agamben. *Parrhesia*, 10, 39-49, p. 46.

¹⁶ Foucault, M. (1972). *The Archaeology of Knowledge*. New York: Pantheon Books, p. 118. (or. ed. Foucault, M. (1969). *L'Archéologie du savoir*. Paris: Gallimard).

¹⁷ Ibidem, p. 15.

¹⁸ Ibidem, Chapter II.

¹⁹ Foucault, M. (1964). *Madness and Civilization: A History of Insanity in the Age of Reason*. New York: Pantheon Books (or. ed. Foucault, M. (1961). *Folie et Dérailson: Histoire de la folie à l'âge classique*. Paris: Gallimard).

²⁰ Foucault, M. (1973). *The Birth of the Clinic: An Archaeology of Medical Perception*. London: Routledge (or. ed. Foucault, M. (1963). *Naissance de la clinique: une archéologie du regard médical*. Paris: Presses universitaires de France).

²¹ Foucault, M. (1970). *The Order of Things: An Archaeology of the Human Sciences*. New York: Pantheon Books (or. ed. Foucault, M. (1966). *Les Mots et les choses: Une archéologie des sciences humaines*. Paris: Gallimard).

²² Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 157.

level, discarding any form of teleology, transcendental subject or unspoken *Zeitgeist*, as the driving forces of history and the informing principles of discourses. This analysis abandons all preconceptions about historical unity or continuity, describing instead the processes of discourse in all their thresholds, alterations, and discontinuities. The ideas that discourse can be described in and of itself, not as a representational mark of what is known but as a precondition for knowledge, tentatively opens up opportunities for showing that what we consider we know is actually depending on how we talk about it.

1.1.1. The discursive formation

What makes the clinical medicine or the madness a united grouping of discourses is not the common reference to given objects, concepts, themes or styles, but the presence of discursive regularities (or rules) between dispersed statements, which produce certain objects, concepts, themes and styles²³. A discursive formation is then the “*system*²⁴” of those statements, which makes possible and shape, in a given space/time, particular cultural configurations²⁵. The concept of discursive formation is elaborated by Foucault firstly in the *Archaeology of Knowledge*. In the earlier work he uses a similar notion, that of “*episteme*²⁶”. The term *episteme*, introduced in *The Order of Things*, refers mainly to the orderly ‘unconscious’ structures underlying the production of scientific knowledge in a particular time and place²⁷. A grouping of statements that suggests a consistent pattern in how they function as constituents of a system of knowledge. The concept of discursive formation seems to partially encompass the episteme, even if more specific, partial, and, at least apparently, less inspired by the structuralist tradition. The individualization and analysis of discursive formations are the main tasks of the archeologist. The first archaeological undertaking is then, to identify and distinguish a discursive formation from others. In a given space/time, in fact, are seemingly ‘active’ different discursive formations which fashion a plethora of discourses, in different areas of human life. Foucault gives explicitly three criteria of individualization. The first is the criterion of *formation*, which refers to the specific set of rules of constitution and existence of all the individual components of a discursive formation (objects, enunciative modalities, concepts and theoretical options). These rules control the fact that something can be talked about, as necessary condition for the appearance of objects of discourse. To this cluster of rules belong for instance, the prohibitions about speaking of certain things or the rules which establish institutional bodies as the proper authority legitimate to talk. In this group we must also include the rules concerning who is allowed to speak/write and the prescriptions which impose the proper forms that concepts and theories must assume to be accepted as knowledge. The second criterion is that of *transformation* or of ‘threshold’. The archeologist must look at the occurrence of new rules of formation, how they come into effect and modify the whole ‘architecture’ and operation of a precedent assembly of objects, statements, concepts and theoretical choices introducing a novel organization through the recomposing of some of them, the elision of others and the emergence of new ones. Foucault’s focus is on the analysis of transformations in their specificity, rather

²³ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 37.

²⁴ Ibidem.

²⁵ Deleuze, G. (1988). *Foucault*. Minneapolis: University of Minnesota Press, p. 5.

²⁶ Foucault, M. (1970). *The Order of Things*, cit., p. IX.

²⁷ Ibidem.

than a general ‘change’: “I have stressed not discontinuity, but discontinuities (that is to say, the different transformations which it is possible to describe concerning two stages of discourse)²⁸”. Finally, stands the principle of *correlation* that is deployed in those relations that localize a specific discursive formation from others in the non-discursive context (the institutions, social relations, economics and political conjuncture) in which operates²⁹. Once identified a discursive formation it is possible to detect and describe its ‘inner’ structure, by dwelling on its individual components (and their process of formation): the objects, the enunciative modalities, the concepts and the theories/strategies. The objects of a discursive formation are groups of relations established between *surfaces of emergence*, *authorities of delimitation*, and *grids of specification*. The “*surfaces of emergence*³⁰” are the fields in which an object first arises. These can be pre-existing fields like family, social group, work situation, etc., each of which is normative to some degree, each of which has developed a ‘margin of tolerance’ that roughly defines the field by what it rejects. The “*authorities of delimitation*³¹” denote who has the authority to delimit, designate, name, and define objects, the structure of their power (both in its organization and in how it was publicly perceived), and the processes by which they adjudicated the limits of a given object. Finally, we must analyze “*grids of specification*³²”, the systems by which objects are described, separated, and classified. What emerges from this overview of the object-making process within a discursive formation is that objects do not pre-exist their emergence under certain complex, relational, discursive conditions, that they are not defined by its internal, conceptual nature, but by its exterior relations, its triangulation or juxtaposition with other objects. In this perspective, we understand the dimension of a discursive formation as a discursive practice, a relentless self-regulated process of objects-making. The second constitutive element of a discursive formation is what Foucault calls “*enunciative modalities*³³”. The premise is that the archaeological method is developed to discharge the approaches to knowledge that privilege a ‘sovereign’ subject anterior to discourse³⁴. Foucault stresses that the meaning of a discourse is not transmitted by “*a thinking, speaking subject*³⁵”, rather it is the discursive formation that provides an arrangement of “*subject positions*³⁶” which individuals may occupy. The subject is then substituted in its ‘unifying’ role of the discourse by the dispersion of subjectivity in various enunciative modalities. The enunciative modalities are then, a set of rules of formation which determine the positioning of the subject within a discursive formation. Foucault establishes three analytical steps in the identification of enunciative modalities. First, one must ask ‘who is speaking?’: “*Who, among the totality of speaking individuals, is accorded the right to use this sort of language? Who is qualified to do so?*³⁷”. Then, ‘which is the institutional sites from which it is possible to speak?’ and lastly: ‘which are the subject positions from which legitimate and binding

²⁸ Foucault, M. (1991). Politics and the study of discourse. In G. Burchell, C. Gordon, P. Miller (Eds.), *The Foucault Effect. Studies in Governmentality* (pp. 53-72). Chicago: University of Chicago Press, p. 57.

²⁹ Foucault, M. (1991). Politics and the study of discourse, cit., p. 54.

³⁰ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 41.

³¹ Ibidem.

³² Ibidem, p. 42.

³³ Ibidem, p. 53.

³⁴ McNay, L. (1994). *Foucault: A Critical Introduction*. Cambridge: Polity Press, p. 68.

³⁵ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 53.

³⁶ Ibidem, p. 51.

³⁷ Ibidem, p. 50.

statements can be made?³⁸. The third component of a discursive formation is the complex of *concepts*. This is also constituted by a group of relations: “[...] *what properly belongs to a discursive formation and what makes it possible to delimit the group of concepts, disparate as they may be, that are specific to it, is the way in which different elements are related to one another*³⁹”. Therefore, the archaeologist’s task is to describe the organization of the field of statements where successive or simultaneous emergence of disparate concepts appear and circulate. The themes or theories formed by certain discursive organizations of concepts, certain regroupings of objects, and certain types of enunciation produced by discourses, are defined by Foucault as *strategies*. Strategies are neither anterior to discourses nor the expression of a world-view expressed in words. They should rather be described as “*systematically different ways of treating objects of discourse, of arranging forms of enunciation, of manipulating concepts*⁴⁰”.

After performed the ‘internal’ analysis of a discursive formation, sorting out the basic individual components of a discursive formation, we can wonder how they are ‘held together’, how they constitute a unified discursive formation. As already hinted, the unity does not depend on the reference to the same object, concepts or style. It depends indeed on the relationships and interplays which make possible objects, concepts and strategies⁴¹. It is at these relationships that the archaeologist must pay attention, in order to understand the unity of a given discursive formation.

1.1.2. The role of the discontinuities and the archive

Foucault shapes a specific perspective or ‘lens’ to distinguish and examine a discursive formation in its historical development. Using this lens, it is possible to compare the discursive formations, to distinguish from those which do not belong to the same time-scale, to map their changes and social effects, in short: to carry out a complete archeological research. Foucault describes this analytical perspective as opposed to the traditional history of thought, ‘guilty’ of having overemphasized continuity and progression in history⁴². He distinguishes clearly between the traditional history (of knowledge and ideas) and his archaeology, describing four main differences: the attribution of innovations, the analysis of contradictions, the comparative descriptions, and the mapping of transformations. Foucault accordingly calls for something innovative, a new perspective, and a new focus: the study of *discontinuity*⁴³. This is the keyword in the historical analysis of the discursive formations, expressed by the attention paid to thresholds, ruptures, mutations, and transformations of discursive formations. The role of discontinuity in the archaeological history is threefold⁴⁴. First, discontinuity is used as a systematic hypothesis by the historian; second, is the result of his description and third, it is the concept that the historian’s work never ceases to specify⁴⁵. The other methodological tool which complements the attention to the discontinuity, is the issue of the institutional ‘sites’ of a discursive formation. From a strictly operational point of view, ‘where’ the archaeologist must look in order to grasp the historical

³⁸ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., pp. 52-55.

³⁹ Ibidem, p. 59.

⁴⁰ Ibidem.

⁴¹ Ibidem, p. 33; see also McNay, L. (1994). *Foucault: A Critical Introduction*, cit., p. 67.

⁴² Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 169.

⁴³ Ibidem, p. 5.

⁴⁴ Kusch, M. (1989). Discursive formations and possible worlds. A reconstruction of Foucault’s archeology. *Science Studies*, 2(1), 17-29, p. 23.

⁴⁵ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., pp. 8-9.

development of a discursive formation? Where to find the clues to understand and describe it? The answer provided by the Foucault is the *archive*⁴⁶. For Foucault, the notion of the archive differs greatly from its traditional meaning. That is, rather than conceptualizing the archive as the site for the accumulation of records, Foucault extends the concept, using it to refer to “*the totality of discursive practice, that falls within the domain of the research project*⁴⁷” or “*the system that governs the appearance of statements [...] grouped together in distinct figures, composed together in accordance with multiple relations [...] with specific regularities*⁴⁸”. His concept of the archive as “*the accumulated existence of discourses*⁴⁹” transforms it from an empirical to an abstract notion⁵⁰, with a “*virtual existence*⁵¹”. The archive is “*the law of what can be said, the system that governs the appearance of statements as unique events*⁵²”. The archive then, is not just a passive collection of records from the past, it is an active and controlling system of enunciation⁵³, which gives form to the “*great confused murmur*⁵⁴” that emanates from the discursive formation. Foucauldian archaeology, focusing on discontinuity and addressed to the archive, emphasizing the “*trans-personal authority*⁵⁵” of discursive formations, ends up setting out a radical destabilization of cultural discourses, devising a counter-intuitive narrative of our present, and a sharp challenge for historians.

1.2. Genealogy

In the foucauldian intellectual journey the term ‘genealogy’ expresses different ideas, goals and ways to reach them, evolving along the path of the Foucault’s serendipitous research. Indulging to a violent abstraction, it is possible to exemplify the meanings of the genealogy, arguing that basically this term refers to a differentiated and multi-layered conceptual practice. A good starting point for the analysis of this constellation of concepts could be, following Saar, the attempt to chart the basic, different but interwoven levels of genealogy⁵⁶. Genealogy can be therefore, understood as a mode of writing history; a mode of evaluation (a critique) and as a specific style for a genre⁵⁷. Genealogy is a specific form of writing history of certain objects characterized by a critical perspective⁵⁸. It implies the persistent attempt to make contingent what appears necessary, artificial what seems natural, strategically oriented what looks as genuinely ingenuous. Its purpose lies in “*describing social phenomena to signify their ‘instrumentalizability’ in constructing patterns between relations of power on the one hand, and norms, facts and systems of belief and knowledge on the other*⁵⁹”. The genealogy, as a critical/historical interrogation of the present, expresses itself in interpreting the combinations of knowledges, truths and authorities, with a

⁴⁶ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 145.

⁴⁷ Fairclough, N. (1992). *Discourse and Social Change*. Cambridge: Polity Press, p. 227.

⁴⁸ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 145.

⁴⁹ Ibidem, p. 289.

⁵⁰ Kendall, G., Wickham, G. (1999). *Using Foucault’s Methods*. London: Sage p. 25.

⁵¹ Featherstone, M. (Ed.) (2000). *Body Modification*. London: Thousand Oaks, p. 169.

⁵² Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 129.

⁵³ Ibidem.

⁵⁴ Ibidem, p. 146.

⁵⁵ Saïd, E. (1994). An Ethics of Language: Review of Michel Foucault’s *The Archaeology of Knowledge and The Discourse on Language*. In B. Smart (Ed.), *Michel Foucault: critical assessments*, Vol. 2 (pp. 60-79). London: Routledge, p. 69.

⁵⁶ Saar, M. (2002). *Genealogy and Subjectivity*, cit., p. 231.

⁵⁷ Ibidem, p. 232.

⁵⁸ Ibidem, p. 233.

⁵⁹ Ibidem, p. 235.

defamiliarizing and performative attitude⁶⁰. This way of writing history is lastly characterized by a precise style of writing, highly rhetorical and irreducibly hyperbolic⁶¹. What needs to be deepened here is the understanding of the main goals pursued through this complex project which works also as the common thread among the different applications of it. The overall aim of the genealogist can be considered the historicization of truths, to explore how it is that some truths and knowledges have come to be accepted as unproblematic⁶². Systematically doubting of any authoritative *grand récit*, genealogy works as a “gray, meticulous and patiently documentary. It operates on a field of entangled and confused parchments, on documents that have been scratched over and recopied many times⁶³”. As Nikolas Rose puts it, “genealogy seeks not to reveal falsity but to describe the constitution of truths⁶⁴”. Foucault instructs the genealogist to make visible the cluster of correlations underpinning one’s object of inquiry⁶⁵. Rather than tying historical events to a solitary, over-riding ‘cause’, Foucault champions the notion of “causal multiplication”; that is, “analyzing an event according to the multiple processes which constitute it⁶⁶”. In other words, “what emerges or comes-to-be does so because of a compilation of disparate factors⁶⁷”. The aim of genealogical research is therefore to describe the “polyhedron of intelligibility⁶⁸” of its object of study, to articulate the “multiple elements, relations and domains of reference that incompletely make this event intelligible⁶⁹”. This approach is radically anti-essentialist, it “oppose[s] depth, finality, and interiority⁷⁰”. Behind things there is “not a timeless and essential secret but rather the secret that they have no essence or that their essence was fabricated in piecemeal fashion from alien forms⁷¹”. The project of genealogical interpretation itself is hence interrogated: what underlies the efforts of interpretation? More interpretation. “If interpretation is a never-ending task, it is simply because there is nothing to interpret⁷²”. There is nothing absolutely primary to interpret because, when all is said and done “underneath it all everything is already interpretation⁷³”.

1.2.1. The Nietzsche’s legacy

Foucault explicitly conceptualizes the idea of ‘genealogy’ first in his seminal essay “*Nietzsche, Genealogy, History*”, published in 1971. Rather than seeking to describe the history of a concept in terms of a linear development, thereby reducing its entire history and genesis to an exclusive concern for utility,

⁶⁰ Saar, M. (2002). *Genealogy and Subjectivity*, cit., p. 235.

⁶¹ *Ibidem*, p. 238.

⁶² Bailey, M. (1993). Foucauldian feminism: Contesting bodies, sexuality and identity. In C. Ramazanoglu (Ed.), *Up Against Foucault: Explorations of some tensions between Foucault and feminism* (pp. 99-122). London: Routledge, p. 120.

⁶³ Foucault, M. (1984). *Nietzsche, Genealogy, History*, cit., p. 76.

⁶⁴ Foucault, M. (1996). The Impossible Prison. In S. Lotringer (Ed.), *Foucault Live (Interviews, 1961 - 1984)* (pp. 275-286), cit., p. 280.

⁶⁵ Foucault, M. (1991). *Politics and the study of discourse*, cit.

⁶⁶ Foucault, M. (1981). Questions of method: an interview with Michel Foucault. *Ideology and Consciousness*, 8, 3-14, p. 6.

⁶⁷ Prado, C. (1995). *Starting With Foucault: An Introduction to Genealogy*, 2nd ed. Boulder: Westview Press, p. 37.

⁶⁸ Foucault, M. (1981). Questions of method: an interview with Michel Foucault, cit., p. 6.

⁶⁹ Dean, M. (1998). *Questions of Method*. In I. Velody, R. Williams (Eds.), *The Politics of Constructionism* (pp. 182-200). London: Sage, p. 188.

⁷⁰ Dreyfus, H. L., Rabinow, P. (1983). *Michel Foucault: Beyond Structuralism and Hermeneutics*, 2nd ed. Chicago: University of Chicago Press, p. 107.

⁷¹ Foucault, M. (1984). *Nietzsche, genealogy, history*, cit., p. 78.

⁷² Dreyfus, H. L., Rabinow, P. (1983). *Michel Foucault: Beyond Structuralism and Hermeneutics*, cit., p. 107.

⁷³ *Ibidem*.

Foucault argues that each concept has a genealogy or history, an uncertain path of emergence that can be traced. Rather than seeking the ‘telos’ of a particular concept, genealogy must record the singularity of events outside of any finality, working as the “*eventalization*”⁷⁴ breaking the self-evidence of its object of study. The genealogy’s goal is not to trace the evolution of a concept, but to isolate the different scenes where they engage in different roles. In this regard, genealogy “*opposes itself to the search for ‘origins’*”⁷⁵. In *Nietzsche, Genealogy, History*, Foucault states to draw his idea of genealogy upon a critical, and philologically mindful interpretation of Friedrich Nietzsche’s *The Genealogy of Morals*. He argues that only sometimes Nietzsche uses in that book the word ‘*Ursprung*’ which denotes a particular essentialist conception of origin. The “*pursuit of the origin (Ursprung)*”⁷⁶ of anything is essentialist: “*because it is an attempt to capture the exact, and pure essence of things*”⁷⁷ it assumes a world of forms pre-existing the world of accident and succession, “*But he who listens to history finds that things have no pre-existing essence, or an essence fabricated piecemeal from alien forms*”⁷⁸. A genealogy, on the contrary, is not a quest for ‘origins’ of phenomena, but the attempt reconstruction their ‘*Herkunft*’ and ‘*Entstehung*’ *Herkunft* is, Foucault notes, the equivalent of ‘descent’, the ancient affiliation to a group, sustained by the bonds of blood, tradition, or social class⁷⁹. The analysis of *Herkunft* even if it might involve biological considerations, mainly attempts to identify the subtle, singular, and sub-individual marks of a given phenomenon, allowing to sort out of different traits which characterize it from similar ones. Wherever unification or coherence are thought to exist, the genealogist sets out to study the beginning, refusing to restore an unbroken continuity that operates beyond the dispersion of forgotten things, or to demonstrate that the past actively lives in the present. Rather, it attempts to follow the complex course of descent by maintaining passing events in their proper dispersion by identifying the contingencies that give birth to those things that continue to exist and have value for us. Instead of resorting to a teleological search for causes and functions, Foucault promotes histories of various phenomena that exist “*not in order to trace the gradual curve of their evolution, but to isolate the different scenes where they engaged in different roles*”⁸⁰. Foucault thus advocates the idea that “*far from being teleologically governed, the historical processes that give rise to the emergence of events are in fact [...] governed by chance*”⁸¹. He argues that historians should accept the introduction of the chance as a category in the production of events. The inclusion of the “*dimension of chance*”⁸² is, for Foucault, one of the fundamental notions required of critical historians. Genealogists aim at demonstrating how things that are assumed to be natural or inevitable have in fact resulted from a chance event or accident. The origin of particular practices is thus never simply ‘waiting to happen’; rather, historical events are contingent, serendipitous or

⁷⁴ Foucault, M. (1981). Questions of method: an interview with Michel Foucault, cit., p. 6.

⁷⁵ Foucault, M. (1984). Nietzsche, genealogy, history, cit., p. 77.

⁷⁶ Ibidem, p. 78.

⁷⁷ Ibidem.

⁷⁸ Ibidem.

⁷⁹ Clarke, R.L.W. (2005). Nietzsche, Genealogy, History. Retrieved 19 April 2013 from <http://www.rlwclarke.net/courses/LITS3304/20052006/05AFoucaultNietzsche,Genealogy,History.pdf>

⁸⁰ Foucault, M. (1984). Nietzsche, genealogy, history, cit., p. 76.

⁸¹ McNay, L. (1994). *Foucault: A Critical Introduction*, cit., p. 8.

⁸² Foucault, M. (1981). *The Order Of Discourse*, cit., p. 68.

accidental: “*nothing that has been in discursive or any other relations need have been so*”⁸³. Foucault is therefore promoting histories that focus on the contingent; that is, he argues that the birth of certain practices is never necessary, but always merely “*one possible result of a whole series of complex relations*”⁸⁴. On the other side the concept of ‘*Entstehung*’ designates the ‘emergence’, the moment of arising. As a tool of analysis ‘emergence’ excludes any final *telos* or historical development informed by necessity: “*new developments may appear as a culmination, but they are merely the current episode in a series of subjugations*”⁸⁵. This ‘emergence’ is the arising from historical struggles and subjugations. Therefore, genealogy aims at reconstructing the various systems of subjection, the “*hazardous play of dominations*”⁸⁶ from which a given phenomenon slowly emerges, as a product of specific social and political struggle of forces. As such, emergence, as analytical category, designates “*a “nonplace*”⁸⁷” where virtually takes place the “*endlessly repeated play of dominations*”⁸⁸, understood as the condition for the emergence of historical events, trying to assign them meanings and values. In short, what genealogy expresses is that “*truth or being does not lie at the root of what we know and what we are, but the exteriority of accidents*”⁸⁹. Thus, tracing the descent and emergence of a phenomenon means to trace back the “*unstable assemblage of faults, fissures, and heterogeneous layers that threaten the fragile inheritor from within or from underneath*”⁹⁰. In sum, genealogy appears as systematic attempt to ‘problematize’ teleological, essentialist and foundational historical accounts which look for causes and reasons homogeneous to the phenomena to elucidate, which privilege continuity and cultivate a-historical *teloi*, producing unified, static, and progressive explanations. Instead, the ‘historical sense’ which informs genealogy is heterogeneous, expressing a ‘dissociating view’ which emphasizes the mutability and the discontinuity. Even the body and the consciousness are refused as the constant variable in history, unmasked as sites of social and political struggles and as such historical products. The world, in this perspective, is portrayed then as a “*profusion of entangled events*”⁹¹, a discontinuous and heterogeneous plethora of contingent events without final meaning or value. This is because, despite our desires to the contrary, there are no “*profound intentions [or] immutable necessities*”⁹². All we are left with is an “*existence among countless lost events, without a landmark or a point of reference*”⁹³.

1.2.2. Power-Knowledge

In the understanding of genealogy, the theme of *power* plays a central role, inextricable tied with the foucauldian journey. For Foucault, power simply “*produces reality; it produces domains of objects and rituals of truth*”⁹⁴. Even what we call the ‘individual’ and the knowledge we have of the individual is the product of relations of power. Foucault claims that we will only understand the real effects

⁸³ Cain, M. (1993). Foucault, feminism and feeling: what Foucault can and cannot contribute to feminist epistemology, cit., p. 1.

⁸⁴ Kendall, G., Wickham, G. (1999). *Using Foucault's Methods*, cit., p. 9.

⁸⁵ Foucault, M. (1984). Nietzsche, genealogy, history, cit., p. 83.

⁸⁶ Ibidem.

⁸⁷ Ibidem, p. 84.

⁸⁸ Ibidem, p. 85.

⁸⁹ Ibidem, p. 81.

⁹⁰ Ibidem, p. 82.

⁹¹ Ibidem, p. 89.

⁹² Ibidem.

⁹³ Ibidem.

⁹⁴ Foucault, M. (1977). *Discipline & punish. The Birth of the Prison*. London: Allen Lane, p. 194 (or ed. Foucault, M. (1975). *Surveiller et punir: Naissance de la Prison*. Paris: Gallimard).

of power when we stop looking at power as an external limitation on an abstract freedom or an already existing subject and instead look for the myriad ways relations of power create the idea of the subject, the rules of truth, and our modes of behavior⁹⁵. Among the ‘products’ or effects of power, according to Foucault, none is more important than knowledge. Yet the relationship of power and knowledge is neither unidirectional nor exterior. Foucault believes they stand in an interior and reciprocal productivity, as indicated by his occasional practice of joining the two terms as power-knowledge (*pouvoir-savoir*). For Foucault there is “no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations⁹⁶”. The crucial feature of Foucault’s genealogy, therefore, is the analysis of the mutual productivity of power and knowledge, in its everyday and mundane exercise, opposed to the all-encompassing model of power analytic. Clearly this idea of power-knowledge as hardcore of the genealogy, is interlinked with a specific idea of *discourse*. The two concepts are intimately connected since “power operates in and through discourses [...] thus the term power-knowledge⁹⁷”. In other words, ‘truth’ is produced by discourse, and power cannot be exercised “except through the production of truth⁹⁸”. When we examine what is taken as knowledge or considered ‘truth’, therefore, we are examining power. Discourses which are upheld as ‘truth’, are described by Foucault as ‘veridical discourses’; that is, as those discourses “concerning what is taken as true knowledge⁹⁹”. For Foucault, therefore, power and knowledge are inseparable concepts; “power produces knowledge [...] a site where power is exercised is also a place at which knowledge is produced¹⁰⁰”. Discourse can be both an instrument and an effect of power, but also “a hindrance, a stumbling-block, a point of resistance and a starting point for an opposing strategy¹⁰¹”. Foucault goes further: “Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it¹⁰²”. Having said that, Foucault states that there is not, on the one side, a discourse of power, and opposite it, another discourse that runs counter to it: “Discourses are tactical elements or blocks operating in the field of force relations; there can exist different and even contradictory discourses, within the same strategy; they can, on the contrary, circulate without changing their form from one strategy to another, opposing strategy¹⁰³”. Therefore, discourses are conceived as the site of tensions and struggles concerning power and knowledge. However, Foucault stresses that power and knowledge are not identical with each other. Hubert Dreyfus and Paul Rabinow emphasize that Foucault does not seek to reduce knowledge to a hypothetical base of power, or to conceptualize power as an always

⁹⁵ Foucault, M. (1980). *The history of sexuality an introduction, The Will to Knowledge*, Vol. 1. New York: Vintage House, pp. 27-30 and 41-42 (or. ed. Foucault, M. (1976). *Histoire de la sexualité: La volonté de savoir*, Vol. 1. Paris: Gallimard).

⁹⁶ Foucault, M. (1977). *Discipline and Punish*, cit., p. 27.

⁹⁷ Gubrium, J., Holstein, J. (2000). *Analyzing Interpretive Practice*. In N. Denzin, Y. Lincoln (Eds.), *Handbook Of Qualitative Research*, 2nd ed. (pp. 487-508). Thousand Oaks: Sage, p. 494.

⁹⁸ Foucault, M. (1980). Two Lectures. In C. Gordon (Ed.), *Power/Knowledge: Selected Interviews & Other Writings 1972-1977 By Michel Foucault* (pp. 78-108), cit., p. 93.

⁹⁹ Dean, M. (1998). *Questions of Method*, cit., p. 187.

¹⁰⁰ Smart, B. (1992). *On Discipline and Social Regulation: a Review of Foucault's Genealogical Analysis*. In D. Garland, P. Young (Eds.), *The Power To Punish: Contemporary Penalty and Social Analysis* (pp. 62-83). Aldershot: Ashgate, p. 65.

¹⁰¹ Foucault, M. (1980). *The history of sexuality an introduction, The Will to Knowledge*, Vol. 1, cit., p. 101.

¹⁰² Foucault, M. (1980). *Power/Knowledge*, cit., p. 102.

¹⁰³ Ibidem.

coherent strategy¹⁰⁴. Rather, Foucault attempts to show the specificity and materiality of their interconnections: “*There is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations*”¹⁰⁵. Conversely, “*if power was able to take it as a target, this was because techniques of knowledge and procedures of discourse were capable of investing it*”¹⁰⁶.

1.3. Tensions and limits within the foucauldian historical research devices

Over the last forty years archaeology and genealogy have been targeted by a relentless flow of scholarly criticism, appointed on many different aspects and at various levels. As far as the archaeology is concerned, first it has been widely argued that the logical and theoretical status of the formation rules which make possible a discursive formation, is fatally ambiguous, and potentially undermines the successful pursuit of archaeology’s goals¹⁰⁷. Foucault is blamed to have never provided a consistent and convincing definition of formation rules¹⁰⁸. As David Howarth states, Foucault “*conflates the idea that rules represent empirical regularities between statements, on the one hand, with prescriptive and causal conceptions of rule-following on the other. Not only does this contravene his archaeological method, which is predicated on a pure description of the facts of discourse, it hypostatizes rules by making them the underlying cause of practices*”¹⁰⁹. A second, main problem regards the very concept of archive. In his analysis of the archive, the archaeologist is said to occupy a “*privileged position*”¹¹⁰. In revealing that any historical discourse is simply a dispersion of statements governed by a series of epiphenomenal rules, he can automatically dispel any claims to truth, meaning and intelligibility as naïve illusions¹¹¹. However, a paradox undermines the archaeologist’s task: in his attempt to articulate his interpretive act, he must reach for the very vehicles of meaning and truth that he seeks to dismantle. Foucault not only weakens his stance as the detached observer in a ‘blank space’, he also engenders a new discursive orthodoxy, complete with rules, concepts and terminology. Foucault remains implacably opposed to treating discourses as meaningful objects in need of further interpretation, or as combinations of essentially meaningless elements that can be abstracted from the changing practices of discursive production. On the one hand, he must suspend the meaning and truth of discourse by being exterior to its production while, on the other hand, he is compelled to be internal to the statements and discourses he studies in order to understand their meaning and thus to get the archaeological project off the ground¹¹². Another difficulty concerns the question of the ‘self-critique’ of the archaeology. As we have seen, a central target of *The Archaeology of Knowledge* is the privileged role of ‘man’ in the

¹⁰⁴ Dreyfus, H. L., Rabinow, P. (1983). *Michel Foucault: Beyond Structuralism and Hermeneutics*, cit., p. 203.

¹⁰⁵ Foucault, M. (1977). *Discipline and Punish*, cit., pp. 27-28.

¹⁰⁶ Foucault, M. (1980). *The history of sexuality an introduction, The Will to Knowledge*, Vol. 1, cit., p. 89.

¹⁰⁷ Howarth, D. (2000). *Discourse*. Buckingham: Open University Press, p. 65.

¹⁰⁸ Dreyfus, H. L., Rabinow, P. (1983). *Michel Foucault: Beyond Structuralism and Hermeneutics*, cit., p. 80.

¹⁰⁹ Howarth, D. (2000). *Discourse*, cit., p. 62.

¹¹⁰ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 147.

¹¹¹ Hutchison, J., *The Methodological failure of the Foucauldian Archive*. Retrieved 20 May 2013 from <http://jeremyhutchison.com/downloads/>

¹¹² Howarth, D. (2000). *Discourse*, cit., p. 64.

modern episteme. Foucault shows that the existence of formation rules forces us to recognize that we cannot fully account for our own archive¹¹³. We are, in short, radically ‘decentered’. This stance poses a critical impasse to Foucault. He must either continue to ‘ignore’ the power of discourse “*to be the place of meaning and truth*”¹¹⁴, and thereby risk incoherence, or make explicit the critical values and intentions that animate the archaeological project. Such a dilemma seems not addressed by Foucault, seriously jeopardizing the consistence of the archaeology¹¹⁵. The last issues in Foucault’s archaeology, concerns the relationship between discourse and its exterior. At the outset, the very distinction between the discursive and the ‘extra-‘ or ‘non-discursive’ seems equivocal. On the one hand, although Foucault aims to describe ‘discourse-objects’ as autonomous systems of dispersed statements, at times he concedes an ontological primacy to discursive practices. The main, recurrent issue then, is whether Foucault supports a kind of linguistic idealism which denies the distinction between discursive and non-discursive, making the first encompassing the second. One interpretative solution devised by Foucault is to focus on the articulation of different sorts of relations and practices. He thus distinguishes between ‘intra-discursive’, ‘inter-discursive’ and ‘extra-discursive’ dependencies amongst elements. The first refers to the structured relationships within discourses between objects, operations and concepts; the second to the correlations between different discourses within a particular episteme¹¹⁶; and the last to the connections between discourses and processes that occur outside discourse¹¹⁷. While this solution does open up the possibility of a theory of articulatory practice, Foucault does not develop these ideas further. As it stands, the idea of system of dependencies and correlations remains too formal, so that in practice it fails to provide a clear division between the discursive and non-discursive realms.

Many limits have been highlighted by scholars over the last thirty years also regarding the genealogical way of writing history. Robert Castel¹¹⁸, for instance, asks: “*How can one write a history of the present, which necessitates a reading of history based on a question formulated today, that is not a projection of today’s preoccupations onto the past?*”¹¹⁹. Castel points out the issue of ‘presentism’ in foucauldian genealogy, as one of its main shortcomings¹²⁰. Another seemingly recurrent foucauldian limit is clearly discussed by Roger Deacon. Deacon considers the charge frequently brought against Foucault’s methodology, that it is self-referential: “*Any theory that calls the grounds of all theory into question, by doubting or relativizing truth, must itself be subject to doubt*”¹²¹. In other words, if the object of criticism is uncertain, then criticism itself is uncertain. Nevertheless, this does not deter Foucault from his genealogical critique of Enlightenment’s assumptions and presuppositions, perhaps because “*the master’s tools may never dismantle the master’s house, but they contain fuzzy blueprints of how the house was*

¹¹³ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 130.

¹¹⁴ Ibidem, p. 111.

¹¹⁵ Howarth, D. (2000). *Discourse*, cit., p. 64.

¹¹⁶ Ibidem, p. 66.

¹¹⁷ Foucault, M. (1991). *Politics and the study of discourse*, p. 58.

¹¹⁸ Castel, R. (1994). *Problematization and reading history*. In J. Goldstein (Ed.), *Foucault and the Writing of History* (pp. 237-252). Oxford: Blackwell.

¹¹⁹ Kendall, G., Wickham, G. (1999). *Using Foucault’s Methods*, cit., p. 239.

¹²⁰ Ibidem, p. 144.

¹²¹ Deacon, R.A. (2003). *Fabricating Foucault: rationalising the management of individuals*. Milwaukee: Marquette, p. 50.

*constructed and might be reconstructed*¹²²). Another general criticism highlighted by the literature, about Foucault's genealogical approach, focuses on the lacking emphasis regarding the alternative spaces and counter-logics of resistance¹²³. This criticism, differently articulated, stresses the lack of conceptual clarity in Foucault's account of power, and its relationship to the concepts of domination, resistance and the subject. These concern questions as to whether resistance is to be understood as either internal or external to the structure of domination and the play of power struggles, as well as our understanding of the emergence and articulation of resistances to systems of power-knowledge. Criticisms also point to the scarcity of concrete analyses of resistance in Foucault's writings. In this sense, *Discipline and Punish* and certain sections of *The History of Sexuality* create the impression that disciplinary power and 'bio-power' are all-encompassing logics of objectification, rationalization and subjectivation, which exclude the possibility of resistance. The last difficulty in Foucault's account is the relationship between the 'micro' and 'macro' levels of his analysis. As many commentators have suggested, while Foucault is correct to problematize a descending concept of power, in which the concrete deployments and strategies of power are the manifestations of some global logic, the precise linkage between the local and the global is not fully theorized. Thus, though Foucault's writings explore the 'micro-physics' of power/resistance, they do not adequately address the formation and dissolution of systems of domination. From this perspective, the relationship between the global question of domination and the more local power/resistance dialectic can only be clarified with a category like that of hegemony, that is, as systems of domination which are formed through power struggles that become sedimented over time.

To summarize, we are confronted with several difficulties in Foucault's ways of writing history. As for the archaeology, these are his failure to formalize satisfactorily the concept of rule, the paradoxical detachment of the historian, the absence of any conceptualization of 'truth' and the contradictions in differentiating discursive and non-discursive. On the other side, genealogy seems affected by presentism and a self-referential attitude. Moreover it shows an inadequate conceptualization of power/resistance and a lack of concrete analyses of resistances to power. Even if it is not possible to reconcile all these limits within a common meta/theoretical frame, it is indeed possible to re-work out and combine the conceptual/epistemic strengths of archaeology and genealogy generating a new and different approach, eluding some of those difficulties.

1.4. The problematization

In the Foucault's words problematization denotes "*the ensemble of discursive and non-discursive practices that makes something enter into the play of the true and the false and constitutes it an object of thought whether in the form of inoral reflection, scientific knowledge, political analysis or the like*¹²⁴". Here I propose to re-think problematization as a style of historical/critical reasoning, aiming at understanding how the RJ "*enter(s) into the play of the true and the false and constitutes it an object of thought*¹²⁵", its political embeddedness and subjectivating effects. Problematization works as an historical ontology of discursive practices, "*the*

¹²² Deacon, R.A. (2003). *Fabricating Foucault: rationalising the management of individuals*, cit., p. 47.

¹²³ Howarth, D. (2000). *Discourse*, cit., p. 83.

¹²⁴ Foucault, M. (1994). 'Le souci de la vérité', interview with Francois Ewald. In M. Foucault, *Dits and Ecrits: 1980-1988*, Vol. 4 (Edited by Daniel Defert et al.), cit., p. 670.

¹²⁵ Ibidem.

said as much as the unsaid¹²⁶”, which constitute the RJ as an academic object and political issue. This approach is elaborated starting by the reconstruction of the ‘normative complementarity’ between archaeology and genealogy. Here is not in question whether the foucauldian intellectual life-course is or is not characterized by a drastic break, which would justify the clear ‘traditional’ distinction in two periods of his work and life. Actually, I will consider the technique of delimitation of research objects through archaeological “*bracketing*¹²⁷” as an integral part of genealogy just because it serves better the goal of destabilizing the authoritative discourses on the RJ, contributing to make intelligible the process of their emergence, their social and political embeddedness. Moreover, to fashion the problematization requires addressing some of the main shortcomings identified by the secondary literature regarding the foucauldian meta/theories. I will namely focus on the relationship between discursive and non-discursive, on the concepts of truth, power and ‘present’. The goal again, it is not to find the ‘true’ or ‘real’ foucauldian viewpoint, but to benefit of his insights constructing a perspective able “*to cut not only to understand*¹²⁸”.

1.4.1. Archaeology and genealogy: a ‘normative’ complementarity

In the literature there has been much debate about the relationships between Foucault’s concepts of archaeology and genealogy¹²⁹. It has traditionally been said that Foucault’s archaeological and genealogical periods are radically different from each other. Just as it is commonplace to distinguish “*between Picasso’s Blue period and his Pink period*¹³⁰”, or between the first and second Wittgenstein, so there is Foucault’s archaeology and his genealogy¹³¹. On the other hand, this opinion is not the only interpretative option available and subscribed by scholars. Some authors, in fact, have argued that archaeology, as Foucault’s method analyzing documents, is indissolubly connected to the genealogy, intended as a series of methodological prescriptions that guide the writing of history using the results of archaeology¹³². My position regarding this issue, is basically that it is *necessary* to combine archaeology and genealogy, for different heuristical and also ethical reasons. In fact what might make valuable the Foucauldian analysis is its double-edged view. On one hand, the structural technique of focusing on both discourse and the speaker as constructed objects “*as a necessary step to free himself from taking the discourses and practices of this society as simply expressing the way things are*”, depicting the “*local discursivities which genealogy brings into play*”, cutting out the attempt to work out a theory of autonomous rule-governed systems of discursive practices. On the other, once isolating discursive objects, the elaboration of the genealogical questions: how are these discourses used? What role do they play in society? As already stated,

¹²⁶ Foucault, M. (1980). The Confession of the Flesh. In C. Gordon (Ed.), *Power/Knowledge Selected Interviews & Other Writings 1972-1977 By Michel Foucault* (pp. 194-228), cit.

¹²⁷ Howarth, D. (2002). An Archaeology of Political Discourse? Evaluating Michel Foucault’s Explanation and Critique of Ideology. *Political Studies*, 50, 117-135, p. 128.

¹²⁸ Foucault, M. (1984). Nietzsche, genealogy, history, cit., p. 88.

¹²⁹ See, for example, Scheurich, J.J., McKenzie, K. (2005). Foucault’s methodologies: Archaeology and genealogy. In N. Denzin, Y. Lincoln (Eds.), *Handbook on Qualitative Research*, 3rd ed. (pp. 841-868). Thousand Oaks: Sage.

¹³⁰ Baert, P. (1998). Foucault’s history of the present as self-referential knowledge acquisition. *Philosophy Social Criticism*, 24(6), 111-126, p. 122.

¹³¹ Bevir, M. (1999). Foucault, Power and Institutions. *Political Studies*, 47, 345-359, p. 347.

¹³² Dean, M. (1994). *Critical and Effective Histories: Foucault’s methods and historical sociology*. London and New York: Routledge, p. 33; Kendall, G., Wickham, G. (1999). *Using Foucault’s Methods*, cit., p. 31.

archaeologies of the 1960s focused on discursive formations, hoping to isolate the rules of production and transformation for discursive practices. The aim of archaeology is to enter the interior of discourse in order to determine the rules that govern it and to describe the various relations among statements in a discursive formation. However, archaeology's critical force was restricted to the comparison of the different discursive formations of different periods. Such comparisons could suggest the contingency of a given way of thinking by showing that previous ages had thought very differently (and, apparently, with as much effectiveness). Of course, “*mere archaeological analysis could say nothing about the causes of the transition from one way of thinking to another and so had to ignore perhaps the most forceful case for the contingency of entrenched contemporary positions*”¹³³. Genealogy, as deployed in *Discipline and Punish*, looks for the rules governing discursive practices having to do with power relations. If archaeology addresses the structure of discursive formations historically situated, the genealogical gaze adds the critical attention towards their power embeddedness and subjectivating effects. Genealogy must then be thought as based on preliminary archaeology, as the attempt to chart the movement of particular discursive formations, in order to unearth the conditions of our present realities. It “*suspends contemporary norms of validity and meaning at the same time as it reveals their multiple conditions of formation*”¹³⁴. Moreover, in the genealogy, the concept of discourse is still widely deployed, although discourses are no longer treated as autonomous systems of scientific statements, but the products of power relations and forces that form them. As Foucault puts it, “*it is in discourse that power and knowledge are joined together*”¹³⁵. What emerges, is that discourses cannot be adequately grasped unless we apprehend their underlying conditions of possibility, the dimensions of materiality, history and institutional practice in which it is embedded. Genealogy becomes the study of how archaeology is brought into play in everyday practices: “*The genealogist is a diagnostician who concentrates on the relations of power, knowledge and the body in modern society*”¹³⁶. It is a way of linking archaeology to the enactment of power. It involves spotting contingencies, rather than accepting accepted wisdom in the form of causal explanations, by exploring the “*contemporary limits of the necessary*”¹³⁷. The ‘normative’ complementarity of archaeology and genealogy makes possible seeing the horizon against which stands out the problematization as meta/theory. This complementarity expresses itself in the will to diagnose and demythologize ‘truth phenomena’ in their political dimension. The common goal is to provide a counter-memory that will help subjects recreate the historical and practical conditions of their present existence¹³⁸, opening new possibilities of understanding. The crucial point to grasp here is that what counts as truth can (and should) itself be historicized. Truths are the product of specific discursive practices to be re-constructed and carefully analyzed as

¹³³ Gutting, G. (2013). Michel Foucault. The Stanford Encyclopedia of Philosophy. Retrieved 12 October 2013 from <http://plato.stanford.edu/archives/sum2013/entries/foucault/>

¹³⁴ Dean, M. (1994). *Critical and Effective Histories: Foucault's methods and historical sociology*, cit., p. 33.

¹³⁵ Foucault, M. (1980). *The History of Sexuality. An Introduction, The Will to Knowledge*, Vol. 1, cit., p. 100.

¹³⁶ Dreyfus, H. L., Rabinow, P. (1983). *Michel Foucault: Beyond Structuralism and Hermeneutics*, cit., p. 105.

¹³⁷ Foucault, M. (1985). *The History of Sexuality: The Use of Pleasure*, Vol. 2. New York: Vintage Books, p. 53 (or. ed. Foucault, M. (1984). *Histoire de la sexualité: L'usage des plaisirs*. Paris: Gallimard).

¹³⁸ Ibidem.

epistemic structures power-embedded, rooted into wider cultural, social and political phenomena.

1.4.2. Discursive and non-discursive

In the problematization's perspective, a discourse is more than a set of 'signs' which reflects reality, neither "[...] a consciousness that embodies its project in the external form of language¹³⁹" nor "a language plus a subject to speak it¹⁴⁰". Instead, 'discourse' refers to practices which exhibit a regularity¹⁴¹ and work as "*ways of constituting knowledge, together with the social practices, forms of subjectivity and power relations which inhere in such knowledges and relations between them*¹⁴²". More than 'representing reality' discourses enable and constrain the imagination and social practices: "*Discourses are practices that systematically form the objects of which they speak [...] discourses are not about objects, they don't identify objects, they constitute them and in doing so, they conceal their own invention*¹⁴³". By conceptualizing discourse as a regularity of practices which shape what can be thought and said, Foucault's work indirectly poses the issue of the relationships between the 'material' and the discursive. The 'material' (or non-discursive), in this reframing of the problematization, comes into light in two different ways, with two different meanings. First of all, the materiality is one of the *attribute* of the discourse. In this vein, there is not ontological distinction between those two terms. The idea of 'discursive practice' as such entails the acknowledgement of the necessary performativity of any regularity of statements, anchored in a specific *form of life*. At the same time it is possible to dis-joint discursive and material, in order to retrieve the heuristical potential of the last term. In this second case, material refers to the reality existing outside the discourse, and as such non-meaningful. From an epistemic viewpoint, the material cannot be either denied or affirmed, because it cannot be known (since is non-meaningful by definition), but at the same time, insofar as is assumed as a 'possibility', can be used as a methodological tool to articulate the discursive realm. The non-discursive is then *hypostatized* as conditions of possibility of the discursive, as the *discursive-to-be*. Accordingly, to trace back the emergence of given true discourses, means to identify the complex discursive framework which makes them intelligible (i.e. epistemically accessible) and thus ontological possible. In this perspective, true discourses are *created* at the moment of the identification of other discourses which are at the same time their condition of intelligibility and possibility. In the case of the RJ, we can talk of 'restoration', 'conflict', 'harm', 'crisis of legal system', etc. insofar as we are able to re-construct the discursive 'reservoir' out of which these discursive objects are meaningfully configured. Scholars, advocates, practitioners as well as opponents of the RJ in front of the 'Kitchner experiment¹⁴⁴' (or the BACRO project in Bristol in 1972) were facing the 'material', i.e. a till then meaningless series of acts. Drawing upon theoretical traditions (often conflicting and overlapping), it has been possible to make those acts understandable and then possible as 'restorative' practices. What is further characteristic of such a conceptualization, is that the 'discursive' shaping of reality, and the specific choices of using specific discursive reservoirs to make sense of the material, follows specific power-

¹³⁹ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 169.

¹⁴⁰ Ibidem.

¹⁴¹ Ibidem.

¹⁴² Weedon, C. (1987). *Feminist practice and poststructuralist theory*. London: Blackwell, p. 108.

¹⁴³ Ibidem, p. 49.

¹⁴⁴ See further ahead, paragraph 2.3.1.

orientations. This means that discourses by competing, combining or overlapping each other, in a given time and space, reinforce, reproduce or overturn more or less organized ways of defining individuals' conducts or field of possible actions. This same multiplicity of discourses available to shape reality, opens spaces for resistance: "*We must make allowances for the complex and unstable processes whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling block, a point of resistance and a starting point for an opposing strategy. Discourse transmits and produces power; it reinforces it but also undermines it and exposes it, renders it fragile and makes it possible to thwart it*"¹⁴⁵". Foucault thus understands discourses to be the substance of social systems, and because of their capacity to be transformed, they should not be conceptualized as fixed, essentialized entities but rather as a window to a partial and situated 'reality'. From this perspective, a field such as the RJ can be understood as a plurality of competing discourses (only some of them 'authoritative'), spanning different disciplines, featuring different actors and producing different meanings which are just as likely to change over time and across geographical spaces. Therefore, the RJ discourses have a situated character and subsequently produce partial, situated knowledges which are open to contestation and negotiation¹⁴⁶. Understanding and resolving the tensions within these negotiations requires, as I will show, at the very least an engagement with power. In short, discourse is here understood as an ensemble of practices through which 'reality' is made possible insofar as it is made intelligible. The question is not that "*nothing exists outside of the discourse*" but that "*nothing has any meaning outside of discourse*"¹⁴⁷". What is not intelligible cannot be denied or asserted as 'lying' in the material realm, but nevertheless it is possible, as long as we are able to construct the conditions for its epistemic access. Discourses construct meaningful configurations out of the material reality, shaping institutions, knowledges, truths, authorities which affect our life. This process must be thought as a social enterprise, a collective and mutually conditioning set of engagements, historically stratified, performed and understood against a "*tissue of contingencies*"¹⁴⁸ or a "*form of life*"¹⁴⁹, i.e. group of customs, agreements and habits, systems of reference culturally, socially and historically rooted. It is this 'form of life' that avoids the radical relativity of producing meanings/realities, disposing us towards certain courses of action. Such enterprise is reproduced at micro (e.g. relationship with oneself) and macro levels (relationship with others), following situated power-orientations, which would be naïve to reduce to more 'primary' processes, such as economic production, social institutions or political behaviour.

1.4.3. Truth and power

Truth here refers to the product of a never finalized struggle between discursive practices¹⁵⁰, historically situated¹⁵¹ and independent of the conscious

¹⁴⁵ Foucault, M. (1980). *The history of sexuality an introduction, The Will to Knowledge*, Vol. 1, cit., p. 101.

¹⁴⁶ See McNay, L. (1994). *Foucault: A Critical Introduction*, cit., pp. 74-76.

¹⁴⁷ Hall, S. (1997). The Work of Representation. In Hall, S. (Ed.), *Representation: Cultural Representations and Signifying Practices* (pp. 13-74). London: Sage, pp. 44-45.

¹⁴⁸ McDowell, J. (2002). Wittgenstein on Following a Rule. In A. Miller, C. Wright (Eds.), *Rule Following and Meaning* (pp. 45-80). Oxford: Acumen, p. 71.

¹⁴⁹ Wittgenstein, L. (1967). *Zettel*. Oxford: Blackwell, § 241.

¹⁵⁰ Kure, N. (2010). Narrative mediation and discursive positioning in organisational conflicts. *Explorations: An E-Journal of Narrative Practice*, 2, 24-35, p. 26.

speakers¹⁵². The discourses which in the course of time gain a prioritized-however, temporary power in the production of specific conditions of truth, are the ‘authoritative’ discourses, the ‘makers’ of boundaries between true and false. Every society, as Foucault claims, has a kind of political economy of truth which says what kinds of discourse are true, what the mechanisms and sanctions are for distinguishing true from false, the techniques for acquiring truth and the status of those who are empowered to say what is true¹⁵³. It is in this way senseless to read Foucault as arguing that truth is ‘relative’, i.e. that all possible truth-conditions are equal, depending merely on context or interpretative perspective. Foucault views truth-conditions as stable and secure, as situated in particular historical milieux (or form of life), which give rise to, and are part of, the order of discourse¹⁵⁴. As Hook states “*a skepticism of truth here defers not to a ‘baseless’ relativism, but instead to a carefully delineated set of conditions of possibility under which statements come to be meaningful and true*”¹⁵⁵. The contingency of these conditions can be reconstructed through the identification of the “*whole strata of practices*”¹⁵⁶ underlying the production of truth. These basic conditions of possibility are institutions, social structures and practices which limit and constrict, reinforce and renew discourses, following a power-orientation. Starting from these premises, it becomes clear that the goal of the problematization is to historicize what counts as truth unveiling the ‘authority’ of its makers. The issue at stake is not demonstrating that specific truth discourses are false, replacing one truth with another. The goal is to trace back the emerge/descent of truth discourses, focusing on their precarious and contingent conditions, describing their structures, questioning their authority, critically placing them in the history. In the problematization’s perspective, this specific concept of truth is linked to a certain theorization of power. Power here comes into light as a double-edged concept: a kind of social relationship, and a component of any social relationship. In his later papers, Foucault elaborates an idea of the kind of power in which he is interested, as “*a mode of action which does not act directly and immediately on others. Instead, it acts upon their actions: an action upon an action, on existing actions or on those which may arise in the present or the future [...] it incites, it seduces, it makes easier or more difficult; in the extreme it constrains or forbids absolutely*”¹⁵⁷. Power appears as a set of practices which interweave the social fabric, binding social structures and individual agency. Accordingly, “*to live in society is to live in such a way that action upon other action is possible -and in fact ongoing. A society without power relations can only be an abstraction*”¹⁵⁸. Power as such is a form or a dimension of any social relation, “[...] every human relation is to some degree a power relation. We move in a world of perpetual strategic relations. Every power relation is not bad in itself, but it is a fact that

¹⁵¹ Goldstein, D.M. (2003). Reproductive Technologies of the Self: Michel Foucault and Meta-Narrative-Ethics. *Journal of Medical Humanities*, 24(3/4), 229-240, p. 231.

¹⁵² Burrell, G. (1988). Modernism, Post Modernism and Organizational Analysis: The Contribution of Michel Foucault. *Organization Studies*, 9(2), 221-235, p. 222.

¹⁵³ Foucault, M. (1980). *Power/Knowledge*, cit., p. 131.

¹⁵⁴ Hook, D. (2007). Discourse, knowledge, materiality, history: Foucault and discourse analysis. Retrieved 22 March 2012 from <http://eprints.lse.ac.uk/953/1/DiscourseknowledgeTODAY.pdf>, p. 7 (or. ed. Hook, D. (2001). Discourse, knowledge, materiality, history: Foucault and discourse analysis. *Theory and psychology*, (11)4, 521-547).

¹⁵⁵ Ibidem, p. 7.

¹⁵⁶ Foucault, M. (1972). *The Archaeology of knowledge*, cit, p. 219.

¹⁵⁷ Foucault, M. (1983). The subject and power. In H. L. Dreyfus, P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (pp. 208-226), cit., p. 220.

¹⁵⁸ Ibidem, pp. 222-223.

*always involves danger*¹⁵⁹”. Therefore all relationships are (also) power relations, implying that mode of action upon actions which defines the field of possibilities of the other and ourselves and involves to some extent ‘a danger’. At the same time, the concept of power denotes a specific social link, which is the production of (true) knowledge. In this view, the production of truth is not only ‘made up’ of power relations as any other social dynamic, but is also the specific form of this idea of power. The non-finalized struggle between discursive practices, historically positioned and speaker-independent from which truths emerge, is a *par excellence* the power-dynamic the problematization is interested to re-construct. Yet, also to tell ‘the truth’ about ourselves entails the same mechanism of truth/power. We are made up, in fact, of multiple relationships (e.g. parent, fellow citizen, stranger, etc.) all at once. As Foucault states, “*If I tell the truth about myself, as I am now doing, it is in part that I am constituted as a subject across a number of power relations which are exerted over me and which I exert over others*¹⁶⁰”. This overall theorization presupposes two concepts inseparable to power: freedom and resistance. Power, in fact, operates only upon free subjects, where freedom means the ability to choose from a range of possibilities or ways of behavior¹⁶¹. In the same way, resistance is part of the power relations, confirming their relational character, reaffirming their boundaries, as well as producing a redefinition of power relations. The political consequences of this perspective are far-reaching. It is not possible to resist to power relations as such, because this would mean to destroy any social relation. Instead, it is possible to denounce the specific and current assemblages of truth as specific configurations of power in given fields, and to transform these configurations by addressing, reformulating, and elaborating them through further exercises of power and new productions of truth¹⁶².

1.4.4. Targeting ‘the present’

Writing a problematization of the RJ means writing a history *in* the present, in a field of power relations and political struggles which underscore forms of knowledge¹⁶³. Here the present is conceived not a homogeneous totality displayed in true discourses and organized in a progressive and unitary line. The present is a tangle of shifting problems each with their specific, local, contextual and partial histories¹⁶⁴. The problematization, by tracing these histories, aims at making visible the taken-for-granted structures of this present, presenting them to be neither universal nor coherent, but indeed rooted in “*lowly origins and ignoble births*¹⁶⁵”. This attitude to question the present, in a historical/critical perspective, might not be a sufficient condition for the intellectual liberation from the myth of the present which ‘has always been’, but it may work at least as a contributory factor of it¹⁶⁶. To problematize the RJ then, is not merely to describe its past, to find out its ‘real’ history, to unveil its

¹⁵⁹ Foucault, M. (1988). On power. In L. D. Kritzman (Ed.), *Michel Foucault: Politics, philosophy, culture. Interviews and other writings, 1977-1984*. New York: Routledge, p. 168.

¹⁶⁰ Foucault, M. (1988). On power, cit., p. 39.

¹⁶¹ Dreyfus, H. L., Rabinow, P. (1983). *Michel Foucault: Beyond Structuralism and Hermeneutics*, cit., pp. 184-188.

¹⁶² Gallagher, M. Foucault, power and participation. Retrieved 4 October 2013 from www.childhoodstudies.ed.ac.uk/research/MGallagher.doc

¹⁶³ Roth, M. S. (1981). Foucault’s “History of present”, cit., p. 43.

¹⁶⁴ Weeks, J. (1982). Foucault for Historians. *History Workshop*, 14, 106-119, p. 116.

¹⁶⁵ Foucault, M. (1977). *Discipline and Punish*, cit., pp. 190-191.

¹⁶⁶ See Baert, P. (1998). Foucault’s history of the present as self-referential knowledge acquisition, cit.

noble truths as trivial lies, but indeed to “*diagnose*” its present, to produce hypotheses “*about the relationship between concepts in their historical sites*”¹⁶⁷. In order to address the processes which constitute the taken-for-granted present of the RJ, there is not space for teleological attempts of interpretation, causal explanations nor is acceptable an analysis in terms of ‘material roots’, where the present becomes a simple reflection of something more real behind its surface¹⁶⁸. We must suspend the contemporary norms of validity and ‘authoritative’ meanings of the RJ in order to reveal its multiple conditions of formation¹⁶⁹. The goal then is not to ‘discover’ the truth but rather the generation of critique, carrying out an “*epistemic project which is no longer exclusively epistemic, but rather primarily critical or political in concern*”¹⁷⁰. The objective is to disturb formerly secure foundations of knowledge and understanding, not in order to substitute an alternative and more secure foundation, but to “*produce an awareness of the complexity, contingency, and, fragility of historical forms*”¹⁷¹. To re-construct the social, political, cultural embeddedness of the RJ’s as a form of knowledge, locating its present in the history, makes possible to match the ‘epistemological’ analysis with the ‘critical’ inquiry pursued within the problematization. In this way it is possible to provide a counter-memory that will help recreate the historical conditions of the present of the RJ. Problematization in this study plays the role of framework for undertaking concrete historical studies of the conditions that made intelligible/possible the emergence of the RJ as sets of authoritative discursive practices. It is the attempt to devise an account of the contribution of local, partial and contextual discourses to the emergence of the RJ as ‘new’ repertoire of images, metaphors, storylines, procedures to think and manage human relations. It provides knowledge of the circumstances of how specific views and understandings of the RJ have become ‘powerful’, setting the boundaries for legitimately ‘discussing’ and ‘doing’ RJ. In this way, by means of problematization, emerges a space where present practices, legitimate techniques and regimes of truths on the RJ are suspended, the conditions of their existence re-constructed, and their hidden assumptions challenged¹⁷².

1.4.5. Reversal, discontinuity and specificity

In order to problematize the RJ, I follow three basic foucauldian principles: *reversal*, *discontinuity* and *specificity*¹⁷³. More than methodological tenets, these principles are cautionary guidelines. They define a research conduct which privileges (and in turn constructs) specific objects of analysis, such as ‘low narratives’ or neglected factors whose identification might contribute to understand the series of phenomena under analysis. The first guideline is the principle of *reversal*. Reversal is a heuristical move which denotes the upturn of assumptions of origin (as *Ursprung*). The ‘authoritative’ sources which seem to

¹⁶⁷ Hacking, I. (1991). How should we do the history of statistics? In G. Burchell, C. Gordon, P. Miller (Eds.), *The Foucault Effect: Studies in Governmentality* (pp. 180-195), cit., p. 183.

¹⁶⁸ Weeks, J. (1982). Foucault for Historians, cit., p. 110.

¹⁶⁹ Dean, M. (1994). *Critical and Effective Histories: Foucault’s methods and historical sociology*, cit., p. 33.

¹⁷⁰ Hook, D. (2005). Genealogy, discourse, ‘effective history’: Foucault and the work of critique. *Qualitative Research in Psychology*, 2(1), 3-31.

¹⁷¹ Smart, B. (1983). *Foucault, Marxism and Critique*. London: Routledge and Kegan Paul, p. 76.

¹⁷² Dreyfus, H. L., Rabinow, P. (1983). *Michel Foucault: Beyond Structuralism and Hermeneutics*, cit., p. 138.

¹⁷³ Hook, D. (2007). Discourse, knowledge, materiality, history: Foucault and discourse analysis, cit., p. 27.

play an obvious role in the production of discourse must be understood as factors which limit and ‘rarefy’ discourse¹⁷⁴. The works of the ‘founding fathers’ of the RJ, widely considered by the authoritative literature the origin of the RJ as well as the ‘first’ restorative experiments set up in Canada for instance, are here traditional sources which impose the individual voices of authors as the footing of the RJ, obscuring the process of selections of those voices as authoritative, and separating them, in an artificial way, from the political field more widely. The counter-term offered by the problematization, is the idea of discourse as *event* in opposition to the idea of discourse as production of individual voices¹⁷⁵. Thinking in terms of event (or *eventualization*) means to perform “[a] *breach of self-evidence [...] rediscovering the connections, encounters, supports, blockages, plays of forces, strategies and so on which [...] count [...] as being self-evident, universal and necessary*”¹⁷⁶. The analysis presented in the next pages aims at working out the RJ as an event, which implies its translation into a historically rooted discursive formation, to be drawn up and discussed. In this way, thinking the RJ as event enables us to look through the myth of creation, and to re-construct the multiple origins and the different rationalities underlying the successful production of the authoritative discourses on the RJ. The second principle is of *discontinuity*, i.e. the heuristical doubt regarding progress, continuity and evolution, as explanatory concepts¹⁷⁷. As Hook states, embracing the discontinuity-view implies that “*rather than assume a shared likeness then, or suppose that each component of the analysis will be of the same type, we must be prepared to search for similar functions across a variety of different forms (language, practices, material reality, institutions, and subjectivity). Similarly, rather than following linear successions of development, we must map parallels of regularity*”. In this perspective, the authoritative discourses on the RJ work in discontinuous and often contradictory ways. If we are to re-construct their discursive formation, then we need to draw up and articulate several and diverse discourses, discharging any cause-effect pattern of analysis entailing the necessary continuity between and within them. Lastly, the principle of *specificity* is meant to replace the over-generalizing forms of analysis which would resolve specific discursive forms into “*a play of pre-existing significations*”¹⁷⁸. In a way, this principle ‘backs up’ the entire project of devising the surfaces of emergences of the RJ as historically articulated discourses which make intelligible/possible its authoritative versions. The refusal of a “*pre-discursive providence which disposes the world in our favor*”¹⁷⁹ implies to consider truth-claims as discursive products, whose life-course is to be historically traced back. Reversal, discontinuity and specificity are the pillars of the problematization of the authoritative discourses on the RJ. By deploying them, it is hopefully possible to free us from the ‘mental cramp’ of thinking the present of the RJ as a natural, essential, and continuous set of narratives, as such legitimized as the product of a progressive history.

1.4.6. Boundaries of the problematization

The theoretical framework of this study presents some limitations, many of which derive from the archaeological/genealogical precursors of

¹⁷⁴ Foucault, M. (1981). *The order of discourse*, cit., p. 214.

¹⁷⁵ *Ibidem*.

¹⁷⁶ Foucault, M. (1981). *Questions of method*, cit., p. 6.

¹⁷⁷ Hook, D. (2007). *Discourse, knowledge, materiality, history: Foucault and discourse analysis*, cit., pp. 21-22.

¹⁷⁸ Foucault, M. (1981). *The order of discourse*, cit., p. 67.

¹⁷⁹ *Ibidem*.

problematization, while others stem from my specific way of problematizing the RJ. David Garland argues that there are potentially serious limitations to the use of Foucault's historical methods¹⁸⁰. The main problem, Garland claims, is that the foucauldian perspective is often (and paradoxically) accepted as offering a grand theory; that is, it is often accepted “*in a manner which tends to displace other interpretive accounts, rather than supplement them or add a new dimension to their explanations*”¹⁸¹. Notably, Garland acknowledges that Foucault's work was not intended by him to be read as a ‘grand theory’ or to offer a totalizing or complete analysis of any of his chosen subjects¹⁸². In the same vein, I do not propose to construct a ‘grand theory’ of the RJ, or to tell the complete story of its coming into being. Rather, the research aims to be aware of its own perspectivity and partiality¹⁸³. As already stated, the aim pursued by these pages is not to merely replace existing accounts of the birth, meaning and application of the RJ with another, opposing a different truth-account. That is, this research does not seek to propose counterarguments that are symmetrical but opposed to existing authoritative accounts. The goal is to make understandable the processes which underlie and feed on the ‘authority’ of some discourses on the RJ, the ways the truths on the RJ are contingently produced, the historical conditions of their emergence. Ironically, such an effort might end up “*as problematic as the authoritative versions [of history] it contest[s]*”¹⁸⁴. This is because a foucauldian-inspired study, as any performance of scholarly knowledge, normally produces power effects whose the researcher might not be aware of; moreover it is necessarily incomplete because does not search for causes or origins but for conditions of emergence, which give rise to myriad more problems to be diagnosed and interpreted. This work is also inherently subjective. Like all research, this study has been influenced by the subjectivity of its author. Of course, the application of any theoretical framework to a particular research problem necessarily highlights only part of the picture. This study is thus limited in the sense that it considers the RJ from a singular theoretical angle. The undertaking of research such as this, is thus an inherently subjective, shifting and incomplete enterprise. Finally, the research is limited by the particular interpretation of Foucault's methodological approach that I, as the researcher, have made. While some authors warn that they have not ‘correctly’ interpreted Foucault, I am of the belief that this would be both impossible and undesirable¹⁸⁵. As already indicated, Foucault himself invited researchers to use his works as tool boxes¹⁸⁶, instruments for possible uses in specific contexts. I therefore do not claim any correctness or completeness, but just to be transparent about my understanding and application of this framework. My aim here is to yield some critical insights about the RJ. There are a number of reasons why Foucault has been chosen to address the research problem of this thesis. Firstly, while the RJ has been considered from a variety

¹⁸⁰ Garland, D. (1990). *Punishment and Modern Society: A Study In Social Theory*. Oxford: Clarendon Press, p. 199.

¹⁸¹ Ibidem.

¹⁸² Ibidem.

¹⁸³ Bailey, M. (1993). Foucauldian feminism: Contesting bodies, sexuality and identity, cit., p. 103.

¹⁸⁴ Rose, N. (1988). Calculable minds and manageable individuals. *History Of The Human Sciences*, 1(2), 179-200, p. 181.

¹⁸⁵ See Scheurich, J., Bell McKenzie, K. (2005). Foucault's Methodologies: Archaeology and Genealogy, cit., p. 841.

¹⁸⁶ Foucault, M. (1996). From Torture To Cellblock. In S. Lotringer (Ed.), *Foucault Live (Interviews, 1961 - 1984)* (pp. 146-149), cit., p. 149.

of theoretical frameworks, a Foucauldian interpretation of the RJ has been so far only partially developed¹⁸⁷. In fact, the field of the RJ has seldom been considered using the theoretical frameworks advanced by Foucault. In this sense, the aim of this thesis is to add another dimension to the conversation on the RJ, or to add a small piece to its theoretical map. Moreover, the literature on the RJ is premised on a traditional, structuralist version of historical events, and consequently, on a structuralist conception of power. Constructing a critical account of the history of the RJ therefore necessitates an analytical framework that contains an alternative to this structuralist conception of power. Additionally, as the RJ is often portrayed as representing the re-emergence of the justice practices of various ancient cultures¹⁸⁸, a methodological perspective that enables the detailed consideration of the discontinuities of history- as well as its continuities- seems to me much needed. Finally, as Rose's work suggests, phenomena that enjoy support from diverse and even seemingly opposed political realms are not best explained from structural frameworks¹⁸⁹. For these reasons, it is hoped that a Foucauldian study of the RJ will be able to make a small, but significant, contribution to this field, by investigating how what have come to be considered the truths of the RJ have emerged onto the contemporary criminal justice landscape.

1.5. The problematization at work

In order to operationalize this multilayered approach I will proceed as follows¹⁹⁰. First I will work toward the identification of the area of study which represents my 'problem'. The focus will be placed on specific 'truths' of the RJ. These truths are encapsulated in the authoritative discourses (explanations and conceptualizations) on the RJ. They constitute the *archive* of the RJ. The second step is, drawing upon the archive, to re-construct the discursive formation of the RJ, as a network of discursive objects (and their relationships) historically situated, which have made possible the RJ's truths. A meticulous scrutiny in the analysis of the problem's discursive manifestations, both textual and non-textual, is the practical way to reach this objective. The third step is the analysis of the political technologies and their overall paradigm, which interweave the discursive formation of the RJ. The last phase represents the analysis of the subjectivating effects of the interaction between the RJ authoritative discourses and human beings involved in the practices inspired by those discourses. Following this path it is possible drawing up of an *apparatus* showing the relationship to the 'problem' of the various phenomena constituting it, describing and interpreting the inextricable power-knowledge dimensions of the RJ.

1.5.1. The identification of the problem: the archive of the Restorative Justice

The RJ is not conceived here as unified, homogeneous field of knowledge, but rather as a galaxy of inconsistencies and disjunctions linked by some ways-of-

¹⁸⁷ Exceptions for the works of George Pavlich and Kelly Richards (see in reference list).

¹⁸⁸ Braithwaite, J. (2002). *Restorative Justice & Responsive Regulation*. Oxford: Oxford University Press, pp. 99-102; Weitekamp, E. (1999). The History of Restorative Justice. In L. Walgrave, G. Bazemore (Eds.), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*. Monsey: Criminal Justice Press.

¹⁸⁹ Rose, N. (1996). *Inventing Ourselves: Psychology, Power and Personhood*. Cambridge: Cambridge University Press, p. 104.

¹⁹⁰ Tamboukou, M., Ball, S.J. (Eds.) (2003). *Dangerous encounters: Genealogy and Ethnography*. New York: Peter Lang.

reasoning taken for granted, values and practices seen as the markers of the ‘true’ RJ. These common threads are embodied into what I call the ‘textbook’ literature on the RJ: seminal articles, well known policy reports, hegemonic manuals, training texts. All those documents entail the ideas of how proper the RJ and its practices should be performed and where; the professional identities instilled in its agents and practitioners; the regulations about what constitutes a good RJ ‘practice’, the step by step directions about how to paint a clear picture of a messy world. The ‘systematization’ of such a complex and ‘discontinuous’ material, the identification of its main strands and inner relationships¹⁹¹, is the *archive* of the RJ, whose reconstruction is the first goal of my research. The researcher’s compilation of the archive is always partial and fragmentary. As Foucault himself acknowledges, it is “*obvious that the archive of a society, culture, or a civilization cannot be described exhaustively*”¹⁹². The goal in fact, is not to provide a complete or thoroughly representative archive, but to identify and question the main recurrent perspectives which, according to the ‘authorities’ of a specific field, are dominant or truthful. For Foucault, “*the most important philosophical projects have to do with understanding how and why we hold some things true, how and why we deem some things knowledge, and how and why we consider some procedures rational and others not*”¹⁹³. The ‘perspectivity’ of the archive is then unavoidable. This makes the archive, as a research tool and the research product, intrinsically problematic but nevertheless useful. Its usefulness resides in its use as a deliberate local, partial and contextual point of view which aims at stimulating critical accounts on what is taken for granted in a given field of knowledge. Many techniques were employed throughout this research to guide and limit the selection of ‘documents’ from the archive. I aimed to ground this process in a thorough knowledge of the literature on the RJ. I read widely on the topic, and confirmed the centrality of my reading materials against bibliographies as they appeared¹⁹⁴. In my perspective, as already said, the ‘basis’ of the archive of the RJ is represented by the ‘textbook’ literature. Its normative structure in fact, ‘naturally’ catalyzes and circularly contributes to shape the truths on the RJ. Problematization is intrinsically reliant upon already existing, traditional versions of the phenomenon under analysis. In this sense, the researcher does not use an entirely separate corpus of documents to the conventional historian; instead, it is in the use of these texts that the two approaches vary. Foucault acknowledges this when he contrasts conventional history with his new approach: “*The document [...] is no longer for history an inert material through which it tries to reconstitute what men have done or said, the events of which only the trace remains; history is now trying to define within the documentary material itself unities, totalities, series, relations*”¹⁹⁵. The problematization of the RJ takes as its starting point precisely that which is taken to be unproblematic, natural and seemingly indisputable about this field. Here is not in question whether one or many versions of the RJ exist. Here the point is to identify the authoritative discourses on the RJ, tracing back their history in order to understand the conditions of their ‘privileged’ position in the multifaceted field of the RJ. In

¹⁹¹ Tambouktou, M. (1999). Writing Genealogies: an exploration of Foucault’s strategies for doing research. *Discourse: studies in the cultural politics of education*, 20(2), 201-217, p. 202.

¹⁹² Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 146.

¹⁹³ Prado, C. (1995). *Starting With Foucault: An Introduction to Genealogy*, cit., p. 10.

¹⁹⁴ See Bouhours, B., Daly, K. (2004). Books and edited collections on restorative justice, 1994-2003. Retrieved 8 June, 2005 from http://www.gu.edu.au/school/ccj/kdaly_docs/daly_rj_booklist.pdf

¹⁹⁵ Foucault, M. (1972). *The Archaeology of Knowledge*, p. 7.

applying this approach, I asked the following questions¹⁹⁶: what is taken-for-granted, left implicit or pre-assumed? What is formulaically repeated, left undefined, but used as though having a fixed and widely accepted meaning? What is considered so obvious that it does not need to be articulated, and what is so marginalized or silenced that it is nearly absent from the archive?

1.5.2. Re-constructing the discursive formation

I utilize a concept of discursive formation only partially drawn upon the original Foucauldian one. In the *Archaeology of knowledge*, as we know, a discursive formation is a particular ordering of things (objects), things said (types of statement), ideas (concepts) and groupings (thematic choices), following particular rules of formation, dictating what can and cannot be said, whom or what has the ability to speak, what is determined/identified to exist or not exist, and what can or cannot change within its boundaries. This stance implies that discourses are understood as systems of statements which bring into existence the very objects they purport to describe and explain, including their institutional and social conditions of possibility¹⁹⁷. This idea is crucial for the present analysis. Nevertheless I will not focus on rules but on discursive objects which emerge from the articulation of specific discourses conceptualized as surface of emergence of the RJ. I will therefore focus on the procedure of production as well as exclusion of discursive objects (concepts and strategies) which represent the backbone of the RJ as discursive formation. I am mainly concerned with the historicization of the discursive formation which shapes the true and taken-for-granted versions of the RJ.

1.5.3. The political rationality of the Restorative Justice: macro and micro levels

From a governmentality perspective, I try to problematize the political rationality embodied by the RJ. This operation implies the analysis of the discursive formation of the RJ as integrated with specific political technologies, operative at macro and micro levels, which encompass its historical emergence. These governmental technologies define a specific overall political framework, to be re-constructed and described. Following Nikolas Rose I will term it *ethopolitics*. In this perspective whilst the state remains a key actor in determining the framework within which acceptable social relations are negotiated, non-state influences and the neo-liberal emphasis upon the individual as entrepreneur mean that. The processes of securitization, refeudalization of governance, psy-individualization of citizens, will be identified as the main political technologies of the ethopolitical paradigm. The last step of the problematization of the RJ consists in integrating the analysis of the RJ discursive formation and its ethos-political embeddedness, examining the subjectivation processes based on the RJ authoritative discourses and channeled through the restorative 'practices' (understood as 'procedural' authoritative discourses on the RJ). The subjectivation processes are nothing but the micro-level of ethopolitical technologies, their application at the 'singular' level of specific procedures (the RJ 'practices') involving specific individuals ('victim', 'offender', 'community'). This means to analyze how the

¹⁹⁶ See Richards, K. (2006). *'Rewriting history': towards a genealogy of 'restorative justice'*. PhD thesis, University of Western Sydney, Australia. Retrieved 4 April 2012 from <http://handle.uws.edu.au:8081/1959.7/17010>

¹⁹⁷ Howarth, D. (2002). *An Archaeology of Political Discourse? Evaluating Michel Foucault's Explanation and Critique of Ideology*, cit., p. 121.

subjectivity of the RJ's stakeholders is *constructed* within the discursive formation of the RJ and how individuals actually are affected by these processes of subjectivation. These questions request a shift in focus and an analysis at a lower level of abstraction. I will start indeed from the 'archival' identification of the authoritative conceptualizations of 'victim', 'offender' and 'community' in the RJ accounts. This investigation includes a discursive analysis which focuses on the surfaces of emergence of this dimension of archive, operationalizing the key concepts of the foucauldian analysis. I will be focusing on Victim-Offender Mediation as a 'procedural' authoritative discourse on the RJ, able to enrich and vehicle the subject positions of 'victim', 'offender' and 'community', emerging from the archive of the RJ. Lastly, I will re-construct the idea of the 'restorative subject' as a specific example of the effects of ethopolitical technologies on individuals.

1.5.4. The Restorative Justice Apparatus

Once isolated the archive, articulated the relative discursive formation, analyzed the political rationality embedded in such a formation and described the subjectivating effects of the discursive formation 'operationalized' through restorative 'practices', it is finally possible to profile the RJ as a *dispositif* or *apparatus*¹⁹⁸. The concept of apparatus plays the role of a sort of "*grid of interpretation*¹⁹⁹", a 're-writing' of existing meaning and the 'imposition' of new meanings between a range of heterogeneous elements (e.g. concepts, objects and institutions). The apparatus is always inscribed in a play of power and linked to certain coordinates of knowledge which issue from it but, to an equal degree, condition it. This is what the apparatus consists in: strategies of relations of forces supporting, and supported by, types of knowledge etc. Its function is to enable the researcher to account for the emergence of practices and institutions, and to place these elements in a broader and critical perspective²⁰⁰. Through the concept of apparatus it is possible to think how discourses partly form social relations, identities and social objects, emphasizing their materiality and positivity, which cannot be reduced to more primary processes, such as economic production, social institutions or political behaviour. We can thus capture the performative and practical aspects of speaking, writing and communicating about the RJ and connects them to questions of power-knowledge and subjectivity. Moreover there is always "*an urgent need*²⁰¹" to which the functioning of the apparatus responds, which in our case is the creation a neo-liberal post-social inclusive justice. Being inscribed in a play of power the apparatus also relates to certain types of knowledge that derive from it, but also condition it. The apparatus appears then as a powerful conceptual tool, apt to *cut* reality in a peculiar way²⁰². New and rather different elements, associations and relations can be seen through it. The new problems and connections that come into view, precisely because of the level of detail at which they are described, seem to become more amenable to action and transformation.

¹⁹⁸ Foucault, M. (1980). Two Lectures, cit., pp. 94-98.

¹⁹⁹ Dreyfus, H. L., Rabinow, P. (1983). *Michel Foucault: Beyond Structuralism and Hermeneutics*, cit., p. 121.

²⁰⁰ Howarth, D. (2000). *Discourse*, cit., p. 79.

²⁰¹ Foucault, M. (1980). Two Lectures, cit., p. 95.

²⁰² Rabinow, P., Rose, N. (2003). *Foucault Today*, cit., p. XVI.

CHAPTER 2

THE ARCHIVE OF THE RESTORATIVE JUSTICE

“[The archive] *It is no longer a monument for future memory, but a document for possible use*²⁰³”

2.0. Introductory remarks

The archive of the RJ consists of the systematization of the authoritative 1) explanations on the emergence of the RJ; 2) conceptualizations of its core characteristics; and 3) procedural discourses on the RJ. The authoritative discourses regularly feature any historical, theoretical and practical account on the RJ, overlapping, conflicting or integrating each other (within and between), composing a milestone for scholars, practitioners, advocates and opponents of RJ. Such discourses are drawn upon the ‘textbook’ literature on the RJ, i.e. the scholarly, advocacy and operational writings published since the late 70s, generally considered by the proponents²⁰⁴ of the RJ (and opponents), the “*sacred texts*²⁰⁵” for the worldwide spreading of RJ’s theories and practices. In the selection of the archival material, I rely then on what is considered ‘normative’ by the proponents of the RJ, targeting (and trying to de-familiarize) the more or less definite image of the RJ they have contributed to build up over the last thirty years. This perspective is partially akin to the famous account of *The Structure of Scientific Revolutions*²⁰⁶ given by Thomas Kuhn, especially regarding the role of scientific textbooks to reconstruct the contemporary state of scientific theory. For Kuhn they must be valued insofar as they give us a window on the ‘normal science’ of a period²⁰⁷. Nevertheless, as subsequent scholarship has shown, what Kuhn dubbed ‘normal science’ has not always been as consensual as he implied²⁰⁸. Often, different paradigms within the periods of ‘normal science’ might co-exist, with an intense competition between and even within them. Accordingly, different and conflicting ‘textbook’ versions of a given scholarly field might be present at the same moment. Even though these versions do not exhaust that field, they offer an interesting glance over it, given to their normativity and tension toward the completeness and the coherence. Therefore, the ‘textbook’ literature on the RJ can be conceived as the crystallization of different attempts to ‘normalize’ some ‘revolutionary’ practices characterized by their ‘borderline’ positions in the context of the well-known strategies of dealing with the crime and its aftermath. This has not produced one ‘normal science’ of the RJ, but a number of competing ‘authoritative discourses’.

²⁰³ Foucault, M. (1991). *Politics and the Study of Discourse*, cit., pp. 191-192.

²⁰⁴ I use the term ‘proponents’ to refer to scholars, advocates and practitioners of the RJ. Only in case of differentiation in the opinion of those three categories I will alternatively use the specific term of ‘scholars’, ‘advocates’ or ‘practitioners’.

²⁰⁵ Crawford, A. (2002). *The state, community and restorative justice: heresy, nostalgia and butterfly collecting*. In L. Walgrave (Ed.), *Restorative Justice and the Law* (pp. 101-130). Cullompton: Willan, 2002, p. 102.

²⁰⁶ Kuhn, T. S. (1962). *The Structure of Scientific Revolutions*. Chicago: University of Chicago Press; Kuhn, T. S. (1969). *The Structure of Scientific Revolutions*, 2nd ed. with Postscript. Chicago: University of Chicago Press.

²⁰⁷ Brooke, J.H. Textbooks and the history of science. Retrieved 19 February 2013 from <http://faculty.education.illinois.edu/westbury/paradigm/brooke.html>

²⁰⁸ See Lakatos, I., Musgrave, A. (Eds.) (1970). *Criticism and the Growth of Knowledge*, Vol.4. Cambridge: Cambridge University Press, p. 231; Toulmin, S. (1972). *Human Understanding*. Oxford: Clarendon Press.

2.1. Authoritative Explanations

The authoritative explanations are the discourses which, usually following a cause/effect patterns, pose and address the questions ‘why RJ?’. They concern historical investigations of the factors, contexts, phenomena which have led to the emergence of the RJ in contemporary western democracy. Such discourses are far from being ‘pacifically’ cohabiting under the common rubric of ‘explanations of the RJ’; they look as conflicting, overlapping, contradicting each other. On the other side, as we will see, a common trait among them is that they structure the emergence of the RJ in functionalist terms. The RJ is an ‘answer’ to different (and often conflicting) ‘needs’, such as those expressed by the crisis of the criminal justice, the rising of awareness of the crime victims’ movement and the claim to be involved in dealing with crimes advanced by the so-called ‘community’.

2.1.1. The breakdown of contemporary criminal justice system(s)

The first authoritative explanation to be analyzed, is that the RJ represents a response to the shortcomings (or even to the overall failure) of criminal justice systems in Western contemporary countries. As the British RJ activist Tony Marshall emphasizes “[RJ] is a practice that contains the seeds for solving a new problem – the inadequacy of the criminal justice system itself, as it lurches from crisis to crisis, based on a primitive philosophy of naked revenge²⁰⁹”. In the same way, one of the ‘forefathers’ of the RJ movement, Howard Zehr, claims that “We know that the system we call “criminal justice” does not work. [...] We have known that for many years, and have tried many reforms, and they have not worked either²¹⁰”. Zehr is echoed by Robert Cario, well-known advocate of the RJ in France, who states: “The crisis of the Penal State is evident. The state has troubles to maintain the jealous monopoly of the repression. Based on the protection of people and aiming at ensuring the rule of law through a due process of law which guarantees the respect of individual liberties. Unfortunately the penal machinery has not yet defined neither the crime nor the punishment or the victim²¹¹”. The breakdown of the criminal justice system seems a tragic, objective fact. Among proponents of the RJ we see a widespread agreement that current systems of criminal justice are, on a theoretical level, unacceptable, and, from an empirical point of view, ineffectual. Common criticisms include the system’s inability to prevent crime, rehabilitate offenders and assist victims. Nevertheless, alternative or more moderate views are present in the ‘textbook’ literature. Gerry Johnstone for instance, claims that the RJ advocates “present us with a one-sided picture of the values that underpin conventional criminal justice²¹²” and argues that despite its shortcomings, the contemporary approach to criminal justice does perform some essential functions with reasonable success. In much of the RJ literature, however, it is taken for granted that the emergence of the RJ is a natural consequence of the failure of criminal justice system²¹³.

²⁰⁹ Marshall, T. F. (1995). Restorative justice on trial in Britain. *Conflict Resolution Quarterly*, 12, 217-231, p. 230.

²¹⁰ Zehr, H. (1985). Retributive Justice, Restorative Justice. *New Perspectives on Crime and Justice - Occasional Papers Series*, 4. Kitchener: Mennonite Central Committee, Canada Victim Offender Ministries, pp. 1-2.

²¹¹ Cario, R. (2005). *Justice Restaurative, Principes et Promesses*. Paris: L’Harmattan, p. 11.

²¹² Johnstone, G. (2003). Introduction: restorative approaches to criminal justice. In G. Johnstone (Ed.), *A Restorative Justice Reader* (pp. 1-19). Devon: Willan, p. 5.

²¹³ See, for example, Cohen, R. (2001). Provocations of Restorative Justice. *Social Justice Research*, 14(2), 209-232, p. 209.

2.1.1.1. *The failure of law and of the criminal justice*

Before criticizing the criminal justice systems, proponents of the RJ have sharply contested the concept of 'legal system' as such. A crucial argument in favor of this point of view is the skepticism about the 'legal perspective' and its *modus operandi*²¹⁴. The emphasis is repeatedly put on the alleged senselessness of holding people accountable to abstract legal categories, disconnected with reality. A paradigmatic example of this attitude is found in the following description of the law by one of the theoretical 'founders' of the movement, Nils Christie: "*Training in law is a training in simplifications. It is a trained incapacity to look at all values in a situation, and instead to select only the legally relevant ones, that is, those defined by the high priests within the system to be the relevant ones*"²¹⁵. A corresponding passage is found, for instance, in Zehr: "*Crime is a result of a legal system which makes arbitrary distinctions between various harms and conflicts. It is an artificial construct which throws into one basket a variety of unrelated behaviors and experiences. It separates them from other harms and violations and thereby obscures the real meaning of the experience*"²¹⁶. In other words, the objection is that the law is an artificial and overly abstract classification system which is fundamentally incapable of capturing infinitely complex and multi-faceted human behavior. Christie and Zehr seem then believe that a free negotiation between the immediate stakeholders would be better at taking into account the essentials in any given case. Starting from the criticism to the legal system as a way of categorizing human deeds, the proponents of the RJ have then focused their attention on the specific case of the criminal justice. Zehr puts this matter in a quite straightforward way: "*Let's start with what we know. We know that the system we call 'criminal justice' does not work. Certainly, at least, it does not work for victims. Victims experience crime as deeply traumatic, as a violation of the self*"²¹⁷. At the same time it is not working for the offenders either: "*It is not preventing offenders from committing crimes, as we know well from recidivism figures. And it is not healing them. On the contrary, the experience of punishment and of imprisonment is deeply damaging, often encouraging rather than discouraging criminal behavior. Nor is the justice holding offenders accountable. Judges often talk about accountability but what they usually mean is that when you do something wrong you must take your punishment*"²¹⁸. Essentially, it seems that the problem with the criminal justice system is both how it is administered (through the court process) and its outputs (punishment or acquittal). Additionally, the criticisms are focused both on how criminal justice is ideally meant to 'work' and on 'how it actually works'. As far as the court process is concerned, Roger Graef notices: "*It comes as a surprise to many victims that they appear in court only if they are needed as witnesses, not in their own right. There they are sometimes subjected to grueling cross-examination, which feels to them like 're-victimization' - living through the crime all over again. They are allowed to speak only about legally defined 'facts' - not about what the crime meant to them. Although court cases are conducted in the name of the victim and the community, they seem to operate mostly according to the*

²¹⁴ Holtermann van, H. J. (2009). *Everything you always wanted to know about restorative justice* *but were afraid to ask*. PhD thesis, Roskilde University, Denmark. Retrieved 5 April 2012 from https://www.academia.edu/198816/Everything_you_always_wanted_to_know_about_restorative_justice_but_were_afraid_to_ask_.

²¹⁵ Christie, N. (1981). *Limits to Pain*. Oslo: Norwegian University Press and Oxford: Blackwell, p. 21.

²¹⁶ Zehr, H. (2005). *Changing Lenses: A New Focus for Crime and Justice*, 3rd ed. Scottsdale: Herald Press, p. 183.

²¹⁷ Zehr, H. (2003). Retributive justice, restorative justice. In G. Johnstone (Ed.), *A Restorative Justice Reader* (pp. 69-83), cit., p. 69.

²¹⁸ Ibidem.

requirements of the courts²¹⁹”. In this perspective, the result is that many victims feel marginalized, and distant from ‘their’ process. Criticisms highlight the little sense of “closure, forgiveness, or encouragement for victims to get on with their lives by putting the damage caused by the crime behind them²²⁰”. For offenders, the proponents of the RJ claim that the court process does the opposite of what is intended²²¹. It can help to distance them from what happened. Although the spotlight is on the person in the dock, the offender takes little part in the proceedings. Observing passively at how their lives are discussed in complicated language by unfamiliar experts, offenders often cannot understand what is going on²²². It is their lawyer’s job to argue on their behalf and get them off, whether they are guilty or innocent²²³. Randy Barnett, considered one of the ‘forefathers’ of the RJ²²⁴, in the 1977 argued that the criminal justice paradigm should be rejected because the lacking of effectiveness, measured by failure in achieving its declared goals: deterrence, retribution and rehabilitations²²⁵. He suggested a new paradigm of dealing with crimes based on the principle of the restitution. Barnett’s radical proposal to discharge the criminal justice paradigm of justice has helped shape the idea of the RJ as a paradigm, beside the specific idea of restitution. Christie in his famous article “Conflicts as property” elaborated a criticism regarding the criminal justice which represents a ‘landmark’ of the RJ literature²²⁶. The matter is that the criminal justice holds the structural ‘task’ of ‘stealing conflicts’ (legally defined as crimes) from their rightful owners, the victim and the offender (or plaintiff and defendant)²²⁷. The stolen conflicts are reshaped and managed by the criminal justice professionals accordingly criteria of rationality absolutely alien to the interests of conflicts’ owners. A strong dissatisfaction and damage for a peaceful social ‘growth’ of the community are the natural consequences of this process²²⁸. The conflict, in fact, is thought by Christie as a precious property that should be returned to the rightful holders in order to make possible a more socially ‘participatory’ management of it. Mary Achilles and Zehr take a slightly different stance. In their view, the basic problem of the criminal justice system is that it is entirely set up as an offender-centered system²²⁹. Once a criminal event moves beyond investigation to arrest and prosecution, cases are defined and processed around offender identities and issues, totally ignoring the victim’s needs²³⁰. Martin Wright, well known British RJ advocate, talks of the criminal procedure as process where the means are “overshadowed by the end²³¹”. He argues that the delays in bringing

²¹⁹ Graef, R. (2000). *Why Restorative Justice? Repairing the Harm Caused by Crime*, edited and additional material by M. Liebmann. London: Calouste Gulbekian Foundation, p. 13.

²²⁰ Ibidem.

²²¹ Ibidem.

²²² Ibidem.

²²³ Ibidem.

²²⁴ See Gavrielides, T. (2005). Some Meta-theoretical Questions for Restorative Justice. *Ratio Juris*, 18(1), 84-106.

²²⁵ Barnett, R.E. (1977). Restitution: A New Paradigm of Criminal Justice. *Ethics*, 87(4), 279-301.

²²⁶ Christie, N. (1977). Conflicts as Property. *British Journal of Criminology*, 17(1), 1-15.

²²⁷ Ibidem, p. 4.

²²⁸ Ibidem, p. 7.

²²⁹ Achilles, M., Zehr, H. (2001). Restoring victims. Restorative justice for crime victims: the promise, the challenge. In G. Bazemore, L. Schiff (Eds.), *Restorative and Community Justice Cultivating Common Ground for Victims, Communities and Offenders* (pp. 87-99). Cincinnati: Anderson Publishing, p. 89.

²³⁰ Achilles, M., Zehr, H. (2000). Restoring victims, cit., p. 9.

²³¹ Wright, M. (1991). *Justice for victims and offenders*. Philadelphia: Open University Press, p. 10.

cases before the courts are followed by the speed of routinization with which the people-processing machine then operates²³². Both the problems are aggravated by the volume of the work confronting the courts. Court proceedings are busy and mechanical technocratic events did not touch the lives of defendants²³³. It has become a commonplace to observe that courts proceedings are based essentially on win/lose, guilty/not guilty principles²³⁴. Another shortcoming of the traditional criminal justice system frequently cited by the proponents of the RJ, as a reason for its emergence, is the inconsistency in sentencing²³⁵. A number of proponents of the RJ criticize the existing criminal justice system on the grounds that sentencing outcomes appear haphazard. Zehr²³⁶, for example, claims that a lack of uniformity in sentencing has been highlighted by studies in which a number of judges are given particular cases to consider, and asked what their sentence would be. “*The range in outcomes*”, Zehr claims, “*is breathtaking*”²³⁷. In a similar fashion, judge Fred McElrea claims that: “*It is [...] inherently unfair to criticize family group conference procedures on the grounds that sometimes they impose outcomes more onerous than the court would have imposed [...] what is overlooked is that sentencing is not an exact science and there can be considerable disparity between the sentences imposed by different judges in similar cases; we do not therefore say that judges should not be involved in sentencing*”²³⁸.

2.1.1.2. Criticisms against the punishment

The criticism regarding the idea and the implementation of the punishment, carried out by the proponents of the RJ, appears even sharper than the attack against the structural features of the criminal justice system. A key feature of the restorative way of thinking about crime and justice is the rejection of responses to crime which consider imposition of pain on offenders²³⁹. In contrast, the RJ is portrayed as a more constructive and humane approach aimed at reparations of harms and broken social bonds, rather than involving deliberate infliction of pain²⁴⁰. At the same time, it is impossible to identify a common perspective regarding the limits and deficiencies of the punishment or the relationship between this and the RJ. According to Jolien Willemsen, the premise of the debate on punishment in the scholarly literature on the RJ, is that there is a strong lack of clarity among the proponents of the RJ about what is meant by the term ‘punishment’²⁴¹. Wright for instance, has argued that the punishment must be considered any infliction of pain on the offender legally convicted of a legally defined offence, looking at the intentions of the legal authorities which administer this process²⁴². Kathleen Daly, on the other hand, would define punishment as anything that is unpleasant: a burden or

²³² Wright, M. (1991). *Justice for victims and offenders*, cit., p. 10.

²³³ Ibidem, p. 11.

²³⁴ Ibidem, p. 12.

²³⁵ Gavrielides, T. (2007). *Restorative Justice Theory and Practice: Addressing the Discrepancy*. Helsinki: HEUNI.

²³⁶ Zehr, H. (2005). *Changing Lenses: A New Focus For Crime And Justice*, cit., pp. 64-65.

²³⁷ Ibidem, p. 65.

²³⁸ McElrea, F. (1993). A New Model of Justice. In B. Brown, F. McElrea (Eds.), *The Youth Court In New Zealand: A New Model Of Justice: Four Papers* (pp. 1-12). Auckland: Legal Research Foundation, p. 4.

²³⁹ Zernova, M. (2007). *Restorative Justice: Ideals and Realities*, cit., p. 39.

²⁴⁰ Wright, M. (1991). *Justice for victims and offenders*, cit., p. 27.

²⁴¹ Walgrave, L. (Ed.) (2003), *Repositioning Restorative Justice*. Cullompton: Willan, p. 27.

²⁴² Wright, M. (1991). *Justice for victims and offenders*, cit.

imposition on the offender²⁴³. Paul McCold²⁴⁴ has claimed that accepting any form of coercion as being potentially restorative would completely shift the RJ back to being retribution. Starting from this point we can observe a really complex discussion on the punishment among the proponents of the RJ, characterized often by the intertwining of descriptive and normative perspectives as well as theoretical misunderstandings. In order to simplify this tangle of arguments, a main distinction can be drawn. It stands between the theoretical stances (criticism against how the punishment is conceived, regardless its factual implementation) and empirical ones (how punishment is carried out, i.e. its material effects). The first 'chapter' of this debate is how the proponents (especially the scholars of the RJ) have critically approached the different theoretical justifications of punishment, indicating the RJ as a way to overcome the shortcomings of these conceptualizations. Lode Walgrave, one of the leading scholars and advocates of the RJ in the "maximalist perspective"²⁴⁵, has claimed the necessity to question all the main, historically-rooted theoretical justifications of the punishment. As far as the consequentialist-utilitarian justification is concerned²⁴⁶, he argues that this stance is totally betrayed by the concrete ways to punish people. In the prison system, in fact, there is not any utilitarian aim, but only infliction of a blind pain. Walgrave argues also against the idea of punitive sanction as a symbolization of what is unacceptable in a given society²⁴⁷. In this case the shortcoming is the impossibility of proportionality and the chimera of consistency. It is impossible to equalize the harm done and the pain inflicted, then is totally neglected the fact that the same kind of punishment has different effects on different people²⁴⁸. To combine the utilitarian argument with the symbolic one does not make it immune from the Walgrave's criticism²⁴⁹. In this case the problem is that the offender remains the focus of the punishment, pushed toward self-defensive positions, causing an additional damage to the neglected victim. In fact, the offender is stimulated to deny the responsibility, minimizing the acknowledgement of the act and its impact on the victim²⁵⁰. Conventional justifications of punitive sanctions, according to Walgrave's perspective, show structural limits such as their side-effects (provoking superficial compliance or stimulating anti-social behavior) or collateral damages (the unfair and unproductive impact on the offender's family). The Walgrave's conclusion is that punitive sanctions are unacceptable and ineffective²⁵¹.

Some proponents have also focused on the relationship between the RJ and the rehabilitative justification of punishment²⁵². Many of them have contrasted the idea of treatment/rehabilitative model as such denying any possibility of combination between the philosophy which underlies this model and the RJ²⁵³.

²⁴³ Daly, K. (2001). Revisiting the Relationship between Retributive and Restorative Justice. In H. Strang, J. Braithwaite (Eds.), *Restorative Justice: Philosophy to Practice*. London: Ashgate (pp. 33-54).

²⁴⁴ McCold, P. (2000). Toward a holistic vision of restorative juvenile justice: A reply to the maximalist model. *Contemporary Justice Review*, 3(4), 357-414.

²⁴⁵ Walgrave, L. (2003). *Repositioning Restorative Justice*, cit., p. 12.

²⁴⁶ Ibidem, p. 14.

²⁴⁷ Ibidem, p. 15.

²⁴⁸ Ibidem, p.16.

²⁴⁹ Ibidem, p.17.

²⁵⁰ Ibidem, p. 17.

²⁵¹ Ibidem, p. 19.

²⁵² Zernova, M. (2007). *Restorative Justice: Ideals and Realities*, cit., p. 40.

²⁵³ Walgrave, L. (1995). Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative? *Howard Journal of Criminal Justice*, 34(3), 228-249; Bazemore, G. (1996). Three

Rehabilitation is criticized on the grounds that it takes a one-dimensional, offender-driven approach, ignoring needs of victims and denying them meaningful participation in the justice process. It views offenders as victims of an underlying psychiatric disorder who are not responsible for their criminal behavior and fails to hold them accountable. Being administered by professionals who “do not see themselves as being in business of moral evaluation²⁵⁴”, the treatment model shields offenders from social condemnation of their offending behavior. According to the proponents of the RJ, this prevents offenders from realizing the wrongfulness of their criminal activities and undermines the informal social mechanisms of crime control²⁵⁵. Nevertheless it is possible to detect the presence of some scholars who understand the RJ and the rehabilitation as compatible, seeing the possibility for the offender to take part to a rehabilitation program as one of the most appreciable RJ’s outcome²⁵⁶. John Braithwaite, for instance, argues that the RJ is often rehabilitative, although does not have the rehabilitation as its primary purpose. It is rehabilitative precisely because it does not directly set out to change people and thus avoids the risk of psychological reactance on the part of the offender. Yet, when it directly pursues the RJ’s objectives, rehabilitation is a likely ‘spin-off’²⁵⁷. Other have also expressed skepticism towards an approach drawing a sharp distinction between RJ and offender rehabilitation, being clearly present in the RJ some rehabilitation elements²⁵⁸. Johnstone has criticized the image elaborated by the proponents of the RJ regarding the rehabilitation as only medical-orientated, whereas socio-therapeutic option is available in the rehabilitation perspective since long time²⁵⁹. According to Jerry Johnstone, when we respond to a harmful act as a crime we bring into play a set of interdependent assumption about how we should regard and handle it²⁶⁰. In this context, the most important assumption are these: the focus of official attention is squarely upon the harmful act and the perpetrator of it; this act is construed as a transgression of society’s fundamental laws-the perpetrator has done something which society forbids people to do because it deems it harmful and/or immoral; the state initiates exclusively legal action on behalf of society, only this can dismiss it; if the legal action is successful the offender is punished; there is considerable social stigma attached to being convicted and punished for a criminal offence²⁶¹. Consistently with this perspective, Gordon Bazemore, taking a stance opposite to Walgrave, argues for a fully restorative model of rehabilitation rooted in a specific relational context²⁶².

Paradigms for Juvenile Justice. In B. Galaway, J. Hudson (Eds.), *Restorative Justice: International Perspectives* (pp. 37-68). Monsey: Criminal Justice Press.

²⁵⁴ Johnstone, G. (2002) *Restorative Justice: Ideas, values, debates*. Devon: Willan, p. 94.

²⁵⁵ Bazemore, G. (1996). Three Paradigms for Juvenile Justice, cit.

²⁵⁶ Wright, M. (2004). The rights and needs of victims in the criminal justice process. In H. Kaptein, M. Malsch (Eds.), *Crime, victims and justice: essays on principles and practice* (pp. 141-155). Aldershot: Ashgate, p. 247.

²⁵⁷ Braithwaite, J. (2002). *Restorative Justice & Responsive Regulation*, cit., pp. 99-102.

²⁵⁸ Daly, K. (2000). Restorative Justice in Diverse and Unequal Societies. *Law In Context*, 17(1), 167-190; Daly, K. (2002). Restorative justice: The real story. *Punishment & Society*, 4(1), 55-79

²⁵⁹ Johnstone, G. (2002). *Restorative Justice: Ideas, values, debates*, cit., pp. 101-111.

²⁶⁰ Johnstone, G. (2003). Introduction: restorative approaches to criminal justice. In G. Johnstone (Ed.), *A Restorative Justice Reader* (pp. 1-19), cit., p. 8.

²⁶¹ Ibidem, p. 9.

²⁶² Bazemore, G., Bell, D. (2004). What is the Appropriate Relationship between Restorative Justice and Treatment? In H. Zehr, B. Toews (Eds.), *Critical Issues in Restorative Justice* (pp. 119-133), Monsey: Criminal Justice Press, p. 121.

2.1.1.3. *The prisons' failure*

From the 'empirical' point of view, the main '*punctum dolens*' of contemporary criminal justice systems, is the implementation of punishments, i.e. how the prison's system actually works. To Zehr, the reasons for the ineffectiveness of prison come as no surprise. In *Changing Lenses*, Zehr describes a case in which the judge, while sentencing a young offender to 20 to 85 years in prison, told the offender, "I trust that [in prison] you will forget the patterns of behavior which led to this violent offense"²⁶³. As Zehr mentions, prison life teaches inmates the exact opposite. It teaches them to be obedient, but does not give them the tools to become self-governing and to take charge of their life in legitimate ways²⁶⁴. It is structured to dehumanize the inmates, denying them a sense of self-worth and self-respect and, in turn, the ability to respect others²⁶⁵. As Zvi Gabbay remarks, while one might disagree with Zehr on different aspects of the incarceration experience, few people would argue that prison is an educational institution that prepares its inmates for the normative life they will be expected to live outside its walls. Since prison is, in many cases, perceived as the only appropriate way to punish offenses for almost every type of crime, it is surprising, according to Gabbay, how little energy is invested in preparations for 'the day after', the time in which the incarcerated offender will reenter society²⁶⁶. This stance finds quite remarkable echo among the proponents of the RJ. The idea that no attention is given to the question of what happens once the sentence is over has been often stressed in the 'textbook' literature. On the other side, in this authoritative writings, there is room for criticizing the fact that restorative 'practices' represent alternatives to incarceration. Tony Dittenhoffer and Richard Ericson's empirical report²⁶⁷ on two Victim-Offender Reconciliation programs in Canada found, for example, that although providing an alternative to incarceration was the principal aim of at least one of these programs, this aim was not being reached. In fact, Dittenhoffer and Ericson found that the programs were increasing rather than decreasing the net of social control, and that in a number of instances, meetings between victims and offenders resulted in a sentence of imprisonment for the offender. While there are usually upper limits placed on the amount and type of punishment that restorative procedures can result in, terms of imprisonment can be imposed by participants in some restorative procedures²⁶⁸, perhaps most often in circle sentencing, where offences of a more serious or personal nature can be considered²⁶⁹. New Zealand's court-referred RJ pilot project for adults also permits this outcome, with 13.7% of offenders being sentenced to imprisonment as a result of a restorative procedure²⁷⁰. Furthermore, RJ

²⁶³ Zehr, H. (2005). *Changing lenses*, cit., p. 18.

²⁶⁴ Gabbay, Z.D. (2005). Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices. *Journal Dispute Resolution*, 2, 349-397, p. 354.

²⁶⁵ Zehr, H. (2005). *Changing lenses*, cit., pp. 35-40.

²⁶⁶ Gabbay, Z.D. (2005). Justifying Restorative Justice, cit., p. 355.

²⁶⁷ Dittenhoffer, T., Ericson, R. (1983). The Victim/Offender Reconciliation Program: A Message To Correctional Reformers. *University of Toronto Law Journal*, 33(3), 315-347.

²⁶⁸ Ibidem, p. 330; Morris, A., Young, W. (2000). *Reforming criminal justice: The potential of restorative justice*. In H. Strang, J. Braithwaite (Eds.), *Restorative justice: Philosophy to practice* (pp. 11-31). Burlington: Ashgate, p. 16.

²⁶⁹ Lilles, H., Circle Sentencing. Retrieved 19 February 2009 from http://www.iirp.edu/article_detail.php?article_id=NDQ3, 2002, § 2.

²⁷⁰ Crime and Justice Research Centre, Victoria University of Wellington, Triggs, S. (2005). *Evaluation of the Court-referred Restorative Justice Pilot Technical Report*. Wellington: Ministry of Justice, p. 3.

programs can also be ‘applied’ to some offenders in addition to a goal term²⁷¹. While the failings of the prison make a persuasive backdrop to arguments for the implementation of the RJ programs, in practice, such restorative measures seem have largely escaped application to the types of offences that might have resulted in their utilization as an alternative to prison²⁷². In this perspective, therefore, the offending population for whom the RJ is rationalized, and the offending population upon whom the RJ is practiced, appear to be quite separate.

2.1.2. The victimhood’s renaissance

Another typical explanation for the emergence of the RJ, shared by a fair number of proponents, is that the RJ has emerged due to the development of a new crime victims’ awareness translated in a worldwide victims’ movement²⁷³. In this frame, the RJ has been as one of the new ways of dealing with crime victims’ needs (as precondition of victims’ rights) starting from the 80s. This interpretation is usually complementary to the failure of criminal justice, offering a solid ground on which the victims’ movement has built up strong political claims and reform’s arguments. Probably, the connection between these two explanations is that the crime victims’ claims are shaped first of all as a criticism regarding the criminal law and its application. Gay Clarke and Iyla Davies, for example, argue that “*the increasing use of victim offender mediation programs in Australia and throughout the world can be seen as [...] a shift in focus in the late 1980s and early 1990s to the rights of victims and the study of victimology*²⁷⁴”. Likewise, Zehr states that “*the theory and practice of restorative justice have emerged from and been profoundly shaped by an effort to take [the] needs of victims seriously*²⁷⁵”. On the same line, as Antony Pemberton et al. claim, there seems to be little doubt that the RJ is in “*the interest of victims of crime*²⁷⁶”. In academic textbooks the two are often paired and legislation concerning the RJ emphasizes the position of victims of crime²⁷⁷. Assisting crime victims in their recovery is considered to be a core element of any RJ intervention²⁷⁸. Walgrave, echoing this perspective, argues that the RJ can be represented as a victim-centered approach to justice²⁷⁹. This is because the RJ does not marginalize the victim from the justice process, avoiding, at the same time, to offer retribution on the victim’s behalf. Instead, the RJ is able to recognize the victim as a central stakeholder within the restorative process, and thus seeks to provide victims with a

²⁷¹ Brochu, S. (2005). Restorative Justice And The Morality Of Law. In E. Claes, R. Foque, T. Peters (Eds.), *Punishment, Restorative Justice And The Morality Of Law* (pp. 79-89). Oxford: Intersentia, pp. 83-84.

²⁷² Dittenhoffer, T., Ericson, R. (1983). The Victim/Offender Reconciliation Program: A Message To Correctional Reformers, cit.

²⁷³ Exceptions are Johnstone, G. (2002). *Restorative Justice: Ideas, values, debates*, cit., pp. 81-83; Doolan, M. (2005). *Restorative Practices and Family Empowerment: both/ and or either/or?* Retrieved 25 May 2012 from http://www.americanhumane.org/site/DocServer/au05_doolan1.pdf?do, p. 2.

²⁷⁴ Clarke, G., Davies, I. (1994). Victim Offender Mediation in Queensland. *The Queensland Lawyer*, 14(5), 169-173, p 169.

²⁷⁵ Zehr, H. (2002). *The Little Book of Restorative Justice*. Intercourse: Good Books, p. 15; see also Llewellyn, J., Howse, R. (1998). Restorative Justice - A Conceptual Framework. Retrieved 1 May 2013 from http://www.lcc.gc.ca/research_project/99_justice_1-en.asp, para 4

²⁷⁶ Pemberton, A., Winkel, F.-W., Groenhuijsen, M. S. (2008). Evaluating Victims Experiences in Restorative Justice. *British Journal of Community Justice*, 6(2), 98-119, pp. 98-99.

²⁷⁷ Ibidem.

²⁷⁸ Ibidem.

²⁷⁹ Walgrave, L. (2003). *Repositioning Restorative Justice*, cit., p. 89.

prominent role in shaping the justice process and in deciding upon a just resolution to the conflict²⁸⁰.

2.1.2.1. *From the dispossession of victims to the rising of victims' movement in criminal justice*

The story of the decline of the role of victims in Western criminal justice systems is a familiar one for the RJ literature. Often, indeed, both the RJ scholarly contributions and policy-oriented interventions, assume as starting point the historical process of victim's 'role dispossession' in the criminal justice. This claim is more or less organized as follows. A thousand years ago, victims' rights to compensation for wrongdoing were codified in written laws, though the implementation of these rights often depended on the threat of the kinship feud²⁸¹. Originally, criminal cases were prosecuted by private individuals, often by means of 'blood feuds'²⁸². Remedies focused on compensating individual victims rather than achieving public goals of deterrence, retribution, or rehabilitation. Over time, however, the law gradually changed; the criminal action became state property²⁸³. Only with the rise of the modern state, the responsibility for the investigation, prosecution and disposition of personal crime ceased to be the victim's duty and become a matter for the Crown or the state²⁸⁴. The erosion of victim's rights over the centuries led eventually to their removal from any meaningful role in the justice system in common law countries²⁸⁵. "*The victim had become another witness*"²⁸⁶, is emphatically argued in the 'textbook' literature. Victims were so comprehensively forgotten that it was not until the middle of the twentieth century that any academic or practical interest in them was revived. Indeed, it was the mid-seventies before researchers, justice policy makers and the broader community began to express concern about their own role, or rather its absence, in the criminal justice system²⁸⁷. In the RJ literature, this transformation is explained drawing upon studies which emphasize a variety of anthropological, sociological, political, and philosophical reasons. In Weitekamp's view, for example, although we tend now to think of the criminal law as inherently public, in the early days of Western legal systems, private individuals prosecuted criminals and meted out punishment²⁸⁸. The criminal law was primarily concerned with victims' compensation or revenge. Criminal law became a matter of public interest with the close of the Anglo-Saxon period in English history and the rise of feudalism. In the Middle Ages, the system of 'composition' combined public punishment with private damages so that crime victims and their families could collect satisfaction from wrongdoers. Increasingly, however, intentionally harmful acts were considered offenses against the 'peace rather than individual victims, and a structured

²⁸⁰ Walgrave, L. (2003). *Repositioning Restorative Justice*, cit., p. 90.

²⁸¹ Walklate, S. (1989). *Victimology: The Victim and the Criminal Justice Process*. London: Routledge; Weitekamp, E. (1999). *The History of Restorative Justice*, cit.

²⁸² Brown, J. G. (1994). The use of mediation to resolve criminal cases: a procedural critique. *Emory Law Review*, 43, 1247-1309.

²⁸³ *Ibidem*, p. 1254.

²⁸⁴ Strang, H. (2003). *Justice for victims of young offenders: the centrality of emotional harm and restoration*. In G. Johnstone, G. (Ed.), *A Restorative Justice Reader: Texts, sources, context* (pp. 286-294), cit., p. 286.

²⁸⁵ Hudson, J., Galaway, B. (Eds.) (1975). *Considering the Victim: Readings in Restitution and Victim Compensation*. Springfield: Charles C. Thomas.

²⁸⁶ Strang, H. (2003). *Justice for victims of young offenders*, cit., p. 286.

²⁸⁷ *Ibidem*.

²⁸⁸ Weitekamp, E. (1999). *The History of Restorative Justice*, cit.

court system developed to redress these public wrongs²⁸⁹. As the state established a monopoly on punishment, the rights of crime victims were gradually severed from the criminal law. The system of the ‘blood feud’ and revenge as the principal remedy for wrongdoing became obsolete²⁹⁰. The rising awareness of crime victims and their efforts put into the creation of a worldwide movement able to lobby the victims’ needs, is considered by the RJ literature a stunning innovation in the criminal justice in the 1960s²⁹¹. This phenomenon is usually assumed as the fundamental step toward the worldwide edification of the RJ theory and practice. Looking more analytically at this process, different have been the conceptualizations of its historical development, and political or legal achievements. According to Johanna Shapland et al., the victims’ movement has developed into four main stages: “*victim aid and assistance; victim experiences with the criminal justice system, State compensation, and reparation by the offender*”²⁹². In the more nuanced perspective of Marlene Young and John Stein, even if focused only on the USA case, it is possible to identify five stages: the development of a field called ‘victimology’; the introduction of state victim compensation programs; the rise of the women’s movement; the rise of crime that was accompanied by a parallel dissatisfaction with the criminal justice system and the growth of victim activism²⁹³. These different steps are considered in the ‘textbook’ literature, crucial for the emergence of the RJ.

2.1.2.2. *The identity of victims*

The ‘victims’ are often represented by the RJ literature as a cohesive, united ensemble of people. Zehr portrays victims as a homogenous and essential category, based on what he sees as the needs of the ‘essential’ crime victim²⁹⁴. According to Zehr’s claims, crime victims do experience “*nearly universal*”²⁹⁵ reactions to victimization, irrespective of the seriousness of the offence. Zehr’s focus on victims of crimes is also evident in his discussion of offenders. He claims that “*offenders often lack a certain moral sense, defined as a preoccupation with their own needs and an [in]ability to empathize with others [...]. This preoccupation with self actually is based in a weak self-image, perhaps in self-hate*”²⁹⁶. Victims are further described as an “*unacknowledged group, a group that was not a self-conscious community and that lacked a collective presence*”²⁹⁷. Nevertheless does exist in the RJ literature a more nuanced perspective on the identity of the victims who, organizing themselves as a movement, have raised the question of how to address their needs in the criminal justice system. Young, for instance, has criticized the mainstream RJ literature for using too homogenous conceptions of victims, followed by generalized, sweeping statements about the beneficial effects of

²⁸⁹ Brown, J. G. (1994). The use of mediation to resolve criminal cases: a procedural critique, cit., p. 1254.

²⁹⁰ Ibidem.

²⁹¹ Young, M., Stein, J. (2004). *The History of the Crime Victims’ Movement in the United States*. Retrieved 22 May 2012 from https://www.ncjrs.gov/ovc_archives/ncvrv/2005/pg4c.html.

²⁹² Shapland, J., Wilmore, J., Duff, P. (1985). *Victims in the Criminal Justice System*. Brookfield: Cambridge Studies in Criminology, p. 2.

²⁹³ Young, M., Stein, J. (2004). *The History of the Crime Victims’ Movement in the United States*, cit.

²⁹⁴ Zehr, H. (2005). *Changing Lenses*, cit.; Zehr, H. (2002). *The Little Book of Restorative Justice*, cit.

²⁹⁵ Ibidem, p. 29.

²⁹⁶ Ibidem, p. 51.

²⁹⁷ Rock, P. (1990). *Helping Victims of Crime: The Home Office and the Rise of Victim Support in England and Wales*. Oxford: Clarendon Press, p. 59.

the RJ for all victims²⁹⁸. Similarly, Chris Cunneen provocatively asks: “*Does the ‘ideal’ victim or offender of RJ ever exist and, if not, what are implications for the restorative practices?*”²⁹⁹. According to him, in the RJ’s framework, ‘victim’ (as well as ‘offender’) is understood as too much uncomplicated and homogeneous category of the self. There are no complexities: a person is either an offender or a victim, and these universal categories appear to subsume all other possible identities. He goes on wondering “*can we assume that everyone subjectively experiences these categories in identical or, at least, similar ways, irrespective of their gender, class, race, ethnicity, sexual preference, religion or age?*”³⁰⁰. In Cunneen’s perspective, victims and offenders are legal subjects who do not exist in a natural state separated from the social characteristics through which individuals live their lives. To be a citizen, to be a victim, to be a criminal takes on meaning only in the context of social relations between people and within the broader institutions of society. Perhaps, it could be argued, the RJ allows us an opportunity to explore these social relations and their impact on crime and victimization³⁰¹. However, given that most RJ processes are already firmly embedded within state practice, the identities of victim and offender and the script which is expected to be followed is already well established. There does not appear to be much opportunity to challenge these identities. Indeed, we must accept the label of ourselves as either an offender or as a victim before we are allowed to enter into established RJ processes. If we refuse, for example, to self-identify as an offender, we are precluded from engaging in the script of the RJ. Like the criminal law more generally, the RJ narratives have tended to construct subjectivity as a binary field of either offender or victim, with little attention to the profound difficulties that underpin these classification. As Cunneen states, in oppressed or marginalized communities many victims may also be offender³⁰².

2.1.2.3. *What do victims want from justice?*

The number of studies on the victims’ claims towards the criminal justice system, elaborated or used by the proponents of the RJ, is simply enormous. Some of these have already emerged from the previous sections. Andrew Woolford, for instance, in his meta-analysis of the RJ literature, identifies the following victims’ needs: acknowledgement that the victim is blameless for the harm he/she suffered; restitution of stolen items; monetary compensation; symbolic atonement in the form of apology; sense of safety and closure; an opportunity for the victim to voice his/her suffering; continuing support³⁰³. Achilles and Zehr isolate other basic needs such as safety, restitution, answers to questions, truth-telling and empowerment³⁰⁴. To simplify the complex landscape of studies on victims’ needs/claims, I draw upon the analytical scheme elaborated by Heather Strang and Lawrence Sherman, which reduces the victims’ needs to five main meta-areas which synthesize the ‘authoritative’ positions within the RJ literature. The first crime victims’ need, they have

²⁹⁸ Young, R., Hoyle, C. (2002). *The Implementation and Effectiveness of the Initiative in Restorative Cautioning by Thames Valley Police: Research Findings*. York: Joseph Rowntree Foundation.

²⁹⁹ Cunneen, C. (2010). The limitations of Restorative Justice. In C. Cunneen, C. Hoyle (Eds.), *Debating Restorative Justice* (pp. 101-189). Oxford: Hart Publishing, p. 132.

³⁰⁰ Ibidem.

³⁰¹ Ibidem, p. 133.

³⁰² Ibidem.

³⁰³ Woolford, A. (2009). *The Politics of Restorative Justice: A Critical Introduction*. Winnipeg: Fernwood, p. 90.

³⁰⁴ Achilles, M., Zehr, H. (2000). Restoring victims, cit., pp. 4-5.

detected, is to be *informed*³⁰⁵. They refer that victims repeatedly consider one of the greatest sources of frustration to them the difficulty in finding out from criminal justice authorities about developments in their cases. Additionally, Shapland et al. further observe that the victim is regarded as ‘supernumerary’ insofar as is not a prosecution witness³⁰⁶. Achilles and Zehr, in their analysis on the conditions of an efficient RJ system, have strongly supported the idea that to be informed is a basic victims’ need. According to them, victims hold the need to understand their role in the criminal justice process (also the RJ ones), including potential benefits and risks to themselves and offenders³⁰⁷. They want to have as much information as possible about their case, the offense and the offender³⁰⁸. A second fundamental need is the *participation*³⁰⁹. A major complaint of victims is that they are not encouraged to feel part of justice proceedings in their case. It appears that participation in the processing of their cases assists victims both in their emotional recovery and in reducing the sense of alienation that results from believing they have no control and no status³¹⁰. Furthermore, as Achilles and Zehr state, victims and victim advocates want to be represented on governing bodies and initial planning committees³¹¹. Their inclusion in the process of development highlights the programs’ commitment to crime victims and the sensitivities that need to be addressed so as not to re-victimize. This important view can assist in enhancing the quality of a program and a sense of ownership in the program from the victims’ perspective. It also sends a strong message of inclusion to the victim services community. Since a core element of victim trauma is disempowerment, there should be as few limits on participation as possible³¹². Another basic claim of the crime victims highlighted by Strang and Sherman is the necessity of emotional restoration and *apology*³¹³. Beyond the calculable material harm victims of crime may experience, there are emotional and psychological dimensions to the loss that have routinely been ignored by the justice system and that need redressing if the experience of victimization is ever to be satisfactorily resolved³¹⁴. While courts and lawyers make reference to pain and suffering experienced by victims, and in some cases financial settlements are arrived at in civil or criminal courts to compensate for this, victims themselves say that emotional harm is healed, as opposed to compensated for, only by an act of emotional repair³¹⁵. The ‘evidence’ suggests that victims see emotional reconciliation to be far more important than material or financial reparation³¹⁶. From the victim’s perspective, traditional criminal justice fails precisely because it treats all similar offences in similar ways, regardless of the differential impact of the offence on

³⁰⁵ Strang, H., Sherman, L. W. (2003). Repairing the Harm: Victims and Restorative Justice. *Utah Law Review*, 22, 15-42, p. 21.

³⁰⁶ Shapland, J., Wilmore, J., Duff, P. (1985). *Victims in the Criminal Justice System*, cit., pp. 74-75 and 77-78.

³⁰⁷ Achilles, M., Zehr, H. (2000). Restoring victims, cit., p. 14.

³⁰⁸ Ibidem.

³⁰⁹ Strang, H., Sherman, L. W., (2003). Repairing the Harm, cit., p. 22.

³¹⁰ Erez, E., Tontodonato, P. (1990). The Effect of Victim Participation in Sentencing on Sentencing Outcome. *Criminology*, 28(3), 451-474, pp. 467-70.

³¹¹ Achilles, M., Zehr, H. (2000). Restoring victims, cit., p. 13.

³¹² Ibidem, p. 15.

³¹³ Strang, H., Sherman, L. W. (2003). Repairing the Harm: Victims and Restorative Justice, cit., p. 22.

³¹⁴ Ibidem.

³¹⁵ Ibidem.

³¹⁶ See also Umbreit, M., Coates, R.B., Kalanjet B. (1994). *Victim meets offender: the impact of restorative justice and mediation*. Monsey: Criminal Justice Press.

different victims. Attempts to create consistency for offenders may produce gross inconsistencies for victims, with costs of crime distributed unequally in ways that are far more emotional and powerful than is generally assumed³¹⁷. In this context, the offer and acceptance of a sincere apology is considered always vital to the successful resolution of the offence and the restoration of the participants. But discussion of apology is redundant if victims' welfare is considered only within the dominant adversarial paradigm of the court system. There is little point in asking victims whether they want an apology when no opportunity exists for a direct exchange between them and their offenders. As Achilles and Zehr clearly emphasize, victims need a 'safe place', meaning to say a physical and emotional space which allows them to recover from the victimization³¹⁸. Whether working with crime victims in the immediate aftermath of an incident or years later, all the interventions must first and foremost recognize victim's safety and security needs, both physical and emotional, an opportunity to identify and articulate their personal needs³¹⁹. This stance is also stressed by Daniel Van Ness and Karen Strong, who identify the safety as the most immediate need for victims of crime, intended as both physical and emotional³²⁰. Heather Strang has also emphasized that the need for a symbolic statement about the legitimacy of the victims' status and acknowledgement of the emotional harm experienced is an aspect of victimization which has only recently been given attention. Indeed is reported evidence to suggest that victims may often see emotional restoration as far more important than material or financial reparation³²¹. The material reparation then remains a basic victims' need, along with the often neglected symbolic and emotional reparation³²². When victims experience material harm, they usually want material reparation, and, absent any other available remedy; they will often take money for nonmaterial harm as well. Whether that reparation should come from the state or from the person who caused the harm is an interesting question. Lastly Strang and Sherman identify in the compliance with the general principles of fairness and respect another fundamental victims' need³²³. Although it is often assumed that victims' sense of satisfaction with the justice system is related only to sentencing *outcome*, the evidence shows that the main factor influencing satisfaction with the sentence is the perception of fairness with the sentencing *process*. Furthermore, it appears that victims do not usually seek a decisive role in the outcome of their cases. They only wish to be consulted throughout the criminal justice process. Some scholars fear that consultation with victims would lend bias or inequity to decisions as to guilt or sentencing. But victims rarely seek a role in the adjudication of their cases. Rather, they seek the chance to present their view on the case to someone, and not necessarily a key decision-maker. The chance to be heard at all is usually the crucial aspect for victims in achieving a sense of satisfaction with the justice system.

³¹⁷ Strang, H., Sherman, L. W. (2003). *Repairing the Harm*, cit., p. 23.

³¹⁸ Achilles, M., Zehr, H. (2000). *Restoring victims*, cit., p. 14.

³¹⁹ *Ibidem*.

³²⁰ Van Ness, D. W., Heetderks Strong, K. (2006). *Restoring Justice: An Introduction to Restorative Justice*, cit., p. 97.

³²¹ Strang, H. (2003). Justice for victims of young offenders: the centrality of emotional harm and restoration, cit., p. 287.

³²² Strang, H., Sherman, L. W. (2003). *Repairing the Harm*, cit., p. 23.

³²³ *Ibidem*, p. 24.

2.1.2.4. Restorative Justice and Crime Victims: fair and effective answers

As already discussed, the limited opportunity for victims to participate in the legal system is a shortcoming frequently cited by the proponents of the RJ. Zehr calls this the “ultimate tragedy”: “those who have most directly suffered are not to be part of the resolution of the offense. In fact [...] victims are not even part of our understanding of the problem³²⁴”. Indeed, to this claim is widely accorded the status of an indisputable ‘truth’ in the ‘textbook’ literature. Even the United Nations Economic and Social Council’s recommendations in regards to ‘mediation’ processes in criminal justice are premised on “the need to enhance active personal participation in criminal proceedings of the victim [and] the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimization³²⁵”. According to Burt Galaway and Barbara Hudson, one of the main tasks of the RJ is to facilitate active participation by victims, offenders, and their communities in order to find solutions to the conflict³²⁶. Actively engaging victims in the process of doing justice and returning to them conflicts ‘stolen’ from them by professionals has become one of the key aspirations of the proponents of the RJ. Krista Pelikan and Thomas Trenczek claim that active participation is a core element of the RJ, a necessary condition in order to produce comprehensive solutions to the offence’s aftermath³²⁷. Integral to this idea of justice which aims at empowering especially victims, reducing the hegemonic intervention of professionals, is the idea that the RJ must be a community-based form of justice. Barnett’s proposal for ‘a new paradigm’ of restitutorial justice, as already discussed, represents a pioneering representation of how the RJ addresses victims’ needs of restitution. He defines crime as an offense of one person against another (rather than against the state), and justice as a “culpable offender making good the loss” caused, and says that he is “against punishment³²⁸”. In its place he proposes “pure restitution” (rather than ‘punitive restitution’, which is forced compensation or imposed fines). The goal is “reparations paid to the victim³²⁹”, which would be ordered, when an offender is “sentenced to make restitution to the victim³³⁰”. In Barnett’s analysis, reparations (he uses the plural) and restitution refer to the same thing: financial payments. He considers a variety of ways of “repaying the victim³³¹” and addresses potential objections of his proposal. Marian Liebmann³³², RJ advocate in UK and author of a well-known textbook, identifies as the primary principled goal of the RJ the necessity to give to the victim the opportunity to have a more central role in the judicial process. She goes on claiming as another fundamental goal of the RJ is not punishment but making good the harm done by offending –for the victim, the community and the offender. She concludes stating that in the RJ “[...] Putting the victim rather than the state at the centre of the judicial process is a

³²⁴ Zehr, H. (2005) *Changing Lenses*, cit., p. 32.

³²⁵ United Nations Economic and Social Council, Recommendation 1999/26, Development and implementation of mediation and restorative justice measures in criminal justice. Resolution, §§ 3-4.

³²⁶ Galaway, B., Hudson, J., Morris A. (1996). *Family Group Conferences: Perspectives on Policy and Practice*. Monsey: Criminal Justice Press, p. 2.

³²⁷ Peikan, K., Trenczek, T. (2006). *Victim offender mediation and restorative justice: the European landscape*. In D. Sullivan, L. Tiffit (Eds.), *Handbook of Restorative Justice A Global Perspective* (pp. 63-91). London and New York: Routledge, p. 65.

³²⁸ Barnett, R.E. (1977). *Restitution: A New Paradigm of Criminal Justice*, cit.

³²⁹ *Ibidem*, p. 289.

³³⁰ *Ibidem*.

³³¹ *Ibidem*, pp. 289-91.

³³² Graef, R. (2000). *Why Restorative Justice? Repairing the Harm Caused by Crime*, cit.

*paradigm shift of real significance*³³³. Lastly, Daly and Stubbs, working on a wide literature, find that the potential benefits of the RJ most frequently considered are those related to the victim, such as the “*victim voice and participation*, and the *victim validation and offender responsibility*³³⁴”.

2.1.2.5. *Critical issues: victims, gender and race in the Restorative Justice’s settings*

The role of victims, their claims and needs, and how the RJ aims at addressing them, might appear fairly uncontroversial in the ‘textbook’ literature. However, must be acknowledged the presence of criticisms against this perspective, coming especially from feminist and race scholars and advocates, who have emphasized the lack of understanding of power relations embedded in responses to crimes against women and racial minorities (including the RJ)³³⁵. The starting point for feminist arguments is that domestic violence is a special type of crime and that the priority of any sort of intervention must be to ensure physical protection for victims, usually women and children³³⁶. The RJ needs, it is argued, to deconstruct generalized notions of crime and recognize the special nature of domestic violence: not an isolated act involving two individuals who are unknown to each other, but rather a gendered strategy of control that includes various types of coercive tactics, and may be part of patterned cycle of behavior which includes contrition and apology³³⁷. Moreover, some of the potential benefits of the RJ are considered not applicable in domestic and family violence cases; for instance, victims may not benefit from meeting with and learning about the offender but may personally targeted by the offender³³⁸. Daly and Stubbs also refer how claims that the RJ is derived from Indigenous practices and or is particularly appropriate for Indigenous communities have been challenged for denying diversity among Indigenous peoples³³⁹ and for re-engaging a white-centres view of the world³⁴⁰. Critics also say that the RJ imposed on Indigenous communities, is neo-colonialist, not community driven, and is an adjunct burden rather than alternative to conventional criminal justice³⁴¹. Circle sentencing is one form of the RJ (and Indigenous justice practice) that has been used widely in Canada and adopted more recently in Australia. In Canada, women’s experiences with sentencing circles are mixed. Concerns have been raised that the subordination of women in some Canadian First Nations communities means that they do not enter the circle on an equal basis³⁴² and that women have sometimes been

³³³ Graef, R. (2000). *Why Restorative Justice? Repairing the Harm Caused by Crime*, cit.

³³⁴ Daly, K., Stubbs, J. (2006). Feminist engagement with restorative justice. *Theoretical Criminology*, 10(1), 9-28.

³³⁵ Cunneen, C. (2010). The limitations of Restorative Justice. In C. Cunneen, C. Hoyle, (Eds.), *Debating Restorative Justice* (pp.101-189), p. 150.

³³⁶ Ibidem, p. 151.

³³⁷ Ibidem.

³³⁸ Ibidem.

³³⁹ Cunneen, C. (2003). Thinking Critically about Restorative Justice. In E. McLaughlin, R. Fergusson, G. Hughes, L. Westmarland (Eds.), *Restorative Justice: Critical Issues* (pp. 182-194). London: Sage, p. 188.

³⁴⁰ Daly, K. (2002). *Sexual Assault and Restorative Justice*. In H. Strang, J. Braithwaite (Eds.), *Restorative Justice and Family Violence* (pp. 62-88). Cambridge: Cambridge University Press, pp. 62-64.

³⁴¹ Tauri, J. (1999). Explaining Recent Innovations in New Zealand’s Criminal Justice System: Empowering Maori or Biculturalising the State? *Australian And New Zealand Journal Of Criminology*, 3(22), 153-167.

³⁴² Wendy, S., Huntley, A., Blaney, F. (2001). *The Implications of Restorative Justice For Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British*

excluded, silenced, or harmed because power relations were not recognized, or gendered violence not taken seriously. Whether in the context of circles or conventional criminal justice, Sherene Razack argues that “*culture, community, and colonialization can be used to compete with and ultimately prevail over gender-based harm*”³⁴³. Thus, ‘cultural’ arguments (such as that sexual violence occurs because the community is coming to terms with the effects of colonialization) may be accepted while “*women’s realities at the intersection of racism and sexism*”³⁴⁴ are ignored. In the Australian context, Melissa Lucashenko³⁴⁵ shows the difficult situation in which Indigenous women are placed: “*Black women have been torn between the self-evident oppression they share with Indigenous men- oppression that fits uneasily [...] into the frameworks of White feminism- and the unacceptability of those men’s violent, sexist behaviors toward their families*”³⁴⁶. How, then, Daly and Stubbs wonder, do these race and gender politics relate to the RJ? First, they say, there is considerable debate, and no one position. For instance, in Australia, there is support for the RJ principles by many Indigenous people and organizations³⁴⁷. However, the use of the RJ to divert men, who have been involved in family violence, from the criminal justice system is accepted by some communities³⁴⁸, but resisted by others. Indigenous communities vary culturally, politically, and in their access to resources. Second, violence is experienced differently in Indigenous and non-Indigenous communities. Thus, if RJ-like responses are introduced, they will require significant reconceptualization of what is, ultimately, a white justice model. The RJ cannot be prescribed, nor adopted as formula³⁴⁹. Rather it needs to be explored and transformed with due regard to the Indigenous principle of self-determination, with reference to existing Indigenous initiatives, and with explicit recognition of Indigenous women’s interests. Third, Indigenous and non-Indigenous women may differ in their conceptualization of, and responses to, the RJ. Finally, race and gender politics have a particular signature, depending on the country and context examined³⁵⁰. The criticisms against the capability of the RJ to satisfy crime victims are not only theoretical ones. In their empirical evaluation of ‘family group conferencing’ in New Zealand, for example, Gabrielle Maxwell and Allison Morris found that victims attended less than half of the ‘conferences’ conducted³⁵¹. More significantly, one third of victims who did not attend even claimed that they were not invited to attend ‘their’ conference³⁵². For many of these victims, participation in a ‘family group conference’ was impossible due

Columbia. Ottawa: Law Commission of Canada. Retrieved 11 April 2012 from http://www.lcc.gc.ca/en/themes/sr/rj/awan/awan_toc.asp

³⁴³ Razack, S. (1994). What is to be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence. *Signs*, 19(4), 894-923, p. 907.

³⁴⁴ Ibidem, p. 913.

³⁴⁵ Lucashenko, M. (1996). Violence Against Indigenous Women: Public and Private Dimensions. In S. Cook, J. Bessant (Eds.), *Women’s Encounters with Violence: Australian Experiences*. London: Sage, pp. 155-156.

³⁴⁶ Ibidem, p. 156.

³⁴⁷ See Aboriginal and Torres Strait Islander Women’s Task Force on Violence (2000). Report. Retrieved 11 April 2012 from <http://catalogue.nla.gov.au/Record/2033437>

³⁴⁸ Blagg, H. (2002). Restorative Justice and Aboriginal Family: Opening a Space for Healing. In H. Strang, J. Braithwaite (Eds.), *Restorative Justice and Family Violence* (pp. 191-205), cit., p. 200.

³⁴⁹ Ibidem.

³⁵⁰ Ibidem.

³⁵¹ Maxwell, G., Morris, A. (1993). *Family, Victims And Culture: Youth Justice In New Zealand*. Wellington: Social Policy Agency and Institute Of Criminology, Victoria University Of Wellington, p. 75.

³⁵² Ibidem, p. 79.

to the ‘conference’ being held at an unsuitable time and/or location³⁵³. More recent research has indicated that low levels of victim participation have also occurred in Britain. Tim Newburn et al. found that following the introduction of ‘youth offender panels’ into Britain’s juvenile justice system, victims attended less than 7% of panels³⁵⁴, and Carolyn Hoyle reports that only 14% of victims attended Thames Valley’s ‘restorative sessions’. Similarly, the South Australian RJ scheme for juveniles is reported to have less than 50% victim attendance³⁵⁵. While this apparent lack of concern for victims could quite possibly be the result of fiscal and/or temporal pressures on conference organizers, it also indicates that victims were not considered to be an integral component of a Family Group conference. Rather, it appears that the attendance of the offender, and the offender’s family and supporters, was held in much higher regard.

2.1.3. Community’s needs

Along with the failing of the ‘formal’ criminal justice system and the re-discovering of crime victims’ centrality in criminal justice, it is possible to detect at least another *explanans* regarding the historical emergence of the RJ theory and practices, deeply rooted in the ‘textbook’ literature. This is the ‘need’ of the *community* to be recognized as a fundamental stakeholder in dealing with crime and its aftermath, its key role in ensuring safety and peace to victims and to foster binding social behavior to offenders, the necessity to be part of the criminal justice system and to escape from the position of a neglected actor. As Albert Dzur and Susan Olson have emphasized, crime, for the proponents of the RJ, means more than violation of the laws of the state and more even than harm to victims³⁵⁶. Echoing Christie, crime is widely conceived by the proponents of the RJ, as a dysfunctional way of saying something, and punishment, is an equally dysfunctional way of answering³⁵⁷. In this picture, the idea that the community has a stake in an offense- that apart from direct victims, a larger social network might also be an affected party- becomes a ‘landmark’ of the RJ. Considering the only abstract, highly formalized ways in which the community is incorporated to mainstream criminal justice practice³⁵⁸, the proponents call for more public participation in the criminal justice process so that the harm to community is more clearly brought to the attention of the offender³⁵⁹. Rather than the general claim that ‘communal harm’ needs to be addressed, then, the best reasons for public participation are more precise reasons that link community participation to a better functioning criminal justice system or some other benefit to the community³⁶⁰. As usual, the ‘textbook’ literature is not so ‘peaceful’ as it might

³⁵³ Maxwell, G., Morris, A. (1993). *Family, Victims And Culture: Youth Justice In New Zealand*, cit., p. 79.

³⁵⁴ Newburn, T., Earle, R., Goldie, S., Campbell, A., Crawford, A., Sharpe, K., et al. (2001). *The introduction of referral orders into the youth justice system: Second interim report*. London: Home Office, p. VII.

³⁵⁵ Blazejowska, L. (1996). *Summary Of Comments On The Report Of The New South Wales Working Party On Family Group Conferencing And The Juvenile Justice System*. Sydney: New South Wales Attorney-General’s Department, p. 19.

³⁵⁶ Dzur, A.W., Olson, S.M. (2004). The Value of Community Participation in Restorative Justice. *Journal of Social Philosophy*, 35(1), 91-107, p. 92.

³⁵⁷ Christie, N. (1981). *Limits to pain*, cit., p. 11.

³⁵⁸ Zehr, H. (2005). *Changing Lenses*, cit.

³⁵⁹ Dzur, A.W., Olson, S.M. (2004). The Value of Community Participation in Restorative Justice, cit. p. 92.

³⁶⁰ Ibidem, p. 93.

appear: even talking of community, different and deeply conflicting stances can be easily detected.

2.1.3.1. *The meaning(s) of 'community'*

As Wright and Orlane Foucault have noticed, the proponents of the RJ usually speak of victims, offenders and the community as “*a neat triangle on a flip chart*”³⁶¹. The same claim is advanced by McCold, who acknowledges the existence of general agreement, in theory, that community is as central to the RJ as are the victim and the offender³⁶². Nevertheless the concept of ‘community’ in the RJ literature is not something unanimously shared, being present different definitions of it³⁶³. As Wright states: “*the community is everyone: the shopkeeper, the doctor or nurse – even the bureaucrat from the Ministry of Education or Justice is a member of the community when he or she comes home*”. Yet, for the most part, community remains a concept vaguely defined. Van Ness and Strong, for instance, elaborate their idea of community in the RJ, by distinguishing between the role of the community and role of government: “*in promoting justice, the government is responsible for preserving order, and the community is responsible for establishing peace*”³⁶⁴. Similarly, McCold and Benjamin Wachtel propose a ‘non-geographic’ perspective on community which can be used to focus and define what community justice initiatives should look like and what they should be trying to achieve³⁶⁵. Community is described by them as a feeling, a perception of personal *connectedness* both to other individual human beings and to a group. Building community, then, involves building connections between human beings. Where is absent any perception of connectedness among a group of people, there is not any community, they argue³⁶⁶. Marshall suggests that the RJ seeks to reduce crime by strengthening bonds of interdependency while holding offenders accountable³⁶⁷. He defines the RJ as a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future. Parties with a stake in an offence include, of course, the victim and the offender, but they also comprise the families of each, and any other members of their respective communities who may be affected, or who may be able to contribute to prevention of a recurrence³⁶⁸. The RJ programs are supposed to empower the victim and offender as well as the personal communities to exercise informal social support and control of the process. Not only are the micro-communities important in the restoration process, but they are the means through which healing and reintegration is possible. In the

³⁶¹ Wright, M., Foucault, O. (2005). Community Involvement in Restorative Justice. *VOMLA Connections*, 19(1), 11-16, p. 11.

³⁶² McCold, P. (1997). *Restorative Justice: An Annotated Bibliography*. Monsey: Working Party on Restorative Justice, Alliance of NGOs on Crime Prevention and Criminal Justice.

³⁶³ Wright, M., Foucault, O. (2005). Community Involvement in Restorative Justice. *cit.*

³⁶⁴ Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, *cit.*

³⁶⁵ McCold, P., Wachtel, B. (2002). *Community Is Not a Place: A New Look at Community Justice Initiatives*. In J.G. Perry (Ed.) *Repairing Communities Through Restorative Justice* (pp. 39-53). Lanham: American Correctional Association.

³⁶⁶ *Ibidem*.

³⁶⁷ Marshall, T.F. (1994). Grassroots Initiatives towards Restorative Justice: The New Paradigm? In R.A. Duff, S. Marshall, R.E. Dobash, et. al. (Eds.), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (pp. 245-262). Manchester: Manchester University Press.

³⁶⁸ Marshall, T.F. (1997). *Seeking the Whole Justice*. ISTD Conference “Repairing the Damage: Restorative Justice in Action” 20-3-1997, Bristol University. London: Institute for the Study and Treatment of Delinquency (ISTD).

same way Rob White stresses that the community is nothing but an endless process to be conceived as an essential part of transforming the conditions that give rise to criminality and criminalization³⁶⁹. In this view, crime is not reducible to the individual. It is a social phenomenon. Concentrating solely on the individual offender, or specific incidents of harm, belies the necessity for widespread changes in particular milieus. An important task of crime prevention, and in dealing with offenders (especially young ones), is, in this perspective, to use the opportunity of intervention in order to rebuild communities, and as part of this to foster the ideas of solidarity and co-operation. Victims, likewise, need access to such relationships, with similar objectives. This is especially so given that victims are generally members of the same neighborhood or community. One way to approach this is through greater democratization of decision making at the neighborhood level, including the incorporation of people, like young offenders, directly into the process³⁷⁰. Building social alliances is also crucial to connecting people across the community, as well as in forging pro-active campaigns on issues such as economic redevelopment, anti-racism and unwanted intrusions by the state. The enhancement of community resources is thought a crucial aspect of any anticrime and social justice strategy³⁷¹. In this regard, in addition to political campaigns for greater assistance in the redevelopment of local neighborhoods, creative thinking has to go into how best to use existing community resources in the here and now³⁷². The point of intervention would be to facilitate harmonious community relations, rather than constantly to remind those present that rules and laws might be transgressed. Lack of adequate resources, a lack of youth-friendly amenities, constant harassment from authority figures, fear of becoming a victim and exclusion from decision-making processes constitute a recipe for resentment, frustration, alienation and retaliation³⁷³.

2.1.3.2. *The community's needs*

As Dzur suggests³⁷⁴, the best way to identify the common 'needs' of the community in the RJ literature, is to look at the 'authoritative' works of Zehr, Braithwaite, Philip Pettit and Christie. As Dzur has emphasized, Zehr grounds the RJ on the fact that for a real experience of justice, the communication between victim and offender cannot be dominated by the state or by criminal justice professionals. State officials are not the best candidates for hearing and validating the victim's truth and the offender's remorse. Indeed, Zehr sees the predominance of officials and professionals in the criminal justice system as hindering the satisfaction of victims' needs. At every turn, he writes, "*as the initial harm turns into a crime and runs through the procedural rules needed to adjudicate it, it becomes more and more abstracted, more and more alienated from the actual experience of victim and offender*³⁷⁵". The loss of autonomy experienced by victims during crime is paralleled in their second victimization by the state: "*Instead of returning power to them by allowing them to participate in the justice process, the legal system compounds the*

³⁶⁹ White, R. (2003). Communities, conferences and restorative social justice. *Criminal Justice*, 3(2), 139-160, p. 151.

³⁷⁰ Ibidem.

³⁷¹ Ibidem, p. 152.

³⁷² Ibidem.

³⁷³ Ibidem, p. 153.

³⁷⁴ Dzur, A.W. (2003). Restorative Justice and Civic Accountability for Punishment. *Polity*, 36(1), 3-22.

³⁷⁵ Zehr, H. (2005). *Changing Lenses*, cit., p. 31.

*injury by again denying power*³⁷⁶. This abstract and alienating experience of justice for victims has a negative effect on them because it frustrates the sort of communicative action that would fulfill victims' needs for information and emotional expression. Professionalization and abstract 'proceduralism' also hinder the reintegration of offenders into law-abiding society, according to Zehr. As with victims, offenders are largely bystanders in the criminal justices. Critical decisions about accountability and responsibility for their actions are made by others: how they will explain, defend, excuse, or admit their actions is determined by defense counsel, and the consequences for their actions are determined by prosecutor, judge, and jury. Because the process is adversarial and non-participatory, it does little to challenge any stereotypes or rationalizations offenders have built up about their victims and about society in response to their crimes, encouraging them to focus on their own legal situations and how to minimize penalties³⁷⁷. In Zehr's perspective restorative intervention are not only a matter of victim and offender. The community in fact, is also a crime stakeholder, necessarily represented by mediators. Indeed, also the victim and the offender 'are' the community; the mediators however, represent the broader community, indirectly touched by the crime. Mediators are ideally community volunteers trained to give some structure to the dialogue between victim and offender but without dominating the proceedings with their own perspectives³⁷⁸. They are the alternative to the legal professionals, they represent the extended community in dealing with the crime and its aftermath. Braithwaite and Pettit offer another interesting perspective on the needs and role of community in dealing with crimes. They view punishment as an inferior response to crime because it threatens what they call "*dominion*³⁷⁹". Dominion, puts simply, is freedom conceived as a social and political value: "*the condition of citizenship in a free society, a condition under which each is properly safeguarded by the law against the predations of others*³⁸⁰". Crimes can threaten dominion in three ways: they can compromise and interfere with the victim's freedom; they can condition victims and reduce the "*extent of undominated choice*" they enjoy; finally crimes can reduce the larger community's freedom by conveying the idea that citizens "*are not protected against arbitrary interference of the sort represented by the crime*³⁸¹". Nonetheless, state responses to such threats to freedom must not themselves become threats to dominion: "*Domination is the main evil against which the state sets itself, after all*" something that "*argues in favor of fines and community service and against prison, since domination is all too likely, if not logically inevitable, under prison regimes*³⁸²". Punitive responses to crime threaten freedom in a number of ways. Clearly, they threaten the freedom of convicted offenders who must serve prison time, because it removes them from the mainstream labor market directly through prison time and indirectly through the stigmatization of the conviction. Lastly, punitive responses to crime present high opportunity costs for society with other ways to use public resources. For these reasons, Braithwaite and Pettit think that the default response to harmful acts ought to be mercy and non-intervention, with

³⁷⁶ Zehr, H. (2005). *Changing Lenses*, cit., p. 31.

³⁷⁷ Ibidem.

³⁷⁸ Ibidem, p. 161.

³⁷⁹ Braithwaite, J., Pettit, P. (1990). *Not Just Deserts: A Republican Theory of Criminal Justice*, Oxford: Clarendon Press, p. 57.

³⁸⁰ Ibidem, p. 57.

³⁸¹ Pettit, P. (1997). Republican Theory and Criminal Punishment. *Utilitas*, 9(1), 59-79, pp. 68-70.

³⁸² Ibidem, pp. 71-72.

punishment and intervention requiring serious justification³⁸³. Like Zehr, Braithwaite and Pettit think that the right response to harmful acts is a decentralized and de-professionalized process that engages the victim and offender in dialogue. They see such a process as being better at addressing the three threats to dominion posed by many crimes—the initial assertion of domination over the victim, the future effects of the crime that condition the victim’s choices, and the effects of the larger community. The first step is for offenders to recognize the wrongfulness of their acts. The best way to do this, for Braithwaite and Pettit, is not by attaching coercive sanctions to certain acts, but by communicating social norms through education and dialogue. Proper socialization into norms like fairness and non-violence is the main reason most people do not commit criminal offenses³⁸⁴. At the same time, presumably, prior socialization has failed to some extent in the case of offenders. So the way out is to remind them of the social norms they have violated, to engage in a dialogue of reprobation and “*moral reasoning*”³⁸⁵. In such a dialogue, ideally involving the victim and supporters of both victim and offender, the offender admits it was wrong to threaten the victim’s dominion and recognizes the victim’s right to live without such threats³⁸⁶. The second step is for offenders to repair the damaged one. Offenders can offer recompense in the form of restitution to victim or victim’s family, or, if that is impossible, in the form of community service. In either case the goal is to lift both victims and offenders out of a state of mutual loss. Third, offenders owe the community reassurance that they will not reoffend. This will be more or less difficult depending on the severity of the offense. To gain such reassurance from offenders, as well as to achieve recognition and recompense from them, the community has a role to play both in communicating reprobative sentiments and in offering avenues for reintegrating into the norm-abiding life of society. Braithwaite and Pettit’s favored RJ forum is the family-group conference. As with Zehr’s victim-offender mediation, family group conferences deal only with cases where “*defendants’ decline to deny their guilt*”³⁸⁷. They are clear that the dialogue that is fostered in conferences is to be organic to the parties themselves and not to be dominated by mainstream concepts of criminal justice. Conference communication directed by lay participants can be authentic in a way that traditional court discourse is not³⁸⁸. Christie, as already said, is considered one of the leading personalities in the RJ movement, namely because of the role Christie attributes to the community in dealing with antisocial behaviors³⁸⁹. Basically, Christie’s rejection of punishment follows a simple moral logic: even though an action caused harm or pain, this is no reason to respond in kind. If we are against harm and pain we are against it whether it is caused by the crime or caused by the response to the crime³⁹⁰. Alternatives to punishment, such as apology or restitution, are preferable simply because they break out of the circle of pain infliction. Non-punitive alternatives are preferable, too, because of how limited pain infliction is at deterring future offenses, educating offenders, and compensating victims. We are, in fact, reluctant about pain

³⁸³ Braithwaite, J., Pettit, P. (1990). *Not Just Deserts*, cit., p. 79.

³⁸⁴ *Ibidem*, p. 82.

³⁸⁵ *Ibidem*, p. 89.

³⁸⁶ Pettit, P. (1997). *Republican Theory and Criminal Punishment*, cit., p. 75.

³⁸⁷ Braithwaite, J., Pettit, P. (1994). *Republican Criminology and Victim Advocacy*. *Law and Society Review*, 28, 765-776, p. 770.

³⁸⁸ *Ibidem*.

³⁸⁹ Christie, N. (1977). *Conflict as property*, cit.

³⁹⁰ Christie, N. (1981). *Limits to Pain*, cit., pp. 10-11.

infliction, choosing to mete it out carefully and in doses of time rather than physical suffering. This squeamishness, Christie believes, is a signal that non-punitive solutions may correspond better, all things considered, with our considered moral beliefs than punishment. Rigid notions of crime and punishment permeate mainstream criminal justice, yet there are other values that might govern: “*Our criminal policies should reflect the totality of the basic values of the system. It is an affront to my values, and I think to many people’s values, to construct a system where crimes are perceived as so important that they decide, in absolute priority to all other values, what ought to happen to the perpetrator of a particular crime*”³⁹¹. The contrast of value pluralism held in the polity with the value monism reflected in the criminal justice system, provides Christie a good response to the conventionalist who sees non-punitive alternatives as being inadequate for dealing with the natural feelings of resentment harbored by victims of harmful acts. Christie can reply that a more civilized approach channels these natural feelings of resentment into dialogue rather than through the more primitive response of pain infliction. Crime control policy, like all policy, should reflect our considered judgments and the balance of our values, not our unreflective preferences for revenge. Far from being a natural response to harmful acts, formal crime control measures like imprisonment are the product of social distances that open up in modern urban life³⁹². In this perspective the RJ procedures are valuable because they return the responsibility for conflict resolution to communities. In mainstream procedures, victims play no role other than witness in the proceedings, since their interest in responding to their harm is taken up and represented by a prosecutor³⁹³. They have no chance to speak with offenders and come to understand more about the reasons for their harmful acts³⁹⁴. As for offenders, by being so thoroughly represented, they have no way of resolving the harm they have caused³⁹⁵. The larger community is also a passive rather than active subject of criminal justice action. It is merely a client of professionals and state officials. The overall effect is a loss in opportunities for “*norm-clarification*”³⁹⁶. It is a loss of pedagogical possibilities. It is a loss of opportunities for a continuous discussion of what represents the law of the land³⁹⁷. Norm-clarification means coming to know just why we do what we do in the criminal justice domain, it means reflecting on what consequences ought to follow what sorts of norm violation, it means taking responsibility for what the state officials and professional agents do who work on our behalf. “*Pedagogical possibilities*”³⁹⁸ implies that we all have a lot to learn about each other, about those who deviate from social expectations, and about our formal and informal mechanisms of social control. Christie is arguing for a more democratic criminal justice process, where citizens have more influence over the criminal prosecution and sentencing and where criminal justice treats offenders as citizens, not as deviants or others or abstractions. This perspective seems inspiring the National Mediation Service Act enacted by the Norwegian parliament in 1991. At the Section 3 in fact, it provides: “*Mediators shall be appointed for each municipality. The mediators are appointed by a representative designated by the Municipal Council/Municipal Councils, a representative of the police and the head of*

³⁹¹ Christie, N. (1981). *Limits to Pain*, cit., p. 45.

³⁹² Ibidem, p. 74.

³⁹³ Christie, N. (1977). *Conflicts as Property*, cit., p. 3.

³⁹⁴ Ibidem, p. 8.

³⁹⁵ Ibidem, p. 9.

³⁹⁶ Ibidem, p. 8.

³⁹⁷ Ibidem.

³⁹⁸ Ibidem.

the National Mediation Service office". Each Norwegian municipality establishes its own mediation service, drawing mediators upon the lay people of the same community, seemingly implementing Christie's viewpoint.

2.1.3.3. *Critical issues: the dark side of the community's involvement*

The role and the meaning of the 'community' in the 'textbook' literature are not only various and sometimes conflicting, but also often conceived as extremely controversial³⁹⁹. George Pavlich⁴⁰⁰, for instance, notes that within the RJ discourses the absolute existence of 'community' is assumed. Community appears as the "*spontaneous and voluntary collective domains that constitute the foundations of civil society*"⁴⁰¹. Community is not a natural set of relations between individuals, nor a natural social process lying at the foundation of civil society. Communities are always constructed on the broad terrain of history and politics. Radical critiques provide a multilayered understanding of the problematic relationship between community and state. Basic to this understanding is a concern that the notion of community presents a harmonious view of social and political relations, which masks conflict, power, difference, inequality and potentially exploitative social and economic relations. The 'postmodernist' understanding of the RJ has questioned the implicit consensual notions of civil society and community. Pavlich⁴⁰² argues that 'community' is also fundamentally about *exclusion*. "*The promise of community's free and un-coerced collective association is offset by a tendency to shore up limits, fortify a given identity, and rely on exclusion to secure self-preservation*"⁴⁰³. Another point of departure in radical critique is to question the claim that the RJ provides an avenue for the community to take back from the state the ownership of the problem of crime⁴⁰⁴. From feminist perspectives the problem has been that the state has never adequately criminalized acts of violence against women. To the extent that we can discuss community in this context, we may well find that community reflects the patriarchal relations which facilitate the acceptance of violence against women. Rather than providing a barrier and safeguard against offending, it may provide social and cultural legitimation for violence. From a postcolonial perspective, colonial policies were directly responsible for the destruction and reconstruction of community in the interests of the colonizer. Many contemporary Indigenous communities were created directly as a result of colonial government policies of forced relocations. Further, contemporary racial and ethnic minority communities within first world metropolis are specifically created under conditions determined by neo- and post-colonial relations which influence the nature of immigration and post-immigration experiences⁴⁰⁵. History and contemporary politics have shaped both Indigenous and post-war immigrant communities. What then does

³⁹⁹ Cunneen, C. (2008). *Understanding Restorative Justice Through the Lens of Critical Criminology*. University of New South Wales, Faculty of Law Research Series, Year 2008 Paper 20. Retrieved 12 October 2012 from <http://law.bepress.com/unswwp/flrps08/art20>, p. 295

⁴⁰⁰ Pavlich G. (2005). *Governing Paradoxes of Restorative Justice*. London: GlassHouse Press.

⁴⁰¹ Ibidem, p. 97.

⁴⁰² Ibidem.

⁴⁰³ Pavlich, G. (2001). The force of community. In J. Braithwaite, H. Strang (Eds.), *Restorative justice and civil society* (pp. 56-68). Cambridge: Cambridge University Press, p. 3.

⁴⁰⁴ Cunneen, C. (2008). *Understanding Restorative Justice Through the Lens of Critical Criminology*, cit., p. 296.

⁴⁰⁵ Cunneen, C. Stubbs, J. (2002). Migration, Political Economy and Violence Against Women: The Post Immigration Experience of Filipino Women in Australia. In J. D. Freilich, G. Newman, S. G. Shoham, M. Addad (Eds.), *Migration, Culture Conflict and Crime* (pp. 159-187). Dartmouth: Ashgate.

‘community’ mean for minority people in these situations and how does it impact on relations with the police, the criminal justice system and the state more generally? Neo-Marxist and governmentality critiques of neo-liberalism also identify the current tendencies towards the responsabilization of individuals, families and communities and the preference towards ‘governing at a distance’. Pavlich⁴⁰⁶ notes that the ‘community’ of the RJ is essentially constituted by the state which designs, creates, funds and staffs the RJ project. It provides authority and legitimacy to the ‘community’ that then participates in the RJ project. Such a community is not independent of state agency⁴⁰⁷. As Braithwaite notes, another important target of criticism against the RJ is its potential to widen the net of social control⁴⁰⁸. This criticism is echoed by Kenneth Polk⁴⁰⁹. As Polk notices, in particular, young people may become subject to conferencing procedures for behavior which would have previously been regarded as too trivial to warrant official intervention⁴¹⁰. As Walgrave puts it, the restorative model is a move from ‘the state of power and the welfare state to “*the empowering state*”⁴¹¹’. He goes on claiming that on the present limited evidence, the RJ more often narrows than widens nets of formal state control; but it does tend to widen nets of community control. Whether the nets that are widened are state or community nets, an assumption that net widening is a bad thing seems wrong.

2.1.4. *‘It has always been Restorative Justice’*: traditional and indigenous justice

The claims of reforming the criminal justice system, giving centrality to victims and involving the broader community in dealing with crimes, are usually combined in the ‘textbook’ literature. The result is a complex multi-faceted account of the RJ’s emergence in the late modernity. In this section I will take into account another very common explanation. In this perspective, the emergence of the RJ can be conceptualized as the resurgence of a pre-modern way of dealing with conflicts⁴¹². This claim, so often repeated, has reached the status of a “*myth*”⁴¹³ in the RJ literature. A possible ‘evidence’ of this phenomenon is that even the United Nations Economic and Social Council in 2002 has declared that the RJ “*often draws upon traditional and indigenous forms of justice*”⁴¹⁴. Braithwaite has plainly synthesized that “*restorative justice has been the dominant model of criminal justice throughout most of human history for all of the world’s*

⁴⁰⁶ Pavlich G. (2005). *Governing Paradoxes of Restorative Justice*, cit., p. 97.

⁴⁰⁷ Ibidem.

⁴⁰⁸ Braithwaite, J. (1999). Restorative Justice: Assessing Optimistic and Pessimistic Accounts. *Crime and Justice: A Review of Research*, 25, 1-127, p. 89.

⁴⁰⁹ Polk, K. (1994). Family Conferencing: Theoretical and Evaluative Questions. In C. Alder, J. Wundersitz (Eds.), *Family Conferencing and Juvenile Justice. Australian Studies in Law, Crime, and Justice*. Canberra: Australian Institute of Criminology, p. 134.

⁴¹⁰ Ibidem, p. 133-135.

⁴¹¹ Walgrave L. (1995). Restorative Justice for Juveniles, cit., p. 233.

⁴¹² Burkemper Jr., T. et al. (2007). Restorative Justice in Missouri’s Juvenile System. *Journal of Missouri Bar*, 63, 128-130; Sylvester, D. J. (2003). Myth in Restorative Justice History. *Utah Law Review*, 471, 493-94; Umbreit, M., et al. (2005). Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls. *Marquette Law Review*, 89(2), 251-304; Braithwaite, J. (1999). A Future Where Punishment Is Marginalized: Realistic or Utopian? *UCLA Law Review*, 46(6), 1727-1750.

⁴¹³ Sylvester, D. J. (2003). Myth in Restorative Justice History, cit.

⁴¹⁴ United Nations Economic and Social Council, Resolution 2002/12, Basic principles on the use of restorative justice programs in criminal matters, Preamble.

peoples⁴¹⁵”. On the other hand, we detect the presence in the RJ literature of some sharp criticisms regarding the abovementioned perspective⁴¹⁶. Some scholars, in fact, rather than seeing the RJ as the ‘primary’ criminal justice, describe it as a relatively recent approach to the crime and its aftermath, which began in the 1970s in North America⁴¹⁷. Under this narrative, the RJ is seen as a novel and innovative system⁴¹⁸, which has come to influence justice systems globally over the last three decades⁴¹⁹. One thing must be noticed before analyzing this new topic. The ‘never-ending’ explanation of the RJ’s history, is potentially conflicting with the previous ones. That’s a potential conflict insofar as the preceding accounts conceive the RJ as the ‘answer’ to late-modern issues, such as the failure of criminal justice or the community’s needs and the crime victims’ satisfaction. On the other hand, this conflict is avoided when the claim that the RJ is not a product of the late-modernity is used as a normative justification (the RJ is acceptable because just ‘revives’ ancient traditions) and not as a causal/descriptive explanation of the RJ’s emergence. In the next pages the topic of the RJ’s ‘ancient’ roots will be considered basically in its descriptive dimension.

2.1.4.1. *The continuity of the Restorative Justice*

According to a wide number of the proponents, the RJ is neither new nor novel. It is, indeed, an archetype of justice nearly as old as human society itself⁴²⁰. In this perspective, the RJ has been the dominant model of criminal justice throughout most of human history for all of the world’s peoples. It is the most ancient and prevalent approach in the world to resolve harm and conflict⁴²¹. In “The History of Restorative Justice”, Elmar Weitekamp explains that in early societies nomadic tribes responded to inter-clan transgressions through a form of RJ called “*restitution negotiations*”⁴²². Proponents of the second narrative also commonly refer to legal codes from ancient societies to support their claims about the prevalence of the RJ in historical societies⁴²³. In *Restoring Justice*, Van Ness and Strong cite several ancient Babylonian codes, including the Code of Hammurabi (C. 1700 B.C.E.), as ‘ancestors’ of the RJ legal provisions, insofar as they prescribed restitution for property offenses⁴²⁴. These scholars also cite European sources for historical support. The Roman Law of Twelve Tables (449 B.C.E.), for instance, required thieves to pay restitution for stolen property and included restitution as an explicit alternative punishment to certain physical offenses⁴²⁵. Early Germanic tribal laws allowed restitution for a broad range of crimes including homicide, and the Laws of Ethelbert, a seventh century collection of English laws, contained detailed compensation

⁴¹⁵ Braithwaite, J. (1999). *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, cit.

⁴¹⁶ Sylvester, D. J. (2003). *Myth in Restorative Justice History*, cit., p. 493.

⁴¹⁷ Mulligan, S. (2009). From retribution to repair: Juvenile justice and the history of restorative justice. *University of La Verne Law Review*, 31(1), 139-149, p. 142.

⁴¹⁸ Sylvester, D. J. (2003). *Myth in Restorative Justice History*, cit., p. 494.

⁴¹⁹ Burkemper Jr., T. et al. (2007). *Restorative Justice in Missouri’s Juvenile System*, cit., p. 130.

⁴²⁰ Braithwaite, J. (1999). *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, cit.

⁴²¹ Liebmann, M. (2007). *Restorative Justice: How it Works*. London and Philadelphia: Jessica Kingsley Publishers, p. 37.

⁴²² Weitekamp, E. (1999). *The History of Restorative Justice*, cit., pp.78-79.

⁴²³ See Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit., pp. 7-8.

⁴²⁴ Weitekamp, E. (1999). *The History of Restorative Justice*, cit., pp. 83-89.

⁴²⁵ Sylvester, D. J. (2003). *Myth in Restorative Justice History*, cit., pp. 511-512.

plans based on the physical harm caused to the victim⁴²⁶. Even Anglo-Saxon law was based on the RJ principles⁴²⁷. Examples include circle sentencing in Canada and the Navajo Peacemaker Court in the United States. In New Zealand, Maori practices provided the foundation for the family group conferencing model⁴²⁸. The RJ is not a new concept⁴²⁹. The principles of the RJ are thought consistent with those of many indigenous traditions, including the Native American, Hawaiian, Canadian First Nation, and Maori cultures. These principles are also consistent with values emphasized by nearly all of the world religions⁴³⁰. This is the case of the family group conferences adapted from Maori traditions in New Zealand, for example, the sentencing circles from aboriginal communities in the Canada, the Navajo peacemaking courts, etc.⁴³¹ According to this narrative, the dominant paradigm shifted from a focus on restitution and restoring community peace to the retributive-based system in a specific moment of the western history: October 14th, 1066, the date of the Norman invasion of England⁴³². After the Norman invasion of England, William the Conqueror and his successors found the legal system to be an effective tool for exerting influence over the authority of the church and for replacing local systems of conflict resolution⁴³³. English monarchs began to define crime as a disruption of the King's peace, and they fined offenders to benefit the King financially and politically⁴³⁴. Under this system, a new model emerged where crime was viewed as a violation against the King and the state rather than against the victim⁴³⁵. The government and the offender became the primary parties to the conflict with the victim playing a secondary role. Rather than seeking to restore the victim, the system focused on maintaining the authority of the state over the transgressor by inflicting punishment which would make the offender and others like him/her, fearful and law-abiding⁴³⁶. Restitution and its focus on the past harm to the victim were abandoned in favor of fines, corporal punishment, and the death sentence as the dominant responses to wrongdoing. This model shaped the common law, as well as the American criminal justice system, and continues to influence them today.⁴³⁷ Zehr argues that the RJ “*owes a great deal to [...] a variety of cultural and religious traditions [...]. The precedents and roots of restorative justice [...] are as old as human history*”⁴³⁸.

⁴²⁶ Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit., p. 8.

⁴²⁷ Liebmann, M. (2000). History and overview of mediation in UK. In M. Liebmann (Ed.), *Mediation in Context* (pp. 19-39). London: Jessica Kingsley Publishers; Cfr. Liebmann, M. (2007). *Restorative Justice: How it Works*, cit.

⁴²⁸ Leung, M. (1999). *The Origins of Restorative Justice*. Retrieved 8 June 2011 from www.cfcj-fcjc.org/full-text/leung.htm, §§ 1-21.

⁴²⁹ Carey, M. (2000). *Restorative Justice -A New Approach With Historical Roots: Corrections Retrospective 1959-1999*. St Paul: Minnesota Department of Corrections, p. 32.

⁴³⁰ Umbreit, M. (2001). *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research*. San Francisco: Jossey- Bass, p. XXIX.

⁴³¹ Zehr, H. (2002). *The Little Book Of Restorative Justice*, cit., p. 62.

⁴³² Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit., p. 8.

⁴³³ *Ibidem*, pp. 9-10.

⁴³⁴ Liebmann, M. (Ed.) (1998). *Community and Neighbour Mediation*. London. Cavendish, p. 37.

⁴³⁵ Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit., p. 8-10.

⁴³⁶ *Ibidem*, p. 9-10.

⁴³⁷ See Liebmann (Ed.), *Community And Neighbour Mediation*, cit. p. 37; Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit., p. 9-10.

⁴³⁸ Zehr, H. (2002). *The Little Book Of Restorative Justice*, cit., pp. 11-12.

2.1.4.2. Other histories

The ‘continuistic’ history of the RJ, however, has engendered criticism for its all-encompassing assertions⁴³⁹. Some critics argue that ‘continuistic’ scholars have mythologized ancient problem-solving systems and historical legal codes in an attempt to create a golden age of criminal justice in which restoration reigned⁴⁴⁰. These critics claim that the second narrative is vastly oversimplified. In each example in which the RJ scholars cite the RJ ‘practices’, they illuminate the ways that those practices existed alongside brutal and inhumane retributive justice methods⁴⁴¹. In “Myth in Restorative Justice”, Douglas Sylvester reviews Weitekamp’s claims about the prevalence of restitution in pre-state societies by examining Weitekamp’s own anthropological sources⁴⁴². According to Daly such “efforts to write histories of restorative justice, where a pre-modern past is romantically (and selectively) invoked to justify a current practice, are not only in error, but also unwittingly ethnocentric⁴⁴³”. What concerns Daly is that the specific histories and practices of justice in ancient societies are grossly conceived as a unified justice form⁴⁴⁴. She claims that efforts to write histories of RJ, where a pre-modern past is romantically (and selectively) invoked, just justify a current justice practice, are not only in error, but also unwittingly reinscribe an ethnocentrism their authors wish to avoid. As Harry Blagg synthetically points out, the RJ literature has accomplished an ‘orientalist appropriation’ of traditional (especially indigenous) justice practices, in order to strengthen its positions⁴⁴⁵.

2.2. Authoritative conceptualizations

Along with the historical explanations, the archive includes the authoritative ‘conceptualizations’ of the RJ. This expression refers to both the attempts to theoretically develop the RJ as a more or less complete theory and the endeavors to justify it as a valuable or effective set of principles and practices. These various positions intertwine with the historical explanations of the RJ, creating a tangle tentatively ‘unraveled’ by the archive.

2.2.1. RJ, punishment and criminal justice

The first authoritative theoretical conceptualization of the RJ is given by the identification of similarities and differences of the RJ respect to the ‘criminal justice’ at large or the penal punishment in particular⁴⁴⁶. This complex of positions intersects the historical explanations of the RJ’s emergence as an answer to the failure of the contemporary Western criminal justice systems. Particularly, early proponents defined the RJ as an *alternative* to criminal justice. The dichotomy RJ/criminal justice has become a sort of standard approach in the ‘textbook’ literature. This basically means that the main features of the RJ have been inferred *ex-negativo* from the criminal justice’s ‘common’

⁴³⁹ Daly, K. (2002). Restorative Justice: The Real Story. *Journal of Punishment & Society*, 55(4), 55-79, pp. 61-64.

⁴⁴⁰ Ibidem.

⁴⁴¹ Nader, L., Combs-Schilling, E. (1977). *Restitution in Cross-cultural Perspective*. In J. Hudson, B. Galaway (Eds.), *Restitution in Criminal Justice: a critical assessment of sanctions* (pp. 27-44). Lexington: Heath Publishing, p. 27; see also Sylvester, D. J. (2003). Myth in Restorative Justice History, cit.

⁴⁴² Sylvester, D. J. (2003). Myth in Restorative Justice History, cit., p. 502.

⁴⁴³ Daly, K. (2002). Restorative Justice: The Real Story, cit., p. 63.

⁴⁴⁴ Ibidem, p. 63.

⁴⁴⁵ Blagg, H. (1997). A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia. *British Journal Of Criminology*, 37(4), 481- 501.

⁴⁴⁶ Roche, D. (2007). *Retribution and restorative justice*. In G. Johnstone, D.W. Van Ness (Eds.), *Handbook of Restorative Justice*. London: Willan, p. 75.

characteristics. Nevertheless, in more recent years, criticisms have been arising against this perspective, deemed as a misrepresentation of more complex relationships between the RJ and the criminal justice⁴⁴⁷. To be noticed that the concept of ‘criminal justice’ held by the proponents of the RJ is quite elusive and magmatic. Broadly speaking, in the ‘textbook’ literature, that expression refers to the widespread institutional system of dealing with crimes in Western modern/contemporary states which entails public prosecution, adjudication (focusing on offender’s liability), punishment with retributive/rehabilitative/deterrent goals and Kantian/utilitarian justifications. Additionally, the proponents of the RJ often use the expression ‘criminal justice’ as synonym of ‘criminal law’, creating sometimes ambiguities leading to possible misunderstandings. Likewise for the authoritative explanations, inconsistencies, paradoxes as well as intersections are present between and even within the ‘conceptual’ discourses. However, the construction of the ‘criminal justice’ as backdrop against which cast the theoretical features of the RJ, plays the role of recurrent element.

2.2.1.1. *Restorative Justice and Criminal Justice*

In the ‘textbook’ literature we can detect at least two main (and conflicting) conceptualizations of the relationships between the RJ and the criminal justice⁴⁴⁸. According to the first, the RJ is a complete, consistent and independent criminal justice paradigm that has the potential to stand alone, and which should replace the current one⁴⁴⁹. On the other hand, supporters of the opposite perspective argue that the RJ can only exist if supported by the criminal justice system. This contrast has accompanied the RJ since its early days. During the 1970s, scholars labeled as the ‘first generations’ of the RJ proponents, such as Gilbert Cantor⁴⁵⁰ and Ab Thorvaldson⁴⁵¹, as well as the already known Christie, Barnett, and Zehr portrayed the relationship between the then emerging RJ approach and the existing criminal justice system as being ‘polar opposites’ in almost every aspect. On the other hand, as Theo Gavrielides stresses⁴⁵², more recently, advocates began to talk about the need to combine the RJ values and practices with existing traditions of criminal practice and philosophy⁴⁵³. Basically the ‘first generation’ claimed the necessity to think and accordingly to locate the RJ outside the criminal justice system, keeping only loose links to it⁴⁵⁴. Cantor, for instance, argued in favor of a total substitution of civil law for criminal law processes with a view to ‘civilizing’ the treatment of offenders. Christie, as already seen, spoke of conflicts being stolen from the parties by the state and to be given back to the rightful owners outside the criminal justice system. Zehr saw (and keeps seeing) crime through

⁴⁴⁷ Roche, D. (2007). *Retribution and restorative justice*, cit., p. 83.

⁴⁴⁸ Of course intermediate positions are available. The two stances considered play the role of idealtypical extreme points of a spectrum of more or less differentiated positions.

⁴⁴⁹ Gavrielides, T. (2007). *Restorative Justice Theory and Practice: Addressing the Discrepancy*, cit., p. 38.

⁴⁵⁰ Cantor, G. (1976). An End to Crime and Punishment. *The Shingle*, 394, 99-114.

⁴⁵¹ Thorvaldson, A.S. (1978). *The Effects of Community Service on the Attitudes of Offenders*. Cambridge: University of Cambridge Press.

⁴⁵² Gavrielides, T. (2007). *Restorative Justice Theory and Practice: Addressing the Discrepancy*, cit., p. 39

⁴⁵³ Braithwaite, J. (1999). Restorative Justice: Assessing Optimistic and Pessimistic Accounts, cit.; Dignan, J. (1994). *Reintegration Through Reparation: A Way Forward for Restorative Justice?* In R.A. Duff, S. Marshall, R. E. Dobash, R. P. Dobash (Eds.), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (pp. 231-244), cit.; Dignan, J., Lowey, K. (2000). *Restorative Justice Options for Northern Ireland: A Comparative Review*. Belfast: HMSO.

⁴⁵⁴ McCold, P., Wachtel, T. (2002). Restorative justice theory validation. In E. Weitekamp, H.-J. Kerner (Eds.), *Restorative Justice: Theoretical Foundations* (pp. 110-142). Devon: Willan.

the lenses of a new paradigm. Barnett argued for the total replacement of criminal justice in favor of the restitutive paradigm. These scholars inspired (or directly argued for) RJ programs operating by way of diversion of cases from the criminal justice system, preserving the purity of the restorative ideals. The incorporation of the RJ into the state of justice system, on the contrary, is considered undesirable because it would dilute the purity of the RJ ideals by bringing judicial coercion into the RJ paradigm. To be true to its values, the RJ should remain informal and voluntary, according to the advocates who draw upon the 'first generation' of RJ scholars. McCold⁴⁵⁵, more recently, has claimed the necessity to develop the RJ according to three normative stages. During the first it would operate by diversion and operated by NGOs. In the second the operational role would be transferred to the criminal justice system. The RJ would lastly, permeate the criminal justice system, as a third stage. Other proponents such as Walgrave⁴⁵⁶ and Dignan⁴⁵⁷ argue for both the diversion and the integration in the criminal justice system. They maintain that the RJ should be made an integral part of it and the system should be maximally, radically and systematically reformed in accordance with restorative values. These proponents are critical of placing the RJ outside the system and limiting it to informal voluntary practices, predicting that this would provide a recipe for marginalization and a missed opportunity to bring about broad and far-reaching reforms in the criminal justice system. However, despite the abovementioned differences, there seems to be at least one main commonality between the 'first generation' of RJ scholars and more recent proponents of the integration model. Both in fact, seem presuppose an 'operational' link between the RJ and the criminal justice. The criminal justice system should provide a legal framework, funding and referrals for the RJ programs and even a back-up in situations where the RJ is either impossible or undesirable⁴⁵⁸. The system should also supply judicial oversight and legal safeguards. Nevertheless in the last decade a new perspective has grown up against this perspective. A new radical view regarding the link between the RJ and the criminal justice has been elaborated. The basic claim is that that practicing RJ under the auspices of this system, pushes the RJ towards the criminal justice's moral compass. Pavlich, for instance, argues that the RJ is parasitic to criminal justice legal definition of crime, failing in offering a new moral framework⁴⁵⁹. Dennis Sullivan and Larry Tift contend that criminal law, as a product of a particular political economy, is designed to preserve existing power relations. It cuts the world into dichotomic categories such as culpable and non-culpable, right and wrong, worthy and non-worthy victims etc. which help to maintain a specific social order. The legal system is intended to deal mainly with interpersonal violence, and social-structural injustices usually do not even deserve the designation of crime⁴⁶⁰. The RJ accepting the authority of criminal justice serves to perpetuate the existing social arrangement by focusing on interpersonal dimensions of crime and deflecting attention away from the deeper roots of crimes as found in class, race, gender-based another social-

⁴⁵⁵ McCold, P., Wachtel, T. (2002). Restorative justice theory validation, cit.

⁴⁵⁶ Walgrave, L. (1995). Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative? *Howard Journal of Criminal Justice*, 34(3), 228-249.

⁴⁵⁷ Dignan, J. (2002). Restorative justice and the law: The case for an integrated, systemic approach. In L. Walgrave (Ed.), *Restorative justice and the law* (pp. 168-190), cit.

⁴⁵⁸ Zernova, M. (2007). *Restorative Justice: Ideals and Realities*, cit., p. 54.

⁴⁵⁹ Pavlich, G. (2005). *Governing Paradoxes of Restorative Justice*, cit., p. 35.

⁴⁶⁰ Sullivan, D., Tift, L. (2001). *Restorative Justice: Healing the Foundations of our Everyday Lives*. Monsey: Willow Tree Press, p. 157.

structural conflicts⁴⁶¹. Other traditional concepts rejected by critics who are skeptical of the RJ's reliance on the criminal justice system are 'victim' and 'offender'. Tiff and Sullivan argue that that distinction of fix identities is itself harming, deconstructive and non-integrative: to be offender means to be controlled, marginalized constrained whereas be a victim means to be disempowered⁴⁶². In the same way Pavlich claims that to label a person as victim is always a 'second victimization' whereas as an offender implies a non-natural and unidirectional attribution of responsibility⁴⁶³.

2.2.1.2. Restorative Justice and Punishment

Regarding the relationships between the RJ and the punishment, as Gavrielides notices, the views might be 'didactically' divided into two main positions⁴⁶⁴. According to the first, the RJ measures cannot, in any way, be punitive⁴⁶⁵. The second contends that the RJ is not "alternative to punishment", but an "alternative punishment"⁴⁶⁶. The argument of the first group is that restorative measures' primary purpose is to be constructive⁴⁶⁷. Therefore, they are not inflicted "for their own sake' rather than for a higher purpose⁴⁶⁸". The second group argues that "this purported distinction is misleading because it relies for its effect on the confusion of two distinct elements in the concept of intention. One element relates to the motives for doing something; the other refers to the fact that the act in question is being performed deliberately or willfully⁴⁶⁹". Daly, for instance, takes the RJ to be punishment, because it leads to obligations for the offender⁴⁷⁰. On the other hand, McCold rejects the idea of including coercive judicial sanctions in the restorative process, as they might shift the RJ back to being punitive⁴⁷¹. He claims that accepting any form of coercion as being potentially restorative would completely move the RJ back to being a theory of retributivism⁴⁷². McCold totally discards coerciveness in the RJ and opts for a 'purist' model of the RJ. In this perspective the potentialities of the RJ are limited to forms of voluntary and informal conflict resolution. Any conflict that cannot be treated consensually would be referred back to the traditional system of criminal justice. Marshall claims that coercive processes in

⁴⁶¹ Mika, H. (1992). Mediation Interventions and Restorative Justice: Responding to the A structural Bias. In H. Messmer, H.-U. Otto (Eds.), *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation: International Research Perspectives* (pp. 559-568). Dordrecht: Kluwer Academic Publishers; Pavlich, G. (1996). *Justice Fragmented: Mediating Community Disputes under Postmodern Conditions*. London: Routledge.

⁴⁶² Sullivan, D., Tiff, L. (2001). *Restorative Justice: Healing the Foundations of our Everyday Lives*, cit., p. 80.

⁴⁶³ Pavlich, G. (2005). *Governing Paradoxes of Restorative Justice*, cit., Chapter 3 and 4.

⁴⁶⁴ Gavrielides, T. (2007). *Restorative Justice Theory and Practice: Addressing the Discrepancy*, cit., p. 41

⁴⁶⁵ Wright, M. (1996). Can Mediation be an Alternative to Criminal Justice? In B. Galaway, J. Hudson (Eds.), *Restorative Justice: International Perspectives* (pp. 227-239), cit., p. 27.

⁴⁶⁶ Duff, R.A. (1992). Alternatives to Punishment or Alternative Punishments? In W. Cragg (Ed.), *Retributivism and its Critics* (pp. 44-68), Stuttgart: Franz Steiner.

⁴⁶⁷ Gavrielides, T. (2007). *Restorative Justice Theory and Practice: Addressing the Discrepancy*, cit., p. 42.

⁴⁶⁸ Walgrave, L., Bazemore, G. (1999). Reflections on the Future of Restorative Justice for Juveniles. In L. Walgrave, G. Bazemore (Eds.), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (pp. 359-399). Monsey: Criminal Justice Press, p.146.

⁴⁶⁹ Dignan, J. (2002). *Restorative Justice and the Law*, cit., p.179.

⁴⁷⁰ Daly, K. (2000). Revisiting the Relationship between Retributive and Restorative Justice. In H. Strang, J. Braithwaite (Eds.), *Restorative Justice: Philosophy to Practice* (pp. 33-54). Aldershot-Singapore-Sydney: Ashgate/Dartmouth.

⁴⁷¹ McCold, P. (2000). Toward a holistic vision of restorative juvenile justice: A reply to the maximalist model, cit.

⁴⁷² Willemsens J. (2003). Restorative Justice: A Discussion of Punishment. In: L. Walgrave (Ed.), *Repositioning Restorative Justice* (pp. 24-42), cit., p. 29.

the RJ must be considered and applied using the ‘tools’ of the criminal justice system⁴⁷³. On the other hand, Braithwaite believes that if a restorative process fails, it should be tried “*again and again*”⁴⁷⁴. Braithwaite’s approach to punishment is based upon the principle of parsimony: punishment should be limited to enable the offender to retain as much ‘*dominion*’ as possible. This approach is considered as comprising a core element of the republican theory of justice. Walgrave conceives punishment as characterized by deprivation, the intentional infliction of pain, hard treatment, and correspondence to the wrong. What makes the difference (likewise for Wright) is the intention of inflicting pain as a distinctive feature of the punishment⁴⁷⁵. Walgrave argues that coerced restorative measures are always better than rehabilitative sanctions. Because of material reasons (the victim and the community benefit for sure of the restoration), as well as because of the reintegration of the offender, the destruction of stereotypes about the offender and because retributive punishment has no instrumental or moral value⁴⁷⁶. Zehr and Christie both acknowledge the possibility of a place for punishment in the RJ. Christie has argued that if pain-intended as a pain-is used, it should at least not be used with an ulterior purpose: rehabilitation or social control. Zehr seems to follow this position, saying that if punishment cannot be eliminated as such by the restorative approach, it should not be normative. The role of punishment in the RJ therefore should be limited to the aim of reducing the general level of pain in a context of restoration takes place⁴⁷⁷. Lucia Zedner identifies three conditions that must be fulfilled to make compatible the RJ with punishment (punitive quality, recognition of social wrong; response to culpability), to which she adds other three fundamental principles that must be respected in order to make acceptable in the criminal justice system the reparation (fairness, consistency, proportionality)⁴⁷⁸. Daly argues that we should embrace the concept of punishment as the main activity of the state’s response to crime⁴⁷⁹, that the RJ is punishment and that it should be. The RJ is an alternative punishment and not an alternative to it. She considers the punishment necessary to vindicate victim’s worth⁴⁸⁰ and that offender can atone only by willingly submitting himself/herself to punishment, not degrading or humiliating⁴⁸¹. Lastly, Antony Duff argues that we response to crime should aim for ‘restoration’, for ‘restorative’ justice: but the kind of restoration that criminal wrongdoing makes necessary is properly achieved through a process of retributive punishment⁴⁸². Offenders should be punished for their crimes, but this punishment should aim at achieving restoration. In Duff’s perspective,

⁴⁷³ Marshall, T.F. (1996). The Evolution of Restorative Justice in Britain. *European Journal on Criminal Policy and Research*, 4(4), 21-43.

⁴⁷⁴ Braithwaite, J. (1999). Restorative Justice: Assessing Optimistic and Pessimistic Accounts, cit.

⁴⁷⁵ Walgrave, L. (2001). On Restoration and Punishment: Favourable Similarities and Fortunate Differences. In A. Morris, G. Maxwell, (Eds.), *Restorative Justice for Juveniles: Conferencing, Mediation, and Circles* (pp. 27-28). Oxford: Hart.

⁴⁷⁶ Ibidem, p. 23.

⁴⁷⁷ Zehr, H. (2005). *Changing Lenses*, cit., p. 210.

⁴⁷⁸ Zedner, L. (1994). Reparation and Retribution: Are They Reconcilable? *The Modern Law Review*, 57(2), 228-250, p. 244.

⁴⁷⁹ Daly, K. (2000). Revisiting the Relationship between Retributive and Restorative Justice, cit., p. 34.

⁴⁸⁰ Ibidem, p. 39.

⁴⁸¹ Ibidem, p. 35.

⁴⁸² Duff, R.A. (2003). Restoration and Retribution. In G. Johnstone (Ed.), *Restorative Justice Reader: Texts, Sources, Context* (pp. 382-398), cit., p. 382.

both restorative and retributive theorists “*are wrong*⁴⁸³” insofar as they suppose we must choose between restoration and retribution as our primary aim. Restoration requires the re-instatement of the *status quo ante*. We can restore security, trust, goods etc. the problem is that the victim, beside these kinds of losses, was also *wronged*, attacked⁴⁸⁴. A relationship has been damaged, that between victim, offender and community. These relationships damaged by the wrongdoer must be restored. Duff states that we are not just dealing an empirical breakdown in a relationship, because a *normative* relationship has been damaged. To restore this kind of damage accordingly, we need to find a normatively adequate way to restore it, a recognition of the wrong as a wrong, an understanding of the wrong which leads to repentance shaped as an apology, not only in verbal way⁴⁸⁵.

2.2.1.3. Procedural criticisms

Many criminal justice activists have expressed disquiet over aspects of the RJ from a *procedural* point of view. Often these criticisms are aimed at specific RJ ‘practices’ and might be broadly characterized as critiques based on liberal arguments centered on the rule of law and equality before the law. They include concerns over abuse of due process; absence of procedural rights and protections; excessive, disproportionate or inconsistent outcomes and so forth⁴⁸⁶. These concerns mainly refer to the potential undermining of defendant’s rights at the investigatory, adjudicatory and sentencing stages of the criminal justice system. At the investigatory stage, the lack of independent legal advice, pressures to admit an offence to obtain the presumed benefit of diversion and the avoidance of a criminal record, and the lack of testing of the legality of police searches, questioning and evidence gathering may compromise outcomes. Furthermore, the pressure to admit an offence means that issues relating to *mens rea* (the defendant’s mental fault) and legal defenses are not considered by the court. A related concern is that the outcome from a RJ program may be more punitive than might be expected if the normal sentencing principles of consistency, proportionality and frugality were applied. There is also potential to ignore the basic human rights principles relating to children and young people: upholding the primacy of the best interests of the child and rehabilitation when sentencing and making other decisions affecting children and young people. As Braithwaite remarks⁴⁸⁷, robust critiques of the limitations of various RJ processes (especially Family Group Conferencing-FCG) in terms of protection of rights have been provided by various authors⁴⁸⁸. They argue that there can be little doubt that courts provide superior formal guarantees of procedural fairness than conferences. At the investigatory stage, Katie Warner wonders: “*Will police malpractice be less visible in a system which uses FGCs? One of the ways in which police investigatory powers are scrutinized is by oversight by the courts. If the police act unlawfully or unfairly in the*

⁴⁸³ Duff, R.A. (2003). Restoration and Retribution, cit., p. 384.

⁴⁸⁴ Ibidem.

⁴⁸⁵ Ibidem, p. 386.

⁴⁸⁶ See for example, Warner, K. (1994). The Rights of the Offender in Family Conferences. In C. Alder, J. Wundersitz (Eds.), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (pp. 142-146), cit.

⁴⁸⁷ Braithwaite, J. (1999). Restorative Justice: Assessing Optimistic and Pessimistic Accounts, cit. p. 101.

⁴⁸⁸ Warner, K. (1994). The Rights of the Offender in Family Conferences, cit.; Van Ness, D.W., Legal Principles and Process. In L. Walgrave, G. Bazemore (Eds.), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, cit.

investigation of a case, the judge or magistrate hearing the case may refuse to admit the evidence so obtained or may criticize the police officer concerned. Allegations of failure to require parental attendance during questioning, of refusal to grant access to a lawyer, of unauthorized searches and excessive force could become hidden in cases dealt with by FGCs⁴⁸⁹”. Warner is moreover concerned that the RJ ‘practices’ might be used as an inducement to admit guilt: its proffering can induce admissions. Warner and Van Ness are both concerned about double jeopardy when consensus cannot be reached at a conference and the matter therefore goes to court, though Warner concedes it is not true double jeopardy. Van Ness’s work affirms the hypothesis that RJ processes can trample on rights, where rights will be better or worse protected after the introduction of a restorative justice program is a contextual matter.

To conclude, it is worthwhile to notice, *a propos* of the procedural risks of the RJ ‘practices’, that the Recommendation (99) 19 concerning mediation in penal matters enacted by the Council of Europe, explicitly recognizes the necessary safeguard of procedural standards in the RJ ‘practices’:

“In order to enable victims and offenders to take part in mediation, members States should take all necessary steps to ensure that their rights are protected and that they are fully aware of their rights. Mediation requires the free and informed consent of both victims and offenders, and should never be used if there is a risk that mediation may disadvantage one of the parties. Due consideration should be given not only to the potential benefits but also to the potential risks of mediation for both parties and in particular for the victim⁴⁹⁰”.

2.2.2. Conflict, harm and crime

One of the main issues regarding the theoretical conceptualization of the RJ is the “*trigger event*⁴⁹¹”, i.e. what makes possible and/or necessary the activation of the restorative interventions. In a different perspective, we can also conceptualize the trigger event as the ‘object’ of the RJ, the target of its practices and then a re-formulation of the concept of ‘crime’. As Woolford has emphasized, basically three are in the RJ literature the possible (alternative) concepts of ‘trigger events’: the *conflict* between victim, offender and the community; the *harm* caused by the offender; the *normative violation* (or the wrong) committed by the offender and suffered by the victim. In the literature is quite shared the idea that the *harm*, rather than the crime, is the trigger event of a RJ intervention⁴⁹². In other words, the RJ responds specifically to interpersonal harms—that is, it addresses harms caused through interaction between two or more individuals⁴⁹³. Others, in a different vein, argue that crime is a form of *conflict* ‘legally categorized’ and therefore they place the RJ under the broad rubric of conflict resolution⁴⁹⁴. In the RJ literature there is also space for another interpretation, according to which the RJ is concerned with

⁴⁸⁹ Warner, K. (1994). *The Rights of the Offender in Family Conferences*, cit., p. 142.

⁴⁹⁰ Committee of Ministers of the Council of Europe, Recommendation (99) 19 concerning mediation in penal matters, § 2.1 The rights of victims and offenders.

⁴⁹¹ Woolford, A. (2009). *The politics of restorative justice: A critical introduction*, cit.

⁴⁹² Mika, H., Zehr, H. (2003). A Restorative Framework for Community Justice Practice. In K. McEvoy, T. Newburn (Eds.), *Criminology, Conflict Resolution and Restorative Justice* (pp. 135-152). Basingstoke and New York: Palgrave MacMillan.

⁴⁹³ Woolford, A. (2009). *The politics of restorative justice*, cit., p. 29.

⁴⁹⁴ Christie, N. (1977). *Conflict as property*, cit.

*normative violations*⁴⁹⁵. Norms are groups-established behavioral codes that guide the activities of individual belonging to the group. Any RJ intervention must, in this view, focus on these violations, aiming at restoring the balance altered by the wrong committed by the offender.

2.2.2.1. *From crimes to conflicts*

Christie, as already discussed, argued that conflicts are good for us, they strengthen us and we have much to learn from them. In contrast, in criminal proceedings the conflict is transformed from a matter between the specific parties to a conflict between one of the parties and the state. In this way, in western societies, conflicts have been taken away from the parties directly involved. He concludes that this is a problem because conflicts are very valuable resources for us as individuals and as communities. Christie explains that the notion of ‘conflicts as property’ does not refer to material compensation; it refers rather to ownership of the conflict itself, intended as valuable source of social capital⁴⁹⁶. Christie then identifies the effects of the victim’s losing ‘ownership’ in the course of criminal proceedings, and he proposes a remedy for this loss in a new court model for dealing with conflicts. This court model is victim-centered and lay-oriented. Christie argues that the goal of this model is easily to give back the conflict to the rightful “owners” (victim, defendant and their neighborhood). In sum, Christie puts forward two related points. First, the state’s representatives (i.e. legal professionals) “*are particularly good at stealing conflicts*⁴⁹⁷” between individuals. Second, these conflicts should be seen “*as property*” because they have great value. If they are treated in social arena, conflicts offer a chance to nurture the social capital, providing “*opportunities for norm clarification*⁴⁹⁸” and helping protagonists to meet and get to know each other. These interactions and “*personalized encounters*⁴⁹⁹” bring victims more fully into the criminal process and invite reflection by an offender about “*how he can make good again*⁵⁰⁰”. Even if the Christie’s work is considered a milestone in the RJ literature, the Norwegian criminologist was not at the time concerned directly with the RJ, but more broadly with the necessity of criminal justice’s reform, in a way of ‘civilization’ of it. Various proponents directly involved in the RJ advocacy and studies, have drawn upon Christie’s argument. Van Ness and Strong, for instance, in many occasions have argued that the conflict is the RJ’s trigger event⁵⁰¹. They state that the crime is primarily a conflict between individuals, which results in disadvantage to the victims as to the community and the perpetrator. Therefore the penal system’s superior goal should be to reconcile the parties and at the same time restore the damages taken place. This process should not be dominated by official authorities⁵⁰² and aiming indeed at enhancing the direct stakeholders (the victims, the perpetrators and the local community). On the same page is Walgrave⁵⁰³. He

⁴⁹⁵ Christie, N. (1977). Conflict as property, cit.

⁴⁹⁶ Condliffe, P., The Rise of Restorative Justice: Promise and Challenge. *New Community Quarterly* 6(3). Retrieved 25 may 2011 from <http://www.newcq.org/pdfs/63/ncq%20therise%2063.pdf>, p. 1.

⁴⁹⁷ Christie, N. (1977). Conflicts as property, cit., p. 4.

⁴⁹⁸ Ibidem, p. 8.

⁴⁹⁹ Ibidem.

⁵⁰⁰ Ibidem, p. 9.

⁵⁰¹ Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit.

⁵⁰² Ibidem.

⁵⁰³ Walgrave, L. (1995). Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative? cit.

claims that decriminalization of wrongdoing by a restorative ‘reaction’ does not belittle transgression of norm, but partly redefines it. He thinks that the offence, defined by concepts of guilt and amends is reconsidered primarily as a ‘conflict’, a ‘problem’ requiring the most valuable social solution possible⁵⁰⁴.

2.2.2.2. *The ‘Harmization’ of crime*

Another authoritative stance on the nature of the ‘trigger event’ is the conceptualization of it as the harm caused by the offence. Bazemore and Umbreit emphasize how fundamentally, restorative approach are distinguished from retributive and rehabilitative ones by its focus on sanctions that address the *harm* caused to victims and communities⁵⁰⁵. Wright goes on, arguing that the traditional association between crime and punishment is not as clear as it seems⁵⁰⁶. The real point about crimes is not that they are punishable but they are *harmful*. Many harmful acts are not defined as criminal, while some not-very-harmful ones are. The list of crimes varies at different times and places; requiring reparation can be a response at least as valid as inflicting punishment⁵⁰⁷. This stance is embraced by the par. 11 Directive of the European Parliament and of the Council COM (2011) 275 establishing minimum standards on the rights, support and protection of victims of crime which states: “*Such services [mediation and other RJ ‘practices’] should therefore have as a primary consideration the interests and needs of the victim, repairing the harm to the victim and avoiding further harm*”. In the same way, the United Nations Economic and Social Council, in the preamble of the Resolution 2002/12, Basic principles on the use of restorative justice programs in criminal matters, explicitly recognizes “[...] *that those initiatives [R] ‘practices’ often draw upon traditional and indigenous forms of justice which view crime as fundamentally harmful to people*”. As David Karp sharply synthesizes, basically in the RJ literature the concept of harm is defined by two variables⁵⁰⁸: material versus personal/relational and private versus public. First, material harm includes lost or damaged property or monetary losses. Personal/relational harm includes physical and emotional harm to crime victims, such as physical injury, anxiety, anger, or depression. A second variable distinguishes harm done to private citizens, business, or organizations from harm done to communities in the form of material damage to public spaces and places etc. Graef is emblematic in his inventory of the primary RJ’s issues⁵⁰⁹: “*What harm was caused? What was its wider emotional context and impact? Why was the harm done? Restorative justice works to heal the damage to individuals caused by conflict and crime. In many situations, this damage occurs to both victims and offenders, and often also affects those who are involved with or depend on them – who are ignored by conventional legal processes. This can be a wide circle of family, friends and employees*”. Achilles and Zehr claim that the first RJ’s aim is the redefinition of crime as a violation which creates obligations provides much-needed recognition to crime victims by the community and by the justice system as the individual harmed and thus as a central stakeholder in a justice

⁵⁰⁴ See also Zehr, H. (1985). Retributive justice, restorative justice, cit.

⁵⁰⁵ Bazemore, G., Umbreit, M. (1995). Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime. *Crime & Delinquency*, 41(3), 296-316.

⁵⁰⁶ Wright, M. (1991). *Justice for victims and offenders*, cit., p.15.

⁵⁰⁷ Ibidem, p.1.

⁵⁰⁸ Karp, D. R. (2001). Harm and repair: Observing restorative justice in Vermont. *Justice Quarterly*, 18(4), 727-757, p. 729.

⁵⁰⁹ Graef, R. (2000). *Why Restorative Justice? Repairing the Harm Caused by Crime*, cit., p. 18.

process⁵¹⁰. The idea that violations create obligations identifies the victim as the person to whom the offender is first and foremost accountable for the specific harm done. In this perspective, since the RJ focuses on the reparation of harms, it provides opportunities for a greater and more meaningful victim's participation, also expressed by possibilities of directly discussing the harms suffered and the needs to be addressed the offender and the community. Starting from the identification of the harms, the RJ emphasizes the importance of providing immediate direct assistance to all victims in the aftermath of crime⁵¹¹. Elsewhere, Zehr is even more straightforward⁵¹². He highlights how the RJ views crime, first of all, as harm done to people and communities. In his opinion, our legal system, with focuses on rules and laws, often loses sight of this reality; consequently, it makes victims, at best, a secondary concern of justice. A harm focus, however, implies a central concern for victims' needs and roles. The RJ 'begins' with a concern for victims and how to meet their needs, for repairing the harm as much as possible, both concretely and symbolically. A focus on harm also implies an emphasis on offender accountability and responsibility. In a similar vein, Strang argues that the need for a symbolic statement about the legitimacy of victims' status and an acknowledgment of the emotional harm experienced is an aspect of victimization which has only recently been given attention⁵¹³.

2.2.2.3. *Crimes and wrongs*

A third way to conceptualize the 'trigger event' of a RJ intervention is the idea of 'wrong' committed by the offender. Hoyle⁵¹⁴ drawing from Paddy Hillyard's et al. book⁵¹⁵, argues that criminalized acts are not only harmful but immoral, in that they are perpetrated by those who intended to harm, or at least are reckless to the probable consequences of their actions. In other words we have to consider 'wrongs' as well as 'harms'. While the RJ aims at holding offenders accountable for their behavior, it allows for consideration of the wider responsibilities of others in their community and the state. It does not seek to apportion blame to the offender's family or friends, but puts the offence in the context of relative deprivation, dysfunctional relationships, poor educational or health services, or failures of those authorities which should identify or respond effectively to evident criminogenic factors. Duff in particular⁵¹⁶, argues that our response to crime should aim for 'restoration'. He states that we can restore security, trust, goods etc. but the problem is that the victim, beside these kinds of losses, was also *wronged*, attacked⁵¹⁷. A relationship has been damaged, that between victim, offender and community. These relationships damaged by the wrongdoer must be restored. Crucially Duff emphasizes that in these cases, we are not just dealing with an empirical breakdown in a

⁵¹⁰ Achilles, M., Zehr, H. (2001). *Restorative justice for crime victims: the promise, the challenge*, cit., p. 88

⁵¹¹ Ibidem, p. 90.

⁵¹² Zehr, H. (1997). Restorative justice: The concept movement sweeping criminal justice field focuses on harm and responsibility. *Corrections Today*, 68-70, p. 68.

⁵¹³ See Strang, H. (2001). Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration, cit.

⁵¹⁴ Hoyle, C. (2010). The case for Restorative Justice. In C. Cunneen, C. Hoyle (Eds.), *Debating Restorative Justice* (pp. 1-100), cit., p. 12.

⁵¹⁵ Hillyard, P., Pantazis, C., Tombs, S., Gordon, D. (2004). *Beyond criminology: Taking harm seriously*. London: Pluto Press.

⁵¹⁶ Duff, R.A. (2003). Restoration and Retribution, cit., p. 384.

⁵¹⁷ Ibidem.

relationship, because a *normative* connection has been damaged⁵¹⁸. To restore this kind of damage accordingly, we need to find a normatively adequate way to restore it, as he states: “*we need a recognition of the wrong as a wrong, an understanding of the wrong which leads to repentance shaped as an apology, not only in verbal way*”⁵¹⁹. He goes on claiming that what needs to be restored is then the offender’s normative relationship with his victim as a fellow citizen and with his fellow citizens more generally. Accordingly a restorative ‘practice’ should focus not only on the harm but on the wrong that was done. It should bring the offender to recognize the wrong, to be censured, to make reparation in a burdensome way for the offender⁵²⁰, the offender must “*suffer the burden to make moral reparation of the wrong committed*”⁵²¹. In sum, for Duff, criminal wrongs upset normative relationships in our societies. Our shared values of “*mutual trust, concern and respect*” are disrupted and challenged by the acts of the wrongdoer, and justice is an opportunity to recommit to these values⁵²². The severity of the breach of the normative order may also demand some other burdensome efforts on the part of the wrongdoer, such as participation in community work. The RJ is then conceived as a space of moral censure in which the facilitator must take pains to communicate to the wrongdoer the dangerous nature of his/her violation and to encourage remorse from this individual.

2.2.3. Restoration(s)

The meaning(s) of ‘restoration’ is another crucial theoretical issue in the ‘textbook’ literature. I will not discuss the numberless practical ways of applying the more or less vague idea of ‘restoration’. Rather, I will dwell only on the concepts of restitution and reparation, as analyzed and interpreted by the RJ ‘textbook’ literature. The notion of restoration, in fact, may be defined by activities regarding material or personal and private or communal harms, loss, wrongs etc.⁵²³, shaped usually as restitutive and/or reparative actions.

2.2.3.1. Restitution

As Sylvester remarks⁵²⁴, the study of the restitution in the criminal justice context was kick-started by Stephen Schafer’s *Compensation and Restitution to Victims of Crime*, published in 1970. Although foremost a comparative review of restitution-based approaches in countries throughout the world, Schafer’s work included an initial foray into explaining restitution’s historical lineage. Even if largely concerned with the decline of restitution in the western democracies, Schafer’s main thesis is that restitution “*for a long period was almost inseparably attached to the institution of punishment*”⁵²⁵. In support of this thesis, Schafer spends most of his time reviewing the use of restitution in the European Middle Ages⁵²⁶, arguing that prior to this period, evidence of restitution’s use in criminal processes is unclear and anecdotal⁵²⁷. Herbert Edelhertz’s *Restitutive Justice* in 1975 was another landmark in the development of restitution’s

⁵¹⁸ Duff, R.A. (2003). *Restoration and Retribution*, cit., p. 385.

⁵¹⁹ Ibidem, p. 386.

⁵²⁰ Ibidem, p. 390.

⁵²¹ Ibidem, p. 394.

⁵²² Woolford, A. (2009). *The politics of restorative justice*, cit. pp. 135-137.

⁵²³ Karp, D.R. (2001). *Harm and repair*, cit., p. 730.

⁵²⁴ Sylvester, D.J. (2003). *Myth in Restorative Justice History*, cit.

⁵²⁵ Schafer, S. (1970). *Compensation and restitution to victims of crime*. Montclair: Patterson Smith, p. 164.

⁵²⁶ Ibidem, p. 165.

⁵²⁷ Ibidem, p. 166.

history⁵²⁸. Edelhertz's work also focused on a comparative review of 'restitutionary' processes around the globe⁵²⁹. Like Schafer, Edelhertz began his work with a review of restitution's origins. Edelhertz openly acknowledged the importance of linking an analysis of "the potential utility of restitution and compensation programs [...] with the recognition that such programs have long historical (and pre-historical) antecedents"⁵³⁰. Another fundamental contribution to the study of restitution, highly considered in the RJ literature, is represented by Albert Eglash "creative restitution's theory"⁵³¹. He worked out the idea of "creative restitution" in dealing with crimes, a perspective based on the idea that offender, even is self-determined, must be guided toward the restitution, and related constructive acts for a victim or community. Creative restitution requires that a situation must be left better than before an offense was committed⁵³². Eglash also assumed that restitution should be "lifelong" and a "form of psychological exercise"⁵³³, able to encourage human growth and "ease stigma"⁵³⁴. As Wright asserts⁵³⁵, in USA a relevant role in the dissemination of the restitution theory was played by the evaluative work of Hudson⁵³⁶. Her survey regarding restitution activities carried by community services programs in USA, spread the awareness of restitution programs' availability in USA, casting at the same time, a critical look on their effective implementation⁵³⁷. The works, already mentioned, of Cantor, Barnett and Thorvaldson, helped a deeper penetration of restitution in USA. Cantor⁵³⁸ argued for the civilization of offender's treatment, considering social vulnerability as the main cause for crime. Civilization entails restitution and compensation through manageable installments upon parties' agreement. The last traditional reference point for the restitution theory is given by Barnett. He tried to analyze the breakdown of our system of criminal justice in terms of what Thomas Kuhn would describe as a crisis of an old paradigm-punishment⁵³⁹. The Barnett's proposal was to overcome the crisis by the adoption of a new paradigm of criminal justice-restitution which in a way deletes the boundary between criminal law and tort law⁵⁴⁰. Thorvaldson, lastly, argued for the autonomous status of the reparation in the sentencing, criticizing at the same time, that when 'rehabilitators' accept reparative measures, they concede that offenders should be held accountable, conceding that suffering is not the only currency for repayment⁵⁴¹.

⁵²⁸ Sylvester, D. J. (2003). Myth in Restorative Justice History, cit., p. 497.

⁵²⁹ Edelhertz, H. (1975). *Restitutive Justice, A general Survey and analysis*. Seattle: Battelle Human Affairs Research Centers, pp. 1-20.

⁵³⁰ Ibidem, p. 1.

⁵³¹ Eglash, A. (1958). Creative Restitution: A Broader Meaning For An Old Term. *The Journal of Criminal Law, Criminology, and Police Science*, 48(6), 619-622.

⁵³² Ibidem, p. 620.

⁵³³ Ibidem, p. 622.

⁵³⁴ Ibidem, p. 621.

⁵³⁵ Wright, M. (1991). *Justice for victims and offenders*, cit., p. 32.

⁵³⁶ Hudson, J., Galaway, B., Novack, S. (1980). *National assessment of adult restitution programs: Final report*. Duluth: School of Social Development, University of Minnesota.

⁵³⁷ Ibidem, p. 20.

⁵³⁸ Cantor, G. (1976). An End to Crime and Punishment, cit.

⁵³⁹ Barnett, R.E. (1977). Restitution: A New Paradigm of Criminal Justice, cit., p. 282.

⁵⁴⁰ Ibidem, p. 296.

⁵⁴¹ Thorvaldson, A. S. (1978). *The Effects of Community Service on the Attitudes of Offenders*, cit., p. 23.

2.2.3.2. *Reparation*

Within the RJ theory it is largely shared that doing justice involves the act(s) of *reparation*⁵⁴². Although, it is possible to say that the idea of reparation is basically a ‘must’ in the RJ literature, we must acknowledge that this concept is shaped, worked out and applied in many different ways. It overlaps, then, with other related concepts, including restitution, compensation, atonement, damages and remedies⁵⁴³. Often the term is used in reference to making amends or paying damages. In all these senses, reparation is a mechanism for redress. At the same time, except for some views⁵⁴⁴, it is not conceived as a synonymous with restitution, still less does it suggest a straightforward importation of civil law into criminal law⁵⁴⁵. Reparation seems connote a wider set of aims. It involves more than making good the damage done to property, body or psyche. According to Gwynn Davis, reparation “*should not be seen as residing solely in the offer of restitution; adequate reparation must also include some attempt to make amends for the victim’s loss of the presumption of security in his or her rights*”⁵⁴⁶. Basically, in the ‘textbook’ literature we can find at least two different concepts of reparation: material and symbolical/emotional⁵⁴⁷. According to Susan Sharpe⁵⁴⁸, material reparation often takes the form of restitution or compensation. Restitution is made by returning or replacing property, by monetary payment, or by performing direct services for the victim⁵⁴⁹. Compensation usually has a narrower meaning, referring to a financial payment that makes up for property that cannot be returned or repaired, or that acknowledges a fundamental loss. Material reparation, especially through compensation, is probably the most obvious concrete form of reparation. Monetary compensation recognizes the fact that the crime deprives its victim of the means to pursue life choices: it seeks to recognize that deprivation and to restore access either to those means which have been denied or to comparable alternative means⁵⁵⁰. Reparation in the literature discourse is not limited to material harm that can be repaired through economic compensation of loss experienced by victims⁵⁵¹. It also includes psychological and relational injuries. Crimes, as the proponents of the RJ argue, take away personal power, disrupt social bonds, and the peaceful communal equilibrium. Zehr claims that both victim and offender need to be healed following the offence⁵⁵². Forgiveness is what empowers and liberates victim, making them survivors⁵⁵³. The offender experiences the same starting a new life⁵⁵⁴. As important as material reparation can be enabling a victim to

⁵⁴² Declaration of Leuven 1997, Restorative Justice Consortium 2002; Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit.; Zehr, H., Mika, H. (1998). Fundamental Concepts of Restorative Justice. *Contemporary Justice Review*, 1, 47-55; Bazemore, G., Walgrave, L. (Eds.), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, cit.

⁵⁴³ Weitekamp, E. (1999). *The History of Restorative Justice*, cit., p. 75.

⁵⁴⁴ Sharpe, S. (2007). The idea of reparation. In G. Johnstone, D. W. Van Ness (Eds.), *Handbook of Restorative Justice* (pp. 24-41), cit., p. 27.

⁵⁴⁵ Zedner, L. (1994). Reparation and Retribution: Are They Reconcilable? cit.

⁵⁴⁶ Davis, G. (1992). *Making amends: mediation and reparation in criminal justice*. London: Routledge.

⁵⁴⁷ Retzinger, S., Scheff, T. J. (1996). Strategy for Community Conferences: Emotions and Social Bonds. In B. Galaway, J. Hudson (Eds.) *Restorative Justice: International Perspectives* (pp. 315-336), cit., p. 316.

⁵⁴⁸ Sharpe, S. (2007). The idea of reparation, cit., p. 27.

⁵⁴⁹ Van Ness, D. W, Heetderks Strong, K. (2006). *Restoring Justice*, cit., pp. 85-86.

⁵⁵⁰ See Zedner, L. (1994). Reparation and Retribution: Are They Reconcilable? cit.

⁵⁵¹ Zernova, M. (2007). *Restorative Justice: Ideals and Realities*, cit., p. 44.

⁵⁵² Zehr, H. (2005), *Changing Lenses*, cit., p. 45.

⁵⁵³ Ibidem, p. 47.

⁵⁵⁴ Ibidem, p. 50.

recover from the effects of a crime, symbolic reparation can be ever more significant⁵⁵⁵. As Strang says: “*victims’ studies show that what victims want most is not a material reparation but a symbolic one, expressed by apology or a sincere remorse*⁵⁵⁶”. This particular form of reparation has apology and forgiveness as core sequence⁵⁵⁷. Apology is largely considered in the RJ literature, as the primary form of symbolic reparation, even if expressed in different ways⁵⁵⁸. It is a condition to generate repair of bond between victim and offender, after this link has been severed by the offender’s deeds⁵⁵⁹. As Bottoms synthesizes, when victim and offender are part of the same moral/social community, a genuine apology offers the best hope for repairing the social/moral breach and making the resumption of previous set of relationships possible⁵⁶⁰. In sum, symbolic reparations are thought as ‘tools’ to make things safe again or preserve their value; to express a moral statement to the community about the right and wrong⁵⁶¹; to give recognition to the victim⁵⁶²; to locate responsibility and help victims to regain their equilibrium lost after a crime.

2.2.3.3. *Conceptual issues*

Different are the conceptual problems related to the reparation, above all whether it should be burdensome or not and its proportionateness. Barnett argues for the non-punitivity or reparation⁵⁶³ whereas Daly⁵⁶⁴ and Duff⁵⁶⁵ think the opposite. Wright and Guy Masters argue against any form of proportionality while Walgrave support the opposite stance⁵⁶⁶. Braithwaite suggests, as part of an ‘immodest’ theory of RJ that restoration might include a wide variety of positive processes and outcomes that exist outside micro-level responses to isolated, incidental harms⁵⁶⁷. First it may involve restoring offenders by creating social support, integrative opportunities, and competencies. Second it may involve rebuilding communities by renewing respect for and commitment to the criminal justice system; by fostering new social ties among community members; by enriching the deliberative democratic process; and by focusing attention on community problems so that broader institutional weaknesses, such as in school or families, can be addressed. Karp lastly, distinguishes between a ‘thin’ and ‘thick’ restoration⁵⁶⁸.

⁵⁵⁵ Sharpe, S. (2007). The idea of reparation, cit., p. 28.

⁵⁵⁶ Strang, H. (2004). *Repair or Revenge: Victims and Restorative Justice*. Oxford: Oxford University Press, p. 98.

⁵⁵⁷ Retzinger, S., Scheff, T. J. (1996). Strategy for Community Conferences, cit., p. 316.

⁵⁵⁸ Johnstone, G. (2003). Introduction: restorative approaches to criminal justice. In G. Johnstone (Ed.), *A Restorative Justice Reader* (pp. 1-19), cit., p. 11.

⁵⁵⁹ Ibidem.

⁵⁶⁰ Bottoms A. (2003). Some sociological reflections on Restorative Justice. In A. Von Hirsch, J. Roberts, A. Bottoms, K. Roach, M. Schiff (Eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Oxford: Hart Publishing.

⁵⁶¹ Zehr, H. (2003). Retributive justice, restorative justice, cit. p. 75.

⁵⁶² Strang, H. (2004). *Repair or Revenge*, cit., p. 102.

⁵⁶³ Barnett, R.E., Restitution: A New Paradigm of Criminal Justice, cit., p. 283.

⁵⁶⁴ Daly, K. (2002). *Sexual Assault and Restorative Justice*, cit., p. 72.

⁵⁶⁵ Duff, R.A. (2002). *Restorative Punishment and Punitive Restoration*. In L. Walgrave, (Ed.), *Restorative Justice and the Law* (pp. 82-100), cit., p. 83.

⁵⁶⁶ Walgrave, L. (2002). Restorative Justice and the Law: Socio-ethical and Juridical Foundations for a Systemic Approach. In L. Walgrave (Ed.), *Restorative Justice and the Law* (191-218), cit., p. 213.

⁵⁶⁷ Braithwaite, J. (1999). Assessing an Immodest Theory and a Pessimistic Theory. In M. Tonry (Ed.), *Crime and Justice: A Review of Research* (pp. 241-364). Chicago: University of Chicago Press.

⁵⁶⁸ Karp, D. R. (2001). Harm and repair: Observing restorative justice in Vermont, cit., p. 731.

The thin version of restoration can be defined as any positive act directed toward a crime victim and/or the affected community. In this version, criminal harm is offset by prosocial behavior. Yet restoration is not necessarily linked to the offence. The thick version of restoration is defined as a positive act directed at the victim and/or the affected community that is linked specifically to the identified harm of crime. Under this model, what specifically has been damaged must be repaired. This damage may be material, interpersonal, or communal. Any restoration that is insufficient to the task or tangential to the specified harm falls short of achieving this justice ideal. Therefore, identification of harm is crucial to assessment, as is the effectiveness of the strategy in repairing the damage⁵⁶⁹. At the end of this overview, it is necessary to shortly mention that in the ‘textbook’ literature there is also room for criticisms against the ‘necessity’ of reparation. Pavlich, for instance, argues that it is based on a medical perspective about the healthy and unhealthy relationships⁵⁷⁰. David Dyck asserts that it is based on the “*ideology of harmony*”⁵⁷¹, a dangerous and mythical ideal which pushes toward the annihilation of conflicts.

2.2.4. A relational justice: the ‘warm side’ of the Restorative Justice

The relevance of concepts such as ‘shame’, ‘love’, ‘relationships’, ‘healing’ and ‘forgiveness’, in the ‘textbook’ literature, is something which deserves analytical attention. This ‘warm side’, indeed, is one of the most striking features of both scholarly and practice-oriented writings on the RJ⁵⁷². Jim Consedine, for instance, stresses how “*Fairness, truth honesty compassion, respect for people are the basic tenets of an acceptable morality that flows from justice and seeks to protect and enhance the common good*”⁵⁷³. Eleanor Judah and Michael Bryant argue that “*Restorative Justice is holistic, inclusive and affirming of the dignity and worth of every human being*”⁵⁷⁴. Eric Wonche adds that “*The values of Restorative Justice begin with respect, seek reconciliation and are based on love*”⁵⁷⁵. In the same vein, Zehr and Toews emphasize that “*Restorative values can be distilled to two key underlying values- humility and respect. Furthermore, we should approach our work with wonder*”⁵⁷⁶. The ‘relational’ dimension of the RJ, seems then a recurrent quality of this way of thinking and doing justice, a specificity which cannot be overlooked.

2.2.4.1. Relationships-building

The idea that the crime damages relationships between parties and the community is often conceived as a ‘truth’ in the ‘textbook’ literature on the

⁵⁶⁹ Karp, D. R. (2001). Harm and repair: Observing restorative justice in Vermont, cit., p. 731.

⁵⁷⁰ Pavlich, G. (2005). *Governing Paradoxes of Restorative Justice*, cit., Chapter 2.

⁵⁷¹ Dyck, D. (2000). Reaching toward a structurally responsive training and practice of restorative justice. *Contemporary Justice Review*, 3(3), 239-265.

⁵⁷² Pranis, K., (2007). Restorative values. In G. Johnstone, D.W. Van Ness (Eds.), *Handbook of restorative justice* (pp. 59-74), cit., p. 61.

⁵⁷³ Consedine, J. (1999). *A Harsh Reality - A Merciful Response*. Paper presented at Reconciling and Restoring Relationships-A Responsibility for All Christians. ICCPPC World Congress. Mexico City, 13-09-1999, p. 41.

⁵⁷⁴ Judah, E. H., Bryant, M. (2004). Rethinking Criminal Justice: Retribution vs. Restoration. *Journal of Religion & Spirituality in Social Work*, 231(2), 1-6.

⁵⁷⁵ Wonsché (2004). How Does the ‘Who, What, Where and How’ Affect the Practice of Restorative Justice? In, H. Zehr, B. Toews (Eds.), *Critical Issues in Restorative Justice* (pp. 253-263). Monsey, New York and Cullompton: Criminal Justice Press and Willan, p. 255.

⁵⁷⁶ Zehr, H., Toews, B. (2004). Preface: opening the dialogue. In, H. Zehr, B. Toews (Eds.), *Critical Issues in Restorative Justice* (pp. VII-XIII), cit., p. IX.

RJ⁵⁷⁷. In the restorative interventions therefore, attention is often placed on relationships building so that victim and offender can (re)gain their sense of identity as people with a rightful place in the community⁵⁷⁸. For victims this means feeling safe from harm at the hands of this or another offender and a sense of belonging to a family and community⁵⁷⁹. For the offender it means to be supported, acknowledged and welcomed back to the community⁵⁸⁰. Daly and Stubbs identify the ‘relationship repair’ as a main goal of any RJ intervention⁵⁸¹. The RJ process can address violence between those who want to continue the relationship, it can create opportunities for relationships to be repaired. As Kay Pranis emphasizes, the importance placed on relationships within a restorative framework often means more than the single relationship between a victim and an offender, including as well the larger web of relationships in which we live⁵⁸². Accordingly, in this perspective, the harms considered in a restorative approach comprise greater social damages as well as individual harms. Crimes seem to be embedded in a community context both in terms of harms and responsibilities. In Pranis’ view, there is a fundamental human need to be in good relationships with others, assuming an interconnected and interdependent universe: “*Every part of existence is connected to every other part and impacts every other part*”⁵⁸³. The concepts of interconnection and interdependence, as driving values embodied in the RJ, are connected to the idea of mutual responsibility. As Sullivan and Tifft emblematically assert: “*We must abolish the self and instead understand ourselves as inextricably connected to and identifiable with other beings and the external world*”⁵⁸⁴. Individuals are thought to be responsible for their impact on others and on the larger whole of which they are part. Communities are responsible for the good of the whole, which includes the well-being of each member. Because all parts of the community are interdependent “*harm to one is harm to all – good for one is good for all*”⁵⁸⁵. Mutual responsibility between the individual and the community is not just a passive responsibility to do no harm but an active responsibility to support and nurture the well-being of the other in his or her unique individual needs. Consequently, the mutual responsibility at the core of the RJ does not entail the suppression of individuality to serve the group but, rather, attends to individual needs while taking into account the impact on the collective. It seeks to meet the needs of both individual and the group in a way that serves both, or that at least achieves balance between them⁵⁸⁶. In the same vein, Lois Presser and Patricia Van Voorhis argue that the RJ places relationships in a broad context, emphasizing new relationships between community’s members as much as family ties⁵⁸⁷. Relationships are at the same time considered concretely, encompassing the here and now, ‘in-session’ relationship between victim and offender, between the victim and his or her neighbor or friend, and between

⁵⁷⁷ Schiff, M. (2007). Satisfying the needs and the interests of stakeholders. In G. Johnstone, D.W. Van Ness (Eds.), *Handbook of Restorative Justice* (pp. 228-246), cit., p. 233.

⁵⁷⁸ Ibidem.

⁵⁷⁹ Ibidem.

⁵⁸⁰ Ibidem.

⁵⁸¹ Daly, K., Stubbs, J. (2006). Feminist engagement with restorative justice, cit.

⁵⁸² Pranis, K. (2002). Restorative Values and Confronting Family Violence. In J. Braithwaite, H. Strang (Eds.), *Restorative Justice and Family Violence* (pp. 23-41), cit., p. 27.

⁵⁸³ Pranis, K. (2007). Restorative values, cit., p. 65.

⁵⁸⁴ See Sullivan, D., Tifft, L. (2001). *Restorative Justice*, cit.

⁵⁸⁵ Pranis, K. (2007). Restorative values, cit., p. 65.

⁵⁸⁶ Ibidem.

⁵⁸⁷ Presser L., Van Voorhis, P. (2002). Values and Evaluation: Assessing Processes and Outcomes of Restorative Justice Programs. *Crime & Delinquency*, 48(1), 162-188.

the offender and his or her neighbor or friend. This perspective is shared by Jennifer Llewellyn, who stresses the importance of relationships as a common thread in the RJ principles and practice⁵⁸⁸. She claims that the RJ is indeed, a “*relational theory of justice*”⁵⁸⁹. That is to say, it is about more than doing justice in a different way—it is a different way of understanding what ‘doing justice’ is all about. As a relational theory of justice, the RJ is rooted in a relational understanding of human beings and the world. It starts from the fundamental assumption that human beings are inherently relational. In this perspective, human beings live in relationships with one another, but, a relational theory claims that we could not do otherwise. We are, on this account, formed in and through relationship with others. Relationship is central to who we are and who we become. This is not to say that we are just the sum of our relationships or wholly determined by them. We still make choices for ourselves and are responsible for those choices. But a relational approach reveals the extent to which our choices are made possible by and realized with the help of others. Our choices also affect others⁵⁹⁰. This relational understanding of human beings challenges the prevailing story of who we are, how we are connected, and what we need and deserve from one another⁵⁹¹. As Michael Schluter claims, applying the relational thinking to the criminal justice determines a radical departure⁵⁹². First of all it requires thinking of crimes as relationships’ breakdowns, even when the offender does not know personally the victim they are fellow citizens. Crime is only secondary an offence against the state. The relational damage of a crime occurs at level of the individuals immediately concerned- the offender and the victim. However, other relationships are also affected, including the offender’s relationship with his or her family, that of the victim with his/her family, and that of the offender’s family with the local community⁵⁹³.

2.2.4.2. *Empowerment and personal transformation*

The concept of *empowerment* is frequently described by the ‘textbook’ literature as a crucial element of any restorative intervention. As Sawin and Zehr state⁵⁹⁴, there has been considerably more debate in the field over the term ‘empowerment’. Robert Bush and Joseph Folger write: “*In simplest terms, empowerment means the restoration to individuals of a sense of their own value and strength and their own’s capacity to handle life’s problems*”⁵⁹⁵. This definition emerges from the field of mediation and some connotations may not fully apply in the RJ settings⁵⁹⁶. On the other hand, many proponents of the RJ, do relate with this definition. Morris and Maxwell start their analysis of empowerment in the RJ’s context, saying that to speak of the empowerment of offenders in conventional

⁵⁸⁸ Lewellyn, J. (2011). A relational vision of justice. Revisioning Justice. Restorative Justice Week 2011, Correctional Services Canada.

⁵⁸⁹ Ibidem.

⁵⁹⁰ Ibidem.

⁵⁹¹ Ibidem.

⁵⁹² Schluter, M. (2003). What is Relational justice? In G. Johnstone (Ed.), *A Restorative Justice Reader* (pp.303-311), cit., p. 304.

⁵⁹³ Ibidem.

⁵⁹⁴ Sawin, L.J., Zehr, H. (2007). The ideas of engagement and empowerment. In G. Johnstone, D.W. Van Ness (Eds.), *Handbook of Restorative Justice* (pp. 41-58), cit., p. 47.

⁵⁹⁵ Bush, R.B., Folger, J. (1994). *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco: Jossey-Bass, p. 2.

⁵⁹⁶ Sawin, L.J., Zehr, H. (2007). The ideas of engagement and empowerment, cit., p. 47.

criminal justice systems is a contradiction in terms⁵⁹⁷. Offenders do not participate much in court proceedings, they watch the trial passively and uninvolved. The intention has been help parties to make their own decisions by themselves, even in the criminal matters. The RJ also addresses a further concern which arises from the practice in traditional criminal justice systems: the absence of any direct contact between the victim and the offender. By bringing offenders and victims together, the RJ enables offenders to understand the consequences of their actions from the perspective of the victim, to accept responsibility for them and to actively make a commitment to some reparation. Thus, young people can feel a part of the proceedings. As far as the victim is concerned, we already discussed the RJ criticism regarding how traditional the criminal justice system has given only a marginal role to victims⁵⁹⁸. The main argument used in favor victims' representations about how offenders should be dealt with, is that they possess the information required to reach a just outcome. To do otherwise, it is argued, retains an imbalance in favor of offenders, for those making decisions about offenders can be influenced by information about their situation, for example, the impact of a particular outcome on them or their families. A thorough analysis of the concept of empowerment is offered by Charles Barton⁵⁹⁹. He states that the RJ philosophy assumes that decisions on crimes are best made by the principal parties (victim and offender) themselves, and preferably in dialogue with one another in the presence of their respective communities of care and support (typically family and friends). In this attribution of centrality to the parties lies according to Barton, the basic element of the *empowerment* in the RJ⁶⁰⁰. Thus, the fundamental difference between 'conventional' criminal justice and the RJ can be most usefully articulated by reference to the concept of empowerment. That is, empowerment of the key stakeholders in the responses of the criminal justice system to wrongful and criminal acts so that the matter is resolved in ways that are meaningful and right for them. This is a complex idea. For one thing, empowerment of this sort cannot be total empowerment where anything goes. Rather, it must be circumscribed, or bounded⁶⁰¹. The relevant restorative processes and outcomes must be consistent with society's shared and most important standards, norms, and values, not to mention the law. For another, the RJ philosophy emphasizes individual and community healing and the creation and re-establishment of social harmony and peace through the criminal justice response to the offence. Thus, the 'restorative' empowerment of the primary stakeholders in the resolution of the dispute is, not only bounded, but also directed⁶⁰². Closely linked to the concept of empowerment in the RJ literature, is the idea of *personal transformation* as a goal of a RJ intervention. Van Ness and Strong indicate as the hallmark of the RJ the "ongoing transformation⁶⁰³": "*transformation of perspective, structures and people. It begins with transformation of ourselves, reconciliation to seek, forgiveness to ask, and healing to receive*⁶⁰⁴". We look not only for justice 'out there', but must turn the lens ourselves as well-on our daily patterns of life and on our treatment of and

⁵⁹⁷ Morris, A., Maxwell, G. (1993). Juvenile justice in New Zealand: a new paradigm. *Australia & New Zealand Journal of Criminology*, 26, 72-90, p. 78.

⁵⁹⁸ Ibidem.

⁵⁹⁹ Barton, C.K. (2003). *Restorative Justice - The Empowerment Model*. Annandale: Hawkins Press.

⁶⁰⁰ Ibidem.

⁶⁰¹ Ibidem.

⁶⁰² Ibidem.

⁶⁰³ Van Ness, D. W., Heetderks Strong, K. (2006). *Restoring Justice*, cit., p. 181.

⁶⁰⁴ Ibidem.

attitudes toward others. The RJ is an invitation to renewal in communities and individuals as well as procedures and programs. The transformative potential of the RJ encounters, according to their supporters, allows them to help the parties achieve personal growth⁶⁰⁵. Umbreit argues that the humanistic approach focus on helping the parties reach the inner resolution through mediate dialogue⁶⁰⁶. This begins with the empowerment of the parties and a process of mutual recognition of the other's humanity: "*through recognition the parties voluntarily choose to become more open, attentive, and responsive to the situation of another, thereby expanding, and their perspective to include an appreciation for another's situation*"⁶⁰⁷.

2.2.4.3. *Healing, Reconciliation and Love*

The United Nations Economic and Social Council, in the preamble of the Resolution 2002/12, "Basic principles on the use of restorative justice programs in criminal matters", explicitly emphasizes "*that restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities*". Concepts such as healing and harmony are new in the criminal justice, whereas they appear crucial in the RJ theory and practice. As Annalise Acorn argues⁶⁰⁸, the RJ tries to mediate and harmonize the two presumptively conflicting realms of love and justice, offering vision of justice as "*tough love*"⁶⁰⁹. Acorn goes on saying that the RJ also places an extraordinary amount of faith in the idea that compassion itself, when extended toward and effected between victims and wrongdoers, will have an overwhelming and magically transformative power in the direction of justice⁶¹⁰. It requires we build better, more respectful, more mutual relationships than those that existed prior to the wrong. It reaches toward an idealized state of right-relationships, as its model of the just. The justice to be restored is the experience of relationships of mutuality, equality and respect in community, as fundamental trait of the RJ model⁶¹¹. Moreover the aspiration of the proponents of the RJ, to transform justice by reconciling it with love is often explicitly expressed in religious terms⁶¹². For example, Zehr speaks of the aspiration of the RJ to emulate biblical justice, because RJ "*grows out of love. Such justice is in fact an act of love which seeks to make things right. Love and justice are not opposites, nor are they in conflict. Instead, love provides for a justice which seeks first to make right*"⁶¹³. He argues that "*love must govern relationships within your own community. The boundaries of love are expanded over the course of biblical history, until Jesus urges us to love not just our own kind but also our enemies and to practice forgiveness*"⁶¹⁴. Van Ness and Strong similarly maintain that the RJ "*speaks to our own brokenness: 'I have loved you with an everlasting love; I*

⁶⁰⁵ Johnstone, G., Van Ness, D.W. (2007). The meaning of restorative justice. In G. Johnstone, D.W. Van Ness (Eds.), *Handbook of Restorative Justice* (pp. 5-23), cit., p. 10.

⁶⁰⁶ Umbreit, M. (1997). Humanistic Mediation: A Transformative Journey of Peacemaking. Retrieved 1 August 2011 from <http://2ssw.che.umn.edu/rjp/Resources/Documents/JUmb97e.PDF>

⁶⁰⁷ Pope, S.G. (1996). Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition. *Mediation Quarterly*, 13(4), 287-94, p. 288.

⁶⁰⁸ Acorn, A. (2004). *Compulsory Compassion: A Critique of Restorative Justice*. Vancouver: University of British Columbia Press, p. 22.

⁶⁰⁹ Ibidem, p.18.

⁶¹⁰ Ibidem, p.19.

⁶¹¹ Ibidem, p. 22.

⁶¹² Ibidem, p. 28.

⁶¹³ Zehr, H. (2005). *Changing lenses*, p. 139.

⁶¹⁴ Ibidem, p. 151.

have drawn you with loving-kindness. I will build you up again and you will be rebuilt⁶¹⁵”. Christopher Marshall contends that “justice in relational and liberationist terms, justice as the existence of right-relationships, where there is no exploitation, and all parties exercise appropriate power⁶¹⁶”. Braithwaite describes the restorative encounter as a “ritual of love⁶¹⁷” and the RJ as “justice administered with love⁶¹⁸”. He also stresses that “the literature on Restorative Justice Conferences shows that love is central to understanding what makes them succeed. The attitude item with the highest loading on the reintegration factor in a factor analysis of offender attitudes toward the conference was ‘during the conference did people suggest they loved you regardless of what you did?’ [...] In short, the feeling by offenders that they were in receipt of unconditional love seems a crucial ingredient for the success of circles⁶¹⁹”. Pranis explicitly claims that “Justice is healing⁶²⁰”. Injustices cause harm- to the person who experiences the injustice, to the community and to the person who commits the injustice. Justice is “a state of healthy balance, [which] requires healing of all those parties. Healing needs are guided by the values of respect, maintaining individual human dignity, non-domination⁶²¹”. Only when all parties feel “equal, respected, valued in their individual uniqueness, able to exercise constructive control in their lives and able to take responsibility for their actions, then justice is achieved⁶²²”. These beliefs are thought as not shared by mainstream of justice in Western countries. Consequently, the RJ represents much more than simply a different or more effective set of techniques. Zehr and Mika provide a list of principles to clarify what constitutes RJ, where the idea of love and healing are crucial⁶²³. They explain that the impetus for their study came from fears that “some of the programs defined as restorative do not appear to contain some of the essential elements originally associated with Restorative Justice⁶²⁴”. They fear that “retributive and punitive programs are simply being repackaged as Restorative Justice initiatives, a reflex of the growing popularity of the concept, and/or the availability of financial recourses⁶²⁵”. Their list is composed of three major headings: crime is fundamentally a violation of people and interpersonal relationships; violations create obligations and liabilities; the RJ seeks to heal and put right the wrongs⁶²⁶. Under each of these headings, a number of secondary and tertiary points specified and elaborated on the general themes providing elements, which, according to their opinion, can address the critical components of one vision of the RJ ‘practice’. In a similar way, McCold in “Restorative Justice: Variations on a theme”, identifies four principles characterizing the RJ’s mindset, which confirm its ‘spiritual’ vocation: moralization, healing, empowerment, transformation⁶²⁷.

⁶¹⁵ Van Ness, D. W., Heetderks Strong, K. (2006). *Restoring Justice*, cit., p. 249.

⁶¹⁶ Marshall, C. D. (2001). *Beyond Retribution. A New Testament Vision for Justice, Crime, and Punishment*. Grand Rapids: William B. Eerdmans Publishing Company, p. 28.

⁶¹⁷ Braithwaite, J. (2002). *Restorative Justice & Responsive Regulation*. Oxford: Oxford University Press, p. 218.

⁶¹⁸ Ibidem, p. 53.

⁶¹⁹ Ibidem, p. 218.

⁶²⁰ Pranis, K. (2007). Restorative values, cit., p. 65.

⁶²¹ Ibidem, p. 66.

⁶²² Ibidem.

⁶²³ Zehr, H., Mika, H. (1998). Fundamental Concepts of Restorative Justice. *Contemporary Justice Review*, 1, 47-55.

⁶²⁴ Ibidem, p. 47

⁶²⁵ Ibidem, p. 49.

⁶²⁶ Ibidem.

⁶²⁷ McCold, P. (1998). Restorative Justice- Variations on a Theme. In L. Walgrave (Ed.), *Restorative Justice For Juveniles: Potentialities, Risks, and Problems* (pp. 19-53). Leuven: Leuven University Press.

2.2.4.4. *Forgiveness*

The relationship between forgiveness and RJ is another ‘hot spot’ of the ‘textbook’ literature. Consedine contends that in many respects forgiveness remains central to any lasting restorative process, personal or collective, though its importance is often underrated and unspoken⁶²⁸. On the surface it sometimes seems an unfair thing to attempt given the pain caused by an injustice. Consedine states that “*practising forgiveness is a foundation stone for healthy living*⁶²⁹”, the step we need to take to be free of the ongoing negative effects of past injustice. It has transformative qualities not found elsewhere. To decide to forgive is to create a different future from one controlled by events from the past. It doesn’t mean forgetting the past. It means remembering the past in a different way, leaving one free to develop the future. One becomes re-empowered to choose a future not controlled by events from the past. Potentially one of the key parts of a RJ process is the opportunity created for forgiveness to begin. In Consedine’s perspective, forgiveness (which must remain a free choice) must be shaped in a way sensitive to victim’s needs, without excluding that offenders too can come to the point of their process where they too need to begin to forgive themselves and possibly others in order to benefit most from the process. On the other hand, Zehr explicitly disconnects forgiveness and reconciliation from the RJ⁶³⁰. He argues that “*forgiveness or reconciliation is not a primary principle or focus of restorative justice [...]. There should be no pressure to choose to forgive or to seek reconciliation*⁶³¹”. Johnstone argues that it would be necessary to pursue broader questions about the potential and limits of apology and forgiveness for reconciling conflicting parties and restoring relationships in particular communities⁶³². It would seem important, in his perspective, to find out, for specific communities, what can be forgiven and what people regard as unforgivable, what makes it easy or difficult to apologize or forgive, whether there are degrees of forgiveness, and so on⁶³³. He claims that it would be mistaken, however, to see the emphasis on apology and forgiveness in restorative conferencing as due solely to its presumed efficacy as a technique for resolving conflict and restoring peace⁶³⁴. Rather, this aspect can be placed in the context of a broader historical shift in ideas about appropriate emotional reactions to those who do wrong and cause us harm⁶³⁵. When looked at in this context, it becomes possible to see a range of ethical issues which are relevant to our estimation of the acceptability and value of the RJ. In particular, this context might alert us to issues concerning the ‘dark side’ of forgiveness.

2.2.4.5. *Shame and empathy*

In my inventory, shame is the last ‘warm emotion’ to be considered. Shame indeed, both in scholarly and practical RJ writings, is conceived as fundamental

⁶²⁸ Consedine, J., Is there are Place for Forgiveness in Restorative Justice? Retrieved 7 April 2013 from <http://www.pacli.org/journals/fjSPL/vol09no1/6.shtml> p.1

⁶²⁹ Ibidem.

⁶³⁰ Zehr, H. (2002) *The little book of restorative justice*, cit., p. 8.

⁶³¹ Ibidem.

⁶³² Johnstone, G. (1999). Restorative Justice, Shame and Forgiveness. *Liverpool Law Review*, 212(3), 197-216.

⁶³³ Ibidem.

⁶³⁴ Ibidem.

⁶³⁵ Ibidem.

topic, basically due to the work of Braithwaite⁶³⁶. Braithwaite argues that punishment should shame the wrongdoer and make him aware of his/her wrongdoing⁶³⁷. But punishment is not an end in itself: it normally aims at the restoration of the individual who is punished. Braithwaite, in fact, contends that shaming helps to reintegrate the offender into the community, rather than to stigmatize. Reintegrative shaming is disapproval dispensed within an ongoing relationship with the offender that is based on respect. It focuses on the evil of the deed rather than on the offender as evil. Stigmatization, by contrast, is shaming where bonds of respect with the offender are not sustained. The result, in this case, is the production of outcasts for whom criminality has become a master-status attribute that informs all other identity's features. Reintegrative shaming communicates disapproval of an act while conferring respect on the offender and reintegrating them back into their community of care; stigmatization is disrespectful, out-casting shaming, which treats the person as the problem⁶³⁸. This theory highlights the importance of understanding the effects of social disapproval and implies that emotions like shame and guilt are of critical importance. This approach also places considerable importance on social processes that involve the disapproval of offending. In this context, where the primary intent is to repair the harm caused by an offence, there is a strong emphasis on forms of disapproval that are reintegrative rather than stigmatizing. Braithwaite's concept of 'reintegrative shaming' does not explicitly rely upon eliciting empathy for victims from offenders, but he does see it as a desirable consequence of successful RJ's interventions⁶³⁹. Besides the seminal contribution of Braithwaite, who, exactly like Christie, elaborated his early work independently and probably ignoring the RJ movement and theory, other authors have worked more directly on the relationship between shame and the RJ. Suzanne Retzinger and Thomas Scheff, for instance, have on various occasions analyzed this relationship⁶⁴⁰. They start from the assumption that shame plays a crucial role in normal cooperative relationships, as well as in conflict⁶⁴¹. Shame and embarrassment are normal signals of a threat to any social bond. If the other person is too close in some way, one feels invaded or exposed. If the other is too far, one feels invisible or rejected. Shame is the emotional cognate of a threatened or damaged bond, just as threatened bonds are the source of shame. Normal shame is an essential building block of relationships and of community. Moving from these assumptions, they argue that the goal of any restorative 'practice' is to remove shame from the victim by making sure that all of the shame connected with the crime is accepted by the offender⁶⁴². By acknowledging his complete responsibility for the crime, the offender not only

⁶³⁶ Braithwaite, J. (1989). *Crime, Shame and Reintegration*. Cambridge: University of Cambridge Press.

⁶³⁷ Schluter, M. (1994). What is Relational Justice, cit., p. 310.

⁶³⁸ Harris, N., Walgrave, L., Braithwaite, J. (2004). Emotional dynamics in restorative conferences. *Theoretical Criminology*, 81, 191-210.

⁶³⁹ Braithwaite, J. (2002). *Restorative Justice & Responsive Regulation*, cit. p. 36

⁶⁴⁰ Retzinger, S., Scheff, T.J. (1996). *Strategy for community conferences*. In B. Galaway, J. Ryan (Eds.), *Restorative Justice*. Monsey: Criminal Justice Press; Scheff, T.J. (1994). *Microsociology*. Chicago: University of Chicago Press; Retzinger, S. (1991). *Violent Emotions*. Newbury Park: Sage Publication; Scheff, T.J., Retzinger, S. (1991). *Emotions and Violence*. Lexington: Lexington Books; Scheff T.J. (1994). *Bloody Revenge*. Boulder: Westview Press.

⁶⁴¹ Retzinger, S., Scheff, T. J. (2000). Shame and Shaming in Restorative Justice. Retrieved 1 August 2012 from <http://www.critcrim.org/redfeather/journal-pomocrim/vol-8-shaming/scheff.html>.

⁶⁴² Ibidem.

takes the first step toward rehabilitation, but also eases the suffering of the victim. For the shaming of the offender to be reintegrative, however, the facilitator must take care that it not be excessive, as already indicated. Humiliating the offender makes it almost impossible for him both to accept responsibility and to help remove shame from the victim. Recognition and encouragement of the core sequence of emotions is the way that an effective facilitator can direct the offender toward rehabilitation and help relieve the victim from suffering. According to Retzinger, manifestations of normal shame, although unpleasant, are brief, as little as a few seconds⁶⁴³. Shame, anger, and other related emotions that persist continuously for many minutes are pathological. Shame is a highly reflexive emotion, which can give rise to long-lasting feedback loops of shame. Furthermore, shame-anger loops can occur between, as well as within, participants. Indignation can be contagious, resulting in mutual and counter-indignation. Both individual and social emotional loops can last indefinitely. Continuous, relentless emotions (such as continuing embarrassment, indignation, resentment and hatred) are always spirals⁶⁴⁴.

2.2.4.6. *Warm emotions: the dark side*

All this talking about relationship-building, forgiveness and various emotions has attracted the critical attention of scholars, most notably the already mentioned Acorn. In her well-known *Compulsory Compassion*, Acorn attempts to deconstruct the ‘warm’ rhetoric of the restorative movement. Drawing from diverse sources, she challenges the fundamental assumptions of that rhetoric, such as the offenders’ capacity for significant accountability and that healing lies in the (re)encounter between victims and offenders in a restorative setting. Her skepticism emerges from several sources, including reflection on her own personal experience, her sense of moral intuition, discomfort with what she perceived as a kind of wishful-thinking ‘romanticism’ in the RJ perspectives, and analysis of the RJ concepts. With all of this in mind, Acorn seeks a critical examination of the RJ. In particular, she critically assesses the claim that the RJ can successfully bring together the values of love and compassion, on the one hand, and the requirement of justice and accountability, on the other hand. As Acorn emblematically writes: “*Indeed, right-relation, explicated in terms of respect, mutuality, reciprocity, and regard, can serve equally well as a conception of love than of justice. In fact, restorative justice theory sees the notion of right-relation as mediating and harmonizing these two presumptively conflicting realms of love and justice. It is in this distinctive move that the case for restorative justice becomes tied to the age-old human hope for the convergence of love and justice*”⁶⁴⁵.

2.3. Authoritative procedures

The last ‘component’ of the archive of the RJ, is represented by the tangle of authoritative procedural discourses. This expression denotes the accounts on specific processes, techniques, measures which set in motion concepts and strategies of the RJ. The ‘textbook’ literature is full of examples of such discourses usually defined as restorative ‘practices’. Even if the conceptual conflicts between and within these discourses seem less relevant than in the authoritative explanations and conceptualizations, many distinctions and even paradoxes are present in the configurations of the different ways of ‘doing’ RJ.

⁶⁴³ See Retzinger, S. (1991). *Violent Emotions*, cit.

⁶⁴⁴ Retzinger, S., Scheff, T. J. (2000). *Shame and Shaming in Restorative Justice*, cit.

⁶⁴⁵ Acorn, A. (2004). *Compulsory compassion*, cit., p. 22.

Nevertheless, the presence of the 'neutral' third party, with his knowledge from 'nowhere', as necessary condition to 'restore' (whatever it might mean), seems almost pervasive.

2.3.1. Victim-Offender Reconciliation Program

According to the 'textbook' literature the first recognized case of Victim-Offender Reconciliation programs (hereafter VORP) was documented in Canada, more precisely in Elmira, Ontario, in 1974⁶⁴⁶. It happened that two adolescents vandalized twenty-two properties in Elmira, creating a situation of pervasive panic in the small Mennonite community. The assigned probation officer, Mark Yantzi and a Mennonite prison support worker, Dave Worth, asked the judge for permission to arrange for the two teenagers an encounter with the people whose properties were damaged, in order to discuss possible ways of reparation. From Elmira, VORPs have become increasingly popular in Canada, and starting from the late 70s, in USA⁶⁴⁷. In few years such programs were reported operating in USA, Germany, England, New Zealand⁶⁴⁸. As for the VORP's logic, the common basic goal is to set up a space and time for people involved in a crime to meet in order to address, with help of a trained convener, the facts and feelings regarding an offence. VORP is based on the idea that following a criminal offence, the "*victim and the offender have a shared interest in righting the wrong*⁶⁴⁹". The emphasis is placed on 'reconciliation', assisting victims in the aftermath of the offence, helping offenders to change their lives and, more generally, "*humanizing the criminal justice system*⁶⁵⁰". Additionally it is possible to describe a sort of 'authoritative' VORP procedure, articulated in four phases: intake, preparation, mediation, and follow-up⁶⁵¹. People enter the VORP through referrals from different sources, (prosecutor, defense counsel, duty counsel, alternative measures, the police, the accused or the victim, etc.). Usually the person charged (often only after pleading guilty) is contacted first. This initial contact gives general information about the VORP program and sets up one-on-one meetings between the mediator and the offender, and the mediator and the victim. Separate meetings are arranged in order to provide an opportunity for the convener to introduce him/herself and to explain the sense of VORP. Both the parties are entitled to describe 'what happened', why, how etc. Each party can refuse to participate, and subsequently, the case will proceed to court⁶⁵². If both parties agree to participate in the program, arrangements are made for the face-to-face meeting. Here parties are stimulated to talk each other in order to understand origins and consequences of the crime, and to find "*humane and remorseful*

⁶⁴⁶ See Liebman, M. (2000). History and Overview of Mediation in the, cit., p. 24.

⁶⁴⁷ Coates, R. B., Gehm, J., (1984). *Victim Meets Offender: A Study of Victim-Offender Reconciliation Programs at Five Midwestern Sites*. Michigan City, Indiana: PACT Institute of Justice; Hughes, S.P., Schneider, A.L. (1989). Victim-Offender Mediation: A Survey of Program Characteristics and Perceptions of Effectiveness. *Crime and Delinquency*, 35, 217-233; Umbreit, M. (1986). Victim/Offender Mediation: A National Survey. *Federal Probation*, 50(4), 53-56.

⁶⁴⁸ Fagan, H., Gehm, J. (1993). *Victim-Offender Reconciliation and Mediation Program Directory*. Valparaiso: PACT Institute of Justice; Umbreit, M. (1995). *Mediating Interpersonal Conflicts: A Pathway to Peace*. West Concord: CPI Publishing.

⁶⁴⁹ Zernova, M. (2007). *Restorative Justice: Ideals and Realities*, cit., p. 8

⁶⁵⁰ Zehr, H. (2005). *Changing Lenses*, cit.

⁶⁵¹ The John Howard Society of Alberta (1998). Report on Victim-Offender Reconciliation programs. Retrieved 10 January 2011 from <http://www.johnhoward.ab.ca/pub/C27.htm>

⁶⁵² Niemeyer, M., Shichor, D. (1996). Preliminary Study of a Large Victim/Offender Reconciliation Program. *Federal Probation*, 60(3), 30-43.

individual is seen rather than the “frightening character” that victims so often picture⁶⁵³”. Not only fact but especially emotions are given importance and only afterwards, it is possible to negotiate a specific ‘reconciliatory’ agreement, i.e. a document which synthesizes the meetings’ outcomes and the reparations. The conveners’ task, during the process is to set up rules of ‘constructive’ communications, manage emotional outbursts and facilitate the agreement’s draft⁶⁵⁴. Once an agreement is reached, there is a period of evaluation and follow-up to determine if the negotiated restitution has been completed. If an agreement is not reached, or the negotiated settlement is not fulfilled, the case is referred back to court. According to the Fraser Region Community Justice Initiatives, “VORP seeks to effect reconciliation and understanding between victims and offenders and to facilitate the reaching of agreements between victims and offenders regarding restitution⁶⁵⁵”. The VORP process offers to people harmed/victims not only opportunity to directly and personally manage the ‘offence’ and its consequences but also “to experience a sense of closure⁶⁵⁶”, even an occasion for spiritual development and healing. VORP, at the same time, provides offenders with a chance to face their responsibilities and “to be aware of the harm suffered by victims, the human cost and consequences; an opportunity to acknowledge responsibility, and to do whatever is reasonable and possible to make amends an opportunity to take responsibility in a serious and honest way, often without being left with a criminal record, finding a fair and reasonable way to resolve the incident⁶⁵⁷”. Finally, VORP is considered to provide the community within which the offence takes place, an occasion to “develop skills which empower them to resolve present and future conflicts, giving community members opportunities to practice their conflict resolution and mediation skills as mediators in criminal and other community conflicts⁶⁵⁸”.

2.3.2. Victim-Offender Mediation

According the authoritative accounts, the idea of Victim-Offender Mediation (hereafter VOM) is nothing but a more ‘laic’ version of VORP. The concept of reconciliation, included in the VORP, was progressively abandoned in favor of a process which emphasized less that ‘religious’ component. Although numerous approaches can be considered, an ‘authoritative’ VOM’s procedure is followed for arranging the mediation settings and for the process of mediation⁶⁵⁹. VOM involves a structured encounter between the victim (or the person harmed) and offender (not necessarily after pleading guilty) facilitated by a skilled mediator⁶⁶⁰. As Van Ness and Strong report, with the assistance of the mediator, the victim and offender begin to “resolve the conflict and to construct their own approach to achieving justice in the face of their particular crime⁶⁶¹”. Umbreit stresses that both are given the opportunity to express their feelings and

⁶⁵³ Umbreit, M. (1993). Crime victims and offenders in mediation: An emerging area of social work practice. *Social Work*, 38(1), 69-73.

⁶⁵⁴ Ibidem, p. 72

⁶⁵⁵ Community Justice Initiatives Association, Victim Offender Reconciliation. Retrieved 10 January 2011 from http://www.cjibc.org/victim_reconciliation.

⁶⁵⁶ Ibidem.

⁶⁵⁷ Ibidem.

⁶⁵⁸ Ibidem.

⁶⁵⁹ Umbreit, M. (2001). *The Handbook of Victim Offender Mediation*, cit.; Liebmann, M. (2007). *Restorative Justice: How it Works*, cit.

⁶⁶⁰ Bright, C., Victim Offender Mediation. Retrieved 10 January 2011 from <http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/processes/vom>.

⁶⁶¹ Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit., p. 69.

perceptions of the offence⁶⁶². The meetings (individual with each party and then common) conclude with an attempt to reach agreement including the different reparative acts. Participation is usually voluntary⁶⁶³. As Van Ness and Strong state “no specific outcome is imposed by the mediator⁶⁶⁴”, being his/her role to “facilitate interaction between the victim and offender in which each assumes a proactive role in achieving an outcome that is perceived as fair by both⁶⁶⁵”. As Chupp highlights, “unlike the traditional criminal justice system, VOM’s involve active involvement by the victim and the offender, giving them the opportunity to mutually rectify the harm done to the victim in a process that promotes dialogue between them⁶⁶⁶”. According to Orlando, VOM aims at “addressing the underlying conflict of and resulting injuries to the victim and offender”. It emphasizes their right to participate in attempting to achieve justice rather than deferring the matter entirely to the criminal processes⁶⁶⁷. As Umbreit argues, a basic case management process in North America and in Europe typically involves four phases (like the VORP): case referral and intake, preparation for mediation, the mediation itself and any follow up necessary⁶⁶⁸. Often, a case is referred to VOM before the first hearing (so upon initiative of prosecutor/police), after a conviction or guilty plea in court decided by a judge, or while the convicted is already serving the sentence (as decided by the competent judicial authority) The mediator then contacts the parties to make sure that both are appropriate for mediation (evaluating the psychologically capability, the possibilities of a second victimization, etc.)⁶⁶⁹. The parties then meet to discuss the problematic situation experienced, to repair the damages, to define payment/monitoring schedules⁶⁷⁰. Both parties present their version of the events leading up to and the circumstances surrounding the crime⁶⁷¹. The victim has a chance to speak about the personal dimensions of victimization and loss, while the offender has a chance to express remorse and to explain circumstances surrounding his/her behaviour⁶⁷². Then the parties agree on the particular nature and extent of the harm caused by the crime in order to identify the acts necessary to repair the injury to the victim. The terms of the agreed reparation (e.g., restitution, in-kind services, etc.) are reduced to writing, along with payment and monitoring schedules⁶⁷³. Following these several steps it is seemingly possible to ‘restore’

⁶⁶² Umbreit, M., Coates, R.B., Kalanjet B. (1994). *Victim meets offender: The impact of restorative justice and mediation*, cit., pp. 8-9.

⁶⁶³ Ibidem, pp. 7-8

⁶⁶⁴ Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit., p. 69.

⁶⁶⁵ Umbreit, M., Coates, R.B., Kalanjet B. (1994). *Victim meets offender: The impact of restorative justice and mediation*, cit., p. 7.

⁶⁶⁶ Chupp, M. (1989). Reconciliation Procedures and Rationale. In M. Wright, B. Galaway (Eds.), *Mediation and Criminal Justice: Victims, Offenders and Community* (pp. 56-68). London: Sage, pp. 65-66, quoted by Bright, C., *Victim Offender Mediation*, cit.

⁶⁶⁷ Orlando, F. (1992). Mediation Involving Children in the U.S.: Legal and Ethical Conflicts. A Policy Discussion and Research Questions. In H. Messmer, H.-U. Otto (Eds.), *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation: International Research Perspectives* (pp. 333-342). Dordrecht: Kluwer Academic Publishers, p. 335, quoted by Bright, C., *Victim Offender Mediation*, cit.

⁶⁶⁸ Umbreit, M. (1996). Restorative Justice Through Mediation: The Impact of Offenders Facing Their Victims in Oakland. *Law and Social Work*, 5(1): 1-13.

⁶⁶⁹ Chupp, M. (1989). Reconciliation Procedures and Rationale, cit., pp. 58-61.

⁶⁷⁰ Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, p. 71.

⁶⁷¹ Umbreit, M. (1996). Restorative Justice Through Mediation: The Impact of Offenders Facing Their Victims in Oakland, cit.

⁶⁷² Chupp, M. (1989). Reconciliation Procedures and Rationale, cit., p. 60.

⁶⁷³ Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, p. 71.

the relationships between parties and community, achieving deterrence, healing, closure and social revitalization⁶⁷⁴.

2.3.3. Restorative Conference

The International Institute of Restorative Practices defines the *restorative conference* (RC) as “*structured meeting between offenders, victims and both parties’ family and friends, in which they deal with the consequences of the crime or wrongdoing and decide how best to repair the harm*”⁶⁷⁵. Terry O’Connell, Ben Wachtel, and Ted Wachtel describe conferencing as “*a victim-sensitive, straightforward problem-solving method that demonstrates how citizens can resolve their own problems when provided with a constructive forum to do so*”⁶⁷⁶. As for VORP and VOM, RCs are a structured way of creating space and time for dialogue between parties involved in problematic situations/crimes, privileging, besides the material reparations, the expressions of emotional states and claims otherwise neglected by the criminal proceeding. Offenders hear how their behavior has affected people. Offenders may choose to participate in a conference and begin to repair the harm they have caused by apologizing, making amends and agreeing to financial restitution or personal or community service work. Conferences hold offenders accountable while providing them with an opportunity to discard the “offender” label and be reintegrated into their community, school or workplace⁶⁷⁷.

Participation in conferences is described as voluntary. After it is determined that a conference is appropriate and offenders and victims have agreed to attend, the conference facilitator invites others affected by the incident—the family and friends of victims and offenders⁶⁷⁸. A restorative conference can be used in lieu of traditional disciplinary or justice processes, or where that is not appropriate, as a supplement to those processes⁶⁷⁹. In the approach to restorative conferences developed by O’Connell, the conference facilitator sticks to a simple written script. The facilitator keeps the conference focused but is not an active participant. In the conference the facilitator provides an opportunity to each participant to speak, beginning with asking open-ended and affective *restorative questions* of the offender. The facilitator then asks victims and their family members and friends questions that provide an opportunity to tell about the incident from their perspective and how it affected them. The offenders’ family and friends are asked to do the same⁶⁸⁰.

In addition, research shows that it consistently provides very high levels of satisfaction and sense of fairness for all participants⁶⁸¹. However, we do not mean to quibble with other approaches. As long as people experience a safe opportunity to have a meaningful discussion that helps them address the emotional and other consequences of a conflict or a wrong, the process is understood as beneficial.

⁶⁷⁴ Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, p. 71.

⁶⁷⁵ Wachtel, T. (2012). Defining Restorative Justice. Retrieved 4 April 2012 from http://www.iirp.edu/what-is-restorative-practices.php#restorative_processes

⁶⁷⁶ O’Connell, T., Wachtel, B., Wachtel, T. (1999). *Conferencing Handbook: The New Real Justice Training Manual*. Pipersville: The Piper’s Press.

⁶⁷⁷ Morris, A., Maxwell, G. (2000). Restorative Justice and Reoffending. In H. Strang, J. Braithwaite, (Eds.), *Restorative Justice: Philosophy and Practice* (pp. 93-103). Burlington: Ashgate.

⁶⁷⁸ O’Connell, T., Wachtel, B., Wachtel, T. (1999). *Conferencing Handbook*, cit.

⁶⁷⁹ Ibidem.

⁶⁸⁰ Ibidem.

⁶⁸¹ McCold, P. Wachtel, T. (1998). Community is Not A Place: A New Look At Community Justices Initiatives, cit.

2.3.4. Family Group Conference or Family Group Decision Making

Starting in New Zealand with the Children, Young Persons and Their Families Act in 1989, the *Family Group Conference* (FGC, *Family Group Decision Making* - FGDM-in USA), has become one of the most diffused restorative ‘practices’⁶⁸². FGC/FGDM brings together family support networks -relatives, neighbors and close family friends- to participate to a decision-making process involving one member of the network. As Lisa Merkel-Holguin, et al. state “*this process of engaging and empowering families to make decisions and plans for their own family members’ well-being leads to better outcomes, less conflict with professionals, more informal support and improved family functioning*”⁶⁸³. Likewise, Wachtel reports that “*the key features of the New Zealand FGC/FGDM model are preparation, information giving, and private family time, agreeing on the plan and monitoring and review*”⁶⁸⁴. What characterizes the FGC/FGDM, is the pivotal role played by the network of the victim and offender, in the decision making process. The convener of the conference facilitates the process of listening and clarifying the issues at stakes, focusing on the ‘facts’ as on the ‘emotional sides’ of the happenings. The family/network, after the listening phase, is left alone to draft a plan for the future of the victim/offender. This plan is carefully examined by the convener, looking at legal as well as safety and moral aspect of the draft and its implementation⁶⁸⁵. Professionals and family members monitor the plan’s progress, and often follow-up meetings are held⁶⁸⁶. In the New Zealand’s version, this procedure is predicated to create a system of dealing with crimes particularly sensitive to Maori youth’s situation⁶⁸⁷. FGC in fact, involves the families, including *whanau* (all those descended from common grandparents), *hapu* (clan) and *imi* (tribe) in the debate on children’s offenses. The outcome of the debate is an agreement that issues around children and young people should be resolved in partnership between the state and families. The underlying intention was to involve families, to give families responsibility to deal constructively with their children’s offending and to restrict the power of professionals, in particular the power of social welfare professionals. At the same time, it was seen to be the state’s responsibility to provide services that can support families and provide for the needs of children and young people in ways that are culturally appropriate and accessible.

2.3.5. Healing Circles

Wachtel delineates the circle as a “*versatile restorative practice that can be used proactively, to develop relationships and build community or reactively, to respond to wrongdoing, conflicts and problems*”⁶⁸⁸. Circles are decision-making processes used for wide range of purposes: conflict resolution, healing, support, information

⁶⁸² Smull, E., Wachtel, J., Wachtel, T. (2012). *Family Power: Engaging and Collaborating with Families*. Bethlehem: International Institute for Restorative Practices.

⁶⁸³ Merkel-Holguin, L., Nixon, P., Burford, G. (2003). Learning with families: A synopsis of FGDM research and evaluation in child welfare. *Protecting Children: A Professional Publication of American Humane Association*, 18(1/2), 2-11.

⁶⁸⁴ Wachtel, T. (2012). Defining Restorative Justice. Retrieved 4 April 2012 from http://www.iirp.edu/what-is-restorative-practices.php#fgc_fgdm

⁶⁸⁵ Ibidem.

⁶⁸⁶ Morris, A., Maxwell, G. (1998). Restorative Justice in New Zealand: Family Group Conferences as a Case Study. *Western Criminology Review*, 1(1). Retrieved 14 May 2012 from <http://wcr.sonoma.edu/copyright.html>

⁶⁸⁷ Ibidem.

⁶⁸⁸ Wachtel, T. (2012). Defining Restorative Justice. Retrieved 4 April 2012 from http://www.iirp.edu/what-is-restorative-practices.php#restorative_processes

exchange, relationship development etc. Two are the circles to take into consideration: healing circles and sentencing circles. Healing circles (but probably the same concept of circle) are found in the Native American cultures of the United States and Canada, and are used there for many purposes⁶⁸⁹. Their adaptation to the criminal justice system developed in the 1980s as First Nations peoples of the Yukon and local justice officials attempted to build closer ties between the community and the formal justice system. In 1991, Judge Barry Stuart of the Yukon Territorial Court introduced the sentencing circle as a means of sharing the justice process with the community⁶⁹⁰. Usually the healing circle's procedure follows three alternative formats: *sequential*, *non-sequential* and *fishbowl-like*⁶⁹¹. In the sequential model, a person speaks at a time, and the opportunity to speak moves in one direction around the circle. Each person must wait to speak until his or her turn, and no one may interrupt. Optionally, a *talking piece* - a small object that is easily held and passed from person to person- may be used to facilitate this process. Only the person who is holding the talking piece has the right to speak⁶⁹². The *sequential circle* is typically organized around subjects identified by the circle facilitator and maximizes opportunities for listening more than talking, as the way to reach relevant decisions⁶⁹³. The *facilitator*, exactly like the different figures of conveners so far described, "*guides but does not control*"⁶⁹⁴. Moreover the same presence of the facilitator can be discharged in favor of a 'non-leader' circle's procedure where participants speak sequentially, in turn, moving around the circle as many times as necessary, until all have said what they want to say. *Non-sequential circles* are often more freely structured than a sequential circle. Conversation may proceed from one person to another without a fixed order. Problem-solving circles, for example, may simply be focused around an issue that is to be solved but allow anyone to speak. One person in the group may record the group's ideas or decisions. A sequential restorative circle may be used instead of a formal conference to respond to wrongdoing or a conflict or problem. The restorative circle is less formal because it does not typically specify victims and offenders and does not follow a script. However, it may employ some of the *restorative questions* from within the conferencing script⁶⁹⁵. The last circle's procedural model is the '*fishbowl*'⁶⁹⁶. According to Wachtel consists in the combination of sequential and non-sequential elements and two different circles: the 'inner' which discusses the issue with a sequential or non-sequential activity and the 'external' composed of observers who might indirectly benefit from the 'inner' discussion⁶⁹⁷.

⁶⁸⁹Parker, L. Circles. Retrieved 24 October 2012 from <http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/processes/circles>.

⁶⁹⁰ Bazemore, G., Umbreit, M. (1999). *Conferences, Circles, Boards, and Mediations: Restorative Justice and Citizen Involvement in the Response to Youth Crime*. Ft. Lauderdale: The Balanced and Restorative Justice Project. Retrieved 24 October 2012 from http://www.rjp.umn.edu/img/assets/18492/Conferences_Circles_Boards_Mediations.PDF

⁶⁹¹ Wachtel, T. (2012). *Defining Restorative Justice*, cit.

⁶⁹² Costello, B., Wachtel, J., Wachtel, T. (2010). *Restorative Circles in Schools: Building Community and Enhancing Learning*. Bethlehem, PA: International Institute for Restorative Practices.

⁶⁹³ Ibidem.

⁶⁹⁴ Pranis, K., Stuart, B., Wedge, M. (2003). *Peacemaking Circles: From Crime to Community*. St. Paul: Living Justice Press.

⁶⁹⁵ Costello, B., Wachtel, J., Wachtel, T. (2010). *Restorative Circles in Schools*, cit.

⁶⁹⁶ Wachtel, T. (2012). *Defining Restorative Justice*. Retrieved 4 April 2012 from http://www.iirp.edu/what-is-restorative-practices.php#restorative_processes

⁶⁹⁷ Costello, B., Wachtel, J., Wachtel, T. (2010). *Restorative Circles in Schools*, cit.

2.3.6. Sentencing Circles

According to the Native Law Centre the sentencing circle is a “*method of dealing with members of the community that have broken the law*”⁶⁹⁸. The referral’s conditions are the guilty plea and the assumption of responsibility by the offender. The sentencing circle involve a wide range of crime’s stakeholders (victim, victim supporters, the offender, offender supporters, judge and court personnel, prosecutor, defense counsel, police, and all interested community members), who come to speak, understand and address the offences’ causes, reasons and consequences, in order to find together the ways to achieve assist healing and to prevent future offences. As for the procedural model, sentencing circles are usually articulated in four phases: offenders’ application to participate in process; a healing circle for the victim and the offender; a sentencing circle aiming at drafting a sentencing plan; follow-up⁶⁹⁹. When a case is sent to the sentencing circle, after the offender’s guilty plea and his/her specific application, both the offender and the victim are prepared by information meetings on the circle’s sense and procedure⁷⁰⁰. Separate healing circles for the victim and offender follow the information meetings. The core phase of the circle is the sentencing meeting, aiming at determining the plan for the offender, drafted by agreement of all the circles’ participants. The final step is the tracking of the progress of the plan⁷⁰¹. To be remarked that circles’ participation is voluntary and that the ‘leader’ of the process is always a trained ‘keeper’. As with other restorative ‘practices’, circles provide a space and time for encounter between the victim and the offender, with a strong involvement of the community in the decision making process. Participants typically speak as they pass a ‘talking piece’ around the circle⁷⁰². The goal of the process is to bring healing and understanding to the victim and the offender. Reinforcing this goal of healing is the empowerment of the community to be involved in deciding what is to be done in the particular case and to address underlying problems that may have led to the crime. As Bazemore and Umbreit emphasize “*in reaching these goals, the circle process builds on the values of respect, honesty, listening, truth, sharing, and others*”⁷⁰³.

2.3.7. Truth and Reconciliation Commissions

Truth and Reconciliation Commissions (TRCs) are court-like RJ bodies⁷⁰⁴ aiming at discovering and revealing past wrongdoing by a state or non-state actors and at resolving conflict left over from the past. They are usually set up by states emerging from periods of internal unrest, civil war, or dictatorship. South Africa’s Truth and Reconciliation Commission (SATRC) has been considered the most successful model among the varieties of TRC spreading

⁶⁹⁸ Native Law Centre (1998). Justice as Healing. A Newsletter on Aboriginal Concepts of Justice, 3(3). Retrieved 4 April 2012 from http://www.usask.ca/nativelaw/publications/jah/1998/Sent_Circle_Guidelines.pdf

⁶⁹⁹ Ibidem.

⁷⁰⁰ Ibidem.

⁷⁰¹ Ibidem.

⁷⁰² Bazemore, G., Umbreit, M. (2002). A Comparison of Four Restorative Conferencing Models by the Office of Juvenile Justice and Delinquency Prevention. In J. G. Perry (Ed.), *Repairing Communities Through Restorative Justice* (pp. 67-105). Lanham: American Correctional Association, p. 6.

⁷⁰³ Ibidem.

⁷⁰⁴ Summary Gade, C. B. N. (2013). Restorative justice and the South African Truth and Reconciliation Process. *South African Journal of Philosophy*, 32(1), 10-35.

around the world during the last twenty years⁷⁰⁵, often based on the SATRC example⁷⁰⁶. The creation of the SATRC was meant to deal with the apartheid's atrocities, granting amnesty, upon the discovery of truth as way to 'restore' and secure a peaceful transition to democracy⁷⁰⁷. Witnesses who were identified as victims of gross human rights violations were invited to give statements about their experiences at *ad hoc* public hearings. Perpetrators of violence could also give testimony and request amnesty from both civil and criminal prosecution. A basic form of restoration in the SATRC was the apology. This model, in fact, along with The Human Rights Violation Committee and The Amnesty Committee, included also The Reparation and Rehabilitation Committee, responsible for making recommendations to the government regarding the provision of reparations and rehabilitation to victims, offering 'a new lens' through which to view the task of dealing with the past. The SATRC received approximately 20,000 statements from victims and their families and approximately 7,000 applications for amnesty⁷⁰⁸. As of November 2000, the SATRC had granted 849 amnesties, but rejected 5,392 applicants. The most common reason for denying an application is that no political motive was attached to the action for which amnesty was sought. The release of the Final Report of the SATRC on 29 October 1998 generated a controversy and protest over the Commission and its activities. Debate continued through the end of 2000, focused mainly on the issue of providing compensation for the victims who came forward to tell their stories. The RJ's basis of the SATRC was seen in the traditional African concept of 'Ubuntu', which derives from the Xhosa expression "*Umuntu ngumuntu ngabantu*" (People are people through other people). Ubuntu conveys the view that our humanity is inextricably bound up in others' humanity, stressing the priority of 'restorative' as opposed to 'retributive' ways of dealing with crimes and mass atrocities⁷⁰⁹. Or, as Desmond Tutu has described Ubuntu: "*Ubuntu says I am human only because you are human. If I undermine your humanity I dehumanize myself. You must do what you can to maintain this great harmony, which is perpetually undermined by resentment, anger, desire for vengeance. That's why African jurisprudence is restorative rather than retributive*"⁷¹⁰.

2.4. From the archive of the Restorative Justice to the discursive formation

In the previous pages I tried to chart the occurrence of three different kinds of authoritative discourses on the RJ, elaborated from the 'textbook' body of explanations, conceptualizations and procedures. The re-construction and combination of the authoritative discourses composes a pluralistic archive, drawing upon which it is possible to elaborate the mechanisms which govern

⁷⁰⁵ Fullard, M., Rousseau, N. (2009). Truth Telling, Identities, and Power in South Africa and Guatemala. Retrieved 4 April 2013 from <http://ictj.org/publication/truth-telling-identities-and-power-south-africa-and-guatemala>.

⁷⁰⁶ Llewellyn, J. J., Howse, R. (1999). Institutions for Restorative Justice: The South African Truth and Reconciliation Commission. *The University of Toronto Law Journal*, 49(3), 355-388, p. 365.

⁷⁰⁷ Rwelamira, M. R. (1996). Punishing Past Human Rights Violations: Considerations in the South African Context. In M. R. Rwelamira, G. Werle (Eds.), *Confronting Past Injustices: Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany* (pp. 3-19). Durban: Butterworths.

⁷⁰⁸ Sarkin, J. (1997). The Truth and Reconciliation Commission in South Africa. *Commonwealth Law Bulletin*, 23(1-2), 528-542.

⁷⁰⁹ Tutu, D. (1999). *No Future Without Forgiveness*. New York: Doubleday.

⁷¹⁰ Tutu, D. quoted by Wilson, R. A. (2001). *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. New York: Cambridge University Press, p. 9.

the ‘sayable and thinkable’ on the RJ, its conditions for establishing truth and falsehood, in a given historical moment. The archive in fact, is not simply a trace or record of something that happens somewhere else neither the expression of an individual or collective consciousness (though it does determine the range of possible subject positions). It is indeed a ‘dispersion’ of statements organized in wider authoritative discourses, which go through various historical transformations and appropriations, creating a tension field within which the *true* meanings of the RJ are re-produced. At the same time, the archive is an instrument of power and a tool of subjugation, by marginalizing ‘deviant’ discourses or treating them as false or illegitimate. It works as a system of ‘normalization’, directing in advance possible statements on the RJ, drawing the ‘frame’ of future and legitimate histories and theories on this subject as well as their applications. In the next chapter, I will articulate the discursive processes which make possible the archive, i.e. the discursive formation of the RJ as “*theoretical twin*”⁷¹¹ of the archive. The task, then, is to understand how the discursive events constituting the archive of the RJ are made instead of others and the specific power relations inherent in archival work⁷¹². As Foucault states, the archive: “[...] *is no longer a monument for future memory, but a document for possible use [...] it functions as a procedure of objectification and subjection*”⁷¹³. As a center of production of meaning, the archive is informed by situated power relations, consonant with wider political rationalities, as I will argue in the chapter 4.

⁷¹¹ Laermans, R., Gielen P. (2007). *Image & Narrative*: Online Magazine of the Visual Narrative, p. 17. Retrieved 2 May 2012 from www.imageandnarrative.be/inarchive/digital_archive/laermans_gielen.htm

⁷¹² Ibidem.

⁷¹³ Foucault, M. (1977). *Discipline and punishment*, cit., pp. 191-192

CHAPTER 3

THE RESTORATIVE JUSTICE AS DISCURSIVE FORMATION

“The world is not the accomplice of our knowledge; there is no pre-discursive providence which disposes the world in our favor”⁷¹⁴

3.0. Introductory remarks

The general objective of this chapter is to re-construct the ‘discursive formation’ that governs and shapes what has been possible to think, say and experience about the RJ, in a given historical moment (the last thirty years ca.), in western societies. The discursive formation is the ‘dynamic’ side of the archive, implying the re-elaboration and meticulous scrutiny of the authoritative discourses, as well as their historical ‘set-in-motion’. From an analytical perspective, the discursive formation is the ‘viewpoint’ which allows us to see how the archive of the RJ brings into existence the very objects it purports to describe, justify and explain, i.e. how those objects have become intelligible/possible⁷¹⁵. Due to the general idea of problematization, the panoply of archaeological concepts and tools is here widely re-defined. To begin with, I understand the internal components of a discursive formation (i.e. the discursive objects) not as ‘rules’ but as relatively stable configurations of meanings, with specific histories. We can imagine different types of discursive objects. I will focus only on a selection of ‘concepts’ and ‘strategies’ constituting the basic ‘units’ of the archive of the RJ. Their analysis follows two steps. First, to re-construct the ‘surfaces of emergence’ of the different discursive objects. This means to identify and describe the cultural constructs whose articulation has made intelligible/possible the objects’ emergence. The second step is to re-construct the surfaces’ combinations, conflicts and overlaps. I will look at the mechanisms that govern the relationships between the discursive objects, defining certain legitimate ways of speaking about the RJ, delimitating the sayable and the thinkable in its histories, concepts and practices. The combination of this two phases (as well as its result), *is* the discursive formation of the RJ, the identification and ‘dynamization’ of the archive’s basic units. The idea which underlies this section is that the emergence of the archive of the RJ depends on certain complex, relational, discursive conditions. There is not a ‘natural’ or ‘essential’ archive of the RJ, but actually a plethora of discursive objects not defined by their internal, conceptual nature, but by their exterior relations, triangulations or juxtapositions with other objects in a ‘field of exteriority’. Moreover, these objects do not belong *exclusively* to the archive of the RJ, being actually shared by other discourses and organizable in many, other archives.

3.1. The discursive objects of the archive and their surfaces of emergence

The “*surfaces of emergence*”⁷¹⁶ are pre-existing discourses which make understandable/possible the concepts (as basic elements of meanings) and strategies (as themes or theories formed by certain discursive organizations of concepts, and certain types of enunciation) which compose the basic units of the authoritative discourses organized in and by the archive of the RJ. The

⁷¹⁴ Foucault, M. (1981). *The order of discourse*, cit., p. 67.

⁷¹⁵ Howarth, D. (2002). *An Archaeology of Political Discourse? Evaluating Michel Foucault’s Explanation and Critique of Ideology*, cit., p. 121.

⁷¹⁶ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 41.

surfaces of emergence constitute in fact, the epistemic/conceptual tension field from which has been possible to make sense of contingent and precarious discursive practices which in turn have ‘fed’ back that field. As already stated in the chapter 1, the surfaces make possible the shift from ‘non-discursive’ and non-intelligible practices (e.g. the Kitchner experiment) to ‘discursive’ and then intelligible realities (the RJ’s concepts and strategies). At this point, the problematization’s guidelines must be integrated by a complementary methodological term. In fact, each surface consists not of one isolated discourse but of a cluster of different narratives under a common rubric. How to justify such a practice of *articulation*⁷¹⁷? As Ernesto Laclau and Chantal Mouffe put it, an articulation is “*any practice establishing a relation among elements such that their identity is modified as a result of the articulatory practice*”⁷¹⁸. Through articulation, a discourse establishes a *closure*, a temporary halt to the fluctuations of meaning of elements. This closure is, however, never permanent⁷¹⁹. Here, the rationale of the articulation is threefold. First I articulate only discourses characterized by basic commonalities in their discursive objects. This also implies a simultaneous historical emergence of the discourses articulated. Second, there is a political element which binds the discourses. These discourses are usually cultural/scientific ‘in nature’ but always political in ‘purpose’, they are object of political struggles as well as instruments of power. Third, the articulation must present an analytical benefit. To be articulated discourses must facilitate the analysis of the archive’s basic components.

3.1.1. Victimology/Crime victims’ movement

The first surface of emergence corresponds to the articulation of the *crime victims movement’s* claims with the discipline of *victimology*. As John Dussich emphasizes, victimology is an academic scientific discipline which describes phenomena and causal relationships related to victimizations⁷²⁰. This includes events leading to the victimization, the victim’s experience, its aftermath and the actions taken by society in response to these misdeeds⁷²¹. Simultaneous to the development of this new discipline in the criminological area, were the early victim programs that spread throughout the world, starting in the mid-1970s in USA, led by the first crime victims’ movements. These were of two general types: grass roots efforts which directly and quickly supported all types of crime victims; and, prosecutor-based victim/witness programs mainly concerned with helping prosecutors successfully try defendants and ease the suffering of victims as they fulfilled their witness responsibilities. Furthermore, legal regulations flourished under the pressure of such movements (e.g. the California’s Victim Compensation program in 1965 or the institutionalization of the national victimization surveys in 1966)⁷²². This dynamic evolution of

⁷¹⁷ See Laclau, E., Mouffe, C. (1985). *Hegemony and socialist strategy: towards a radical democratic politics*. London and New York: Verso; Fairclough, N. (1995). *Critical Discourse Analysis*. Boston: Addison Wesley.

⁷¹⁸ Laclau, E., Mouffe, C. (1985). *Hegemony and socialist strategy: towards a radical democratic politics*, cit., p. 105.

⁷¹⁹ Ibidem, p. 110.

⁷²⁰ Dussich, J. (2006). Victimology. Past, present and future. UNAFEI Resource Material Series, 81, 116-129. Tokyo: United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, p. 130. Retrieved 21 May 2012 from http://www.unafei.or.jp/english/pdf/RS_No70/No70_12VE_Dussich.pdf

⁷²¹ Ibidem, p. 130.

⁷²² Dussich, J. (2003). History, Overview and Analysis of American Victimology and Victim Services Education. Exploration of Higher Education and Professional Practice. Proceedings of the First American Symposium on Victimology, 9/10-1-2003, Kansas City, Kansas, p. 6.

victimology and victim programs in the early 1970s was followed by the education of university students interested in understanding victimization and the training of practitioners wanting to facilitate victim recovery⁷²³. The relationships between the RJ mainstream theories and those two phenomena have been widely acknowledged by the proponents of the RJ. The Prison Fellowship International, for instance, states that “*Restorative justice is a new movement in the fields of victimology and criminology*”⁷²⁴ and Thomas Marshall explicitly says: “*Nevertheless, it was part of a successful movement to make the interests of victims more apparent and more influential, to be incorporated even into academic criminology as a distinct sub-discipline of ‘victimology’*”⁷²⁵. As Pemberton et al. notice: “*Restorative justice and victims are often mentioned in the same sentence, chapter or book*”⁷²⁶. Moreover, this perspective has been espoused by pieces of legislation such as the preambles to the UN draft declaration on the RJ or the EU Framework decision on the position of victims within the criminal procedure. The issue at stake here is to elaborate the connection between the RJ and the victimology/victims’ movements, developing a thorough analysis of archive’s structure in light of that discursive articulation.

3.1.1.1. *Victimology and crime victims’ movements*

It is widely accepted in literature, that the concept of a science to study victims and the word ‘victimology’ has its origin with the early writings of Benjamin Mendelsohn. His article “A New Branch of Bio-Psycho-Social Science, Victimology” is considered a groundbreaking work in the field⁷²⁷. Furthermore, the first systematic treatment of victims of crime appeared in 1948 in Hans Von Hentig’s book *The Criminal and His Victim*, where was suggested a new dynamic and dyadic approach to crime aiming an taking equally into account the criminal and the victim⁷²⁸. The publication of Schafer’s work, *The Victim and His Criminal*⁷²⁹, was the first to emerge in America which gave support to a course fully dedicated to victimology. From these pioneering works, victimology has become a wide and tangled field of study and research. As Rob Mawby and Sandra Walklate⁷³⁰ states, within this extensive academic landscape, might be identified some primary ‘types’ of victimological research. They differentiated between three main strands: positive victimology, radical victimology, and critical victimology⁷³¹. Another attempt of simplifying the many strands in victimological reflection was made by Jan Van Dijk⁷³². He

Retrieved 11 November 2012 from <http://www.american-society-victimology.us/documents/SymposiumOnVictimologyJan2003.pdf>

⁷²³ Ibidem, p. 7.

⁷²⁴ The Prison Fellowship International (2003). What is Restorative Justice? Restorative Justice Briefing Paper, 1. Retrieved 1 April 2012 from <http://www.pfi.org/cjr/restorative-justice/introduction-to-restorative-justice-practice-and-outcomes/briefings/what-is-restorative-justice>

⁷²⁵ Marshall, T. F. (1995). The evolution of restorative justice in Britain, cit., p. 22.

⁷²⁶ Pemberton, A., Winkel, F. W., Groenhuijsen, M.S. (2007). Taking Victims Seriously in Restorative Justice. *International Perspectives in Victimology*, 31, 4-14, pp. 4-5.

⁷²⁷ Mendelsohn, B. (1956). Une Nouvelle Branche de la Science Bio-Psycho-Sociale: La Victimologie. *Revue Internationale de Criminologie et de Police Technique*, 2, 782-789.

⁷²⁸ Fattah, E.F. (2000). Victimology: Past, Present and Future. *Criminologie*, 33(1), 17-46.

⁷²⁹ Schafer, S. (1968). *The Victim and His Criminal. A Study in Functional Responsibility*. New York: Random House.

⁷³⁰ Mawby, R.I., Walklate, S. (1994). *Critical Victimology, International Perspectives*. London: Sage.

⁷³¹ Ibidem.

⁷³² Hentig von, H. (1941). Remarks on the interaction of perpetrator and victim. *Journal of the American institute of criminal law and criminology*, 31, 303-309; Hentig von, H. (1948). *The criminal and his victim, studies in the sociobiology of crime*. New York: Anchor Books.

suggested the distinction between rehabilitation, feminist and insurance, as the most recurrent ideological perspectives in victimology⁷³³. Simultaneous to the first scientific attempts to ‘ground’ the academic field of victimology, it is possible to notice the development of early victim programs spreading throughout the USA in the mid-1970s (mainly grass roots efforts supporting specific victims and prosecutor based victim/witness programs⁷³⁴). As Dussich argues, the much higher public profile accorded to victims starting from the 70s, was the result of a long-lasting process to which various factors have contributed⁷³⁵. First, the interests of victims were initially championed by penal reformers. The most notable example is Margery Fry⁷³⁶, who campaigned to promote the idea of victim compensation as something to which they should be entitled both from the state and also, by way of reparation, from their offender. This kind of work helped at the penal policy level, to shape some of the first victim-focused reforms of the criminal justice system, using as a starting point the reconceptualization of crime, as not (simply) a violation of the legal order but (also) as a violation of the rights of the individual victim. A second important factor in the process of increasing the visibility of victims relates to the role of the media during the late 1960s. A third source was a growing sensitization during the 1960s and 1970s towards the existence and needs of particular groups of ‘vulnerable’ victims: notably women who experienced domestic violence, sexually assaulted or raped and children who were the victims of abuse. The last factor relates to the introduction and increasingly widespread use of victim surveys on the part of both central and local government agencies⁷³⁷. Victimology and crime victims’ movement claims are clearly two distinct phenomena, with different theoretical and historical features. At the same time cannot be overlooked the wide range of commonalities which motivates the articulation of them under the common label of surface of emergence of the archive of the RJ. The mutual conditioning of these two phenomena has been already hinted. In short, victimology became the academic/scientific ‘shield’ of crime victims’ movement, backing up their often ‘emotional’ claims, while the victims’ movement became the ‘political’ way, for victimologists, to deploy on the ground their theories⁷³⁸.

3.1.1.2. *Discursive objects (concepts): identity of victims in the Restorative Justice*

The fundamental concept of ‘victim’ as used both by authoritative histories and conceptualizations of the RJ, seems mainly be understandable looking at the surface under analysis. By ‘victim’ I mean also some basic understandings of its role in the history of criminal justice. ‘Victims’ are often represented in the archive as a cohesive, united ensemble of people⁷³⁹. The idea of victim as

⁷³³ Dijk van, J.J.M. (1999). Introducing victimology. Retrieved 4 June 2011 from <http://www.victimology.nl>, p. 60.

⁷³⁴ Dussich, J. (2003). History, Overview and Analysis of American Victimology and Victim Services Education, cit., p. 7.

⁷³⁵ See Dignan, J. (2005). *Understanding victims and restorative justice*. Berkshire: Open University Press, Chapter 1.

⁷³⁶ Fry, M. (1951). *Arms of the Law*. Toronto: Longmans, Green & Company.

⁷³⁷ President’s Commission on Law Enforcement and the Administration of Justice, 1967.

⁷³⁸ Peters, T., Aertsen, I., Robert, L., Lauwaert, K. (2003). From Community Sanctions to Restorative Justice- The Belgian Example. UNAFEI Resource Material Series, 61, 180-211. Tokyo: United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, p. 189. Retrieved 5 May 2012 from www.unafei.or.jp/pdf/no61/ch12.pdf.

⁷³⁹ Zehr, H. (2005). *Changing Lenses*, cit., p. 29.

‘anthropological category’, is a typical conceptual structure of victimological and victims’ movement stances. In victimological works, in fact, we usually find descriptions of “*crime victim*⁷⁴⁰” as a person who has been physically, financially or emotionally injured and/or had their property taken or damaged by someone committing a crime, while “*general victim*⁷⁴¹” is a person who has injured by an event, an organization or a natural phenomenon. In both cases victim is a category of people with specific socio-cultural, psychological, economical features. This understanding of the victim’s identity finds more precisely its surface in the so called *positive victimology*. The key characteristic of this strand in victimology, as David Miers reported, is the attitude to look for the factors, inherent in individuals, which contribute to victimization, focusing especially on interpersonal crimes⁷⁴². The main issues are why some persons become victims more so than others, what are the consequences of the victimization and its impact on societies and legal regulations⁷⁴³. Even though the ‘positivists’ focus on the victim of crime as an object of research, “*their concern is largely confined to offences of violence between non-strangers to which the victim is considered to have contributed*⁷⁴⁴”. They consider the term victim as being self-evident by the mere fact of suffering an injury by an act defined as ‘criminal offence’, without any consideration to the social meanings attached to the label of ‘victim’⁷⁴⁵. This understanding of ‘victim’ is quite widespread in the RJ authoritative discourses. The victim is here conceived as an individual characterized by ‘personal’ factors such as vulnerability/weaknesses, disempowered and in need of recognition. The authoritative discourses do not aim at deconstructing the status of ‘victim’ as a legal category, taking for granted its nature as an actor with unique qualities, not depending on the processes of criminalization. Nevertheless, as we have seen in the previous chapter, it does exist in the RJ authoritative discourses a set of perspectives on the identity of the crime victims looking at political, social and cultural factors which underlie the criminalization processes and the definition of the victim’s identity. Broadly speaking, these alternative understandings seem influenced by the victimological strand known as ‘critical’. According to Mawby and Walklate, *critical victimology*, as a projection of the ‘critical’ criminological reflection, is an attempt to examine the wider social context of victimology⁷⁴⁶. It involves the analysis of the policy response and service delivery to victims of crime. This perspective constitutes an attempt to appreciate the generative mechanisms which set the material conditions for becoming victim in a specific cultural, social, gendered and economic environment⁷⁴⁷. The efforts to de-construct the cohesive image of the victim in the RJ accounts, can be appreciated in light of the ‘import’ of critical victimology’s concepts and strategies within the archive of the RJ, where slowly have been reaching an expansive endorsement by scholars, advocates and practitioners. As it seems clearer at the end of this analysis, the (contested) identity of the victim in the

⁷⁴⁰ Dussich, J. (2006). *Victimology. Past, present and future*, cit.

⁷⁴¹ Ibidem.

⁷⁴² Miers, D. (1989). Positivist victimology: a critique. *International review of victimology*, 2, 19-50.

⁷⁴³ Ziegenhagen, E. (1977). *Victims, crime and social control*. New York: Praeger.

⁷⁴⁴ Miers, D. (1989). Positivist victimology: a critique, cit.

⁷⁴⁵ Ben-David, S. (1986). The social function of the ‘career victim’. In K. Miyazawa, M. Ohya (Eds.), *Victimology in comparative perspective* (pp. 33-43). Tokyo: Seibundo.

⁷⁴⁶ Mawby, R.I., Walklate, S. (1994). *Critical Victimology, International Perspectives*, cit.

⁷⁴⁷ Ben-David, S. (2000). Needed: Victim’s victimology. In P.C. Friday, G.F. Kirchhoff (Eds.), *Victimology at the transition from the 20th to the 21st century* (pp. 55-72). Monchengladbach: Shaker Verlag & WSVP, p. 66.

archive of the RJ appears understandable only if located within the tension field created by the intersection between positive victimology, crime victims' movement claims and critical victimology. This academic/political surface makes explicable the tensions recurrent among the proponents of the RJ regarding 'who is' the victim: they refer to different traditions of criminological thought, only partially 'operationalized' by the crime victims' movements. The critical victimology, in fact, does not appear historically implemented by any 'critical' crime victims' movement. This helps to realize the limited grip of the critical perspective regarding the victims' identity on the application of the RJ. Hardly often indeed, in the statements of intentions of the organizations involved in RJ services it is possible to find reference to that critical perspective. They actually embrace the 'positive' stance on being victim, elaborating and applying techniques and form of communications informed by the popularization of this specific victimological strand.

3.1.1.3. *The victims' needs*

The concept of victims' *needs* (paralleling that of victims' *rights*), is another 'pillar' of archive of the RJ comprehensible from the victimology/victims' movement viewpoint. This shift in orientation has aimed at changing the victim's perception. It illustrates a change of focus: instead of the generally proclaimed victim's rights, the focal point is now shifted to the victim's self-awareness and understanding of one's individual needs⁷⁴⁸. As Sarah Ben-David emphatically states "*the 'old paradigm' (primarily addressing the victim's rights) can be observed as an expression of pure morality in relation to the victim, whereas the new paradigm (addressing the victim's needs) demonstrates consideration and care for morality*⁷⁴⁹". The 'new paradigm' involves not only the protection of the victim's rights and interests but also the provisions to meet the victim's needs. The current victimological theory articulates this new paradigm both in terms of direct action and of academic/scientific field of interest. From a 'practical' point of view, the 'need-perspective' attempts to modify the perception of victimization, shifting it from the individual to the institutional level and creating a different cultural and social understanding of crime. The victims' movement played a remarkable role in promoting this shift from the 'old' to the 'new' perspective, acknowledged by the worldwide legal implementation of the recognition and protection of victims needs along with (and as a basis for) victims' rights. From the 1980s, especially in Anglo-Saxon countries, victim assistance programs have been focusing on satisfying victims' needs, often with private/public partnerships. Furthermore, several legal acts have been embracing this shift between the 'old' and 'new' paradigm in approaching victims. Examples were the Recommendation (77)27 of the Committee of Ministers of the Council of Europe on the compensation of victims of crime, the Recommendation (85)11 concerning the position of the victim in the framework of criminal law and procedure, the Recommendation (87)21 concerning assistance to victims and the prevention of victimization and the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985). More recently the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, has widely endorsed the centrality of victims' needs (e.g. par. 38, 46, 51). The content of

⁷⁴⁸ Ben-David, S. (2000). *Needed: Victim's victimology*, cit., p. 66.

⁷⁴⁹ *Ibidem*.

such legal acts is deeply informed by the victimological studies on the victims' needs or by the victim movements' claims towards the criminal justice system, appearing the conceptual basis for the authoritative claims of RJ regarding the necessity of focusing on victims' needs.

3.1.1.4. *Relationships, harm and community*

The relationship victim/offender in the archive of RJ, seems partially informed by the surface under analysis. Victimology, in fact, is normally portrayed as the study of victims as caught up in “*asymmetric relationships or situations*”⁷⁵⁰. ‘Asymmetry’ refers to unbalanced, exploitative, oppressive, and destructive, alienating situations, often entailing suffering. This asymmetry, but even more generally the focus on the relationships victim/offender, finds an interesting match especially in the authoritative conceptualizations of the RJ. Also the notion of ‘harm’ finds a partial emergence from the surface under analysis. In victimology the ‘harm’ is the trigger event of victimization. Accordingly, the categorizations of harm in victimological contributions are typical. Harm to a victim can be physical, psychological, economic, or spiritual. It can concern ‘primary victims’, but also ‘secondary’ and ‘tertiary’ victims. We have already seen how the ‘harm’ is one of the typical ‘trigger event’ of restorative interventions. Moreover, the refined archive’s classifications of harms, seemingly emerge from the sharp victimological distinctions aforementioned. Finally, the community, as crime stakeholder, has partial conceptual ‘roots’ in this surface. As already said in victimology the term ‘crime victim’ generally refers to any person, group, or entity who has suffered injury or loss due to illegal activity. Victimological accounts often starts from the legal definition of victim as person who has suffered direct, or threatened, physical, emotional or pecuniary harm as a result of the commission of a crime; or in the case of a victim being an institutional entity, any of the same harms by an individual or authorized representative of another entity. Besides ‘primary’ crime victims, there are also ‘secondary’ crime victims who experience the harm second hand, such as intimate partners or significant others of rape victims or children of a battered woman. It may also make sense to talk about ‘tertiary’ crime victims who experience the harm vicariously, such as through media accounts or from watching television⁷⁵¹. The concepts of ‘secondary’ or ‘tertiary’ victims appear as possible the ‘roots’ of the community as a fundamental stakeholder in the archive of the RJ. We might in fact see the insertion of community within the number of crime stakeholders to involve and satisfy, as discursively related to the victimological discourses.

3.1.1.5. *Discursive objects (strategies): Victims’ participation as ‘benchmark’ of the Restorative Justice*

The discursive strategy of constructing the fulfillment of victim needs as a benchmark for the criminal justice’s transformation can be considered surfacing the combination victimology/victims movements. For decades victimologists have been telling that victims want to participate in the criminal justice system⁷⁵². However, just how victims want to participate and the

⁷⁵⁰ Dussich, J. (2006). Victimology. Past, present and future, cit., pp. 119-120.

⁷⁵¹ See Burgess, A.W., Regehr, C., Roberts, A. (2010). *Victimology: Theories and Applications*. Sudbury: Jones & Bartlett, Chapter 3.

⁷⁵² Wemmers, J.-A. (2007). Victim participation and therapeutic jurisprudence: a canadian perspective, Paper Presented at the Workshop on Victim Participation in Justice and Therapeutic Jurisprudence: A Comparative Analysis, 8/9-3-2007. International Institute for the

consequences of their participation in the criminal justice system have been and continue to be fervently debated⁷⁵³. The victimological literature usually distinguishes between two types of victims' participation, namely *active* participation (where the victim has decision-making power) and *passive* participation (where victims have no power over decisions but are consulted and informed of the developments in their case)⁷⁵⁴. Ian Edwards, in his well-known analysis of victim involvement in criminal proceedings, identifies four types participation⁷⁵⁵. The first type of participation is *control*. According to Edwards, control implies that criminal justice authorities are obliged to seek and apply the victim's preference. This type of participation is essentially the same as active participation where the victim is the decision-maker. The second type is *consultation*. This type of participation compels criminal justice authorities to seek and consider victims' preferences. Consultation coincides with what is also referred to as passive participation. The third type is *information provision*, in which authorities are required to seek and consider victim information. According to Edwards, this type of participation obliges victims to supply information and does not give them a possibility of choice. This type of participation is essentially expressed by the role of the witness in criminal justice: victims are obliged to testify if requested. Edward's fourth type of participation is *expression*. Here, victims have the option of supplying information or expressing emotions and authorities are obliged to allow victim expression but they are not obliged to consider it. Victim participation of some kind is now a requirement of legal proceedings according to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), the Council of Europe Recommendations for Victims of Crime ((85) 11), the Council Framework Decision of the European Union (2001/220/HA)) or the Directive 2012/29/EU. To use the participation as the way to introduce a new idea of thinking and doing justice is a basic strategy of the RJ's accounts which emerges from this basic tenet of victimological studies and victims' movements political claims. In the chapter 2 the 'authoritative' conceptualizations of victims' needs, for instance, seem largely understandable if put in the context of the long-lasting debate, in victimological literature and among crime victims' advocates, about participation as basic and encompassing goal of any victim sensitive theory and program.

3.1.1.6. *Being restored*

The strategy of describing the victim as 'harmed subject' to be 'restored' seems discursively 'rooted' in the language of the victims assistance programs devised by the victims' movements and scientifically endorsed by victimologists. Many examples can be provided. The distinction between 'victim assistance' and 'victim recovery'⁷⁵⁶, shared by both victimology and victims' movements,

Sociology of Law, Oñati, Spain, p. 2. Retrieved 15 April 2012 from http://www.cicc.umontreal.ca/recherche/victimologie/paper_onati.pdf

⁷⁵³ Ashworth, A. (1993). Victim impact statements and sentencing. *Criminal Law Review*, July, 498-509; Erez, E. (1999). Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice. *Criminal Law Review*, 545-556; Edwards, I., (2004). An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making. *British Journal of Criminology*, 44, 967-982.

⁷⁵⁴ Wemmers, J.-A. (2003). *Introduction à la victimologie*. Montreal: Les Presses de l'Université de Montréal.

⁷⁵⁵ Edwards, I., (2004). An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making, cit.

⁷⁵⁶ Dussich, J. (2006). Victimology. Past, present and future, cit., p. 118.

appears crucial in regard. Victim assistance, support or services are described by the scientific literature as those activities which are applied in response to victimizations with the intention of relieving suffering and facilitating recovery⁷⁵⁷. This includes offering information, assessments, individual interventions, case advocacy, system advocacy, public policy and program development. Victim recovery is the resumption of the same or better level of functionality as was enjoyed prior to victimization. The victim as 'harmed subject' and in need of restoration, seems a projection of the victimological idea of victim as individual abused in his/her level of mental health and wellbeing. The *recovery* is the basic need of such a stereotypical victim. Recovery means first try to regain their previous level of functioning plus learn from the crime episode and exceed the previous level of functionality. To be recovered suggests that a person has at least regained their prior level of well-being and at best, has exceeded it. This state may be measured by identifying their previous mental condition and determining if they have at least regained that prior status using the criteria of⁷⁵⁸: trust in others, autonomy of self, control over personal situations, successful relationships, etc. The 'victim trauma' appears then the reference point of the victimological operative interventions, recurrent in the authoritative accounts. Trauma includes emotional and physical experiences that produce pain and injuries. Emotional injury is a normal response to an extremely abnormal event. It results from the pairing of a painful or frightening emotional experience with a specific memory which emerges and has a long-lasting effect on the life of a person. Basically, the victimological enterprise combined with victims' movement claims, works out a discursive strategy composed by two elements: the first is the concept of victim as 'harmed subject', the second is the purported necessity of treating the harm focusing on the assumed complex nature of it, through 'recovery' as basic need of the harmed subject. This discursive strategy is crucial for the archive of the RJ, which relies on the two-term structure as one of its basic conceptual tenets.

3.1.1.7. *Measuring victims' satisfaction as criteria of justification*

Another pervasive discursive strategy is the purported necessity of measuring the *satisfaction* of victims, as justification for the RJ's interventions. As Barton Poulson emphasizes "*within the field of restorative justice, at least three voices may be heard: the voice of theory, the voice of practice, and the voice of research*⁷⁵⁹". In fact, scholars of the RJ since the late 70s have gradually elaborated more complex evaluative analysis regarding the practical outcomes of RJ programs around the world. The empirical researches which aim at measuring and evaluating RJ programs' application, often see in the satisfaction of victims, variously operationalized, a crucial reference point, the most important variable. The system of measuring victims' satisfaction is possible also thanks to specific scientific tools elaborated within the victimological enterprise. Particularly, considering official police statistics as incomplete, victimologists started a wide use of quantitative and qualitative surveys about crimes committed against more or less large groups of people. 'Victims survey' is a periodic data collection and analysis process conducted usually on behalf of a government entity, within the general population, to study information about crime victims

⁷⁵⁷ Dussich, J. (2006). *Victimology. Past, present and future*, cit., p. 117.

⁷⁵⁸ *Ibidem*, p. 118.

⁷⁵⁹ Poulson, B. (2003). A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice. *Utah Law Review*, 1, 167-203.

regardless of whether they reported their victimization to the police or not⁷⁶⁰. It typically uses a face-to-face or telephone interview (or sent questionnaire) and covers demographics, attitudes about crime and details about the victimizations experienced over the previous six months. Victimologists then estimate victimization rates and risks, investigate how criminal justice system handles the problem, examine societal response to problem. What is particularly relevant here, is that they crucially use the satisfaction of victims as a benchmark for evaluating as successful or not any form intervention to relieve victims' conditions. Moreover, the victims' movements 'normative' use of the surveys' outcomes has works as one of the most widespread ways to criticize the results of the criminal justice as well as to justify alternatives to it. Both the 'descriptive' and 'normative' uses of the victim surveys, help us to understand the general acknowledgement in the archive of the 'victim satisfaction' as the main variable in evaluating and promoting the RJ.

3.1.2. Communitarianism/Abolitionism

The second surface of emergence is given by the articulation of two different but synchronic discourses: the penal abolitionism and the re-birth of communitarian philosophy in the late 1970s. The relationships between abolitionism(s), communitarianism(s) and the RJ are, once again, somehow already emphasized by the proponents of the RJ. For instance, Pemberton has stressed⁷⁶¹ that the "*Restorative Justice is seen by many as a possible replacement of the criminal justice system. Howard Zehr's paradigm shift and the differences between vertical justice and new, horizontal justice are a prime example, as well as the redefinition of crime as a conflict between individuals in Christie's classic 'Conflicts as property'*". Thorburn in the same vein has stated⁷⁶² that "*restorative justice has much more in common with the prison abolition movement than it does with mainstream rehabilitation accounts of criminal justice'*". Moreover, we have already seen as some of the 'founding fathers' of the RJ, are usually linked to the abolitionism movement and theories (Christie above all). Additionally, there is wide acknowledgement that a version of communitarianism which relates directly to the practices of criminal justice, has directly contributed to build up the momentum of the RJ⁷⁶³ (this is the case of Braithwaite⁷⁶⁴). In the next sections I will place emphasis on the discursive objects (concepts and strategies) which gain epistemic/conceptual consistence within the articulation of abolitionism and communitarianism.

3.1.2.1. *Toward the deinstitutionalization and de-professionalization*

As Vincenzo Ruggiero pointed out "*penal abolitionism is not merely a theory of decarceration, but an approach, a perspective, a methodology, and most of all a way of*

⁷⁶⁰ Dussich, J. (2006). *Victimology. Past, present and future*, cit., p. 119.

⁷⁶¹ Pemberton, A. (2004). *Abolitionist tendencies and victims' needs in RJ*. Paper presented at the Third Conference of the European Forum for Victim-Offender Mediation and Restorative Justice "Restorative Justice in Europe: Where are we heading?", Budapest, Hungary, 14/16-10-2004. Retrieved 22 September 2010 from www.euforumrj.org/readingroom/Budapest/workshop10.pdf

⁷⁶² Thorburn, M. (2005). *The Impossible Dreams and Modest Reality of Restorative Justice*. *Queen's Law Journal*, 30(2), 863-882.

⁷⁶³ Pemberton, A. (2004). *Abolitionist tendencies and victims' needs in RJ*, cit., p. 32.

⁷⁶⁴ See Braithwaite, J. (1989). *Crime, Shame and Reintegration*, cit.; Braithwaite, J., Pettit, P. (1990). *Not Just Deserts: A Republican Theory of Criminal Justice*, cit.; Braithwaite, J., Mugford, S. (1994). *Conditions of Successful Reintegration Ceremonies*. *British Journal Of Criminology*, 34(2), 139-171.

seeing⁷⁶⁵”. Abolitionists put into question the validity of the guilt-and-punishment frame of reference as well as hitherto well-accepted beliefs about the relevance of terms like ‘crime’, ‘dangerousness’, and many others⁷⁶⁶. Abolitionism is a critique of the reference schemes of criminal law and criminal justice, but also a sensitizing theory on the issues of total institutions in general and prisons in particular. More than a paradigm it seems an incomplete, competing perspective on social control in contemporary societies. A useful classification to understand the wide range of theories included under the common rubric of abolitionism, is to distinguish between a ‘restricted’ and a ‘wider’ sense of this term⁷⁶⁷. Abolitionism in a restricted sense deals with the abolition of a specific aspect of the penal system (e.g. capital punishment). This type of abolitionism is close to decriminalization in the sense of those processes by which the ‘competence’ of the penal system to apply sanctions as a reaction to a certain form of conduct is withdrawn in respect of that specific comportment. We speak of abolitionism in a wider sense when not a part of the criminal justice system but the system as a whole is seen as a social problem in itself and the abolition of this total system is considered to be the only adequate solution to this problem. It is emphasized the importance of a comparison between the penal law system, the administrative and the civil law systems with regard to their conditions of application, ‘controllability’ and their immediately intended ‘products’. As I will argue, the ‘wider’ sense of abolitionism contributes to make understandable various crucial tenets of the archive of the RJ, first of all the main reasons why the criminal justice system is problematic as a system of social control. The ‘wider’ abolitionism critique in fact, is placed on the fact that the criminal justice causes unnecessary and unequally distributed suffering, ‘stealing’ the conflict, marginalizing people directly involved and resulting difficult to control. The replacement of the centralized state administration of penal justice by decentralized forms of autonomous conflict regulation, whereby those directly involved have more influence, follows as a natural consequence of that awareness. The ‘wider’ abolitionist perspective opens up space to the emergence of concepts and strategies of positive reform of criminal justice on which the RJ authoritative discourses will be based. In the same period the abolitionism(s) were starting to spread in academia throughout Europe, a ‘complementary’ process takes place: the rise of new versions of communitarianism in political and social philosophy and the gradual diffusion of reforms inspired by them⁷⁶⁸. Broadly speaking, communitarianism is a range of philosophical positions sharing the critics to traditional liberalism as motivating atomistic tendencies of modern liberal societies, emphasizing social responsibility and promoting policies meant to minimize the erosion of communal life in an increasingly fragmented society⁷⁶⁹.

⁷⁶⁵ Ruggiero, V. (2011). An Abolitionist View of Restorative Justice. Retrieved 4 April 2003 from https://eprints.mdx.ac.uk/7831/1/Ruggiero-_Abolitionist_View_of_Restorative_Justice.pdf, p. 1 (or. ed. Ruggiero, V. (2011). An Abolitionist View of Restorative Justice. *International Journal of Law, Crime and Justice*, 39(2), 100-110).

⁷⁶⁶ Ibidem, p. 10.

⁷⁶⁷ Ibidem, pp. 1-2.

⁷⁶⁸ A ‘unified’ version of communitarianism does not exist. Here I try to reconstruct some common features among the several versions of such a magmatic philosophical stance, generalizing them as a framework, which ends up being, needless to say, just an analytical tool.

⁷⁶⁹ Modern-day communitarianism began started in the Anglo-American academia as a critical reaction to John Rawls’ *A Theory of Justice* Rawls, 1971 (Harvard University Press). Drawing primarily upon the insights of Aristotle and Hegel, political philosophers such as Alasdair MacIntyre, Michael Sandel, Charles Taylor and Michael Walzer disputed Rawls’ assumption that the principal task of government is to secure and distribute fairly the liberties and

Communitarians examine the ways shared conceptions of the good (values) are formed, transmitted, justified, and enforced. They therefore focus on communities and moral dialogues within them, on how values and traditions, are historically transmitted and enforced. The sources of social cohesion are often found in shared assumptions so deeply engrained in everyday life that they do not have to be articulated: in folkways, customs, prejudices⁷⁷⁰. Especially in ‘moralistic’ and ‘responsive’ communitarian perspectives, individuals are considered as closely involved in interdependencies which have special qualities of mutual help and trust. The interdependencies have symbolic significance in the culture of group loyalties which take precedence over individual interests⁷⁷¹. Communitarianism can be taken to stand for a highly socialized view of people in which their moral position can be understood only in terms of their social relationships. Oversimplifying the articulation between abolitionism (in wider sense) and communitarianism (particularly the moralistic versions), we might say that abolitionist perspective is essentially ‘critical’ (providing arguments on the replacement of criminal justice as system of social control) while the communitarian is a ‘constructive’ (offering arguments on the ground of new forms of social control). Their point of connection is framing and constructing the ‘community’ as a subject with a crucial role in leading forms of social control which emphasize participation, normative integration and common values/beliefs/principles. The meaning(s) of ‘community’ in the archive of the RJ, appears then understandable if referred to the combination of the idea of community as alternative to the state in dealing with social conflicts (abolitionism) and the idea of social interdependency worked out within the communitarian perspectives. Community is the ‘third way’, a kind of ‘antagonist’ to the state but also to the social atomization processes caused by the privatization of public spaces. In the authoritative discourses the binary opposition between the state (and criminal justice system as its expression), and a ‘virtual’ space radically different, independent and even alternative is considered evident and unquestionable. Even if in the authoritative discourses hold different conceptualizations of ‘community’, this basic conceptual configuration is a recurrent reference point (also for the critical works as a critical target). In this perspective, also the different versions of the ‘trigger event’ appear related to that complex discursive combination. Particularly, the concepts of ‘conflict’ and ‘harm’ are understandable in light of the idea of ‘problematic situation’, an expression which replaces -in the abolitionist view- the identifying expressions such as offence, crime and criminal act. At the same time the traditional means of state interventions on social conflicts, appear to be an invasion of the community’s domain, an attempt of colonization, able to cause damages and social losses⁷⁷².

3.1.2.2. *Discursive objects (concepts): Community as third actor*

‘Community’ is a key concept in any authoritative understanding of the RJ. Its surface of emergence seems to be the tension field created by the intersection of ‘moralistic’ communitarian claims associated with the critique to the criminal justice worked out by the ‘wider-sense’ abolitionism. Communitarians generally make several claims about the nature of persons and human identity not least

economic resources individuals need to lead freely chosen lives. Other well-known communitarians are Alan Ehrenhalt, Robert Putnam, Amitai Etzioni and William A. Galston.

⁷⁷⁰ Lasch, C. (1994). *The Revolt of the Elites and the Betrayal of Democracy*. New York: Norton, p. 92.

⁷⁷¹ Braithwaite, J. (1989). *Crime, Shame and Reintegration*, cit, p. 100.

⁷⁷² Christie, N. (1977). Conflicts as property, cit.

that persons are embedded in communities. They claim that the self is constituted to some extent through a community that provides shared values, interests or practices. A person's individual values are formed in the social context of these communities and often pursued through communal attachments. The separate individual does not make up the basic moral unit of society in this scheme of things, but rather is attached to other individuals in community to whom he or she is somewhat dependent. The appeal of communitarianism is based on the purported growing perception that there has been an "erosion of communal life in contemporary society, and that this is associated in some way with a decline in standards of behaviour and relationships together with increasing crime and social exclusion"⁷⁷³. Particularly, as Amitai Etzioni states, "'responsive' communitarians stress that individuals who are well-integrated into communities are better able to reason and act in responsible ways than isolated individuals, but add that if social pressure to conform rises to high levels, it will undermine the individual self"⁷⁷⁴. Communitarians look at social institutions (families, schools, communities, community of communities) as the providers of the moral infrastructure of society, being their societal role to "introduce values and begin the development of the moral self of individuals"⁷⁷⁵. The acknowledgement of 'community' as an essential component within the formation of individual identity and as the means for citizens to achieve improved levels of personal well-being⁷⁷⁶, is crucial concept for the archive of the RJ. Particular attention must be drawn to the work, so far just hinted, of Etzioni in regard, as leading proponent of the 'moralistic' communitarian viewpoint⁷⁷⁷. Etzioni argues that community can be defined with reasonable precision. Two are its main characteristics: first, a web of affect-laden relationships among a group of individuals, relationships that often crisscross and reinforce one another (as opposed to one-one individual relationship); and second, a measure of commitment to a set of shared values, norms, and meanings, and a shared history and identity -in short, a particular culture. Etzioni constructs his case for communitarianism around a fundamental assertion that individuals should have a key role in furnishing the needs of their neighbors. He thus argues that individuals, once they have met their personal responsibilities, have an obligation to promote the wellbeing of relatives, friends and others in the various communities to which they belong⁷⁷⁸. These include all types of social groups, such as schools, organizations, families, neighborhoods and interest groups⁷⁷⁹. This case, for the application of reciprocity in care and compassion, is a common theme in communitarian literature, as theorists argue for a balance between individual rights and collective obligations and responsibilities⁷⁸⁰. In this perspective, we

⁷⁷³ Arthur, J. (2003). *Community Involvement and Communitarian Theory*. Retrieved 6 February 2012 from http://www.citized.info/pdf/commarticles/Community_Involvement_James_Arthur.pdf, pp. 1-2.

⁷⁷⁴ Etzioni, A. (2003). Communitarianism. In K. Christensen, D. Levinson, (Eds.), *Encyclopedia of Community: From the Village to the Virtual World*, Vol. 1. (pp. 224-228). London: Sage.

⁷⁷⁵ Ibidem.

⁷⁷⁶ Dixon, J., Dogan, R., Sanderson, A. (2005). Community and communitarianism: A philosophical investigation. *Community Development Journal*, 40(1), 4-16.

⁷⁷⁷ See Etzioni, A. (1995). *The Spirit of Community: rights, responsibilities and the communitarian agenda*. London: Harper Collins; Etzioni, A. (1997). *The New Golden Rule: community and morality in a democratic society*. New York: Basic Books.

⁷⁷⁸ Etzioni, A. (1995). *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda*, cit., p. 144.

⁷⁷⁹ Ibidem, pp. 119-122.

⁷⁸⁰ Bellah, R.N. (1995/6). Community Properly Understood: A Defence of Democratic Communitarianism. *The Responsive Community*, 6(1), 1-5; Sandel, M. (1984). The Procedural

can acknowledge that an individual may influence another person's understanding of reality, but at the same time we must accept that the social world is conceivable only through the medium of group discourses and categories and that even moments of deep self-understanding are conditioned by communal bonds. As David Pearson states, "to earn the appellation 'community' [...] groups must be able to exert moral suasion and extract a measure of compliance from their members. That is, communities are necessarily, indeed, by definition, coercive as well as moral, threatening their members with the stick of sanctions if they stray, offering them the carrot of certainty and stability if they don't"⁷⁸¹. This idea of community as a mobile net of relationships morally laden, with a 'responsive' potential, intrinsically difficult to further specify, is a recurrent element in the archive of the RJ. This is because the community conceived by communitarian (but also abolitionist) approaches, precursor of the archive's one, is not a static entity, quantitatively definable. 'Community' is the product of a shift in the conceptualization of social control and citizenship that involves the construction of a third 'virtual' reality between state and individuals; a subject whose identity is factiously drawn upon not better identifiable customs, habits, attitude of a borderless collectivity. The point then, is not on 'who is the community', as restorativists keep wondering, but to highlight the reference of the archive of the RJ to a theoretical perspective that seeks to lessen the focus on individual rights and increase the focus on supposedly communal needs.

3.1.2.3. Trigger events: problematic situations, conflict and harm

The concept of 'crime' has, to some extent, begun to be replaced within the archive, by terms such as 'harm', 'conflict' or 'dispute'⁷⁸². Hudson and Galaway, for example, assert as the first fundamental propositions of the RJ that "*crime is primarily conflict between individuals [...] only secondarily a violation against the state*"⁷⁸³. Umbreit and Roberts⁷⁸⁴ have even coined the seemingly tautological term 'criminal conflict', while Herman Bianchi⁷⁸⁵ simply prefers 'wrongs'. Although this tendency has been criticized for a number of reasons ("*harm and legal wrongdoing are not identical*"⁷⁸⁶, "*victims of rape or even burglaries do not want to be known as 'disputants'*"⁷⁸⁷) its influence appears to have become more pervasive. Problematic situations, conflicts and harms as objects of 'restorative' thinking and interventions, seemingly find their surface of emergence in the communitarian/abolitionist construct. Already in the 1940s Edwin Sutherland's work on white-collar crime introduced a definition of crime based

Republic and the Unencumbered Self. *Political Theory*, 12(1), 81-96; Tam, H. (1998). *Communitarianism: A New Agenda for Politics and Citizenship*. Basingstoke: Palgrave Macmillan.

⁷⁸¹ Pearson, D.E. (1995). Community and sociology. *Society*, 32(5), 44-50, p. 47.

⁷⁸² Graef, R. (2000). Why Restorative Justice? cit., p. 30; Zehr, H. (2005). *Changing lenses*, cit. p. 89.

⁷⁸³ Hudson, J., Galaway, B. (1996). Introduction. In: B. Galaway and J. Hudson (Eds.), *Restorative Justice: International Perspectives* (pp. 1-14), cit. p. 2.

⁷⁸⁴ Umbreit, M., Roberts, A. (1996). *Mediation of Criminal Conflict in England: An Assessment Of Services In Coventry And Leeds*. St Paul: School of Social Work, University of Minnesota, p. 6

⁷⁸⁵ Bianchi, H. (1994). *Justice As Sanctuary: Toward a New System of Crime Control*. Bloomington: Indiana University Press, p. 100.

⁷⁸⁶ Duff, R. A. (2003). Probation, Punishment And Restorative Justice: Should All Turism Be Engaged In Punishment? *The Howard Journal*, 42(2), 181-197, pp. 185- 186; Von Hirsch, A., Ashworth, A., Shearing, C. (2003). Specifying Aims and Limits for Restorative Justice: A 'Making Amends' Model? In A. Von Hirsch, J. Roberts, A. Bottoms, K. Roach, M. Schiff (Eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (pp. 21-41). Oxford: Hart Publishing, pp. 22-23.

⁷⁸⁷ Zehr, H. (2002). *The Little Book Of Restorative Justice*, cit., p. 9.

on concepts such as “*injury to the state*” and acts “*socially harmful*”⁷⁸⁸. In the 1970s radical criminologists advocated a further deepening of the criminological agenda to include racism, sexism and economic exploitation. In many respects this important debate was foreclosed by the growing hegemony of realist approaches. But it is a debate that remains unfinished. By the 1990s numerous ideas of ‘harm’ begun to circulate on the margins of criminological inquiry⁷⁸⁹. This idea of ‘socially harmful’ acts to be addressed with specific means is stated in a stronger way by abolitionism and finds its frame of meaning within communitarian claims of individual dependence on community. In the abolitionist perspective(s) the “*categories of ‘crime’ are given by the criminal justice system rather than by victims or society in general. This makes it necessary to abandon the notion of ‘crime’ as a tool in the conceptual framework of criminology. Crime has no ontological reality. Crime is not the object but the product of criminal policy. Criminalization is one of the many ways of constructing social reality*”⁷⁹⁰. The idea of ‘crime’ as an essentially coercive imposition by the state on an incommensurable diversity of ‘problematic situations’ according to a totalizing narrative of justice, rationality, and citizenship, prominently features abolitionist works⁷⁹¹. For Louk Hulsman, for instance, the task is then to study the problematic situations (an expression which replaces the identifying expression of crime) and to identify the contradictions at the heart of the various criminal justice systems⁷⁹². In other words, abolitionists are interested no longer in the enduring issue of the causes of criminality, but rather in the possibility of identifying suitably criteria for the definition of communicative channels between reasoning actors involved in the problematic situations. This idea of defining and supporting an interpretation of criminality as state-dependent opposed to a socially ‘rooted’ understanding of problematic situations as the issue to ‘communicatively’ address, lies at the core of the archive of the RJ as a crucial concept. In this perspective, the current approach to crime control, the definition of crime and the justification of punishment need a reconceptualization in a broader social sense. ‘Crime’ is understood as a social construction, to be analyzed as a myth of everyday life⁷⁹³. As a myth, crime serves to maintain political power relations and lends legitimacy to the expansion of the crime control apparatus and the intensification of surveillance and control. It justifies inequality and relative deprivation⁷⁹⁴. For these reasons it is necessary to appreciate the crime as a social event, a socially constructed phenomenon respect to which any simplified reaction in the form of punishment becomes problematic. Bearing in mind the abolitionist critique to the concept of crime, it is possible to understand the authoritative idea of ‘trigger event’ in the archive. Crime, in these perspectives, is nothing but the legal conceptualization of broken relationships rooted in the community. If we are to find a solution to the problems of crime, the authoritative conceptualizations insist that we must attend to their social causes and mend the broken relationships between

⁷⁸⁸ Sutherland, E. H. (1949). *White Collar Crime*. New York: Holt, Rinehart & Winston.

⁷⁸⁹ Muncie, J., McLaughlin, E. (1996). *The Problem of Crime*. London: Sage/Open University.

⁷⁹⁰ Hulsman, L. (1986), Critical Criminology and the Concept of Crime. *Contemporary Crises*, 10(1), 63-80, pp. 34-35.

⁷⁹¹ Lea, J. (1998). Criminology and Postmodernity. In P. Walton, J. Young (Eds.), *The New Criminology Revisited*. London: Macmillan.

⁷⁹² Ceretti, A., A Homage to Louk Hulsman. Retrieved 4 April 2012 from <http://www.defensesociale.org/revista2003/04.pdf>, p. 50.

⁷⁹³ Hess, H. (1986). Kriminalität als Alltagsmythos. Ein Plädoyer dafür, Kriminologie als Ideologiekritik zu betreiben. *Kriminologisches Journal*, 18(1), 22-44.

⁷⁹⁴ Ibidem, pp. 24-25.

offender, victim and their community. The central contention of abolitionism, 'endorsed' by the RJ, is that events and behaviours that are criminalized only make up a minute part of the events and behaviours that can be so defined and that crime is not the object, but the product of crime control philosophies and institutions⁷⁹⁵.

3.1.2.4. *Discursive objects (strategies): The dichotomy State/Community*

One of the basic discursive strategies around which the archive of the RJ is built up, is the opposition of the 'state' and the 'community' as two obviously conceptually and empirically distinct entities. Both these collective subjects are considered the 'environments' of ways of thinking and doing justice, sharply opposed. Moreover, it is a widespread authoritative tenet that the state has been threatening the community, invading its areas of traditional action. To think of the dichotomy state/community as premise of the RJ's histories, justifications and practices, is a discursive strategy which presents its conditions of intelligibility/possibility in the abolitionist/communitarian construct. To question the ethical caliber of a state that intentionally and systematically inflicts pain upon other people is a well-known abolitionist claim which can be 'completed' by the communitarian understanding of the community as the radical alternative to the state and its apparatuses to maintain power and exercise social control⁷⁹⁶. Notably, Christie's and Hulsman's abolitionist perspectives contain many implicit references to Jürgen Habermas' idea of the "colonization of the life-world"⁷⁹⁷. The de-colonization of criminal justice's 'system rationality' is in fact, another target of the abolitionist critique. Though the tension Habermas observes between systems and life-worlds does not lead him directly to a rejection of the criminal justice system, he does argue against the degeneration of criminal justice into a state instrument of crime control in which the critical dimension of power is ignored. Thus, penal instrumentalism is another object of abolition which can be derived from Habermas. A further aim of abolition is related to the constitution of moral discourse. In Western, neo-liberal societies, values like care and empathy are delegated to the private sphere and are thereby excluded from public, or political, ethics. These latter ethics are dominated by abstract, so-called 'masculine' notions such as rights, duties and respect, which outrule more subjective, contextually determined 'feminine' notions such as care and empathy⁷⁹⁸. The dominance of abstract approaches of rights results in a morality that is oriented towards a generalized other, whereas a feminist approach is oriented towards a concrete other. Thus, abolitionism also implies the abolition of the 'masculine', individualistic, neo-liberal values upon which our penal systems are built⁷⁹⁹. The dichotomy of masculine/feminine ethics appears as projection of the state/community opposition, and as such reproduced within the archive of the RJ as opposition between criminal justice (state-masculine)/RJ (community-feminine).

⁷⁹⁵ Haan de, W. (1987). Fuzzy Morals and Flakey Politics: The Coming Out of Critical Criminology. *Journal of Law and Society*, 14(3), 321-332.

⁷⁹⁶ Swaaningen van, R., Abolitionism. The Sage Dictionary of Criminology. Retrieved 4 April 2012 from http://www.sagepub.com/upm-data/49750_McLaughlin_and_Muncie_'A'_Chapter.pdf, p.1

⁷⁹⁷ Habermas, J. (1987). *Theory of Communicative Action*. Vol. 2, *Lifeworld and System: A Critique of Functionalist Reason*. Boston: Beacon Press.

⁷⁹⁸ See Daly, K. (2002). Restorative justice: The real story, cit., p. 64.

⁷⁹⁹ Swaaningen van, R. (1989). Feminismus und Abolitionismus als Kritik der Kriminologie. *Kriminologisches Journal*, 21(3), 162-181.

3.1.2.5. *Stopping the 'loss of the social'*

Another typical discursive strategy is to conceptualize the criminal justice as a system which naturally produces 'social losses', opposed to the re-vitalization of social life-worlds carried out by the RJ. In this perspective, the criminal justice breaks systematically human relationships in order to re-construct the symbolic social order altered by the crime. It produces social losses represented by the dispossession of community agencies of the informal social control traditionally performed, whereas the RJ re-constructs social bonds. This discursive structure which basically consists in opposing the RJ and the criminal justice in regard to the social effects of their means, emerges from the surface under analysis. As Norman Dennis and George Erdos remark⁸⁰⁰, communitarians commonly stress the dangerous loss of both social cohesion and self-control which has occurred in the past 30 years in contrast to the days in the 1930s when "social control was pervasive and consensual, and therefore low-key, good-natured and effective"⁸⁰¹. If we specify the criminal justice as a state instrument in the creation of that loss, as abolitionists argue, the link between the RJ and this surface is clearer. In the abolitionist/communitarian perspective, the basis of social order is thus considered to reside in the informal control mechanisms of civil society, the only able to reproduce and maintain a culture of mutual respect, trust, and restraint⁸⁰². These non-authoritarian mechanisms are the archetypical precursors of the RJ initiatives, portraying the as a typical way of doing justice in those 'traditional' and nostalgically yearned societies. The 'loss of social' is moreover conceptualized by abolitionist/communitarian claims as the dismantling of the powers of local authorities by the central state⁸⁰³. In a context of decline of the paternalistic welfare state communitarians strive to 'imagine' a more participatory and democratic future for local governance beyond the market and the state⁸⁰⁴. Community becomes the backdrop of the attempts to re-imagine the public sphere, often in profoundly exclusivist and naturalized such as in the narratives of Etzioni, Murray and Dennis. The critique of the social loss caused by the state apparatuses (e.g. criminal justice) dispossessing the community of social control tasks and means, represents in these perspectives the basis for a self-alleged inclusive way of thinking and doing justice. The RJ, according the authoritative discourses, was exactly this: an alternative to the welfarist and liberal perspectives in dealing with social conflicts.

3.1.2.6. *Offering 'social alternatives'*

The last RJ's discursive strategy emerging from the abolitionist/communitarian construct is to portray community as a 'source' of radical alternatives (respect to the criminal justice) for the management of problematic situations. Respect to the previous strategies, it is important to remark the idea of alternative 'means' to crime and punishment, which community is naturally supposed to nurture. Crime and punishment are considered closely related to "social

⁸⁰⁰ Dennis, N., Erdos, G. (1992). *Families without fatherhood*. London: IEA Health and Welfare Unit, p. 21.

⁸⁰¹ Hughes, G. (1996). Communitarianism and law and order. *Critical Social Policy*, 49, 17-41, p. 24.

⁸⁰² Dennis, N., Erdos, G. (1992). *Families without fatherhood*, cit., p. 85.

⁸⁰³ McLaughlin, E. (1992). The Democratic Deficit: European Union and the Accountability of the Police. *British Journal of Criminology*, 34(2), 473-487.

⁸⁰⁴ Burns, T., Hambleton, R. Hoggett, P. (1994). *The Politics of Decentralisation*. Basingstoke: Palgrave Macmillan, p. 22.

*negativity*⁸⁰⁵”, i.e. expressive of destructive developments within contemporary society, in particular, as they affect the weakest society’s members. Abolitionists argue that in order to define an effective politics of penal reform, “*crime and punishment should be seen as action and reaction, but as spiralling cycles of harm*⁸⁰⁶”. Instead of exclusively entrusting professional specialists in drafting such policies, they should be worked out democratically, under conditions of mutuality and solidarity, to be created by social and political action. The urgent issue that then arises is how this might be done. On a general note, abolitionists admit that no single solution to the problem should be expected. Considering the diversity of relevant social phenomena, to devise constructive interventions requires the development of a multiplicity of forms of social regulation operating as forms of conflict resolution as much as possible independent to the state. Abolitionists focus their interest on ‘autonomous’ forms of conflict resolution and dispute settlement. Other “*styles of social control*⁸⁰⁷” must be pursued, more democratic, participatory, cost-effective, and constructive, i.e. based on compensation and reconciliation aims instead of revenge and punishment. To this end, the criminal justice system needs to be decentralized allowing the development of participatory processes of definition and management of problematic situations. Through contextualization, the dichotomized character of criminal justice could be replaced with a continuum⁸⁰⁸. In this way “*participants would be urged to confront and grapple with complexities around notions of human ‘agency’, ‘intentionality’, ‘responsibility’ and ‘guilt’ rather than reducing them to manageable proportions by applying the binary logic of criminal law*⁸⁰⁹”. The idea of participatory and decentralized forms of regulation of problematic situations help us to understand the recurrent claim in the archive of the RJ, that is necessary to invest in community-based forms of social control, more human and democratic, definitely represented by the RJ’s interventions.

3.1.3. Religious groups/psychological ‘complex’

The third surface to be taken into account is given by the articulation of the discourses of the spiritual groups involved in the reform of criminal agencies according to reconciliatory perspectives since the 1970s and the spreading of the ‘Psy-ethos’ in western societies during last three decades⁸¹⁰. This articulation is explained by the common goal pursued by these different discourses and its political uses. By conceptualizing the ‘deep dimension’ of the crime, this discursive articulation contributes to endorse approaches to deviant behaviour as moral/psychological deficiencies, opening up to forms of interventions closely linked to self-responsibilizing political strategies (see next chapter). As I will argue, especially the conceptualization of the ‘warm side’ of the RJ is understandable in light of the concepts and themes composing this surface. Whilst the spiritual groups clearly pursue that goal with religious

⁸⁰⁵ See Baratta, A. (1982). *Criminologia critica e critica del diritto penale*. Bologna: Il mulino.

⁸⁰⁶ Pepinsky, H.E. (1986). Post-Marxist criminology: Lessons from British policing. *Law and Human Behavior*, 10(3), 265-277.

⁸⁰⁷ Black, D. (1976). *The Behavior of Law*. New York: Academic Press, p. 4-5.

⁸⁰⁸ Christie, N. (1986). The ideal victim. In E. A. Fattah (Ed.), *From crime policy to victim policy: reorienting the justice system* (pp. 17-30). London: Macmillan.

⁸⁰⁹ Haan de, W. (1991). Abolitionism and crime control. A contradiction in terms. In K. Stenson, D. Cowell (Eds.), *The Politics of Crime Control* (pp. 203-217). Beverly Hills/London: Sage, p. 212.

⁸¹⁰ Richards, K. (2005). Unlikely friends? Oprah Winfrey and restorative justice. *Australian and New Zealand Journal of Criminology*, 38(3), 381-399.

beliefs, the psy-discourses represent a laic version of the same attempts, deployed with relatively similar means. Many examples can be given of direct involvement of religious group in the reform of criminal justice. Mennonite Church, Quakers and Catholics have played a remarkable role in the affirmation of reconciliatory approaches to the crime and its aftermath. Beside the presence (historically rooted) of religious groups in the criminal justice system, we can observe a similar ‘reforming’ role played by the counseling and therapy experts in the last three decades. Indeed, the therapeutic language has informed a range of criminal justice policies that have emerged in recent years, particularly those designed to assist victims of crime, in a way working as the secularized version of the action of religious groups involved in the criminal justice reform. It has come to be accepted that crime victims must be offered opportunities to tell the story of their victimization, to express their pain, fear and/or anger about the offence, and to ‘be heard’. The popularization of concepts such as self-help, empowerment, healing, ‘being heard’ act as surface of emergence for many conceptualizations and justifications of the RJ. Many of them give often great importance to the stakeholders’ direct expression of emotions and feelings. The goal is to create a space and time for the ‘confession’ of deep sentiments, stimulating constructive inner dynamics which allowing stakeholders to mirror emotional experiences, ‘heal’ form inside the personal, emotional and spiritual loss produced by the ‘crime’. At the same time is emphasized the relevance of ‘being heard’ as complementary need to the expressions of internal states. Both the concept of direct expression of feeling and the claim of ‘being heard’ are drawn upon the discursive reservoir of the religious movement and of the psycho-therapeutic ideologies. What is here reproduced is a kind of confessional-relationship between the stakeholders⁸¹¹, organized by the responsible of the restorative process (mediator, facilitator etc.). This schema is basic both in secularized and religious ways of dealing with conflicts.

3.1.3.1. *Spiritual and/or psychological: religious groups and psy-discourses in criminal matters*

According many authoritative explanations, the RJ is somehow related to religious notions, such as the ones of Christian biblical justice linked to the pacifist and prison abolitionist tradition of Quakers and Mennonites. The authoritative histories of the RJ actually start from the well-known Mennonite experiment in Kitchner. In order to understand the nexus of sense between the RJ and such groups, it might be more useful to carefully examine their ‘discourses’ within the frame of the reform of criminal agencies in the 70s⁸¹², especially in USA, and their ‘secularization’ through the emergence of a wide range of scientific/therapeutic discourses on crime and justice, starting from

⁸¹¹ Brigg, M. (2003). Mediation, Power, and Cultural Difference, cit.; Schehr, R.C. (2000). From Restoration to Transformation: Victim-Offender Mediation as Transformative Justice. *Conflict Resolution Quarterly*, 18(2), 151-169.

⁸¹² Among the most active groups in USA and Europe we must considered The Mennonite church and its Central Committee’s USA Office on Crime and Justice; The Presbyterian Church USA (author of *Justice or “Just Desserts?”: An Adult Study of the Restorative Justice Approach*); The American Baptist Church USA which adopted a specific Statement of Concern on Restorative Justice; The Southern Baptist Women’s Missionary Union which led the *Project HELP: Restorative Justice*; Prison Fellowship International which hosts the well-known *Restorative Justice Online* as a service of their International Centre for Justice and Reconciliation; the Roman Catholic Church approved in November 2000 in USA the document *Responsibility, Rehabilitation and Restoration: A Catholic Perspective on Crime and Criminal Justice*.

the 80s. This process has basically reshaped in psychological terms the ideas of identity, autonomy, freedom and self-fulfillment, with regard of crime and justice. Humans involved in crime, are understood as inhabited by a deep spiritual/psychological space, and they 'must' evaluate and act upon themselves in terms of this 'popularized' belief⁸¹³. They come to speak of themselves in terms of a psychological language of self-description -the language of intelligence, personality, anxiety, neurosis, depression, trauma, extroversion and introversion and to judge themselves in terms of a psychological ethics⁸¹⁴. The combination of spiritual group discourses and psychologization of criminal agencies towards their reform is here considered a crucial surface of emergence of many archive's discursive objects.

3.1.3.2. *Discursive objects (concepts): Storytelling*

The concept of 'storytelling' with its apparently therapeutic effects is a milestone of the archive of the RJ. That victims of crime might not feel the need to engage in the 'talking cures'⁸¹⁵ is almost entirely unacknowledged in the RJ's field. Like victims, however, offenders are often constructed as an essential group. The offender of the RJ imagination is always able to draw on his or her 'innate' and 'human' capacity to express emotions about the offence. This view is clearly stated by the Victim-Offender Mediation Association, who list as the first of ten underlying principles of VOM, that "*human beings possess untapped inner resources that, under the right circumstances, can be accessed and utilized to address issues and resolve problems of importance to them*"⁸¹⁶. Umbreit's guide to VOM, similarly lists as one of seven principles underlying that restorative 'practice' the "*belief in the capacity of all people to draw on inner reservoirs of strength to overcome adversity*"⁸¹⁷. Constructing 'psy' knowledges as an 'innate human resource' that can be drawn upon in restorative processes, however, operates to render all offenders 'equal', irrespective of gender, ethnicity and/or socioeconomic status, as well as level of verbal ability⁸¹⁸. By portraying the sharing of experiences and/or emotions as innate, natural and basic human need, these proponents represent the RJ as natural and universal by extension.

3.1.3.3. *Trauma, Healing, Closure*

The authoritative writings on the RJ often use concepts like shame and trauma recovery⁸¹⁹. For instance, Braithwaite points out that the RJ 'practices' provide opportunities for victims to hold offenders accountable, tell their story to offenders and others, and receive new information that may have been missing; all of which are also considered components of successful trauma recovery programs⁸²⁰. He argues that experiences of victimization, and even trauma, are involved in most situations of conflict and wrongdoing. The RJ is supposed to acknowledge and address this sense of victimization and the

⁸¹³ Rose, N. (1985). *The Psychological Complex: Psychology, Politics and Society in England, 1869-1939*. London: Routledge.

⁸¹⁴ Richards, K. (2005). Unlikely friends? Oprah Winfrey and restorative justice, cit., p. 384.

⁸¹⁵ Ibidem.

⁸¹⁶ Victim-Offender Mediation Association (Minnesota), Recommended Ethical Guidelines. Retrieved 8 May 2012 from <http://www.giustiziaminorile.it/rsi/studi/guidelinesminnesota.pdf>, p. 1.

⁸¹⁷ Umbreit, M. (2001). *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research*. San Francisco: Jossey- Bass, p. 5.

⁸¹⁸ Richards, K. (2005). Unlikely friends? Oprah Winfrey and restorative justice, cit., p. 384.

⁸¹⁹ Ibidem; see also Acorn, A. (2004). *Compulsory Compassion: A Critique of Restorative Justice*, cit.

⁸²⁰ See Braithwaite, J. (1989). *Crime, Shame and Reintegration*, cit.

resulting needs, often for everyone involved, including those who have offended. With or without the frameworks employed by Braithwaite and others, such ideas have been considered fruitful resources for the proponents of the RJ working in a variety of settings. The archive relies profoundly upon a range of spiritual/therapeutic discourses based on discursive objects such as ‘holism’, ‘unity’, ‘transformation’, ‘personal growth’, ‘healing’, ‘closure’, ‘transformation’, ‘reconciliation’ and ‘harmony’⁸²¹. Proponents discuss ‘harms’, ‘conflicts’ instead of ‘crimes’. This spiritual/psychological vocabulary of the RJ appears to have become so taken-for-granted that it is seldom even remarked upon⁸²². Thus proponents of the RJ have embraced and promoted an approach to crime that is partially justified by reference to therapeutic discourses. Significantly, many authoritative discourses are embedded within these spiritual/therapeutic ideas not only in the works of those we might consider ‘evangelical’ supporters (such as Pranis, Zehr, Van Ness and Umbreit), but in the works of more discerning scholars also. Many authors, for example, discuss the potential of the RJ to effect ‘healing’ and/or ‘closure’ for victims and offenders⁸²³. These spiritual/therapeutic discourses inform a great many RJ programs, particularly many of those that focus on serious, violent and/or adult offending. Many of these programs have adopted these ideas as their stated objectives, and list, for example, ‘healing’ and ‘closure’ as crucial benefits for victims and offenders who participate.

3.1.3.4. *Discursive objects (strategies): The existence of a deeper reality of crime and its impact*

The idea that the crime damages relationships between parties and the community is often conceived as a ‘truth’ in the authoritative discourses⁸²⁴. The ‘relationships-(re)building’ is portrayed as a distinctive feature of the RJ, one of the main reasons for its justification and explanation. The pre-condition of the ‘relationship-(re)building’ is the idea that ‘crime’ is the formalization of a dysfunctional deep and complex set of relationships, emotionally and spiritually laden. The peculiarity of the RJ is that conceptualizes as its main goal to create conditions for victim and offender to (re)gain their sense of well-being in the relationship, and as people with a safe place in the community⁸²⁵. For victims this means feeling safe from harm at the hands of this or another offender and a sense of belonging to the community. For the offender it means to be assisted, accepted and welcomed back to the community⁸²⁶. As we have already seen, Daly and Stubbs identify the “*relationship repair*”⁸²⁷ as a main goal of any RJ intervention. The RJ ‘practices’ can address violence between those who want to continue the relationship, they can create occasions for

⁸²¹ Basil, R. (Ed.). (1988). *Not Necessarily The New Age: Critical Essays*. Buffalo: Prometheus Books, pp. 10-11.

⁸²² See Acorn, A. (2004). *Compulsory Compassion*, cit.; Blagg, H. (1998). Restorative Visions and Restorative Justice Practices: Conferencing, Ceremony and Reconciliation in Australia. *Current Issues In Criminal Justice*, 10(1), 5-14.

⁸²³ Barton, C. (2003). *Restorative Justice: The Empowerment Model*. Sydney: Hawkins Press; Braithwaite J., Braithwaite, V. (2001). Shame and Shame Management. In E. Ahmed, N. Harris, J. Braithwaite, V. Braithwaite (Eds.), *Shame Management Through Reintegration* (pp. 3-57). Cambridge: Cambridge University Press; Johnstone, G. (2002). *Restorative Justice: Ideas, values, debates*, cit.; Johnstone, G. (Ed.). (2003). *A Restorative Justice Reader*, cit.; Strang, H. (2002). *Repair or Revenge*, cit.

⁸²⁴ Schiff, M. (2007). Satisfying the needs and the interests of stakeholders, cit., p. 233.

⁸²⁵ Ibidem.

⁸²⁶ Ibidem.

⁸²⁷ Daly, K., Stubbs, J. (2006). Feminist engagement with restorative justice, cit.

relationships to be repaired. As Pranis highlights, the importance placed on relationships within a restorative framework often means more than the single relationship between a victim and an offender, including as well the larger web of relationships in which we live⁸²⁸. Accordingly, in this perspective, the harms considered in a restorative approach comprise larger social damages as well as individual harms, embedded in a community context both in terms of harms caused and responsibilities produced. This ideological primacy of relationships and relationship-(re)building in the archive of the RJ, can be understood as a pervasive discursive strategy which finds its 'natural' environment in the therapeutic/spiritual construct.

3.1.4. Informal Justice/Alternative dispute resolution

The last surface of emergence to analyze is given by the articulation of two parallel strands of theory and practice in the legal field, developed since the late 70s, especially in Anglophone areas, and then spreading around the western world. The informal justice and ADR⁸²⁹ theories and movements play the role of surface of emergence of various discursive objects of the archive of the RJ. As widely known, they both challenge traditional understandings of the centrality of adjudication to the maintenance of social order in modern society. Broadly speaking, they express an anti-law ideology, claiming that non-'formal' and non-adversarial ways of resolving conflict are possible and even actually historically and socially deep-seated. As movements, Informal justice and ADR have urged the legal profession to move away from its exclusive focus on the use of courts to resolve conflicts and to consider a broader spectrum of problem-solving approaches. Many authoritative accounts on the RJ seem understandable using concepts and strategies proper of this cultural, academic and political construct, especially as for the relationship between the RJ and the 'traditional' legal institutions is concerned.

3.1.4.1. *ADR and Informal justice: theories and movements*

Informal justice, intended as a cluster of socio-legal and anthropological theories inspiring the spread of a wide range of extra-judicial practices (such as arbitration panels, mediation boards, neighborhood justice centers etc.), has been labeled a "*growth industry*"⁸³⁰ since the 70s. Concomitant to this growth is the large body of academic literature on alternative dispute resolution (ADR) which has been produced in the same period⁸³¹. There are a variety of ways of conceptualizing the field of legal informalism⁸³². Richard Abel, for example, defined informal justice as encompassing legal institutions which are "*non-bureaucratic in structure and relatively undifferentiated from the larger society, minimize the use of professionals, and eschew official law in favor of substantive and procedural norms that are vague, unwritten, commonsensical, flexible, ad hoc, and particularistic*"⁸³³. Susan Silbey

⁸²⁸ Pranis, K. (2002). Restorative Values and Confronting Family Violence, cit., p. 1.

⁸²⁹ Merry, S.E. (1987). Disputing without culture. *Harvard Law Review*, 100(8), 2057-2073, p. 2058.

⁸³⁰ Gallagher, W. (1988). The Transformation of Justice: Hofrichter's Neighborhood Justice and Harrington's Shadow Justice. *Law & Social Inquiry*, 13, 133-143.

⁸³¹ Ibidem, p. 134.

⁸³² Krieken van, R. (2001). Legal informalism, power and liberal governance. *Social and Legal Studies*, 10(1), 5-22.

⁸³³ Abel, R. (Ed.) (1982). *The Politics of Informal Justice*. New York: Academic Press, p. 2.

and Austin Sarat⁸³⁴, on their part, make a threefold distinction among the groups advocating new forms of dispute processing, the establishment Bar and legal elites, the ‘access to justice’ movement, and ‘improved quality of law’ proponents. Christine Harrington and Sally Merry’s typology distinguishes of three different, albeit related, projects in community mediation which also captures the full range of informal justice initiatives: the delivery of dispute resolution services, social transformation, and personal growth⁸³⁵. As for the ADR movement, usually is considered as ‘architected’ during the decade of the 1970s under the inspiration of Warren Burger⁸³⁶. To be more civilized, he claimed, Americans had to abandon the centrality of the adversary model. The harmony law model would replace ‘no-win’ solutions of the adversary process. Alternative dispute resolution would provide access, help resolve overcrowded courtrooms, and decrease American litigiousness. Relationships not root causes, and interpersonal conflict resolution skills, not power inequities or injustice, were and are the main topics of the ADR movement. Martin Chanock talked of “*missionary justice*⁸³⁷” to call attention to the spread of compromise models of dispute settlement in Africa. Laura Nader used the term “*harmony ideology*⁸³⁸” to refer to the use of compromise, consensus, and like mechanisms to control and stifle conflict. Carol Greenhouse described the context that nourishes the notion that lawyers should become “*healers of human conflict*⁸³⁹”. Informal justice and ADR basically express the same purposes regarding ‘how’ doing justice and ‘why’ in that way. It is possible to argue that ADR movement plays approximately the same role of crime victims’ movements respect to victimology, i.e. main common concerns but more practical perspective. Insofar as they articulate each other, offering an overlapping of perspectives, goals, and means they are here considered as unified surface of emergence.

3.1.4.2. *Discursive objects (concepts): The understanding of the adversarial approach*

The developments of ADR as well as informal justice initiatives are usually conceptualized as responses to dissatisfaction with the adversarial and formal nature of common law litigation⁸⁴⁰. The understanding of the adversarial/formal legal system held by informalists and ADR theorists and practitioners is a useful tool to understand specific discursive concepts of the RJ authoritative accounts, especially the meaning of ‘criminal justice’. In the informalism perspective, litigation is based on the premise that the truth of the dispute is found by requiring the disputants to prove their arguments through a pre-defined compulsory procedure, governed by complex rules on the examination and the evidence. This system is ‘adversarial’ because based on a

⁸³⁴ Silbey, S.S., Sarat, A. (1989). Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstitution of the Juridical Subject. *University of Denver Law Review*, 66(3), 437-498.

⁸³⁵ Harrington, C.B., Merry, S.E. (1988). Ideological Production: The Making of Community Mediation. *Law and Society Review*, 22(4), 709-735.

⁸³⁶ Nader, L. (1992). From Legal process to mind processing. *Family and Conciliation courts Review*, 30(4), 468-473, p. 468.

⁸³⁷ Chanock, M., quoted in Nader, L. (1990). *Harmony Ideology: Justice and Control in a Zapotec Mountain Village*. Stanford: Stanford University Press, p. 297.

⁸³⁸ Nader, L. (1990). *Harmony Ideology*, cit.

⁸³⁹ Greenhouse, C. (1986). *Praying for justice*. New York: Cornell University Press.

⁸⁴⁰ Brooker, P. (1999). The ‘Juridification’ of Alternative Dispute Resolution. *Anglo-American Law Review*, 28(1), 1-36.

structural confrontation between the litigants, naturally endorsing ‘win-lose’ solutions. Both ADR and informal justice proponents have been criticizing the specialized language of litigations, the leading role of lawyers, the alienating bureaucracy and the costs of the litigation, as well as the win-lose outcomes⁸⁴¹. The concept of ‘criminal justice’ recurrently evoked by the RJ discourses as what is necessary to improve/change/abolish, appears meaningful insofar as is casted against the backdrop of the informal/ADR understandings of the ‘adversarial approach’ to conflicts. This ‘nexus of sense’ appears even clearer if we look at how informalists often portray the western concept of ‘law’ as based on a patriarchal paradigm, characterized by hierarchy, linear reasoning, the resolution of disputes through the application of abstract principles, and the ideal of the reasonable person⁸⁴². Its fundamental aspiration is objectivity, and to that end it separates public from private, form from substance, and process from policy. A ‘feminine’ or ‘warmer’ way of dealing with conflicts (i.e. cooperative and voluntary, not coercive) is therefore acclaimed to counterpart or overcome the limits of the ‘adversarial’ perspective. It is underlined the necessity to reject an objectivist approach to conflict resolution, considering conflicts in terms of relationships and responsibility⁸⁴³; to enable the parties to exercise self-determination and remove the hierarchy and the dominance which characterize the judge/litigant and lawyer/client relationships. Finally, emotions must be recognized and incorporated into the legal process. These stances help to understand the characterization of many crucial issues in the authoritative procedural discourses on the RJ, such as the centrality of the participation/involvement of parties and the marginalization of specialist in dealing with the conflict, the role third-party intervener as expert of the process and not of the content etc. Broadly speaking the features of ‘doing’ RJ appear as constructed *ex-negativo* from those ones held by the adversarial structure and by the actors of legal process, as conceived by the informal justice/ADR theories.

3.1.4.3. *The crisis of legal system*

Another typical conceptual tenet of ADR/informal justice theories is a specific idea of the ‘crisis of the legal system’, whose understanding facilitates the comprehension of the same discursive object in the archive of the RJ. The expression ‘litigation explosion’ describes the contemporary perception that litigation is increasingly prevalent in the western world and burdensome to society⁸⁴⁴. In the ADR/informal justice perspective, the ‘fact’ of a litigation explosion, is the marker (and the cause) of the crisis of the western legal systems. According to this narrative, throughout the past 40 years we have assisted to a “*widely reported volume of increasing concern and discontent with our judicial system, our adversary process, the pervasive role of lawyers in society, the level of performance and accountability of the legal profession, and the perception that lawyers’ economic self-interests conflict with their clients’ and the public’s interest in prompt, efficient and economical*

⁸⁴¹ See Cappelletti, M., Garth, B.G. (Eds.) (1978-1979). *Access to justice*, Vol. 1. Amsterdam: Sijthoff and Noordhoff.

⁸⁴² Grillo, T. (1991). The mediation alternative: Process dangers for women. *Yale Law Journal*, 100, 1545-1610, p. 1547.

⁸⁴³ *Ibidem*, p. 1548.

⁸⁴⁴ Galanter, M. (1986). The Day After the Litigation Explosion. *Maryland Law Review*, 46(3), 3-39; cfr. Johnston, M. (2007). The Litigation Explosion, Proposed Reforms, and their Consequences. *BYU Journal of Public Law*, 21, 179-207, p. 181.

*dispute resolution*⁸⁴⁵”. Lord Woolf, in his well-known report, claimed that the UK legal (civil) system was so beset by problems of cost, delay and complexity that the cumulative effect was a “*denial of access to justice*⁸⁴⁶”. More specifically he described the civil justice system in UK as overly dependent on party-control (i.e. lawyer control) regarding conduct, pace and extent of litigation, designed along the lines of a trial by battle, closed, too heavily dependent on an ‘al-embracing trial’, formalistic, inflexible, complex⁸⁴⁷. In a similar vein the American Bar Association emphatically stated: “*the courts of our country are in crisis. The failure of state and local legislatures to provide adequate funding is effectively -at times quite literally- closing the doors of our justice system*⁸⁴⁸”. The crisis of legal system as litigation explosion is one of the common starting points for ADR/informalism proponents to claim that society must develop ways of reducing adversary trials, the “*anachronistic confrontation of resources in preparing and conducting trials*⁸⁴⁹”. The goal is to readdress adversarial services into a less alienating and more cost-effective systems for parties directly involved⁸⁵⁰. Even if we must notice the presence in the ADR/informalist literature of disagreement regarding the dimensions (and indeed the very existence) of such a litigation explosion⁸⁵¹, the crisis of the legal system as litigation explosion appears a theoretical pillar of this narrative as well as a crucial conceptual framework to understand the RJ’s idea of ‘legal system’ as something to be changed or replaced.

3.1.4.4. *Discursive objects (strategies): The necessity of harmonious and consensual relationships*

The discursive construction of the main goal of the RJ as the re-definition of harmonious relationships between parties involved in conflicts (as well as the same definition of ‘harmonious relationships’) is a discursive strategy emerging from the informal justice/ADR surface. “*Harmony ideology*⁸⁵²” has been widely considered the ideological core of informal justice/ADR theories and practices. According to this narrative, the adversary and harmony models of law reflect different ideals and awareness. The first engenders actions “*based on the notion of injustice and on an understanding of power differential and recognition that organizing pressure on the political and economic forces that generate their disputes is primary*⁸⁵³”. Fundamental issues in this perspective are those of class, race, and gender. The harmony model “*comes together around values of consensus settlement and the management of social disorder through healers of human conflict*⁸⁵⁴” that reduces “*power differentials and articulates the notion that disputes are generated in relationships by*

⁸⁴⁵ Watkiss, D.K., The Litigation Explosion and the Trial Lawyer’s Changing Role. Retrieved 5 June 2013 from http://www.iatl.net/files/public/83_litigation_i4a.pdf

⁸⁴⁶ Woolf, H. (1995). Access to justice. Interim report to the Lord Chancellor on the civil justice system in England and Wales.

⁸⁴⁷ Ibidem, p. 5.

⁸⁴⁸ ABA Task Force on Preservation of the Justice System (2011). Final Report. Retrieved 5 June 2013 from, http://www.micronomics.com/articles/aba_report_to_the_house_of_delegates.pdf, p. 1.

⁸⁴⁹ Ibidem.

⁸⁵⁰ Ibidem.

⁸⁵¹ Galanter, M. (1983). Reading the landscape of disputes: what we know and don’t know and think we know about our allegedly contentious and litigious society. *UCLA Law Review*, 31(4), 4-71.

⁸⁵² Nader, L. (1992). *From legal process to mind processing*, cit., p. 468.

⁸⁵³ Ibidem.

⁸⁵⁴ Ibidem.

*the failure of individuals to act as they should*⁸⁵⁵. The adversary model is practically concerned to improve the provision of legal services, reducing court congestion, trial costs, improving access to legal dispute processing. Furthermore, the “*hope that society could be restructured through new forms of popular justice*⁸⁵⁶” and the project of individual empowerment, in which legal informalism is meant to permit individuals “*to take greater control over their own lives, enhances their personal skills in dealing with conflict, and endows them with techniques they can apply to other situations*⁸⁵⁷” appear as basic tenets (or foundational principles) of the ADR/informal justice. They represent the discursive space within which emerges the authoritative strategy of portraying the RJ as the new panacea for the criminal justice, based on a constructive/harmonious understanding of social relationships. Moreover the authoritative procedural discourses on the RJ emphasize almost consistently the role of the conveners to re-create harmonious relationships among parties involved, often conceptualizing the restorative ‘practices’ as consensus-based decision-making processes.

3.1.4.5. *Limits of Informality: State’s power*

The discursive strategies used to criticize the RJ ‘from within’, i.e. by proponents engaged in academic reflections and advocacy of the RJ, seem widely understandable if put in relation with the surface under analysis. The archive of the RJ, in fact, includes self-critical authoritative discourses which make condemnations of the RJ based on the idea that the RJ extends state power and supervision, borrowing judicial language, and therefore reproducing its dynamics are probably the most recurrent and actually reaching the state of ‘authoritative’ criticisms. Such a tangle of criticisms seems to ‘reproduce’ the disagreements typical of the ADR/informal surface. The literature on the ADR/informal justice, in fact, shows a remarkable quantity of writings about the theoretical and practical limits of such a construct, at different levels. A good starting point in this regard, is the well-known publication in the 1982, of *The Politics of Informal Justice* by the already cited Abel. This book has to some extent shaped the debate about the limits of informal justice⁸⁵⁸. The basic claim of this work is that informal justice initiatives expand state power according to non-state forms, concealed by the ‘carefully cultivated’ illusion of non-coerciveness⁸⁵⁹. Abel shows how both the expansion and contraction of legal informalism, both formal and informal forms of dispute processing, serve the interests of capital and class domination. But, since he was still attached to the ideal of ‘liberation’, Abel was forced to conclude that informalism does still “*express values that deservedly elicit broad allegiance*⁸⁶⁰”, and identified an underlying ‘potential’ which might be brought to the surface and realized only if legal informalism is linked to broader political and social movements. “*Informalism?*”, wrote Abel, “*is not an end in itself, but it can be a very important means in the struggle for justice*⁸⁶¹”. Much of the critical scholarship inspired by Abel has examined the relationships between the informal/ADR construct with the existing legal processes and has looked at the ways informal justice initiatives *maintain* or

⁸⁵⁵ Nader, L. (1992). *From legal process to mind processing*, cit., p. 470.

⁸⁵⁶ Harrington, C.B., Merry, S.E. (1988). Ideological Production: The Making of Community Mediation. *Law and Society Review*, 22(4), 709-735, p. 715.

⁸⁵⁷ Ibidem.

⁸⁵⁸ Ibidem.

⁸⁵⁹ Abel, R. (Ed.) (1982). *The Politics of Informal Justice*, cit. p. 6.

⁸⁶⁰ Ibidem, p. 310.

⁸⁶¹ Ibidem, p. 13.

challenge these processes. The first wave of critical socio-legal research on informalism examined its *social control* function, i.e., the ways it promotes conformity to norms. This early work on informalism describes the ADRS as a product of the changing nature of state power and corresponding changes in the form of law⁸⁶². Together, the state and its legal apparatus have generated new forms of social control⁸⁶³. According to the social control perspective, informalism represents the expansion of state power, but the form of state power represented by informalism is significantly different from traditional state social control mechanisms⁸⁶⁴. There is a certain irony, if not ambiguity, in this particular form of social control because it adopts the language of the helping professions, the language of anti-coercion and anti-punishment. The symbols of community participation, represented by concepts such as neighborhood justice and community justice, are not merely masks for state power but are expressions of it. This critique of informalism does not, however, reinstate the “*myth of rights*”, it identifies the “*politics of rights*”⁸⁶⁵. It keeps alive on-going debates concerning the limits of rights as a vehicle for social change by examining the different social ordering functions of various forms of dispute processing, the relationship of informalism to formalism, and the limitations of a law-centered view of socio-legal relations⁸⁶⁶. Within the critical tradition, another perspective on the spot has emerged in recent years. It stresses the role of human agency, as well as the constraints of social structure, and argues that informalism may in some instances function to resist state law. In this view, informalism enhances legal pluralism. The social control perspective is cast as having produced pessimism about informal justice, deregulation, and popular justice, which Maureen Cain claims results from a “*failure to distinguish between types of informal justice in a theoretically adequate way*”⁸⁶⁷. These scholars agree that the social control perspective on informalism has “*overemphasized social structural influences and underplayed the degrees of autonomy that community justice institutions can have*”⁸⁶⁸. Roger Matthews drew attention to the fact that the formal legal apparatus had in fact expanded, and between 1950 and 1980 the number of lawyers had doubled; rather than a process of de-professionalisation, an expanding array of professionals had simply been supplemented with another layer of para-professionals; law had become more rather than less complex, opaque and expensive⁸⁶⁹. The main lines of criticism centered on the notion of legal informalism being a ‘trojan horse’ for ever more cunning state penetration of social life, an ever widening net of social control, and Matthews identified this critique’s core concerns as: double

⁸⁶² Harrington, C.B. (1985). *Shadow justice: the ideology and institutionalization of alternatives to court*. Westport: Greenwood Press; Hofrichter, R. (1987). *Neighborhood justice in capitalist society: the expansion of the informal State*. Westport: Greenwood Press; Abel, R. (1981). Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice. *International Journal of the Sociology of Law*, 9, 245-267.

⁸⁶³ See Cohen, S. (1985). *Visions of Social Control: Crime, Punishment and Classification*. Cambridge: Polity Press.

⁸⁶⁴ Harrington, C.B., Merry, S.E. (1988). Ideological Production: The Making of Community Mediation, cit., p. 713.

⁸⁶⁵ Scheingold, S. (1974). *The Politics of Rights*. New Haven: Yale University Press.

⁸⁶⁶ Harrington, C.B. (1985). *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court*. cit.; Sarat, A. (1988). The New Formalism in Disputing and Dispute Processing. *Law & Society Review*, 21(5), 695-715, p. 695.

⁸⁶⁷ Cain, M. (1985). Beyond Informal Justice. *Contemporary Crises*, 9(4), 371-401, p. 335.

⁸⁶⁸ Henry, S. (1985). Community Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Cooperative. *Law & Society Review*, 19, 303-327, p. 307.

⁸⁶⁹ Matthews, R. (1988). *Informal Justice*. London: Sage, p. 9.

tracking, ineffectiveness, relegitimation of law and the expansion of social control⁸⁷⁰. The concept of double-tracking refers to the fact that instead of operating as an alternative to formal procedures of dispute-processing, what appeared to have happened is that informal justice simply augmented formal processes and structures. New clientele were being dealt with by the informal processes, so that “*a central paradox of the movement towards informal justice was that it succeeded in formalizing the informal*”⁸⁷¹. They dealt mostly with interpersonal conflicts, consumer complaints, and public order offences, and the majority of disputants were black and female, attracting the criticism that informal processes seemed to be generating a ‘second-class’ set of legal procedures. For Yves Dezalay, this contrast between ‘high’ and ‘low’ justice is a central feature of law in liberal class-divided societies, and the ongoing cohabitation of the two forms of law an essential elements of the continuing legitimacy of law⁸⁷². Numerous authoritative criticism present in the archive, regarding historical, conceptual of practical profiles of the RJ can be understood if analyzed in light of the critical literature on the informal justice/ADR. Particularly, the stances on the criminal/legal colonization of the RJ (Cunneen, Pavlich), the endorsement of racial and sexual ‘unbalances’ (Daly, Brigg, Blagg), the promotion of an ‘exclusive’ way of dealing with conflicts which reproduces the exclusionary mechanisms of any community (Crawford), all these critical remarks look like ‘reflexes’ of the informal justice/ADR construct in the discursive field of the RJ.

3.2. From the ‘external’ conditions to the ‘internal’ relationships

The scientific knowledge on the victims of crimes, articulated with the claims of the grassroots victims organizations, the abolitionist/communitarian construct, the psy-knowledge combined with spiritual claims and the informal justice/ADR theories, represent the conditions of intelligibility of the RJ, the nexus of sense which makes possible their understanding, not only to us but also to the proponents of the RJ. In fact, the contingent actions undertaken by proponents over the last forty/thirty years, have become a meaningful configuration thanks to the aforementioned surfaces of emergence. They are not only a methodological tools which enable us to understand the historical emergence and theoretical justifications of the RJ, but the backdrop against which ‘borderline’ interventions and reflections in criminal justice have been casted, contingently composing the magmatic ‘true’ knowledge on the RJ. At this point, we can wonder how the discursive objects are ‘held together’, how they constitute a ‘unified’ discursive formation. As already discussed in the chapter 2, Foucault gives some indications for a discursive formation to be ‘a unity’. Firstly, to refer to the same object “*does not enable one to individualize a group of statements and to establish between them a relation that is both constant and describable*”⁸⁷³. Even though the discourses that constitute the discursive formation refer to the same object, it is not possible to derive its coherence through it because the object does not possess a pre-discursive identity, but rather is constituted by the discursive framework in which it is implicated⁸⁷⁴. Therefore, the object is the result of the different discourses that take it as an

⁸⁷⁰ Matthews, R. (1988). *Informal Justice*, cit., p. 9.

⁸⁷¹ Ibidem, p. 10.

⁸⁷² Dezalay, Y. (1994). *Marchands de droit. La restructuration de l'ordre juridique international par les multinationales du droit*. Paris: Fayard, p. 156.

⁸⁷³ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 32.

⁸⁷⁴ McNay, L. (1994). *Foucault: A Critical Introduction*, cit., p. 67.

object of study. Secondly, it is incorrect to define a group of statements by a definite style, or a correspondence in vocabulary or metaphor. Thus, if there is a unity, it is not based on a naïve idea of the resemblance of statements. Thirdly, a unity of a discursive formation cannot be drawn from concepts and their use in a specific discourse, since they are not always logically connected. Concepts are often heterogeneous and even incompatible with other concept used in a given field⁸⁷⁵. Lastly, it is a wrong hypothesis to seek the principle of the unity of a discursive formation in the existence of the identity and persistence of themes⁸⁷⁶. Foucault asserts that “*it is legitimate in the first instance suppose that a certain thematic is capable of linking, and animating a group of discourses*”⁸⁷⁷. The same theme may occur in different discursive formations and contradictory themes may be employed in the same discourse. The unity of a discursive formation refers then to “*the historically positioned relations between discursive objects which ensure the interplay of their appearances and dispersions, transformations and erasure*”⁸⁷⁸. For this reason, it does not suffice the purpose of this chapter (unpacking the discursive formation of the RJ), just to identify the discursive space within which the main explanations and justifications of the RJ become comprehensible. In the next pages I will then focus on the relationships between the discursive objects previously identified, analyzing the processes of delimitation, constraint, exclusion which make possible, from a dynamic perspective, the archive. I will look at the ‘internal structure’ of the archive i.e. how the authority of the authoritative discourses actually ‘works’, at their ‘internal’ epistemic/conceptual conditions once their ‘external’ conditions of intelligibility/possibility have been re-constructed. As Foucault claims “*in every society the production of discourse is at once controlled, selected, organized and redistributed by a [...] number of procedures*”⁸⁷⁹. These concerns lead to his emphasis of the fact that discourse is both that which constrains or enables, writing, speaking, thinking. These processes, of formation and constraint, production and exclusion, are inseparable. More than this, they are both complimentary and constitutive of one another. The archive of the RJ exists through their mutual constitution⁸⁸⁰.

3.2.1. Authorities of delimitation

As Foucault said a discursive formation “[...] *is made possible by a group of relations established between authorities of emergence, delimitation, and specification*”⁸⁸¹. Accordingly it is necessary to complement the analysis of the surfaces of emergence of the RJ with two other elements, at the same time conceptual constructs and methodological tools. Focusing on them is possible to grasp the ‘internal’ functioning of the archive of the RJ. The first element is what Foucault calls the “*authorities of delimitation*”⁸⁸². Who have the authority to delimit, designate, name, and define the RJ’s discursive objects? Who has the ‘right to speak’ in the authoritative accounts on the RJ? These authorities are groups which are able to produce an expert knowledge over RJ, organizing the field in which the legitimacy or not of a particular account of the RJ appears

⁸⁷⁵ McNay, L. (1994). *Foucault: A Critical Introduction*, cit., p. 67.

⁸⁷⁶ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 35.

⁸⁷⁷ Ibidem.

⁸⁷⁸ Ibidem, p. 33.

⁸⁷⁹ Ibidem, p. 52.

⁸⁸⁰ Hook, D. (2007). *Discourse, knowledge, materiality, history: Foucault and discourse analysis*, cit.

⁸⁸¹ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 44.

⁸⁸² Ibidem, p. 41.

and is contested. The ‘authorities of delimitation’ are the subjects entitled to decide what is valid or invalid, true or false and legitimate or illegitimate within the discourse have specific conditions. They are considered legitimate as they speak from a certain “*enunciative modality*”⁸⁸³ or subject position. This authority is reinforced by norms, practices and institutions which ‘certify’, for instance, the psychiatrist, the criminologist or the mediator, as performing actions with a certain (epistemic/conceptual) legitimacy. This authority in turn allows its possessors to create certain parameters (or “*margins of tolerance*”⁸⁸⁴) of normative behaviours. Once something or someone falls outside these legitimate margins, it emerges as an object to be designated and investigated and then rejected as being outside of the agreed perceived norms. It therefore needs to be defined by another group or authority. To sum up, these ‘authorities’ have the ability to ‘delimit’, ‘designate’, ‘name’, and define human constructions such as crime, disability, disease etc.⁸⁸⁵. They are taken up by ‘experts’ with a certain kind of knowledge. Foucault asserts that these experts are not necessarily the original authors of everything they make statements of authority about⁸⁸⁶. Accordingly, it is essential to understand that it is not necessarily who produces the statements but the role of authorities of delimitation which is of relevant if we want to describe how the discursive formation of the RJ actually works. In this perspective, the crime victims’ movement appears one of the strongest authorities in the construction of the discourses on the RJ. Similarly, religious leaders (Quakers, Mennonites) have had a relevant role in the creation of the authoritative conceptualizations of the RJ. The professional psy-expertise involved in the criminal justice reform is another significant authority of delimitation. Lastly, a specific academic category represented by criminologists has played a role in the set-up and development of those narratives. Their ‘institutional site’ of speaking is characterized by one main aspect: they are experts on the ‘nature’ of the issues at stake (crime/conflict, victim, offender, community, restoration). Their enunciative modality is basically the primacy respect to the ‘object’ of the offender. An authority which is clearly missing among those who have produced the expert knowledge on the RJ, is of course an ‘offenders’ movement’. Therefore, who discursively creates the needs of the offender in the RJ? The question is easily answered: crime victims’ leaders, criminologists, psy-experts and religious authorities. Their accounts on offender’s needs, views, behaviours etc., are not balanced by the presence of a group directly representative of the offender’s claims. The difference is therefore that victims’ needs are elaborated by a specific interest organization and then filtered by the scientific knowledge of criminologists, psy-experts and religious leaders whereas the offender’s perspective is entirely shaped by these authorities. Probably, the only counter-balance in the definition of the offender’s identity in the authoritative accounts on the RJ is embodied in the human rights movement which has slowly come to deal with the RJ initiatives. In this ‘subject’ it is possible to see a potential authority of delimitation able to create a narrative on the offender ‘qualitatively’ divergent from the victim’s movement perspective, first and foremost because built on a different preliminary understanding of the position of the offender, his/her needs and rights.

⁸⁸³ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 124.

⁸⁸⁴ Ibidem, p. 41.

⁸⁸⁵ Ibidem, pp. 55-61.

⁸⁸⁶ Sheridan, A. (1997). *Michel Foucault. The Will to Truth*. Abington: Routledge, p. 97.

3.2.2. Grids of specification

The knowledge that experts use as basis for their authority, is part of what Foucault calls the “*grids of specification*⁸⁸⁷”, i.e. specific structures of knowledge. The grids work in a circular way: they legitimize the experts’ positions and the statement they produce, and at the same time are ‘made true’ and reproduced by the experts’ work, as “*a field of circular causality*⁸⁸⁸”. The grids of specification are composed of all the knowledge -legitimate and illegitimate- encompassing a certain discourse. The ‘authorities of delimitation’ select from these frameworks what they deem legitimate knowledge, and discard or delegitimize what is not. Besides specific knowledge, the grids produce also binary oppositions, for instance between what is ‘true’ and what ‘false’. This opposition is crucial to appreciate not only how the authorities of delimitation ‘use’ the grids of specification, but also how both embody specific power relations, mainly expressed by the generation of the legitimate ‘truth’ by refusing other statements, designated as false. This opposition can be described as “*games of truth*⁸⁸⁹”, i.e. the dynamic definition and exclusion of statements according to their ‘nature’ as true or false, a nature which is deep-seated in power relations, shaped as legitimate knowledge, administered by expert authorities, and delimited by particular rules⁸⁹⁰. In our case, the grids of specification are then the frameworks of knowledge underpinning the demarcation, description, classification of the RJ performed by the authorities of delimitation. In this regard, and more precisely, the authoritative explanations appear to be built on the opposition between continuistic/non-continuistic histories whereas the conceptualizations are based on the core comparison with the criminal justice. In many authoritative explanations, the events, developments, inventions regarding the RJ seem to be linked in a continuous and necessarily progressive evolution. It is a linear history consisting of a series of events, progressing or regressing in a certain direction, usually culminating in the belief that the current period of time is somehow fundamentally unique from and superior to any other period of time⁸⁹¹. Additionally, in the discussion of the RJ origins, events are often considered as ‘agents’ that can bring about other historical events. In this causal perspective, we see the RJ as a product of a genetic connection between some specific phenomena (the cause, e.g. the breakdown of criminal justice) under certain conditions (e.g. the emergence of a crime victim movement). On the other side, we detect the presence of non-continuistic histories which stress the innovation brought by the RJ, its link to the late-modernity of western societies. Looking at the explanatory authoritative discourses as integral to a specific grid of specification, it can be emphasized a last aspect. The RJ is often considered a functional ‘answer’ to a specific ‘crisis’, or ‘lack’ and ‘needs’. Accordingly, it is possible to define these accounts as ‘functionalist’. Underlying the authoritative explanations is the idea that social reality is a complex system whose parts work together to promote stability. In this perspective, when a deficiency or a surplus is present in social reality some natural reactions come into being filling the gap or eliminating the excess. Approximately this idea underlines the rising of the RJ: a critical situation (breakdown of criminal

⁸⁸⁷ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 42.

⁸⁸⁸ Ibidem.

⁸⁸⁹ Foucault, M. (1994). Interview with Michel Foucault. In J.D. Faubion (Ed.), *Essential Works of Foucault 1954-1984*, Vol. 3 (pp. 239-297). New York: The New Press, pp. 296-297.

⁸⁹⁰ Ibidem.

⁸⁹¹ Weitekamp, E. (1999). *The History of Restorative Justice*, cit.

justice) asks for a solution (the rise of the RJ). As for the authoritative conceptualizations, they appear to be always fabricated in reference to the criminal justice system, intended as a magmatic mindset, an ensemble of professionals, institutional structures and expert knowledge. This reference can be critical and oppositional or constructive and positive, i.e. the RJ is conceptualized as either an alternative or complementary (to different degrees) to the criminal justice.

3.2.3. Points of Diffractions

The epistemic/conceptual authority of the archive of the RJ, expresses itself in defining who can speak and how, what can be talked about the causes, concepts and practices of the RJ. Its sources are specific cultural/political constructs which have gradually made acceptable the authoritative discourses, as a part of our collective imaginary in dealing with crimes. At this point two last remarks must be done. The first regards the relationships within and between the surfaces of emergence, which so far I described as isolated and inactive entities, focusing on their tensions and combinations. The second remark is in regard of the dynamic construction of the archive. The surfaces of emergence are 'static' factors; the problem is to set-in-motion them in order to understand how the authoritative discourses have become possible. Starting from the first point, it has already been mentioned how the new criminological knowledge on victims shapes the identity of the two main actors of the RJ. Victim and offender seem to 'find' their needs, claims and identities in the victimological research, which 'lands out' its categories and an overall perspective to the authoritative rationalizations of the RJ. At the same time emerges a particular tension between the categories of victim and offender as conceptualized in the authoritative accounts. In fact, while the presence of a crime victim movement filters the identity of victim worked out by the victimological research (and crime victims' movement), the absence of an 'offenders' movement' defines a kind of lack which potentially affects the role of the offender in the RJ theory and practice. This gap between the categories of victim and offender in the authoritative accounts, expresses itself in the less nuanced identity of the offender, usually depicted as just the counterpart of the victim, the 'other' silenced by the expert discourses which speak in his/her behalf, asking for being ashamed, restoratively punished or pushed toward reparation. The existence of epistemic tensions is not only integral to the same surface of emergence but can be detected also between them. This is the case of the relationship between abolitionist/communitarian discourses and the victimological knowledge. What can be easily distinguished is the presence of a "point of diffraction"⁸⁹² which characterizes this relationship. Victimological research in fact, takes for granted what abolitionism accounts deeply deconstruct: the concept of crime (over-determined in victimology and deconstructed in the abolitionism). Similarly, the abolitionism/communitarian view 'clashes' against the spiritual/therapeutic perspective. In the first discursive construct, de-professionalization and communitarian regulation of problematic situations are unquestionable points. On the other hand, the spiritual/therapeutic discourses imply the strong and regulative presence of experts, creating a vertical way of regulating social conflicts, which, as a consequence of this expert intervention, become inner conflicts. This epistemic shift in 'knowing' the conflict is a relevant point of diffraction between those

⁸⁹² Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 66.

two surfaces of emergences. These kinds of tensions have implications for the authoritative discourses on the RJ. For instance, the contraposition between the different concepts of 'trigger event' or the various declinations of 'restoration' seem to be related to the tension abovementioned. The distinction between conflict, harm, normative violation or restitution and reparation, the link with the punishment and the criminal justice, are all depending on different (and divergent) kinds of knowledge which 'ground' the different authoritative discourses.

3.2.4. Thresholds of emergence

The second, aforementioned observation is about what Foucault calls the "*thresholds of emergence*"⁸⁹³ and its application to the authoritative accounts on the RJ. These thresholds are the historical phases faced up by a discourse in order to achieve its epistemic authority (or scientificity). Foucault identifies four thresholds: *positivity*, *epistemologization*, *scientificity* and *formalization*⁸⁹⁴. In the case of the archive of the RJ, we can consider the 'positivities' as the borderline innovative practices of dealing with crimes which in the 1980s will become the target of the rationalization carried out by the authoritative discourses on the RJ (e.g. Kitchener experiment). Slowly, a system of forming statements explaining and justifying those practices can be discerned. This is the hard core of many authoritative discourses, characterized for a low level of abstraction and a strong procedural attention drawn to the practices such as VOM or family conferencing. The epistemologization, i.e. the development of a refined epistemic authority and of specific discursive objects and themes, is related to the particular 'retrieval' of some theoretical writings which originally were not meant to contribute to the RJ at all. This is the case of the 'sacred texts' of the RJ, the seminal contributions which have been representing the hard core of the authoritative discourses. Authors such as Christie, Barnett and Eglash, widely considered as pioneers in the RJ theory, wrote independently and way before the birth of the restorative movement, accordingly ignoring its claims. Only from the 1980s the proponents of the RJ started to re-frame those writings, taking possession of them as the 'forefathers' words' on the RJ. In this way the authoritative discourses on the RJ have gained a more structured and refined epistemic authority, i.e. a theoretical pedigree certified by the scientific reputation of the 'forefathers'. The scientific threshold is then reached by the emergence of the new criminological knowledge on the crime victims combined with the therapeutic expert knowledge (as a secularized version of the spiritual/religious one) on the needs of victims and offenders. The formalization threshold is lastly attained through the growing of the legal codification of many authoritative accounts on the RJ⁸⁹⁵. This is probably the uttermost certification of the authority of those accounts in defining (normatively) the possibility of what can be said and done in the RJ field. What must be stressed regarding these thresholds is that they are not regular and successive historical stages. Neither are they definitive and necessary phases in the evolution of the authoritative discourses. In fact, antagonistic accounts often are put forward, destabilizing the epistemic authority of the former ones. These thresholds are instead the living and magmatic history of the

⁸⁹³ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 186.

⁸⁹⁴ Ibidem, pp. 182-187.

⁸⁹⁵ Marshall, T.F. (1999). *Restorative Justice: An Overview*, cit.; Hayes, H., Daly, K., (2004). Conferencing and Re-offending in Queensland. *The Australian and New Zealand Journal of Criminology*, 37(2), 167-191.

authoritative accounts on the RJ, a dynamic ensemble of institutions, practices, academic arguments and practical experiences contingently linked together and synchronically interacting which give to the RJ's edifice that appearance of a multifaceted, shifting and conflicting reality.

3.2.5. External systems of exclusion

The authoritative discourses on the RJ work also through a series of exclusionary mechanisms which make possible the emergence of certain objects instead of others. As Hook writes⁸⁹⁶, the first exclusionary mechanisms Foucault deals with are the social procedures of prohibition which correspond roughly to “*taboos, rituals and privileges of the speaking subject*”⁸⁹⁷. These forms of prohibition seem fairly straightforward and Foucault does not spend much time in elaborating them⁸⁹⁸. Accordingly I will not dwell on this exclusionary mechanism. A second, more complex and interesting (for this work) exclusion mechanism operating within the order of discourse is the opposition between true and false. We have already identified the combination between authorities of delimitation/grids of specification as a crucial condition for the production of legitimate (or true) statement regarding whichever entity. Thinking in terms of external systems of exclusion means to complement that analysis, illustrating the specific form of truth-claims produced thanks to that combination. Our ‘will to truth’, is, Foucault claims, something “*like a system of exclusion, a historical, modifiable, and institutionally constraining system*”⁸⁹⁹. Which are then the claims of truth held by the authoritative discourses? First of all, we can focus on the truths regarding the identity of the RJ's stakeholders (victim, offender and community). The first truth regards the ‘ontological’ distinction between these three entities. Probably as consequence of their surfaces of emergence, the authoritative discourses take for granted that victim, offender and community are three distinguishable and necessary distinct entities with different ‘natural’ identities, needs, claims, features, histories. The authoritative accounts are built upon this distinction, as the prescribed ways of dealing with them are based on that separation. The possibilities of overlapping are mainly excluded. The possibility of ‘role reversal’ is simply denied. The idea that victim, offender and community are ‘roles’, is just neglected, or defined as false. A second truth is that behind the crime there is always a conflict or a source of harm/loss. This truth, shaped as objective discourse emerging from the communitarian/abolitionist surface, is one of the milestones of RJ authoritative discourses. The possibility that crimes might not imply any conflict, or damage and loss regarding the people directly involved, is obliterated. A third truth is that the criminal justice does not work. This discursive object rooted in the ADR/informal justice construct, is another certainty of the authoritative accounts. The idea of a ‘criminal justice’ as not easily definable entity which is in crisis since ever, excludes any appreciation of any possible constructive function performed by this ‘system’, dubbing as false this positive appraisal. The idea that between parties involved in crime/conflicts, stands normally a ‘relationship’ to be addresses is a recurrent truth which excludes the possibility of discard the restorative intervention in favor of punishment for instance, defining as false the denial of ‘link’ between

⁸⁹⁶ Hook, D. (2007). Discourse, knowledge, materiality, history: Foucault and discourse analysis, cit., p. 4.

⁸⁹⁷ Foucault, M. (1981). The Order Of Discourse, cit.

⁸⁹⁸ Ibidem.

⁸⁹⁹ Ibidem, p. 54.

parties. The claim of healing potential of the communication, regarding the relationship altered by the conflict/crime is another truth purported by the authoritative accounts. This statement excludes the possibility that parties might not want any communication between them, not looking at it as a healing mechanism. This truth additionally imposes the 'meeting' between parties as privileged site of healing, excluding the possibility that parties would claim the distance or avoidance as healing mechanism

The "*will to truth*⁹⁰⁰" is a crucial component in the workings of a successful discourse⁹⁰¹. The strongest discourses are those which have attempted to ground themselves on the natural, the sincere, the scientific -in short, on the level of the various correlates of the 'true' and reasonable. This situation is aptly characterized by Said when he notes: "*the will to exercise [...] control in society and history has also discovered a way to clothe, disguise, rarefy and wrap itself systematically in the language of truth, discipline, rationality, utilitarian value, and knowledge. And this language in its naturalness, authority, professionalism, assertiveness and anti-theoretical directness is [...] discourse*⁹⁰²". In the case of the authoritative discourses of RJ, their 'truthfulness' is anchored to several scientific grounds. The existence of counter-discourses within the RJ literature exposes the limits of the mainstream truths of the RJ. Nevertheless, scientific ground is offered by the victimological knowledge, especially through victimization reports which work as both explanation and justification of the RJ historical emergence. The 'quantitative' criticism regarding the legal justice system, included in the ADR/informal justice literature reinforces that ground.

The "*fabrication of divisions*⁹⁰³" is another mechanism of external exclusion. According to this procedure, operating along the lines of 'division and rejection', certain utterances are rejected by complex processes anchored in dividing and sorting, for example the right from the wrong, the irrational from the rational, the sane from the mad. For example, 'rational' discourses often function to exclude the discourses and experiences of the "*irrational other*⁹⁰⁴". In the case of RJ's accounts, multiple divisions stand as milestones. The distinctions operating within the discursive formation of the RJ, mainly oppose victim and offender, crime and conflict, community and state, restoration and punishment, just to recall the main ones. These binaries oppositions continue to influence academic, political and media discourses, as well as subjectivity, a theme I elaborate further in next chapter. The "*censorship*⁹⁰⁵" is the last external exclusionary mechanism. Rules of exclusion prohibit speaking about certain objects (sexuality, for example, or politics), arrange certain rituals and circumstances in which it is permissible to do so, and grant certain people (and exclude others therefrom) the exclusive right to do so. Speech is not the mere "*verbalization of conflicts and systems of domination, but [...] is the very object of man's conflicts*⁹⁰⁶". The prohibitions in authoritative accounts on RJ are various. The idea that community would be a criminogenic factor instead as a positive stakeholder, the denial of overlapping between victim and offender, the impossibility of restoration, the will to revenge or punish as legitimate are all objects of prohibition.

⁹⁰⁰ Foucault, M. (1981). *The Order Of Discourse*, cit., p. 54.

⁹⁰¹ Hook, D. (2007). *Discourse, knowledge, materiality, history: Foucault and discourse analysis*, cit., p. 6.

⁹⁰² Said, E. (1983). *The world, the text and the critic*. Cambridge: Harvard University Press, p. 216.

⁹⁰³ Foucault, M. (1981). *The Order Of Discourse*, cit., p. 55.

⁹⁰⁴ McNay, L. (1994). *Foucault: A Critical Introduction*, cit., p. 86.

⁹⁰⁵ Foucault, M. (1981). *The Order Of Discourse*, cit., p. 53.

⁹⁰⁶ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 216.

3.2.6. Internal systems of exclusion

There are also a number of exclusions which work internally to discourse. Foucault identifies as the main ones the *discipline*, the *author* and the *commentary*. Each of these permits the generation of new discourses “*virtually ad infinitum - although within certain limits of constraint*⁹⁰⁷”. As for the *commentary*, Foucault argues that every society has its major and privileged narratives which “*lie at the origins of a certain number of new verbal acts, which are reiterated, transformed, or discussed*⁹⁰⁸”. The idea underpinning the ‘commentary’ as a system of exclusion, is that originality is impossible while inter-textuality, as the use of pre-existing discourses as reservoirs for the construction of other narratives, is just unavoidable. At the same time the ‘authority’ of the commentaries entails the de-qualification (and then the exclusion) of lowly narratives as potential ‘footings’ of new discourses. Commentary’s role is to re-articulate and re-enact what has already been said: it “*gives us the opportunity to say something other than the text itself, but on condition that it is the text itself which is uttered and, in some way, finalized*⁹⁰⁹”. Foucault distinguishes these foundational narratives of a society in primary (foundational religious, juridical or scientific texts) and secondary cultural texts⁹¹⁰. It is due to “*the ‘top-heaviness’ of primary texts that they will remain permanent, yet ever capable of being brought up to date, revisited for hidden or multiple meanings*⁹¹¹”. The commentary “*gives us the opportunity to say something other than the text itself, but on condition that it is the text itself which is uttered*⁹¹²”. Foucault’s point here is that we overestimate “*the importance of originality and freedom in everyday discourse when in fact much of what is spoken is really the product of repetition, or discursive ‘re-circulation’*⁹¹³”. Which are the commentaries upon which the authoritative accounts on RJ are written? The theories of punishment, social control, but also theories of psychological and spiritual development, theories of justice especially in western countries seem to play the role of condition for the authoritative texts of the RJ, to be produced and kept alive as understandable set of principles. In our case, the commentaries refer to the proliferation of interpretations by various authors about the ‘true meaning’ of ‘primary’ RJ’s texts. They are secondary narratives which accumulate to build a textual hierarchy about what can be said or thought about a particular topic or theme. This mass of commentary has the potential then, to produce new discourse. A specific dimension of commentary is the citational network, which is based on the practices of citing the works of particular authors to support or alternatively dismiss their standpoints. Along with the other internal rules, commentary plays a key role in establishing the conditions of possibility of contemporary and future scholarly work by constructing dominant and subordinate knowledges. Another mechanism of internal exclusion is that of the *author*⁹¹⁴. Foucault means the author in the sense of a principle or grouping of discourse, a focus of coherence, a unity and origin of meaning⁹¹⁵. Whereas

⁹⁰⁷ Hook, D. (2007). Discourse, knowledge, materiality, history: Foucault and discourse analysis, cit., p. 9.

⁹⁰⁸ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 216.

⁹⁰⁹ Ibidem, p. 221.

⁹¹⁰ Foucault, M. (1981). *The Order Of Discourse*, cit., p. 58.

⁹¹¹ Ibidem.

⁹¹² Ibidem.

⁹¹³ Hook, D. (2007). Discourse, knowledge, materiality, history: Foucault and discourse analysis, cit., p. 10.

⁹¹⁴ Foucault, M. (1981). *The Order Of Discourse*, cit., p. 57.

⁹¹⁵ Ibidem.

commentary restrains the potential hazards of discourse through the repetition and similarity, the ‘author’ limits this same possible and unforeseeable discursive developments, through the identity of individuality and the ‘I’⁹¹⁶. Although the principle of the author is obviously not to be found in each instance of discourse, it is a crucial foundation of the legitimacy and truth of certain statements⁹¹⁷. In “What is an author?”, Foucault develops this conceptions affirming that the ‘author-function’ must not be thought as a creative, inventing capacity, but rather as a multifaceted and mutable discursive function which refers to the existence of certain groups of discourse (associated with the author in question) and affirms their status within a given time/space⁹¹⁸. Asking “*what matter who’s speaking?*”⁹¹⁹”, as Hook emphasizes, Foucault “*inverts the typical causal assumption of author-generates-discourse to ask how discourse instead give(s) rise to subjects (like authors) with privileged positions (and a series of related possible subject-positions)*”⁹²⁰”. Instead of examining what the author individually produces in the texts, Foucault “*suggests we ask instead about what possible subject-positions are made possible within such texts*”⁹²¹”. Different and interconnected are the main factors of grouping the authoritative discourses of RJ, disguised behind the voices of individual authors. The opposition to the criminal justice system, the reframing of crime as conflict/harm, the attention to the psychological/spiritual reality, altogether these principles compose the ‘author-function’ of the authoritative accounts, the condition of their unity as a common body of thoughts, attitudes, means and ends. Accordingly, it is neither the work of the ‘founding’ fathers nor the intuitions and achievements of the pioneer practitioners of the RJ to give coherence to the authoritative discourses. It is indeed, the complex process of inclusion/exclusion of statements, articulated by specific expert authorities in reference to specific knowledge embedded in certain power relations, which works as ‘author-like’ generative mechanism of truths on the RJ.

The *discipline* is the last internal principle of discursive limitation. A legitimate disciplinary statement is depends on a variety of conditions, related to the appropriate domain of objects, theories, methods, propositions, rules, definitions, techniques and instruments⁹²². Disciplines are “*defined by groups of objects, methods, their corpus of propositions considered to be true, the interplay of rules and definitions, of techniques and tools: all these constitute a sort of anonymous system*”⁹²³”. A discipline is neither the “*sum total of all truths that may be uttered concerning something*”⁹²⁴” nor the “*total of all that may be accepted, by virtue of some principle of coherence or systematization, concerning some given fact or proposition*”⁹²⁵”. For a proposition to belong to a discipline, it must fulfill certain conditions other than mere truth: it must refer to a specifically delimited range of objects and it must utilize certain “*conceptual instruments and techniques of a well-defined type*”⁹²⁶”. For

⁹¹⁶ Foucault, M. (1981). *The Order Of Discourse*, cit., p. 57.

⁹¹⁷ Ibidem.

⁹¹⁸ Foucault, M. (1977). What is an author? In D. F. Bouchard (Ed.), *Language, Counter-memory, Practice* (pp. 113-138). Ithaca: Cornell University Press.

⁹¹⁹ Ibidem, p. 138.

⁹²⁰ Hook, D. (2007). Discourse, knowledge, materiality, history: Foucault and discourse analysis, cit., p. 11.

⁹²¹ Ibidem.

⁹²² Foucault, M. (1981). *The Order Of Discourse*, cit.

⁹²³ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., pp. 222-223.

⁹²⁴ Ibidem, p. 223.

⁹²⁵ Ibidem.

⁹²⁶ Ibidem.

a proposition to be considered true, it must accommodate itself to the theoretical field that prevails in the discipline into which it is inserted. The authoritative discourses of the RJ work out as a discipline, i.e. a delimited range of interplaying discursive objects, which define the standards of which statement is possible to include and which ones to exclude from the same discipline. Insofar as they are disciplinary discourses, they embody 'automatically' the exclusionary process proper of any discipline. In our case, this discipline is concerned with the control of 'problematic situations' at a societal level, looking at the individualization of social control as a mean/end to be achieved. Moreover, it excludes 'top-down' explanations on the emergence of conflicts, de-qualifying 'external' and coercive means of intervention as invading the personal and societal space where conflicts arise. In short, the internal systems of exclusion contribute to shape the discursive formation of the RJ, as a variable range of phenomena which govern what has been possible to think, say and experience about the RJ, in a given space/time. The concepts of commentary, author and discipline helps us to recognize the restraining 'forces' operative in the authoritative discourse. The re-circulation of statement, the author-like grouping of discourses and the delimitation of rigid disciplinary fields, work as complex of "*restrictive and constraining*"⁹²⁷ conditions for the creation of true and (false) statements on the RJ.

3.3. 'Beyond' the discursive formation

The archive indispensably requires the re-construction of its conditions of intelligibility/possibility and a careful analysis of the epistemic/conceptual conditions of its authority. This means to re-construct the articulation of cultural constructs, historically positioned, which make the discourses on the RJ a meaningful configuration of concepts and strategies. The discursive formation is nothing but the archive from a different perspective, a perspective which unveils those historical conditions which are necessary part of the archive itself. To analyze the discursive formation of the RJ means moreover to look at the dynamic relationships between the archive's basic units (discursive objects) which make the archive 'authoritative'. Stopping the analysis at this point would mean to risk reproducing discourses detached from the political processes which 'embed' them within power/knowledge relationships. Discourses cannot be separated by their political performativity. As Hook writes, "*without reference to the underwriting political conditions of knowledge and without reference to the political frame of what constitutes reasonable knowledge, discursive analytic procedures will only be able to make isolated comments, with a generalizability and political relevance limited to the reference point of the analyzed texts*"⁹²⁸. Moreover, without reference to the subjectivating effect of the archive, the problematization would remain largely condemned to say nothing about individuals involved- and constructed- in those discourses as 'victim', 'offender' and 'community'. In order to unify the political and subjectivating dimension of the RJ, the analytic efforts included in the next chapters will be shaped as the examination of the political rationality, articulated in specific political technologies, which is the 'context' of the RJ and then the basis for the analysis of the power/subjectivity nexus. This double operation makes possible to overcome the shortcomings of a pure 'discursive' analysis, opening

⁹²⁷ Foucault, M. (1981). *The Order Of Discourse*, cit. p. 61.

⁹²⁸ Hook, D. (2007). *Discourse, knowledge, materiality, history: Foucault and discourse analysis*, cit., p. 38.

up a way toward the RJ apparatus. In short, the methodological injunctions prioritized by Foucault regarding the 'discursive' analysis, can be better deployed within the ambit of a critical work which locates the archive within the broader analysis of power and subjectivity.

CHAPTER 4

THE POLITICAL RATIONALITY OF THE RESTORATIVE JUSTICE

“[...] power can retreat here, re-organize its forces, invest itself elsewhere [...] and so the battle continues⁹²⁹”.

4.0. Introductory remarks

This chapter focuses on the ‘political rationality’ which is integral to the emergence of the discursive formation of the RJ. The questions to be addressed are: what is the logic of the inscription of the RJ into the social and individual ‘body’? Which are the political conditions which contribute to make the RJ intelligible and possible? The assumption which leads this part of my research is that the discursive formation of the RJ responds to a specific political rationality, ‘operationalized’ through a panoply of political technologies⁹³⁰. The analytical and conceptual reservoir elaborated by Nikolas Rose is a constant reference point in the next sections. Particularly, the concepts of ethopolitics and ethopolitical technologies play a role in the understanding of the ‘political rationality’ of the RJ. Ethopolitics is style of governing not reducible to a particular political philosophy, but rather is characterized by its type of technologies⁹³¹, inscribed in the framework of neo-liberal governmentality. This means that ethopolitical technologies complement the neo-liberal transformation of the market from a limited form of social action to the organizational principle for society⁹³², contributing to the redefinition of individual/collective ethos of the *homo economicus* as self-managing, self-responsible and self-controlling. However, ethopolitics is here used as a conceptual construct/analytical tool without direct reference to the Rose’s crucial idea of ‘molecularization’ of life and to how scientific developments have changed conceptions of human identity and governance. Yet, differently from Rose, I will focus on other ‘media’ and ‘effects’ of ethopolitics. Securitization, refeudalization of governance, and psy-individualization are not alternative to the rise of genetics or biological citizenship as *‘explanans’* and *‘explanandum’* of ethopolitics, they are just other *variants*. Here ethopolitics is thought as the political rationality which ‘evolves’ the biopolitics embodied in the archetypical welfare state. The ethopolitical ‘rise’ is represented by the neo-liberal shift from a political system engaged in granting collective well-being, to fostering of self-managing competences of individuals, in short: from the ‘taking care’ of the social (and individual) *bios*, to political colonization of the individual (and social) *ethos*. Such colonization is implemented by specific political technologies shaping *post-social* citizens⁹³³.

4.1. From Biopolitics to Ethopolitics

The concept of ‘biopolitics’, as elaborated by Foucault, refers to what “*brought life and its mechanisms into the realm of explicit calculations and made knowledge-power an*

⁹²⁹ Foucault, M. (1980). Body/Power. In C. Gordon (Ed.), *Power/Knowledge: Selected Interviews & Other Writings 1972-1977* By Michel Foucault (pp. 55-62), cit. p 56.

⁹³⁰ See Pavlich, G. (2005). *Governing Paradoxes of Restorative Justice*, cit.

⁹³¹ Phillip, B. (2003). *Governing liberal subjects: Foucault, Psychology and self-help books*. PhD thesis, University of Melbourne, Australia.

⁹³² Shamir, R. (2008). The age of responsabilization: on market-embedded morality. *Economy and Society*, 37(1), 1-19, p. 6.

⁹³³ See Inda, J.X. (2008). *Targeting Immigrants: Government, Technology, and Ethics*. Oxford: Blackwell.

*agent of transformation of human life*⁹³⁴”. He distinguished historically and analytically between two dimensions of this power to life, namely between the disciplining of the individual body, on the one hand, and the social regulation of the body of the population, on the other⁹³⁵. The concept of biopolitics signals then a theoretical critique of the “*juridico-discursive*⁹³⁶” model of power, emphasizing the productive (against the repressive) capacity of power that cannot be reduced to the ancient sovereign ‘right of death’. While sovereignty mainly operated as a repressive mechanism⁹³⁷, the new life-administering power is dedicated to inciting, reinforcing, monitoring and optimizing the forces under its control⁹³⁸. Biopolitics implies two typologies of strategies: totalization and individualization. The totalizing strategies refer to the practices aiming at controlling of all aspects of life by creating pressure to conform to norms. The individualizing strategies come into light because those who fall outside the norm are targeted with disciplinary/normalizing interventions⁹³⁹. Power thus operates through both the production of knowledge, and the creation of a desire to conform to the norms that this knowledge establishes. This desire to conform leads people to sustain their own normalization voluntarily, through self-disciplining. Three are the historical components/stages of the biopolitical paradigm: *pastoral power*, *raison d'état* and *polizei*. Basically, the foucauldian idea is that the techniques of differentiation, individualization and submission, embodied by the ‘pastoral power’, have been adjusted, modified, improved and upgraded, first in the seventeenth and eighteenth centuries by the ‘police’ of the *raison d'état*, and then at the end of the nineteenth and the beginning of the twentieth centuries by the welfare state (whose French name, *état providence*, is reminiscent of its religious origins), thus transforming techniques for the ‘government of souls’ into techniques for the ‘political government of men’. The concept of ‘ethopolitics’ represents a kind development of the foucauldian biopolitics. The shift seemingly occurred during the second half of the 20th century, changing the focus of biopolitics from the governmental ‘care’ for the collective, to the responsabilization of individuals for their own life. This neoliberal shift allows for the conduct of individuals to be “*governed ‘at a distance*⁹⁴⁰”. The state no longer is directly in charge of the coercive ‘care’ of the people. It drastically reduces its action, making available limited resources in specific areas which are up to the individual to take advantage of (for example, health clinics might offer free flu shots, but individual decide if access such a resource). The choice becomes a crucial site of political intervention: individuals must become free, must enjoy a specific form of freedom linked to certain idea of responsibility. In addition, Rose comments that, because of this shift biopolitics has been democratized and political and personal aspirations

⁹³⁴ Foucault, M. (1980). *The history of sexuality an introduction, The Will to Knowledge*, Vol. 1., cit., p. 143.

⁹³⁵ Lemke, T., Biopolitics and beyond. On the reception of a vital Foucauldian notion. Retrieved 5 May 2012 from http://www.biopolitica.cl/docs/Biopolitics_and_beyond.pdf

⁹³⁶ Foucault, M. (1980). *The history of sexuality an introduction, The Will to Knowledge*, Vol. 1., cit., p. 82.

⁹³⁷ Lemke, T. (2005). A Zone of Indistinction. A Critique of Giorgio Agamben’s Concept of Biopolitics. *Outlines*, 1, p. 3.

⁹³⁸ see Foucault, M. (1980). *The history of sexuality an introduction, The Will to Knowledge*, Vol. 1, cit., Part 5.

⁹³⁹ Pylypa, J. (1998). Power and Bodily Practice: Applying the Work of Foucault to an Anthropology of the Body. Retrieved 5 May 2012 from http://arizona.openrepository.com/arizona/bitstream/10150/110194/1/azu_gn1_a785_n13_21_36_w-ocr.pdf, p. 24.

⁹⁴⁰ Rose, N. (2006). *The Politics of Life Itself*, cit., p. 6.

for health are now the same, “*the will to health would not merely seek to avoidance of sickness [...] but would encode an optimization of one’s corporeality to embrace a kind of overall ‘well-being’ -beauty success, happiness, sexuality, and much more*”⁹⁴¹. Biopolitics is now about choice and thus has turned into *ethopolitics*, i.e. in the shaping of individual subjectivities which aim not only at avoiding physical sickness, personal damages, formal sanctions etc. but also at being the ‘best person’ they can be. Ethopolitics, then, is the ethical-political rationality which drives individuals to re-define the relation with themselves, in terms of open-ended futures⁹⁴². Individuals become endless moldable realities: they must believe and pursue the infinite plasticity of their being. But there is more to Rose’s account than a shift in the target of political rationalities from the political elaboration of the life to the actual make-up of individual freedom in relation to the body. For Rose, ethopolitics also relates to crucial changes in the relation between the individual and the state. He defines an account of a historical shift from a biopolitics of populations to an ethopolitics characterized by the individual management of the ‘*somatic*’ self. Within such a perspective, he argues, individuals are presented with new ways of rendering their identities to themselves in thought and language, evaluating and ultimately acting upon them using specific newly shaped categories. Choice, freedom and risk become ‘individualized’, the individual becomes “*intrinsically somatic*”⁹⁴³ and ethical practices “*increasingly take the body as a key site for work on the self*”⁹⁴⁴.

4.1.1. Ethopolitics: individual and collective dimensions

Ethopolitics as an analytic tool, allows us to ‘unify’ the processes of constructing values, beliefs and sentiments underpinning responsible self-government and shaping individuals’ conduct⁹⁴⁵. As Rose states, “*if discipline individualizes and normalizes and biopower aggregates and socializes, the ethopolitical technologies work through the values, beliefs, and sentiments thought to underpin the techniques of responsible self-government and the management of one’s obligations to others. Life itself, in its everyday manifestations, is the object of adjudication*”⁹⁴⁶. Foucault argued that within liberal modes of governance, subjects are constituted as active agents, who can be governed through their autonomy and capacity to act⁹⁴⁷. In this context, governmental objectives are to be achieved not through direct acts of intervention, but by realigning individual subjectivities in line with governmental aims⁹⁴⁸, devolving of autonomy and responsibility from the state to ‘active’ citizens. This involves the “*conduct of conduct*”⁹⁴⁹, the deployment of particular strategies and techniques aiming at shaping behaviour towards

⁹⁴¹ Rose, N. (2006). *The Politics of Life Itself*, cit., p. 17.

⁹⁴² Braun, B. (2007). Biopolitics and the molecularization of life. *Cultural geographies*, 14, 6-28.

⁹⁴³ Ibidem, p. 11.

⁹⁴⁴ N. Rose, (2001). The politics of life itself. *Theory, culture and society*, 18, 1-30, p. 17.

⁹⁴⁵ Skinner, D. (2005). *Organising Organic: Individual and Collective Constructions in a Rural Community*. 4th International Critical Management Studies Conference, Cambridge, United Kingdom. 4/6-7-2005, p. 9.

⁹⁴⁶ Rose, N. (2001). Community, Citizenship, and the Third Way. In D. Meredyth, J. Minson (Eds.), *Citizenship and Cultural Policy* (pp. 1-17). London: Sage, 2001, p. 4.

⁹⁴⁷ Foucault, M. (1983). The Subject and Power. In H. L.Dreyfus, P. Rabinow (1982). *Michel Foucault: Beyond Structuralism and Hermeneutics* (pp. 208-226), cit.

⁹⁴⁸ McIntyre, Z., McKee, K. (2012). Creating Sustainable Communities through Tenure-Mix: the responsibilisation of marginal homeowners in Scotland. Retrieved 5 May 2012 http://www.gla.ac.uk/media/media_129712_en.pdf, p. 2.

⁹⁴⁹ Rose, N. (1996). *Inventing Ourselves: Psychology, Power and Personhood*, cit., p. 155.

particular ends⁹⁵⁰. Ethopolitics represents then, a specific form of government ‘at a distance’, which entails a particular reconfiguration of state-citizen relations⁹⁵¹. Gradually, its technologies have sought to govern “*individual conduct with reference to dominant moral discourses of responsible behaviour. Subjects are constructed as ethical citizens who can take responsibility for their own well-being, including their ability to purchase and consume goods and services*”⁹⁵². Hence, their ‘success’, depends on their ability to ‘actively’ participate in the shaping of their own lives, as opposed to passive dependency on the state. The crucial feature of ethopolitics has been then defined by this governmental objective of “*simultaneously empowering citizens and making them responsible for their own life outcomes*”⁹⁵³. The wide spreading as crucial political themes of issues such as local autonomy, participation, community ownership of conflict, communities’ self-help services etc., feature prominently the emergence of ethopolitics as neo-liberal rationality of government in the last thirty years. Moreover, as “*ethopolitical ‘media’*”⁹⁵⁴, must be included culture, aesthetics and lifestyle choices, all channels for encouraging governable subjects to self-regulate their conduct with reference to a “*certain art of living*”⁹⁵⁵. At the same time, emerges the possibility of difficult adjustments to the ‘art of living’ sustained by the ethopolitical means. Accordingly, “*those who are denied choice or make the wrong choice are stigmatized and may be subject to targeted state interventions designed to reconstruct them as ‘good’ citizens who can access markets and direct their own normalized acts of consumption*”⁹⁵⁶. The individual body is as a site of intervention for ethopolitical technologies exactly like the collective body. As Rose argues that “*the person whose conduct is to be governed is believed to desire personal autonomy as a right, but autonomy does not imply that individuals live their lives as atomized isolates*”⁹⁵⁷. He continues, “*they are understood as citizens, not of societies as national collectivities, but of neighborhoods, associations, regions, networks, subcultures, age groups, ethnicities, and lifestyle sectors - in short, communities*”⁹⁵⁸. Therefore, the “*moral order cannot rest on legal codes enforced and upheld by guardians; it is embodied and taught through the rituals and traditions in the everyday life of communities*”⁹⁵⁹. The collective dimension of ethopolitics refers then to shaping of a reciprocal obligation between government and the governed through a *community-based* ethic that produces new subjectifications. In this perspective it is possible to advance Foucault’s ideas by emphasizing how contemporary technologies of governance involve constructing subjectivities for subjects as citizens within the context of their communities⁹⁶⁰. Here community represents both a territory (i.e. spatial scale of intervention) and a governmental technique (i.e. strategy of government) that works through the values, meaning and sentiments thought to underpin the

⁹⁵⁰ Flint, J. (2003). Housing and Ethopolitics: constructing identities of active consumption and responsible community. *Economy and Society*, 32(3), 611-629.

⁹⁵¹ Miller, P. Rose, N. (2008). *Governing the Present*. Cambridge: Polity Press.

⁹⁵² McIntyre, Z., McKee, K. (2012). Creating Sustainable Communities through Tenure-Mix: the responsabilisation of marginal homeowners in Scotland, cit., p. 3.

⁹⁵³ Ibidem, p. 3.

⁹⁵⁴ Ibidem, p. 4.

⁹⁵⁵ Rose, N. (2001). Community, Citizenship, and the Third Way, cit., p. 5.

⁹⁵⁶ Flint, J. (2003). Housing and Ethopolitics: constructing identities of active consumption and responsible community, cit.

⁹⁵⁷ Rose, N. (2001). Community, Citizenship, and the Third Way, cit., p. 4.

⁹⁵⁸ Ibidem.

⁹⁵⁹ Ibidem, p. 9.

⁹⁶⁰ Ibidem.

social webs of connection that bind us as members of moral communities⁹⁶¹. Community is the elective space where ethopolitical technologies construct an explicit moral rationality that seeks to invoke responsible and ethical self-conduct⁹⁶² as well as the *medium* of such a politics of conducts. Community makes possible to match the emphasis on the individuals taking responsibility for ‘enterprising’ their own lives with reference to particular (shared) norms of civility⁹⁶³. One of the main effects of such a phenomenon is to challenge the ‘social’ welfare with ‘technologies of agency’ that seek to mobilize the ability of individuals to act in their own interests. Such techniques do not seek to negate individual initiatives rather put them into action, contributing to their ethical construction⁹⁶⁴.

4.2. The Securitization as ethopolitical technology

The concept of ‘*securitization*’ is widely known among social and political scientists. Several declinations have been offered by scholars, mainly pointing out the distinction between ‘external’ (transformations of the relationship among sovereign states) and ‘internal’ (transformations of the relationships between state and citizens) as conceptually and empirically crucial. In short, two different ‘versions’ of securitization have been traditionally considered and analyzed: one is related to international relations; the other to the ‘internal’ political bond (citizen/State). Here, is the specific re-formulation of the *internal* dimension which directly matters as ethopolitical technology. From the ‘internal’ viewpoint, securitization is often conceptualized as the qualitative transformation of the processes of social protection in processes of individual defense through panoply of instruments which aim at making it possible to predict and thus prevent dangerous events. It expresses the “*unrelenting de-socialization of security and the growing securitization of personal safety mainly conveyed through the increasing use in different milieus of society of a wide range of techniques designed to ensure a safe and secure future*”⁹⁶⁵. The security at stake is then the negative/private state of immunization from risk and dangers, as neo-liberal product of the celebration of a ‘gated’ freedom⁹⁶⁶. Internal securitization is closely related to the social disintegration of welfare state, appearing indeed as the basis for a post-welfare political project. Here the processes of securitization are seen in terms of attribution to the security of a primacy-status as political technology which deeply affects the production of self-responsible subjectivities and as such embodying and deploying the ethopolitical rationality. As Colin Gordon argues, security is not merely a self-evident object of political power but “*a specific principle of political method and practice, distinct alike from those of law, sovereignty and discipline, and capable of various modes of combination with these other principles and practices within diverse governmental configurations*”⁹⁶⁷. In the same vein, Anthony Burke contends that we should see security as “*an*

⁹⁶¹ See Etzioni, A. (1995). *The Spirit of Community: rights, responsibilities and the communitarian agenda*, cit.

⁹⁶² Rose, N. (2001). Community, Citizenship, and the Third Way, cit.

⁹⁶³ See Dean, M. (1999) *Governmentality: power and rule in modern society*, cit.

⁹⁶⁴ Cruikshank, B. (1999). *The Will to Empower: democratic citizens and other subjects*. Cornell: Cornell University Press.

⁹⁶⁵ Schuilenburg, M. (2012). The Securitization of Society: On the Rise of Quasi-Criminal Law and Selective Exclusion. *Social Justice*, 38(1-2), 73-89, p. 75.

⁹⁶⁶ See Bauman, Z. (1998) *Globalization: The Human Consequences*. New York: Columbia University Press.

⁹⁶⁷ Gordon, C. (1991). Governmental rationality. In G. Burchell, C. Gordon, P. Miller (Eds.), *The Foucault effect: Studies in governmentality* (pp. 1-48). Chicago: University of Chicago Press, p. 20.

*interlocking system of knowledges, representations, practices, and institutional forms that imagine, direct, and act upon bodies, spaces, and flows in certain ways-to see security not as an essential value but as a political technology*⁹⁶⁸”. In this perspective securitization sets in motion a particular political dynamic, empowering specific political actors, and building up technologies and instruments of making responsible subjectivities. More analytically, it is possible to realize the internal securitization as ethopolitical technology as long as we look at four interlinked expressions of this process, three different ways it is deployed on the ground today: pluralization, responsabilization, hybridization, and contractualization of security.

4.2.1. Pluralization of security

As Marina Caparini remarks, “*contemporary empirical evidence across a variety of states indicates that security is being provided by multiple actors*⁹⁶⁹”. What is characteristic of this state of affairs is that the state, as a weberian monopolistic provider of security, has been paralleled by a multiplicity of security ‘suppliers’ “*from the private sector, local communities and civil society, and mixed entities that combine public and private attributes*⁹⁷⁰”. While the state remains a crucial actor in the provision of security, it is not the only ‘player’, and sometimes or under certain circumstances, it may not even be the most important one. David Bayley and Clifford Shearing have conceptualized this trend as the “*pluralization of the ‘auspices’ and ‘providers’ of security*⁹⁷¹”. This means that “*the state can no longer be considered the sole element authorizing security provisions (auspice); other non-state actors have assumed the responsibility for their own protection and exercise the power and capacity to arrange for and procure their own security, transforming the nature of security governance*⁹⁷²”. Private subjects such as commercial firms, community-based actors, non-state agencies and non-governmental organizations become the ‘new’ providers of individual and collective security, by supplying spaces immunized by dangers of damages of personal properties or by offering services aiming at neutralizing risks for the individual health. The process of pluralization then expresses itself “*with the proliferation of contract private security firms which sell their services to members of the public, including businesses, homeowners and banks [...] Individuals, communities, firms and other groups are arranging for their own security through the use of commercial security firms, or in the case of commercial enterprises, often the establishment of their own in-house security departments*⁹⁷³”. Concrete examples of the pluralization of security are the proliferation of civil society-based forms of *preventive* governance of crimes. Moreover scheme of community policing aiming at creating “*relationships and cooperation with various sectors of the community, including religious leaders, business groups, neighborhood associations and other citizen self-help groups*⁹⁷⁴”, appear a visible expression of the pluralization. A further and common characteristic of the

⁹⁶⁸ Burke, A. (2002). Aporias of Security. *Alternatives*, 27, 1-27, p. 3.

⁹⁶⁹ Caparini, M. (2006). The Pluralisation of Security, Applying a Security Governance Perspective to the Privatisation of Security. In A. Bryden, M. Caparini (Eds.), *Private Actors and Security Governance* (pp. 263-282). Geneva: The Geneva Centre for the Democratic Control of Armed Forces (DCAF). Retrieved 4 May 2012 from <http://www.dcaf.ch/content/download/36837/528891/file/chapter14.pdf>, p. 267.

⁹⁷⁰ Ibidem, p. 265.

⁹⁷¹ Bayley, D. H., Shearing, C. D. (2001). *The New Structure of Policing: Description, Conceptualization, and Research Agenda*. National Institute of Justice Research Report. Washington: U.S. Department of Justice, p. 1.

⁹⁷² Caparini, M. (2006). The Pluralisation of Security, cit., p. 266.

⁹⁷³ Ibidem.

⁹⁷⁴ Ibidem.

actual deployment of a pluralized security, is that the ‘targets’ as well as the ‘users’ of the new security providers are often individuals who behave as ‘functional consumers’. For instance, the users (i.e. the direct beneficiaries) have social and economic resources to hire private guards for patrolling their gated communities while the targets (i.e. the people controlled by private security agencies) have the social and cultural means to choose community-led initiatives to solve their conflicts and prevent criminal situations. On the other side, individuals deprived of economic, social and cultural resources, are doomed to be ‘treated’ the most discriminatory and exclusionary apparatuses of security and criminal control systems, often the last resort for the central state not only to regulate at a distance but to intervene ‘muscularly’ on deviance and marginality⁹⁷⁵. Broadly speaking, the process of multiplying security providers and of qualitative re-definition of their features (as later on I will further describe), seems consistent with the ethopolitical rationality of ‘governing at a distance’. The state in fact, performs a “*meta-regulatory role while the actual implementation of security measures and other functions is taken over by other actors*”⁹⁷⁶. The central governments define general frames and criteria whereas private actors are delegating of security functions within the standards given by the state, whose role in this perspective becomes to regulate the activities of non-state actors.

4.2.2. Securitization as responsabilization

The securitization processes are also expressed by a significant and widespread trend toward the *responsibilization* of individuals and communities as a form of preventive governance of risks and dangers⁹⁷⁷. Individual citizens and communities are pushed toward taking responsibility for their own security; they are encouraged to distribute among themselves the concern to create ‘livable’ spaces namely reducing crime’s opportunities⁹⁷⁸. As Ronen Shamir states, “*responsibilization -namely expecting and assuming the reflexive moral capacities of various social actors- presupposes one’s care for one’s duties and one’s un-coerced application of certain values as a root motivation for action*”⁹⁷⁹. Concretely, responsabilization may result in greater citizen involvement in community-based voluntary security initiatives such as Neighborhood Watch schemes or RJ programs. Is a manifestation of this trend also the “*privatization, franchising, outsourcing and deregulation which contribute to horizontally allocate authority to numerous state and non-state units that assume the economic enterprise form, follow principles of economic sustainability and cost-benefit risk-management and adhere to standards of performance that are adjusted to a reality of an all-encompassing market environment*”⁹⁸⁰. In this way making individuals and communities responsible for their security produces a singular identification between providers and users of security services. In a consistent neo-liberal perspective, social actors are the ‘masters of their destiny’ as far as the security issues are concerned. The responsabilization’s trend also entails the amplified approval and legitimation of security provision by private actors. The state itself has played a vital role in the legitimation of the role of private actors in the provision of security. This has been possible through

⁹⁷⁵ See Wacquant, L. (1999). *Les Prisons de la misère*. Paris: Editions Raisons d’agir.

⁹⁷⁶ Ibidem.

⁹⁷⁷ Garland, G. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press, pp. 124-125.

⁹⁷⁸ Caparini, M. (2006). The Pluralisation of Security, cit., p. 266.

⁹⁷⁹ Shamir, R. (2008). The age of responsabilization: on market-embedded morality, cit., p. 7.

⁹⁸⁰ Ibidem, p. 6.

decisions to privatize formerly governmental functions, through the recognition of the expertise and knowledge the private sector can offer through its pursuit of public-private partnerships, and through collaborative relations with civil society and the private sector in managing crime and security. In a broader sense, responsabilization works as a specific governmental strategy, contributing to the construction of a “*moral agency as the necessary ontological condition for ensuring an entrepreneurial disposition in the case of individuals and socio-moral authority in the case of institutions*”⁹⁸¹. As Shamir emphasizes, “*neo-liberal responsabilization is unique in that it assumes a moral agency which is congruent with the attributed tendencies of economic-rational actors: autonomous, self-determined and self-sustaining subjects*”⁹⁸².

4.2.3. Hybridization of security

Another crucial feature of the securitization, closely related to the previous ones, is the redefinition of the line between public and private in thinking and providing security. During the last thirty years, in western democracies, we have been assisting during a singular “*growth in public-private sector relationships reflects a blurring of the distinction between the categories and their integration through network relations and practices*”⁹⁸³. Private security providers are employed by both governments and private organizations. At the same time, “*the emergence of hybrid policing and security structures that incorporate elements of both public and private also contribute to blurring: joint public-private policing initiatives, governments and other public agents hiring private security firms, and personnel exchanges and flows between public and private bodies, as well as the adoption of corporate management practices and the commercialization of services by public law enforcement and security agencies*”⁹⁸⁴. Indeed, the same public-private dichotomy regarding the security issues, have been increasingly conceptualized as “*the wrong way to view security more generally today; rather, [...] since there are hybrid forms of policing and security provision, it is more correct to replace the dichotomy between public and private with a continuum*”⁹⁸⁵. The redefinition or blurring of the public/private line, presents several and different expressions. This is the case of ‘mass private property’ (e.g. business and industrial complexes, gated communities etc.), insofar as the owners of such complexes more and more discharge the public police’s services for obtaining security, hiring private security firms or developing in-house security departments in charge of providing security to the mass property and its users. Another example is offered by the increasing cooperation between public and private security actors. In a wide variety of areas, ranging from the information-sharing about country vulnerabilities to the establishment of standards for protective security and resilience, private security organizations “*are asked to join public in developing plans and coordination for possible attacks and disasters, especially those involving critical infrastructure*”⁹⁸⁶. The development of hybridized security policies and institutions clearly raises a number of questions. First of all, the issue of impartiality. Private security providers cooperating with public authorities, directly compete with private sector firms for contracts, but at the same time enjoy a position of connection with the public sector. This creates a specific asymmetry on the market, with potential

⁹⁸¹ Shamir, R. (2008). The age of responsabilization, cit., p. 7.

⁹⁸² Ibidem.

⁹⁸³ Caparini, M. (2006). The Pluralisation of Security, cit., p. 267.

⁹⁸⁴ Ibidem.

⁹⁸⁵ Ibidem.

⁹⁸⁶ Ibidem, p. 268.

dangers for economic actors and final users. Moreover the public/private structures are also more susceptible to corruption due to their close links with the private security sector. In both cases it is impossible to demarcate the exact division of responsibilities between public and private actors involved as well as the kind of responsibility at stake, jeopardizing any form of concrete accountability.

4.2.4. Contractual Securitization

As Rose notices, security practices of the 'biopolitical' welfare state were, in principle, "*territorialized across a single uniform plane, that of 'society'*"⁹⁸⁷. A realm of collective security was to be maintained by the state on behalf of all citizens, through universal measures ranging from old age pensions to a unified and socially funded police force. In the present political space, each community is to take responsibility for preserving the security of its own members (e.g. residents of a neighborhood, the employees of an organization, the consumers and staff of a shopping complex etc.). Security, here, is to be managed within a variety of discrete spatial-ethical zones, which assume responsibility for 'their own' risk management⁹⁸⁸. Moreover, "*we witness a multiplication of control expertise in alliance with responsabilization, the collective logics of community come into alliance with the ethos of individual autonomy characteristic of advanced forms of liberalism: choice, personal responsibility, control over one's own fate, self-promotion and self-government*"⁹⁸⁹. These self-managing communities are touted, in the current anti-political arguments, as a remedy for both the individualized profit-orientation of free-market forces, and by the permanent financial crisis of the central government. They are the only alternative to the security decay of contemporary era, the only trustworthy subjects in daily securing our lives. As Rose states, "*new modes of neighborhood participation, local empowerment and engagement of residents in decisions over their own lives will, it is thought, reactivate self-motivation, self-responsibility and self-reliance in the form of active citizenship within a self-governing community*"⁹⁹⁰. In this perspective, a redefinition of the community as a security provider is much needed: "*community is not simply the territory within which crime is to be controlled, it is itself a means of government: its detailed knowledge about itself and the activities of its inhabitants are to be utilized, its ties, bonds, forces and affiliations are to be celebrated, its centres of authority and methods of dispute resolution are to be encouraged, nurtured, shaped and instrumentalized to enhance the security of each and of all*"⁹⁹¹. Jonathan Simon describes how the approach to the issue of crime is governed by the interaction between various parties, of which the state is one (albeit a very influential one), as well as how practices such as housing, welfare work, education, and health are being restructured according to the logic of the securitization principle⁹⁹². In short, not only is the notion of 'security' used to justify all sorts of measures that have other intentions, but the technologies, practices, and metaphors of the criminal law system are also more evidently present than ever before in diverse domains⁹⁹³. Securitization appears here contractually reflected in local

⁹⁸⁷ Rose, N. (2000). Government and control. *British Journal of Criminology*, 40, 321-339.

⁹⁸⁸ Ibidem, p. 328.

⁹⁸⁹ Ibidem, p. 329.

⁹⁹⁰ See Rose, N. (1999). Inventiveness in politics: review of Anthony Giddens, *The Third Way*. *Economy and Society*, 28(3), 467-493; Rose, N. (1996). The death of the social? Refiguring the territory of government. *Economy and Society*, 25(3), 327-356.

⁹⁹¹ Rose, N., (2000). Government and control, cit., p. 329.

⁹⁹² Simon, J. (2007). *Governing Through Crime. How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Oxford: Oxford University Press.

⁹⁹³ Ibidem, pp. 4-5.

alliances between government and other players, where the involvement and responsibilities of the participants are reinvented, formulated, and legitimized⁹⁹⁴. These contracts are characterized by a system of reciprocity or communality since the parties have to agree on what to do and what not to do, as well as the way in which the resources they create will be used. In addition, as Crawford puts it, they reflect “*a desire to control the uncertainty of the future*”⁹⁹⁵ by introducing all sorts of measures designed to prevent assumed future behavior.

4.2.5. Ethopolitics and securitization

The pluralization of security’s ‘auspices’ and ‘providers’, the horizontal distribution of responsibility as a security strategy, the qualitative hybridization between private and public providers of security, the contractual element of securitization, are four interlinked dimensions of the internal securitization as ethopolitical technology. This multidimensional phenomenon plays a role within the new governmental ‘politics of conduct’ in forging political subjectivities. In fact, ethopolitics is expressed through forms of security governance ‘beyond-the-state’ that yield a specific emphasis on autonomous, freedom-aspiring, self-sufficient social agents in the production of security. A key feature of ethopolitics, says Rose, is its concern with the ethical, rather than political sensibilities of its subjects; we might say in ethopolitics a trend wholly consistent with the moralistic responsabilization of private actors in providing security. Securitization marks the ethopolitical shift from state governance of the individual to a kind of individual self-governance or care of the self, in the domain of a ‘democratized’ security. Within this process one can see a specific collective self-actualization, the realization of protected social environments through participatory ways, involving private and public in an enterprise that blurs their respective boundaries, offering a contractual mean to produce ‘gated’ *milioux* where to realize the individual selves.

4.3. The ‘Re-feudalization’ of governance

The second ethopolitical technology to be analyzed is the ‘*re-feudalization*’ of governance⁹⁹⁶. This expression is only partially akin to the Habermasian concept of ‘refeudalization of public sphere’. According to Jürgen Habermas

*“With the interweaving of the public and private realm, not only do the political authorities assume certain functions in the sphere of commodity exchange and social labor, but conversely social powers now assume political functions. This leads to a kind of ‘refeudalization’ of the public sphere. Large organizations strive for political compromises with the state and with each other, excluding the public sphere whenever possible. But at the same time the large organizations must assure themselves of at least plebiscitary support from the mass of the population through an apparent display of openness”*⁹⁹⁷.

⁹⁹⁴ Crawford, A. (2003). Contractual governance of deviant behaviour. *Journal of Law & Society*, 30, 479-505.

⁹⁹⁵ Ibidem, p. 490.

⁹⁹⁶ The metaphor of feudalism expresses the idea of the contemporary, progressive rising of horizontal relationships between the public and private powers as far as the monopoly of coercion (in a broad sense) is concerned, in a way similar to the pre-modern feudalism as well as the gradual emergence of private systems of governance of public issues.

⁹⁹⁷ Habermas, J., Lennox, S., Lennox, F. (1974). The Public Sphere: An Encyclopedia Article. *New German Critique*, 3, 49-55, p. 54.

Here, refeudalization refers to a political technology which works toward the hybridization of public and private governance in neo-liberal regimes, engendering a specific ‘third way’ of exercising authority and control over a wide range of social issues, first of all the crime and deviance. Particularly, the appeal to ‘community’ as a site of governmental authority in both Europe and North America, seems to be a crucial expression of this political technology. This can be seen, for instance, in respect of policing policy (‘community policing’), penal policy (‘punishment in the community’), health care policy (‘care in the community’), schools policy (‘community education’) and justice policy (‘community mediation’) ⁹⁹⁸. For these reasons the traditional view that modern states govern through the exercise of authority, backed by their capacity to exert a monopoly of legitimate coercion has produced more undefined and multifaceted imagery of the state and governance, now described as “*hollowing out*” ⁹⁹⁹ and engaged in the ethopolitical project of “*ruling at a distance*” ¹⁰⁰⁰.

4.3.1. Governance through Community

Rose argues that “*community emerged as a rather unexpected theme in debates about the governability of liberal, democratic and market based societies in the closing decades of the twentieth century*” ¹⁰⁰¹. He shows there has been an increasingly amount of theoretical endeavors to identify a ‘third way’ of governing based on the re-discovery of the community as site and vehicle of governance ¹⁰⁰². For proponents of these various third way strategies of governing, community is posited as “*the ideal territory for the administration of individual and collective existence, the plane or surface upon which micro- moral relations among persons are conceptualized and administered*” ¹⁰⁰³. As Rose remarks, neo-classical models of free competition between rational economic actors are being supplanted by models that emphasize “*the significance of interpersonal trust, local and community-based trading networks, collaboration among enterprises sharing a commitment to their particular geographical region*” ¹⁰⁰⁴. The concept of ‘community’ here represents a singular combination between the notion of ‘civil society’ offered by the ‘left’, as “*the antidote both to the state and its bureaucratic apparatus of political administration and control, and to the free market celebrated by liberal individualists and neoconservatives*” ¹⁰⁰⁵, and the idea championed by contemporary civic republicanism of community as a means with which to arrest liberal individualism ¹⁰⁰⁶. Community steps into

⁹⁹⁸ See Crawford, A. (1999). Questioning Appeals to Community within Crime Prevention and Control. *European Journal on Criminal Policy and Research*, 7(4), 509-530.

⁹⁹⁹ Jessop, B. (1993). Towards a Schumpeterian workfare state? Preliminary remarks on Post-Fordist Political Economy. *Studies in Political Economy*, 40, 7-40; Rhodes, R.A. (1994). The hollowing out of the State: the changing nature of the State in Britain. *The political Quarterly*, 65(2), 138-151.

¹⁰⁰⁰ Rose, N., Miller, P. (1992). Political Power Beyond the State: Problematics of Government. *British Journal of Sociology*, 43(2), 173-205.

¹⁰⁰¹ Rose, N. (1999). *Powers of Freedom: Reframing political thought*. Cambridge: Cambridge University Press, p. 167.

¹⁰⁰² Wynyard, M. A. (2009). *Great Transformations: Karl Polanyi and Nikolas Rose on the shifting fortunes of social strategies of government*. M.A. thesis, Massey University, Palmerston North, New Zealand. Retrieved 7 February 2012 from <http://mro.massey.ac.nz/bitstream/handle/10179/1028/02whole.pdf?sequence=1>

¹⁰⁰³ Rose, N. (2000). Governing Liberty. In R.V. Ericson, N. Stehr (Eds.), *Governing Modern Societies*. Toronto: University of Toronto Press, p. 169.

¹⁰⁰⁴ Rose, N. (1999) *Powers of Freedom: Reframing political thought*, cit, p. 168.

¹⁰⁰⁵ Ibidem.

¹⁰⁰⁶ Ibidem, p.170.

the space previously occupied by ‘the social’¹⁰⁰⁷. Just as the social was purported as an antidote to the disintegration initiated by industrialization, so to ‘community’ emerges “*like a phoenix out of the fragmentation of social and political space generated in the course of commodification, marketization and the like*”¹⁰⁰⁸. The ‘third way’ of governance must be then thought as a ‘smooth’ alternative to both free market individualism and state-centered collectivism. In this view, individuals are constantly stimulated to see themselves as members of a community and as such are ethically obliged to adhere to its values. Accordingly, social issues are re-formulated in reference to community norms, values and cultures. Governmental interventions seek to address such issues by acting on (and constructing) the dynamics of community, “*by enhancing the bonds that link individuals to their community, rebuilding shattered communities and so on*”¹⁰⁰⁹. This new politics of community moves beyond the ‘basic’ neoliberal preoccupation with downsizing the state. In this perspective the state plays “*an active role, taking on the responsibility for the provision of training, for help with childcare, and for a raft of other means with which to ‘enable’ individuals to exercise autonomous, responsible liberal subjectivity*”¹⁰¹⁰. The task for politics shifts away from governing the morality of a uniform social citizenry toward the reinvention and deployment of the forms of community that will establish the ethical basis for a self-governing polity¹⁰¹¹. Of course, as Rose notices, the appeals to community are not a fresh novel. In the last thirty years, liberal political discourses have in fact, mitigated the ideal of individual liberties and rights advancing arguments of combining them to ‘the interests of community’¹⁰¹². Moreover, “*the theme of the loss of community, and the need to remake community or substitute something for its benefits, emerges with remarkable regularity in critical reflections on the state of the nation, from the nineteenth century onward*”¹⁰¹³. Society gives way to community, the notion of a welfare state or social state gives way to that of an ‘enabling’ state, or a ‘facilitating’ state¹⁰¹⁴. As already seen, the state is no longer to be the sole guarantor of security, order, health and productivity, rather, “*individuals, firms, organizations, localities, schools, parents, hospitals, housing estates must take on themselves -as partners- a portion of the responsibility for resolving these issues*”¹⁰¹⁵.

4.3.2. Contractual governance

The refeudalization of governance is furthermore expressed through the spreading of what Crawford calls “*contractual governance*”¹⁰¹⁶. One of the features of the contemporary social regulation of behaviour in neo-liberal democracies, seems in fact, the spreading of mechanisms of contracts and agreements which shape private-public ‘horizontal’ synergies as techniques of governance¹⁰¹⁷. First, contracts entail a degree of reciprocity and mutuality and are hence concerned with the distribution of responsibilities and obligations. Secondly,

¹⁰⁰⁷ Rose, N. (1996). The death of the social? Refiguring the territory of government, cit.

¹⁰⁰⁸ Rose, N. (2000). *Governing Liberty*, cit., p. 166.

¹⁰⁰⁹ Ibidem.

¹⁰¹⁰ Wynyard, M. A. (2009). *Great Transformations: Karl Polanyi and Nikolas Rose on the shifting fortunes of social strategies of government*, cit.

¹⁰¹¹ Ibidem, p. 167.

¹⁰¹² Rose, N. (1999). Inventiveness in politics, cit., p. 475.

¹⁰¹³ Ibidem, pp. 475-476.

¹⁰¹⁴ Ibidem, p. 476.

¹⁰¹⁵ Ibidem.

¹⁰¹⁶ See Crawford, A. (2003). Contractual governance of deviant behaviour. *Journal of Law & Society*, 30, 479-505.

¹⁰¹⁷ Ibidem.

they define a role for the subject as an active, responsible agent. Thirdly, contracts and agreements are premised on the rational choice of participating parties and draw their power for regulating behaviour through the (albeit limited) voluntary commitment of subjects, which produces a sense of ownership, stimulating an active responsibility for the self-regulating and self-policing of individual conduct¹⁰¹⁸. To promote the development of the contractual relationships between citizens and state, provides an overall framework for the rights and responsibilities' agenda promoted by neo-liberalism. On the other side, the contractual relationships require that citizens, in return for the increased opportunities they are offered, strictly comply with the contracts' duties. This normative connection of opportunities/rights to (increased) responsibilities/duties is deployed through specific intervention aiming at addressing the 'defaulting contractors', often through exclusionary penalties¹⁰¹⁹. One of the main social effects of the contractualization of governance is the creation of complex networks of governance that has emerged alongside state governments, or "*contractual communities*"¹⁰²⁰. As Shearing states "*these include such spaces as communities of library users, the residential communities that North Americans term 'gated communities', communities of shoppers at malls as well as virtual communities such as the communities of credit card holders and Internet users*"¹⁰²¹". These "*arenas of governance*"¹⁰²²", are one of the products of the social regulation through negotiated agreements between public authorities and those private social actors characterized by a contractual power related to their economic, social and cultural status. Particularly, "*the contracts that establish these arenas of governance are, in part, contracts that set out such things as the proper expectations (rights) and responsibilities (duties) of community members*"¹⁰²³". Moreover, these arenas are characterized by specific modes of governance and rules that define "*the conditions of 'citizenship' in these new spaces of governance*"¹⁰²⁴". Notions of 'inclusion' and 'empowerment' are central to these arenas of governance contractually created. Exactly like the liberalism of the early twentieth century tried to isolate and classify groups recalcitrant to its idea social order, so the re-feudalized governance implies the identification of "*problematic persons*"¹⁰²⁵" to be reformed re-socialized to the rules of the new arenas of governance. In this emerging context managing the problematic persons means that they will be given "*with an opportunity to achieve full membership in a moral community through work and adhere to the core values of honesty, self-reliance and concern for others*"¹⁰²⁶".

4.3.3. Techniques of the 'Third way'

Looking more closely at the techniques of this emerging model of governance, we can easily detects a wide array of hybrid and flexible mechanisms, which purportedly ensure accountability, reconciling conflicting interests, and overcoming the destructive divide between state and society. Examples are the "*focus groups, citizens' juries, partnerships of all sorts between the public services and those*

¹⁰¹⁸ Crawford, A. (2003). Contractual governance of deviant behaviour, cit.

¹⁰¹⁹ Flint, J. (2004) Housing and ethopolitics: Constructing identities of active consumption and responsible, cit.

¹⁰²⁰ Shearing, C. (2001). Punishment and the Changing Face of the Governance. *Punishment & Society*, 3(2), 203-220, p. 211.

¹⁰²¹ Ibidem.

¹⁰²² Ibidem.

¹⁰²³ Ibidem.

¹⁰²⁴ Ibidem.

¹⁰²⁵ Rose, N. (1999). Inventiveness in politics, cit., p. 488.

¹⁰²⁶ Rose, N. (2001). Community, Citizenship, and the Third Way, cit., p. 12.

wanting to make profits, between public, profit-making and not-for-profit organizations, between professionals and lay persons, between political institutions and voluntary organizations, [...] proposals for strengthening and preserving marriages and families to build social capital, and in drugs and crime-prevention schemes¹⁰²⁷”. Generalizing, the ‘third way’ techniques are a particular version of ‘traditional’ welfare programs. As already hinted, they are characterized by a reformulation of the inclusion/exclusion dichotomy. In this perspective, the crucial issue of poverty is conceptualized not as effect of a material/cultural deprivation but as consequence of a moral deficiency expressed by the dis-connection from responsabilizing circuits of moral community. Exclusion, then, is the lack of “self-control provided by work, family, housing, and so forth, whereas inclusion is a matter of reattachment¹⁰²⁸”. It concerns the effects of the moral ‘disintegration’ more than political-economic processes. Accordingly, individuals who refuse to adhere to communal values or to become responsible and govern themselves ethically, are to be addressed through practices aiming at promoting compliance with those values¹⁰²⁹. The consequence of refusing the moral community’s membership is then harsh measures justified on the ground of reattaching failing citizens to a virtuous community, consistently reconstructing their ethos¹⁰³⁰. Excluded persons will be empowered, up-skilled, educated, and trained, giving centrality to work and family as central means for that ethical reconstruction¹⁰³¹. These strategies employ a wide array of re-moralizing techniques such as “psychological and behavioral therapies, pedagogies of citizenship competences, shaming, and threats of withdrawal of support¹⁰³²” in order to stimulate the failing citizens “to achieve the disciplining and moralizing benefits thought to flow from wage labor¹⁰³³”. The complement of the communal moralism becomes then the “enhancement of the powers of the penal and psychiatric complexes and the transformation of social workers and other caring professionals into agencies of control concerned with risk management and secure containment¹⁰³⁴”. This is a ‘third way’ that pursues to govern through the “micromanagement of the self-steering practices of its citizens¹⁰³⁵”. Rose argues that these strategies do not represent anything like a genuine invention in politics but are rather, “an entirely familiar assortment from the grab bag of liberal democracy, yet sadly stripped of any residual utopianism¹⁰³⁶”.

4.3.4. Ethopolitics and re-feudalization

The ethopolitics’ core, as already said, is the emergence of a moral vocabulary of politics in which the subject is to be governed in accordance with (supposedly shared) ethics and in the name of ethics¹⁰³⁷. The ethopolitics expressed to the specific technology of re-feudalization of governance, “seems to represent a fundamentally backward looking response to the challenges facing contemporary

¹⁰²⁷ Wilkinson, H. (1998). The family way: navigating a Third way in Family policy. In I. Hargreaves, I. Christie (Eds.), *Tomorrow’s politics: The third way and beyond* (pp. 111-121). London: Demos, p. 115.

¹⁰²⁸ Giddens, A. (1998). *The third way: the renewal of social democracy*. Cambridge: Polity, pp. 102-103

¹⁰²⁹ Rose, N. (2001). Community, Citizenship and the third Way, cit.

¹⁰³⁰ Ibidem.

¹⁰³¹ Rose, N. (1999). Powers of Freedom: Reframing political thought, cit., p. 266.

¹⁰³² Rose, N. (1999). Inventiveness in politics, cit., p. 489.

¹⁰³³ Ibidem.

¹⁰³⁴ Rose, N. (2001). Community, Citizenship and the third Way, cit.

¹⁰³⁵ Ibidem.

¹⁰³⁶ Rose, N. (1999). Inventiveness in politics, cit., p. 474.

¹⁰³⁷ Ibidem.

*politics*¹⁰³⁸”, appealing “to an imaginary universal moral consensus, in order to justify a banal and stultifying vision of the future, much like the present only without its downsides¹⁰³⁹”. The refeudalization is a technology of government that in a particular way, ‘revives’ the past, with its reference to the family or the community, as crucial spaces of government as well as politico-moral ideals¹⁰⁴⁰. The ideals of ‘communal’ inclusion and empowerment that act to enhance the opportunities for the promotion of individuals through their own action, hardly index anything novel, rather they are entirely congruent with the moral technologies emergent in the nineteenth century that similarly sought to instill in the subject the “corporeal and moral habits of industriousness¹⁰⁴¹”. The governmental techniques exemplified by the rubric of refeudalization aim at managing the moral order, emphasizing the ways in which the institutions of the family, the school and the workplace serve to sustain the stability and order of a society, now imagined as a single consensual community¹⁰⁴². On the other side, sectors of population deemed as problematic, insofar as they break the moral rules of the arenas of governance contractually created, are targeted with specific ‘third way’ techniques which work along the lines of the ‘traditional’ couple inclusion/exclusion reformulated as empowerment/disempowerment. However, for the most reluctant population’s segments those techniques are often replaced by the traditional panoply of ‘muscular’ instruments of marginalization and social ostracism (prisons, asylums, ghettos, etc.).

4.4. The Psy-Individualization: making up post-social citizens

The last technology to be considered and analyzed is the process of *psy-individualization*. This technology involves “a plethora of indirect mechanisms that can translate the goals of political, social, and economic authorities into the choices and commitments of individuals¹⁰⁴³”, contributing to the ethopolitical governing ‘at a distance’, via the re-definition of individuals’ subjectivity¹⁰⁴⁴. The psy-individualization consists then in displacing the concept of society by the new concept of the ‘self-governing individual’. It works by installing through the diffusion of psy-techniques, a concept of the human subject as an “autonomous, individualized, self-directing, decision-making agent at the heart of policymaking”¹⁰⁴⁵. This technology ‘offers’ individuals, groups and communities new opportunities to participate ‘actively’ in various arenas of action “to resolve the kind of issues hitherto held to be the responsibility of authorized governmental agencies¹⁰⁴⁶”. Here, individuals, groups and communities are “encouraged freely and rationally, to conduct themselves¹⁰⁴⁷”, and to become “‘experts of themselves’, to adopt an education and knowledgeable relation of self-care in respect of their bodies, their minds, their forms of conduct and that of the members of their families¹⁰⁴⁸”. However, the implication of these processes is that individuals and communities “must assume active

¹⁰³⁸ Rose, N. (1999). Inventiveness in politics, cit., p. 490.

¹⁰³⁹ Ibidem.

¹⁰⁴⁰ Ibidem, p. 487.

¹⁰⁴¹ Ibidem.

¹⁰⁴² Ibidem, p. 490.

¹⁰⁴³ Rose, N. (1996). Governing “advanced” liberal democracies. In A. Barry, T. Osborne, N. Rose (Eds.), *Foucault and political reason* (pp. 37-64). London: UCL Press, p. 58.

¹⁰⁴⁴ Ibidem.

¹⁰⁴⁵ Rose, N. (1999). Inventiveness in politics, cit., p. 499.

¹⁰⁴⁶ Burchell, G. (1996). Liberal government and techniques of the self. In A. Barry, T. Osborne, N. Rose (Eds.), *Foucault and political reason* (pp. 19-36), cit., p. 29.

¹⁰⁴⁷ Ibidem.

¹⁰⁴⁸ Rose, N. (1996). Governing “advanced” liberal democracies, cit., p. 59.

responsibility for these activities, both for carrying them out, and of course, for their outcomes¹⁰⁴⁹”. Furthermore, these processes of ‘responsibilisation’, as institutionally dependent processes of individualization and standardization¹⁰⁵⁰, incite and encourage the “individual as enterprise¹⁰⁵¹” to “conduct themselves in accordance with the appropriate (or approved) model of action¹⁰⁵²”.

4.4.1. A political psy-regulation

As a form of governing conduct, ethopolitics presupposes the possibility of “a self-determining, self-governing individual who fuses ethical and political domains¹⁰⁵³”. This means that ‘practices of government’ become to depend on, and operate through, ‘practices of the self’. In this context, psy-individualization processes render “the lives of individuals as private matters free from state intervention by offering citizens the opportunity for ‘choice’, for ‘autonomous’ life plans and the ‘freedom’ to be the persons they want to be¹⁰⁵⁴”. The premise of such a project is that “‘good’ government is a republic of autonomous self-governors¹⁰⁵⁵”. Thus, this political technology aims at producing and offering “choice, freedom and autonomy ensuring that norms of obligation, accountability and responsibility continually turn the subject back on itself¹⁰⁵⁶”. The overall goal is to mold hyper-individualized and responsible individuals, working on their identities as crucial political site. Within this process of governmentalized self-constitution, individuals ‘naturally’ choose to shape an individualized and responsible self. As Rose emphasizes: “Incorporating, shaping, channeling, and enhancing subjectivity have been intrinsic to the operations of government. [...] This has not been achieved through the growth of an omnipotent and omniscient central state whose agents institute a perpetual surveillance and control over all its subjects. Rather [...] bringing the varied ambitions of [...] authorities into alignment with the ideals and aspirations of individuals, with the selves each of us want to be¹⁰⁵⁷”. Rose with these words describes exactly the process of working out individualized selves as decisive political technology within neo-liberal regimes. Such individualized selves are the ‘raw material’ from which drawing up “citizens capable of bearing a regulated freedom¹⁰⁵⁸”. ‘

4.4.2. Psy-techniques

Concretely, the psy-individualization is deployed through what Rose calls the “psy-complex¹⁰⁵⁹”. This expression refers to the panoply of techniques for the incorporation of psychological ideas about human resources and group dynamics into an increasing number of social domains, as well as to the “the nature and implications of the proliferation of psychotherapies¹⁰⁶⁰”. Rose argues that “the diversity and heterogeneity of psychology has been one of the keys to its continued inventiveness

¹⁰⁴⁹ Rose, N. (1996). Governing “advanced” liberal democracies, cit., p. 29.

¹⁰⁵⁰ Beck, U. (1992). *Risk Society: Towards a New Modernity*. New Delhi: Sage.

¹⁰⁵¹ See Foucault, M. (2008). *The Birth of Biopolitics Lectures at the College de France (1978-1979)*. Edited by M. Senellart, A.I. Davidson, A. Fontana, F. Ewald. Basingstoke: Palgrave Macmillan, p. 241(or. ed. Foucault, M. (2004). *Naissance de la biopolitique: Cours au Collège de France (1978-1979)*. Edited by M. Senellart. Paris: Gallimard/Seuil).

¹⁰⁵² Burchell, G. (1996). Liberal government and techniques of the self, cit., p. 29.

¹⁰⁵³ Dean, M. (1995). Governing the unemployed self in an active society. *Economy and Society*, 24(4), 559-583, p. 562.

¹⁰⁵⁴ Rimke, H. M. (2000). Governing Citizens through self-help literature. *Cultural Studies*, 141, 61-78, p. 72.

¹⁰⁵⁵ Ibidem, p. 71.

¹⁰⁵⁶ Ibidem, p. 72.

¹⁰⁵⁷ Rose, N. (1990). *Governing the Soul: The Shaping of the Private Self*. London: Routledge, p. 213.

¹⁰⁵⁸ Rose, N., Miller, P. (1992). Political power beyond the state, cit., p. 174.

¹⁰⁵⁹ Rose, N. (1985). *The Psychological Complex: Psychology, Politics and Society in England*, cit.

¹⁰⁶⁰ Rose, N. (1990). *Governing the Soul: The Shaping of the Private Self*, cit.

[...] *and wide-ranging social applicability*¹⁰⁶¹. Across this diversity Rose identifies and emphasizes overarching commonalities in their effects, especially their role in producing ‘intensely subjective’ beings, and modern societies that accord a central role to the “*subjective aspects of the lives of individuals as they conduct their commerce with the world, with others and with themselves*”¹⁰⁶². Of the various technologies Rose explores, psychotherapies most fully typify the logic of neoliberal subjectivity in prioritizing individual liberty. Psychotherapeutic discourses therefore constitute influential vehicles through which neoliberal governance is dispersed and achieved. Rose argues that: [psychotherapeutic] “*technologies for the government of the soul operate not through crushing subjectivity in the interests of control and profit, but by seeking to align political, social and institutional goals with individual pleasures and desires, and with the happiness and fulfillment of the self*”¹⁰⁶³. Their power lies in their capacity to offer means by which the regulation of selves -by others and by ourselves- can be made consonant with contemporary political principles, moral ideals, and constitutional exigencies. They are, precisely, therapies of freedom¹⁰⁶⁴. There is a strong emphasis on inter-personal relationships in these practices, primarily in the form of face-to-face, or co-present, relationships between clients and practitioners. Rose argues that in seeking to govern at a distance via the autonomy of ‘free subjects’, those governing psy-techniques needed detailed knowledge of the individuals to be governed¹⁰⁶⁵. As such, the psy-disciplines emerged as key technologies of liberal government during the late 19th/early 20th century, and have become increasingly important during the post war years. The value of psy-disciplines is that they provide various ‘human technologies’ for acting upon and producing certain outcomes in terms of human conduct, such as “*reform, efficiency, education, cure, or virtue*”¹⁰⁶⁶. In this sense, psy expertise is not intended to crush or dehumanize personhood, but rather to produce it. The human technologies provided by psy expertise, Rose argues, have come to underpin and ultimately transform a range of diverse practices for dealing with persons that were previously legitimized in other ways, including via tradition, moral codes or rules of thumb¹⁰⁶⁷. In this process, our very ideas ourselves, of identity, autonomy, freedom and self-fulfillment were reshaped in psychological terms. Human beings in these regions came to understand themselves as inhabited by a deep interior psychological space, to evaluate themselves and to act upon themselves in terms of this belief. They came to speak of themselves in terms of a psychological language of self-description -the language of intelligence, personality, anxiety, neurosis, depression, trauma, extroversion and introversion and to judge themselves in terms of a psychological ethics. This was not just a process of individualization: we also witnessed a psychologization of collective life, the invention of idea of the group, large and small, of attitudes, public opinion and the like. Practices from factory to army were now understood in terms of the psychodynamics of interpersonal relations. Social problems from prejudice and warfare to criminality and poverty were analyzed in psychological terms. Psychology was a ‘generous’ discipline, it gave itself away to all kinds of professionals from police to military

¹⁰⁶¹ Rose, N. (1990). *Governing the Soul: The Shaping of the Private Self*, cit., pp. 10-11.

¹⁰⁶² Ibidem, p. 3.

¹⁰⁶³ Ibidem, p. 501.

¹⁰⁶⁴ Ibidem, p. 257.

¹⁰⁶⁵ Rose, N. (1996). *Inventing Ourselves*, cit.

¹⁰⁶⁶ Ibidem, p. 88.

¹⁰⁶⁷ Ibidem.

commanders, on condition that they came to think and act, in some respects, like psychologists.

4.4.3. Risk, participation and psy-individualization

The psy-techniques, insofar as they ‘create’ hyper-individualized and responsabilized subjectivities, spreading the perception of individual and collective lives as regulated by the free exercise of choice, appear linked to specific risk management strategies. Risk, in this context, is constructed as a tool to manage society in a seemingly ‘hands-off’ way and distances experts from “*direct intervention into personal lives, while employing the agency of subjects in their own self-regulation*”¹⁰⁶⁸. We have been assisting a proliferation of institutionalized risk environments where people spend large proportions of their lives, exposed to influence from various governmental strategies and where participation in programs and strategies is valorized. Techniques of participation and self-governance are typically ‘deficit ridden’, meaning there is always ‘more room for improvement’. Such approaches locate remedial action with the individual ‘agent of change’. Broader social and economic factors contributing to the generation of discriminations, remain unexamined. Individuals are not passive consumers of the processes of governance, control and surveillance in which they are expected to engage. Perceptions of risk are then highly subjective, locally mediated and may be expected to vary according to particular cultural and social contexts¹⁰⁶⁹. Nevertheless, despite the benefits of citizen participation in policy-making, there is an extensive critique of the challenges of citizen involvement in participatory decision-making processes¹⁰⁷⁰. Citizen participation in decision-making may entail cost, problems of representativeness, complacency, selfishness, lack of authority and the power of wrong decision-making¹⁰⁷¹. ‘Participants’ often construe participation as no more than passive involvement in a managed process. Effective and meaningful participation can be liberating, empowering and sometimes lead to tangible positive outcomes, but generally requires more time and effort by government and an active engagement with citizens. It involves not only consultation, but co-decision-making at all stages of the process, so that ‘participants’ experience ownership, autonomy and efficacy. As such the construction of these kinds of risk environments is a complement of the ethopolitical psy-individualization as well as a condition for its possibility.

4.4.4. Ethopolitics and psy-individualization

Ethopolitics illustrates how governance reformulates the agency of subjects as their own self-regulation. Individuals participate in becoming good citizens not under coercion, “*but to be educated and solicited into a kind of alliance between personal objectives and ambitions or socially prized goals or activities*”¹⁰⁷². The construction of individualized and responsible citizens becomes then one of the crucial conditions of the ethopolitics as governmental rationality. We might say that securitization and refeudalization of governance contribute indirectly to the achievement of this individualized ethos. Individualization through the

¹⁰⁶⁸ Petersen, A. (1997). Risk, Governance and the New Public Health. In A. Petersen, R. Buntun (Eds.), *Foucault, Health and Medicine* (pp. 189-206). London: Routledge, p. 203.

¹⁰⁶⁹ Tulloch, J., Lupton, D. (2003). *Risk and Everyday Life*. London: Sage.

¹⁰⁷⁰ Simmons, R., Birchall, J. (2005). A joined-up approach to user participation in public services: strengthening the ‘participation chain’. *Social Policy and Administration*, 39(3), 260-283.

¹⁰⁷¹ Irvin, R., Stansbury, J. (2004). Citizen Participation in Decision Making: Is it Worth the Effort? *Public Administration Review*, 64(1), 55-65.

¹⁰⁷² Rose, N. (1990). *Governing the Soul*, cit., p. 10.

diffusion of risk-mentality and psy-discipline plays a direct role in this enterprise, basically integrating and completing the de-socialization of security and the emergence of hybrid arenas (and actors) of governance. Ethopolitics constructs citizens essentially 'ethical', and its technologies act upon "*the ethical formation and the ethical self-management of individuals*"¹⁰⁷³". What follows is "*engagement in the collective destiny in the interests of economic advancement, civic stability, even justice and happiness*"¹⁰⁷⁴". As a result, individuals take on social responsibilities which were formerly the domain of the state, and self-government replaces state government: "*ethos-politics concerns itself with the self-techniques necessary for responsible self-government*"¹⁰⁷⁵". These issues from a subjectivation perspective will be largely developed in the next chapter.

4.5. Ethopolitics and Restorative Justice

Securitization, refeudalization of governance and psy-individualization 'deploy' the post-social ethopolitical rationality, contributing to the stability of the neo-liberal governmentality. The discursive formation of the RJ is intertwined with these technologies; they represent its conditions of intelligibility/possibility from a 'political standpoint'; they are the "*governmental activities*"¹⁰⁷⁶" which make the RJ fully "*thinkable and practicable*"¹⁰⁷⁷". The target of this investigation is not institutions, theories, or ideology, but governmental technologies, the hypothesis being that discursive formations are not just governed by institutions, prescribed by ideologies, guided by pragmatic circumstances but characterized by specific regularities, logics, strategies, and 'reasons' politically rooted. It is a matter of analyzing ethopolitics as a 'regime of practices', as the condition for the creation of "*places where what is said and what is done, rules imposed and reasons given, the planned and the taken for granted meet and interconnect*"¹⁰⁷⁸". Ethopolitics works in order to make the individual a "*significant element*"¹⁰⁷⁹". Which strategy, self-evidence, or logic rendered it acceptable the RJ, integrating its discursive formation? Ethopolitical technologies, working toward the securitization of personal life (de-structuring the welfare state, through a panoply of instruments which aim at making it possible to 'predict' and thus 'prevent' dangerous events) the refeudalization of governance (diffusing hybrid providers of social/crime control) and the individualization of the citizen (imposing self-education, self-management, self-therapy), are pivotal governmental techniques in that they perfectly coalesce technologies of domination and technologies of self, necessary to the establishment of the RJ as a discursive formation. In a controlling and, at the same time, disciplining manner, these technologies present the relay between the self-reforming self and the reforming social institutions which support the emergence of the RJ discursive formation¹⁰⁸⁰". Of course this 'relay' is not as consistent as it might seemingly appear. Tensions between the aforementioned political technologies are actually thinkable. For instance, the communal moral embeddedness produced by the 'third way' strategies might clash against the hyper-

¹⁰⁷³ Rose, N. (1999). Inventiveness in politics, cit., p. 475.

¹⁰⁷⁴ Ibidem.

¹⁰⁷⁵ Ibidem, p. 478.

¹⁰⁷⁶ Maasen, S., Sutter, B. (2007). *On Willing Selves. Neoliberal Politics vis-à-vis the Neuroscientific Challenge*. Basingstoke: Palgrave Macmillan, p. 7.

¹⁰⁷⁷ Gordon, C. (1991). Governmental rationality, cit., p. 3.

¹⁰⁷⁸ Foucault, M. (1991). Questions of method, cit., p. 75.

¹⁰⁷⁹ Foucault, M. (1988). The Concern for Truth. In L. D. Kritzman (Ed.), *Michel Foucault: Politics, philosophy, culture. Interviews and other writings, 1977-1984* (pp. 255-267), cit., p. 153.

¹⁰⁸⁰ Maasen, S., Sutter, B. (2007). *On Willing Selves*, cit., p. 8.

individualization of neo-liberal subjects. This kind of tension expresses the complexity of the neoliberal governmentality, opening up for possibilities of resistance in the interstices of its mechanisms.

As Foucault warned, the analysis of governmental technologies, apart from the exercise of political sovereignty, concerns “*the relation between self and self, private interpersonal relations involving some form of control and guidance, relations within social institutions and communities*”¹⁰⁸¹. At this point, then, it is necessary to extend the analysis to the micro-level of the ethopolitics. It is indispensable to reduce the level of abstraction, shifting the focus from the ‘collective’ targets of ethopolitical technologies to the ‘individual’ objectives. The next chapter, in fact, drawing upon the imaginable wide range of micro-technologies, focuses on those ones which are coextensive of the RJ as a sample of the micro-level of ethopolitical rationality

¹⁰⁸¹ Gordon, C. (1991). Governmental rationality, cit., pp. 2-3.

CHAPTER 5

THE RESTORATIVE SUBJECTIVATION

“[I]o claim that the subject is constituted is not to claim that it is determined; on the contrary, the constituted character of the subject is the very precondition of its agency¹⁰⁸²”

5.0. Introductory remarks

In the next sections I analyze a ‘sample’ of the micro-ethopolitical technologies which contribute to the creation of post-social citizens. This basically means to investigate the construction of subject positions within the archive of the RJ, to locate them in the discursive formation of the RJ, and then to ask how individuals are actually affected by the process of ‘imposition’ of (and resistance to) those ways of *being subject*. ‘Victim’, ‘offender’ and ‘community’ are not natural or essential ‘identities’, but specific subject positions produced by combinations, overlaps and conflicts between and within the authoritative discourses on the RJ. For individuals, to be confronted with these positions entails to be offered with particular images, metaphors, storylines and concepts¹⁰⁸³, which, once taken up, contribute to shape their selves and then their field of possible actions. The general premise of this argument is the idea of subject as a discontinuous category composed of a dispersion of ‘postures’ within a specific discursive formation¹⁰⁸⁴. The link between these discontinuities is not established by the subject itself, “*but by the specificity of a discursive practice*¹⁰⁸⁵”. The discursive formation of the RJ represents then, at the same time, the site and the condition for processes of subjection and self-constitution, informed by the ethopolitical logic. In order to address this multifaceted topic, I start by articulating a part of the archive of the RJ just sketched out in the chapter 2: the authoritative conceptualizations of ‘victim’, ‘offender’ and ‘community’. Once completed this archival analysis, I scrutinize the surfaces of emergence of those subject positions, operationalizing the key concepts of the problematization. Then, I focus on how a specific procedural discourse on the RJ (i.e. Victim-Offender Mediation), mobilizes and ‘offers’ the positions of ‘victim’, ‘offender’ and ‘community’ to individuals, according to an ethopolitical logic.

5.1. Victim, Offender and Community in the archive of the Restorative Justice

The authoritative discourses on the RJ are the bearers of various subject-positions, i.e. specific positions of agency and identity in relation to particular forms of knowledge and practice¹⁰⁸⁶. In order to re-construct the positions of ‘victim’, ‘offender’ and ‘community’ within the archive of the RJ, I focus on and systematize how the ‘textbook’ literature conceives the ‘needs’ of those stakeholders. This seems the easiest way to understand the configuration of those positions, allowing both analytical parsimony and consistency. As just hinted in the chapter 2, Strang and Sherman, in their well-known analysis of crime victim’s positions in the literature on the RJ, reduce the victims’ needs to

¹⁰⁸² Butler, J. (1994). Contingent Foundations: Feminism and the Question of ‘Postmodernism’. In S. Siedman (Ed.), *The Postmodern Turn: New Perspectives on Social Theory* (pp. 153-170). Cambridge: Cambridge University Press, p. 164.

¹⁰⁸³ Davies, B. (2000). *A Body of Writing*. Walnut Creek: AltaMira Press, p. 89.

¹⁰⁸⁴ McNay, L. (1994). *Foucault: A Critical Introduction*, cit., p. 69.

¹⁰⁸⁵ Ibidem.

¹⁰⁸⁶ See Hall, S. (1997). *The Work of Representation*, cit., p. 51.

five main meta-areas¹⁰⁸⁷. The first victim's need detected, it is to be informed. They refer to the fact that victims repeatedly consider one of the greatest sources of frustration the difficulty in finding out from criminal justice authorities about developments of their cases¹⁰⁸⁸. A second fundamental want is the personal participation. A persistent complaint of victims is that they are not stimulated to feel part of justice proceedings in their case¹⁰⁸⁹. Related to this need is the claim, highlighted by Strang and Sherman, of the victims' necessity of emotional restoration and apology¹⁰⁹⁰. Beyond the quantifiable damage victims of crime may experience, there are emotional and psychological dimensions of loss usually ignored by the justice machinery. On the other hand, victims themselves say that emotional harm is truly healed only by an act of emotional repair¹⁰⁹¹. In this perspective, a genuine apology exchange is thought to be fundamental to a successful restoration¹⁰⁹². Shapland et al.¹⁰⁹³ additionally claim that victims are more positive to accept apologies by offenders when associated to 'remorse through action'. In the same vein, Achilles and Zehr emphasize that victims need a 'safe place', meaning to say a physical and emotional space which allows them to recover from the victimization¹⁰⁹⁴. They argue that any restorative intervention must first of all recognize the victim's safety and security needs, both physical and emotional, giving an opportunity to identify and articulate personal needs. This stance is also stressed by Van Ness and Strong who identify the safety, both physical and emotional, as the most immediate need for crime victims¹⁰⁹⁵. Heather Strang¹⁰⁹⁶ has likewise stated that the need for a symbolic statement about the legitimacy of the victims' status and acknowledgement of the emotional harm experienced, is an aspect of victimization which has only recently been given attention. The last fundamental victim's need identified by Strang and Sherman is the compliance with the general principles of fairness and respect¹⁰⁹⁷. They stress that victims' sense of satisfaction with the justice system is not only related to the sentencing outcome, but fundamentally to the perception of fairness of the sentencing process at all. Woolford¹⁰⁹⁸, in his recent overview of the RJ's literature, essentially supports the outcomes of Strang and Sherman's analysis. He identifies the following victim's frequent requests: acknowledgement for being blameless as for the harm suffered; restitution of stolen items; monetary compensation; symbolic atonement/apology; sense of safety and closure; an opportunity for the victim to voice his/her suffering and continuing support. All these requests seem consonant with the aforementioned victims' claims.

The matter of offender's needs is a less investigated area in RJ's literature, respect to the victim's one. Nevertheless it is possible to identify some

¹⁰⁸⁷ Strang, H., Sherman, L. W. (2003). *Repairing the Harm: Victims and Restorative Justice*, cit., p. 21.

¹⁰⁸⁸ *Ibidem*, p. 20.

¹⁰⁸⁹ *Ibidem*, p. 21.

¹⁰⁹⁰ *Ibidem*, p. 22.

¹⁰⁹¹ *Ibidem*, p. 22.

¹⁰⁹² *Ibidem*, p. 23.

¹⁰⁹³ Shapland, J., Atkinson, A., Atkinson, H., Colledge, E., Dignan, J., Howes, M., et al. (2006). Situating restorative justice within criminal justice. *Theoretical Criminology*, 10(4), 505-532, p. 514.

¹⁰⁹⁴ Achilles, M., Zehr, H. (2001). *Restoring victims*, cit., p. 14.

¹⁰⁹⁵ Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit., p. 97.

¹⁰⁹⁶ Strang, H. (2003). Justice for victims of young offenders: the centrality of emotional harm and restoration, cit., p. 287.

¹⁰⁹⁷ Strang, H., Sherman, L. W. (2003). *Repairing the Harm*, cit., p. 24.

¹⁰⁹⁸ Woolford, A. (2009). *The Politics of Restorative Justice: A Critical Introduction*, cit, p. 90.

common and recurrent themes. Zehr argues that offenders usually lack both the in-depth understanding of the consequences of their actions and the ability to empathize with victims¹⁰⁹⁹. They use neutralizing strategies (i.e. rationalizations to distance themselves from the people they hurt) and live in a sense of alienation from society at large, sharpened by the legal process¹¹⁰⁰. Zehr maintains that what offenders really need is to be encouraged to understand the impact of their behaviour -i.e. the harms done - and to take steps to put things right as much as possible¹¹⁰¹. Offenders need from justice an accountability that addresses the resulting harms, encourages empathy and responsibility and transforms shame. They need encouragement to personal transformation, including healing for the harms that contributed to offending behaviour, opportunities for treatment, support for integration into the community, and temporary restraint, at least for some of them¹¹⁰². Other well-known analyses, both theoretical and empirical, have expressed considerations on offenders' needs similar to the Zehr's ones¹¹⁰³. Gavrielides has freshly and further supported this well-established representation. He asserts that in the RJ, victim and offender are not considered strangers, but related, because of the 'social liaison' that connects them¹¹⁰⁴. The offender occurs as a free individual, provided with rights that need to be respected and protected. Offenders also have obligations, among which is crucial to restore the balance that the offence has altered in the community. In general, offenders are "*both considered mentally competent and hence morally culpable actors, who are expected to take responsibility for their actions, not only to the parties directly injured, but also to a wider community*"¹¹⁰⁵. In a RJ's perspective, victim and offender are two sides of the same coin; the offender is not a parasite of society, but 'one of us'¹¹⁰⁶. If the offender's needs are a scarcely explored area, it is not possible to say the same as for the 'community'. Many and conflicting are the conceptualizations of this distinctive stakeholder in the RJ's mainstay writings, emerging as an intensely fragmented topic. As McCold and Wachtel have noticed¹¹⁰⁷, it can be easily acknowledged the existence of a general agreement that 'community' is as central to the RJ as are the victim and the offender. Nevertheless, the concept of 'community' in the literature is not something unanimously shared, being present different definitions of it¹¹⁰⁸. As Wright maintains: "*community is everyone: the shopkeeper, the doctor or nurse -even the bureaucrat from the Ministry of Education or Justice is a member of the community when he or she comes home*"¹¹⁰⁹. Yet, for the most part, community remains a concept imprecisely defined. Community is described as a feeling, a perception of personal connectedness both to other human beings and to a group¹¹¹⁰, the main actor to establish

¹⁰⁹⁹ Zehr, H. (2002). *The Little Books of Justice & Peacebuilding*, cit., p. 16.

¹¹⁰⁰ Ibidem.

¹¹⁰¹ Ibidem, pp. 14-15.

¹¹⁰² Ibidem, p. 15.

¹¹⁰³ Umbreit, M., Coates, R.B., Kalanjet, B. (1994). *Victim meets offender: the impact of restorative justice and mediation*, cit.; Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit.

¹¹⁰⁴ Gavrielides, T. (2005). Some Meta-theoretical Questions for Restorative Justice, cit., p. 98.

¹¹⁰⁵ Daly, K. (1999). Revisiting the Relationship between Retributive and Restorative Justice. Retrieved 10 April 2013 from http://www.griffith.edu.au/__data/assets/pdf_file/0014/50342/kdpaper6.pdf, p. 5.

¹¹⁰⁶ Gavrielides, T. (2005). Some Meta-theoretical Questions for Restorative Justice, cit. p. 98.

¹¹⁰⁷ McCold, P., Wachtel, T. (1998). Community is Not A Place, cit., pp. 71-72.

¹¹⁰⁸ Wright, M., Foucault, O. (2005). Community Involvement in Restorative Justice, cit., p. 1.

¹¹⁰⁹ Ibidem.

¹¹¹⁰ McCold, P. Wachtel, T. (1998). Community is Not A Place, cit.

peace¹¹¹¹, an endless process of transforming the conditions that give rise to criminality and criminalization¹¹¹². Despite these different views, one thing seems commonly assumed: crime is not reducible to the individual, it is a *social* phenomenon. The criminal justice, focusing exclusively on the individual offender and the specific harm caused to an individual victim, hinders the possibility of collective changes of broader social issues which lie behind criminal behaviours. Conversely, building social alliances is crucial in order to deal effectively with crimes, connecting people across the community, as well as forging pro-active social interventions, independent from the unwanted intrusions of the state. In this perspective, the point of intervention is to facilitate harmonious community relations, rather than constantly imposing rule-binding behaviours through the threat of force¹¹¹³.

It emerges from this short overview a basic configuration of the victim, offender and community's 'needs' in the 'textbook' literature. Several inferences can be drawn from this outline. 'Victims' are often represented as a cohesive, united ensemble of people. They seem to be characterized by standard material, symbolical and emotional needs. This subject position implies to be dis-empowered, in search of participation, acknowledgement and empathy. Especially symbolical and emotional needs are stressed by the literature. Therefore, the victim is depicted as an 'emotional subject' deeply harmed by the offender, looking of healing, empowerment, transformation and relational recovery. The offender's image is quite symmetrical to the victim's one. The 'relational side' is frequently highlighted, being routinely underlined the offender's need of transformation and personal development, achievable through a process which often entails apology, empathy and 'reintegrative' shame. Lastly, 'community' is mostly described as a consistent social entity, due to shared characteristics among its members, such as place or belief. It is a kind of communal network, with an assumed shared understanding of social phenomena (i.e. the crime) and a sense of connectedness which allegedly plays a role in ensuring freedom and security in opposition to the state (and the 'mainstream' criminal justice as its expression). In addition, it must be noticed that the authoritative descriptions of 'community' usually do not take into consideration the possibility that community relationships (namely family and peer-to-peer dynamics) might promote or facilitate criminal behaviours¹¹¹⁴. This overview is just a partial synthesis of what is meant 'to be' a victim, offender and community in the RJ's literature. Particularly, it must be acknowledged the presence of several attempts to challenge the basic assumptions regarding the authoritative conceptualizations of the RJ's stakeholders. This is the case of writings which aim at unveiling gender-, race- or power-related unbalances which underpin the various conceptualizations of 'victim', 'offender' and 'community' in the RJ's literature¹¹¹⁵.

¹¹¹¹ Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit.

¹¹¹² White, R. (2003). Communities, conferences and restorative social justice *Criminal Justice*, cit.

¹¹¹³ Ibidem, pp. 152-153.

¹¹¹⁴ Polizzi, D. (2011). Heidegger, Restorative Justice and Desistance: A Phenomenological Perspective. In J. Hardie-Bick, R. Lippens (Eds.), *Crime, Governance and Existential Predicaments* (pp. 129-155). Basingstoke: Palgrave Macmillan, p. 141.

¹¹¹⁵ See Cunneen, C. (2008). *Understanding Restorative Justice Through the Lens of Critical Criminology*. Cit.; Daly, K. (2000). Restorative Justice in Diverse and Unequal Societies, cit., pp. 167-190; Daly, K. (2002). Restorative justice: The real story, cit., pp. 55-79; Pavlich, G. (1996). *Justice Fragmented*, cit.

5.2. Subjectivation

The positions of 'victim', 'offender' and 'community' emerge from the interaction of several authoritative discourses. This virtual space, where discourses 'battle' over the subject positions' definitions, by exclusions as well as combinations¹¹¹⁶, is the discursive formation of the RJ. Legal categories are (partially) reshaped within this virtual space, and along with categories drawn upon other discourses, they define the meanings of 'being' victim, offender and community in the RJ, following the ethopolitical logic. From the standpoint of people involved in the applications of the RJ, this process is an example of how limited traits of subjectivities can be shaped, implicitly contributing to define their field of possible actions¹¹¹⁷. Participants of RJ programs are, in fact, provided with words and patterns to think themselves, potentially influencing their self-image, creating possibilities of freedom or subjugation. This process is not unidirectional; the individuals who embody those subjectivities are not just passive points of application of discursive relations. To become 'victim', 'offender' or 'community', involves several opportunities of self-organization and even active resistance against the backdrop of heteronomous discourses.

5.2.1. Discourses, subjection and self-constitution

As widely argued for in the previous pages, discourses are more than pure linguistic entities which inertly portray the reality. They do not refer to texts, in a narrow sense, but to "*the ensemble of phenomena in and through which social production of meaning takes place, an ensemble which constitutes a society as such*"¹¹¹⁸. More precisely, discourses contribute to *constitute* subjectivities, offering positions from which to act and speak, making possible the establishment of specific idea(s) of 'who we are', in (and through) a given societal context¹¹¹⁹. Therefore, subjectivities are not given by 'nature', but established through conflicting and intersecting discourses that encourage individuals to accept 'proper' or 'normal' self-images, linked to broader and fragmented social contexts¹¹²⁰. Looking at this entangled process from the perspective of individuals, two different but synchronic phases can be considered. The first stage (*subjection*) results from the ways that discourses normalize the idea of ourselves, how they 'interpellate' us, the second (*self-constitution*) refers to the individual's active realization of the self¹¹²¹. Self-constitution concerns individuals' self-identification with definite positions through their own volition, even though this might be a consequence of these positions being suggested or advocated by others through relations of power¹¹²². Judith Butler argues that this double-edged process "*denotes both the becoming of the subject and the process of subjection - one inhabits the figure of autonomy only by becoming subjected to a power, a subjection which implies a radical dependency*"¹¹²³. She goes on claiming that

¹¹¹⁶ Hook, D. (2007). Discourse, knowledge, materiality, history, cit., pp. 522-523.

¹¹¹⁷ Which and how psychological dynamics facilitate the acceptance of those traits and interact with pre-existing dimensions of stakeholders' subjectivities is as relevant as beyond the scope of this analysis. See Hall, S. (1996). Introduction: Who Needs Identity? In S. Hall, P. du Gay (Eds.), *Questions of Cultural Identity* (pp. 1-17). London: Sage, p. 7; Rasmussen, M.L. (2006). *Becoming Subjects: Sexualities and Secondary Schooling*. New York: Routledge, p. 86.

¹¹¹⁸ Laclau, E. (1980). *Populist Rupture and Discourse*, cit., p. 89.

¹¹¹⁹ Rasmussen, M.L. (2006). *Becoming Subjects*, cit., pp. 85-86.

¹¹²⁰ Laclau, E., Mouffe, C. (1985). *Hegemony and Socialist Strategy*, cit., p. 115.

¹¹²¹ Foucault, M. (1982). *The Subject and Power*, cit., p. 212.

¹¹²² *Ibidem*, pp. 212-213.

¹¹²³ Butler, J. (1997). *The Psychic Life of Power: Theories in Subjection*. Stanford: Stanford University Press, pp. 83-84.

“such subjection is a kind of power that not only unilaterally acts on a given individual as a form of domination, but also activates or forms the subject¹¹²⁴”, implying a space for practices of resistance and self-construction. Subjectivities are then the “the point of suture¹¹²⁵” between the never-unified products of subjection and subjectivation. Not the mere sum of subjects positions, but their precarious and incessant synthesis. This process does not take place in a vacuum, but actually is imbricated in relation of forces which ensure the reproduction of the social system, facilitating, marginalizing or limiting the emergence of specific subject-positions, through practices of selection, exclusion and domination¹¹²⁶. Starting from these assumptions, the RJ can be thought as the field for a never finalized discursive struggle, where some discourses (including ‘mainstream’ criminal justice), in the course of time, gain a prioritized- however, temporary power in the production of specific subjectivities’ traits¹¹²⁷.

5.2.2. Recalling the discursive formation of the Restorative Justice

The discourses which make possible/understandable the RJ are multiple, intersecting and deeply different. As already highlighted, the first discourse to take into account is related to the consolidation of the (general) victimology as a scientific and academic discipline combined with the emergence of crime victims’ movement(s) in western contemporary democracies. The rise of the ‘victimhood’, as academic subject and political resource, plays the role of crucial discursive pillar of the RJ. The victimological ‘necessity’ of the involvement of crime victims in criminal justice, and the political claim of meeting the expectations of crime victims have become key categories in the language of the proponents of the RJ. This is not a natural phenomenon, but the consequence of the consolidation of the victimological research and of and popularization of victim movements’ claims. A second discursive ‘actor’ of the RJ field, is the *lato sensu* communitarian claim in penal matters, given by the articulation of at least two different but synchronic discourses: the penal abolitionism (specially the institutional abolitionism) and the re-birth of communitarian philosophy in the late 1970s. Penal abolitionism is not merely a theory of decarceration, but an approach, a perspective, a methodology, and most of all, a way of seeing¹¹²⁸. As a paradigm, penal abolitionism rejects the reliance on penal structures and state-imposed oppression, as legitimate reactions to human conflict, harm and violence. This perspective also challenges the ontological reality of crime, unveiling its social construction and claiming community-led answers to the social problem of crime¹¹²⁹. In the same vein, communitarian claims finds the sources of social cohesion in shared assumptions so deeply engrained in everyday life, that they do not have to be articulated: in folkways, customs, prejudices etc.¹¹³⁰. In this perspective, individuals are densely enmeshed in interdependencies which have special qualities of mutual help and trust. These interdependencies have a symbolic significance which takes precedence over individual interests¹¹³¹. If properly nourished, social interdependencies can work as a positive constraint for anti-

¹¹²⁴ Butler, J. (1997). *The Psychic Life of Power*, cit., p. 84.

¹¹²⁵ Hall, S. (1996). Introduction: Who Needs Identity? cit., p. 5.

¹¹²⁶ Hook, D. (2007). Discourse, knowledge, materiality, history, cit., p. 3.

¹¹²⁷ Kure, N. (2010). Narrative mediation and discursive positioning in organisational conflicts, cit, p. 26.

¹¹²⁸ Ruggiero, V. (2011). An Abolitionist View of Restorative Justice, cit., pp. 1-2.

¹¹²⁹ Ruggiero, V. (2010). *Penal Abolitionism*. Oxford: Oxford University Press.

¹¹³⁰ Lasch, C. (1994). *The Revolt of the Elites and the Betrayal of Democracy*, cit., p. 92.

¹¹³¹ Braithwaite, J. (1989). *Crime, shame and reintegration*, cit., p. 100.

social behaviours, including criminal acts. A third discourse to be considered is the so called 'Psy-discourse' and its spreading during the last two decades¹¹³². This phenomenon refers to therapeutic languages which have informed a range of criminal justice policies emerging in recent years, particularly those designed to assist victims of crime, seemingly working as the secularized version of the action of religious groups involved in the criminal justice reform. Thanks to this discourse, it has now become widely accepted, that crime victims must be offered opportunities to tell the story of their victimization, express their pain, fear and/or anger about the offence, and to 'be heard'. The last discursive component of the RJ field is the 'mainstream' Western legal-criminal discourse. Here, the emphasis is put on public needs triggered by the crime and on universal claims regarding the human behaviour. This discourse (both in utilitarian and Kantian versions) embraces the Enlightenment's notion that a universal and transcendent rationality defines the formation of individual subjects¹¹³³. It conceives the subject as a transcendent and rationally self-interested individual, whereas reason and rationality are the unifying principle underpinning subjectivity. Moreover, it shows a typical dichotomizing attitude¹¹³⁴. The criminal-legal rationality is, in fact, based on a binary classification system "both for evaluation of acts and for evaluation of persons. Acts become right or wrong -non-crimes or crimes- and persons criminals or non-criminals"¹¹³⁵. These seemingly unrelated discourses are pre-existing cultural, academic and political constructs which play the role of surfaces of emergence of the RJ¹¹³⁶, delimiting the space within which have slowly become understandable/possible its concepts and strategies. In this field is shaped a dispersal of apparently definite discursive objects, whose 'victim', 'offender and 'community' are nothing but examples. They do not precede their emergence under specific discursive conditions, being therefore not defined by their internal nature, but by the juxtaposition, intersection and competition of certain discourses. Becoming 'victim', 'offender and 'community' occurs then as social and psychological effect of discursive relations acting upon individuals directly involved in RJ processes. Once adopted, those partial self-images deeply delimit the participants' subjective experiences, delineating their field of possible actions. Many examples of these complex dynamics within the discursive formation of the RJ can be given. Victimological discourses clash against the 'mainstream' criminal justice because of the identification of the victims not as a universal subject, but as a contextual, local and specific entity. On the other hand, the focus on victim' needs is in tension with the unalienable rights of the offender conceptualized (and safeguarded) in the 'mainstream' criminal justice discourse. Moreover, insofar as the criminal justice discourse makes possible within the wider RJ's context the emergence of human rights claims, the tension with the victimological discourses appears even more evident. The communitarian discursive component shows conflicting relations with the psy-discourses. In the communitarian perspective,

¹¹³² Rose, N. (1996). *Inventing Ourselves: Psychology, Power and Personhood*, cit.; Richards, K. (2005). Unlikely friends? Oprah Winfrey and restorative justice, cit.

¹¹³³ Hill, F.D. (2009). Restorative justice: Sketching a new legal discourse. *Contemporary Readings in Law and Social Justice*, 1(1), 115-162, p. 2.

¹¹³⁴ Christie, N. (1986). Images of man in modern penal law. *Contemporary Crises*, 10, 95-106, p. 95; Achutti, D. (2011). The Strangers in Criminal Procedure: Restorative Justice as a Possibility to Overcome the Simplicity of the Modern Paradigm of Criminal Justice. *Oñati Socio-Legal Series*, 1(2), 1-15, pp. 10-11.

¹¹³⁵ Christie, N. (1986). Images of man in modern penal law, cit. p. 96.

¹¹³⁶ Foucault, M. (1972). *The Archaeology of Knowledge*, cit., p. 41.

de-professionalisation and communitarian regulation of problematic situations are unquestionable points. Conversely, the therapeutic discourses imply the strong and regulative presence of experts, creating a vertical way of regulating social conflicts, which, as a consequence of this expert intervention, become 'intrapersonal conflicts'. These kinds of tensions have several implications for many RJ's discursive objects. For instance, the contraposition between the different concepts of 'trigger event' or the various declinations of 'restoration' seem to be related to the tension abovementioned. The distinction between conflict, harm, normative violation or restitution and reparation, the link with the punishment and the criminal justice, are all depending on different (and divergent) kinds of knowledge which 'ground' the different RJ's discourses. As already stated, the relationships between the RJ discourses can be seen also as of reciprocal integration and not only as conflict. This is the case of the link between victimological discourses and psy-discourses. The concept of active participation in the RJ processes, expressed also through the necessity of 'speaking out' and 'being heard' on the experience of victimization, is a theme shared by both discourses. In this case, it must be noticed the particular combination between a normative claim which comes from the crime victims' organizations and the descriptive accounts of psy-experts, regarding the necessity of expressing inner needs and being heard as a symmetrical complement.

5.2.3. Becoming Victim, Offender and Community

From the discursive formation of the RJ, as an effect of the interaction between the aforementioned discourses (especially the victimological/psy-discourses), originates a 'victim' contextualized and characterized by emotions such as fear and loss of control, with multiple weaknesses and a unique sense of vulnerability. Once taken up, this subject position conveys the self-perception of a lack of agency, control and resilience. Therefore it entails the (ethopolitical) necessity of self-improvement, shaped as enhancement of own self-management, self-control and self-actualization. The premise of such a position is that it depends on our own will, capacity and action to *become* 'victim'; we are responsible of embracing this status. At the same time, working on our ethical substance, we can re-shape this existential condition. Likewise, to conceive the relationships between 'victim' and 'offender' as dynamical, emotions-laden, characterized by needs to be re-addressed by personal involvement, speaking out and talking of the crime's consequences, implies the development of a self-management posture facilitated by the work of the conveners of restorative programs. The position(s) of 'community' and its role in the restorative discourses, emerges from the combination of the idea of community as alternative to the state in dealing with social conflicts (abolitionism) with the model of social interdependency broadly worked out within the communitarian perspectives. Community appears as a kind of 'alternative' to the state, but also to the social atomization processes caused by the privatization of public spaces. Community is the 'third way', the space where conflicts arise but also where they can be addressed. In the RJ discursive field, the binary opposition between the state (and criminal justice system as its manifestation) and a 'virtual' space radically different, independent and even alternative, arises as a recurrent trait. In this perspective, also the different versions of the 'trigger event' are related to that complex discursive combination. Particularly, the concepts of conflict and damage are rooted in the idea of 'problematic situation', an expression which replaces -in the

abolitionist view- identifying terms such as offence, crime and criminal act. At the same time, the mainstream means of state interventions on social conflicts appear to be an invasion of the community's domain, an attempt of colonization, able to cause damages and social losses¹¹³⁷. As for the offender's subject position, in the victimological discourse the offender is considered only as a 'correlate' of the victim, and not precisely characterized. In the 'mainstream' criminal justice discourse, the offender is either a rational actor able to calculate the 'price' of his/her behaviour or a subject with a reduced capacity of rule-following due to moral or mental deficiencies. Psy-discourses regularly relate with this last account of the offender as a subject with precise deficits, whereas from the communitarian view, he/she could be shaped as the disturbing-factor of communitarian order, due to being less socialized or deliberately a rule-breaker. In the discursive formation of the RJ, these different descriptions of offender's positions, determine a rather composite accounts and a less definite configuration respect to the victim's case. It is again the 'warm side' which appears to be the prioritized dimension of this position, emerging chiefly from the emphasis on transformative 'opportunities' provided to the offender through the RJ processes. Opportunities shaped as spaces and moments of self-reflection, considering the individual reasons and consequences of his/her acts, insulating them from the wider social and cultural context. Thus, the concrete way to develop such opportunities is the work on himself/herself, in order to reach a better capacity of self-management, self-care, self-surveillance as conditions for a peaceful social life. As for the offender's subject position, must finally be stressed the overall limited attention devoted to its characterization in the authoritative discourses. It is actually remarkable the offender's *absence*, or better, the exclusion of its clear representation in the discursive formation of the RJ. In this exclusion, is not to be seen a 'lack' of the discursive formation but indeed the effect of exclusionary processes which play a crucial role in the construction of any subjectivity. In this way, it makes it virtually impossible to think of the offender as something else than a necessary correlate of the victim or of a subject in need of legal protection. This point highlights the fact that the RJ discursive field entails both inhibiting and productive ways of defining its actors. Moreover, these processes of production, constraints and exclusion, seem inseparably linked to power relationships¹¹³⁸. In fact, the offender's characterization through its 'exclusion', might be seen as related to the absence of an offender grass-root movement able to claim offenders' needs. Conversely, the crime victim movement has intensely contributed to the construction of the RJ field, affirming victims' interests and values in it¹¹³⁹. This has led to 'prioritize' the description of victims' features and needs, bringing about a particular set of power-relations, rooted in a given historical and social context, which seemingly affects the offender's configuration.

5.3. Victim-Offender Mediation as vehicle of the 'restorative' subjectivation

The discursive formation of the RJ 'reaches' concrete human beings insofar as it is operationalized by micro-level procedural discourses which set up

¹¹³⁷ Christie, N. (1977). Conflicts as property, cit.

¹¹³⁸ Hook, D. (2007). Discourse, knowledge, materiality, history, cit., p. 3.

¹¹³⁹ Mather, L., Yngvesson, B. (1981). Language, Audience, and the Transformation of Disputes. *Law & Society Review*, 15(3/4), 775-822, p. 796.

'restorative' roles, functions, means and goals directly involving individuals¹¹⁴⁰. The process of 'restorative' subjectivation, inspired by the post-social ethopolitical rationality, is then functionally depending on such 'procedures', among which VOM is *par excellence* the most diffused. For this reason I decide to focus on it as paradigmatic example of how the discursive formation of the RJ activates processes of subjectivations, 'offering' the specific subject positions above analyzed, to individuals. The aspects of the VOM procedure fitting with this analysis, revolve around the mediation session itself. As we have seen in the chapter 2, some variations exist in the way VOM procedures unfold, nevertheless are recognizable some 'authoritative' patterns. The standard VOM procedure is characterized by four steps: case referral and intake; preparation for mediation; mediation session(s); mediation follow-up¹¹⁴¹. The mediation session usually consists of the introductory statement by mediator; the parties' storytelling phase; face to face exchange of information and clarification of facts; reviewing victim losses and options for compensation; developing written agreement; closing statement by the mediator¹¹⁴². When we focus on the 'restorative' subjectivation, the case referral/intake is the first crucial phase to be analyzed and discussed. In the chapter 2, we saw how the authoritative discourses define three alternative case referrals hypothesis: the guilty plea of the person charged, the conviction (and the admission of responsibility), the voluntary participation without reserves regarding the criminal charge. In the first two cases the acceptance of the charge automatically entails the acceptance of the legal status of 'offender', while the counterpart is automatically assigned the status of 'victim'. 'Offender' and 'victim' are then legal/criminal qualifications projected in the RJ procedures and then interacting with the same 'labels' but understood from a 'restorative' perspective. The consequence is that the subject positions of 'offender' and 'victim' in the deployment of the VOM, are the product of specific conflicts, overlaps and combinations between the 'legal discourse' and the restorative discourses. In the third case the situation is slightly different. Here the legal distinction stands between a person charged (but not sentenced yet) and a person filing the criminal complaint. This implies that in the case of activation of the VOM, the weight of the legal status will be seemingly 'lighter', i.e. conditioning to a lesser extent the signification of the subject positions and the effects of their assignation. As for the storytelling phase, it provides the person qualified as 'offender/charged person' with the opportunity to offer his/her point of view about the happenings leading the case, while the 'victim/charging person' can listen directly, confront and question the other party, describing the effects of those happenings on his/her life. The responsibility of the person institutionally labeled as 'mediator' is to make ideally understandable the parties' narrative, reframing, paraphrasing, acknowledging emotions, translating/verbalizing emotions, synthetizing¹¹⁴³. The mediator's role is not to allocate responsibilities, blaming parties or offering 'solutions'. Mediator must remain neutral (change the disputant's perspective; don't try to change his mind), eventually defining the relevant

¹¹⁴⁰ It must be noticed that VOM might be informed by authoritative discourses not (entirely) referable to the RJ discursive field. In the next pages I will focus only on the idealtypical hypothesis of VOM with a pure restorative 'background'.

¹¹⁴¹ See Van Ness, D.W., Heetderks Strong, K. (2006). *Restoring Justice*, cit.

¹¹⁴² Schehr, R.C. (2000). From Restoration to Transformation: Victim-Offender Mediation as Transformative Justice, cit., p. 156.

¹¹⁴³ Brigg, M. (2003). Mediation, Power, and Cultural Difference. *Conflict Resolution Quarterly*, 20(3), 287-306, p. 295.

background information during the second phase of the VOM process (preparation for mediation), meeting in private with each party. The mere ‘procedural’ role of the mediator suggests the parties they are the ‘masters of their destiny’, responsabilizing them as well as individualizing the conflict, qualified as a mere private issue. On a general note, the mediator must portray himself/herself as someone who cares about parties’ situation and is interested in seeing their concerns taken seriously. However, the VOM’s sessions are considered successful only to the extent that the ‘victim’ and the mediator consider the resolution satisfactory. Because the VOM “*channels communication into areas specifically for redressing harm done, no attention is paid to status, race, ethnicity, class, or gender issues*”¹¹⁴⁴. Finally, what distinguishes the VOM from legal dispute resolution is the “*range of creative possibilities open to mediators who have the power to encourage mediation participants in a specific direction toward resolution of their dispute*”¹¹⁴⁵.

5.3.1. Confession as subjectivating technique in Victim-Offender Mediation

As Morgan Brigg argues, in the VOM process the mediator serves as the figure to whom the parties *confess* and as the one who specifies the parameters for confessing¹¹⁴⁶. ‘Confession’ here identifies, in foucauldian perspective, a crucial technique of the self in which the individual confesses his/her sentiments, opinions, and desires to an external authority¹¹⁴⁷. The process of storytelling, both in the private and in the common sessions, aims at ‘revealing’ the individual and activates a process of self-work (re-evaluating thoughts, behaviors, actions, and overall way of being) which might be valued by VOM participants as an opportunity to speak and to be heard and thereby achieve some measure of justice¹¹⁴⁸. From this phase onward, the VOM processes characteristically take the form of a protracted confessional in which a specific approach to conflict and selfhood is promoted and reinforced. In this context the legal ‘labels’ are partially re-worked and the restorative subject positions signified, assigned and resisted by the parties. Such a process is developed especially as a consequence of the mediator’s ‘technical’ activities. Depending on process differences and mediator styles, parties may be ‘trained’ about appropriate communication styles, ‘coached’ on ways of relating more constructively, ‘taught’ how to positively express own emotions and face other’s behaviour. The (unidirectional) establishment of mediation’s ground rules to be accepted by parties at the beginning of the session is the most elementary way for the mediator to establish goals and means but also roles and identities during the forthcoming phases. In this context, crucial techniques are the reframing and the translation/verbalization of emotions. Broadly speaking, reframing is “*to change the conceptual and/or emotional setting or viewpoint in relation to which a situation is experienced and to place it in another frame which fits the ‘facts’ of the same concrete situation equally well, or even better, and thereby changes its entire meaning*”¹¹⁴⁹. Concretely, reframing involves to choose of

¹¹⁴⁴ Schehr, R.C. (2000). From Restoration to Transformation: Victim-Offender Mediation as Transformative Justice, cit., p. 157.

¹¹⁴⁵ Ibidem.

¹¹⁴⁶ Brigg, M. (2003). Mediation, Power, and Cultural Difference, cit., p. 294.

¹¹⁴⁷ Foucault, M. (1981). *The History of Sexuality. An Introduction, The Will to Knowledge*, Vol. 1, cit., pp. 58-61.

¹¹⁴⁸ See Pavlich, G. (1996). The Power of Community Mediation: Government and Formation of Self. *Law & Society Review*, 30(4), 707-734, p. 721.

¹¹⁴⁹ Blanciak, P. (2002). Reframing: The Essence of Mediation. Retrieved 4 June 2012 from http://www.mediate.com/articles/blanciak.cfm#_ftn1

paraphrasing/emphasizing or to avoid it “*shifting the attitude or orientation of parties. At its most subtle, it can involve paraphrasing anger and other emotion that parties express in a calm and steady voice, serving as a demonstration that such matters can and should be handled in a particular way*”¹¹⁵⁰. In this way the mediator aims at “*signaling them as inappropriate, suggesting agenda items in ‘neutral’ terms, diffusing personal attacks, directing a party to address a shared problem, and redirecting discussion from surface-level positions to underlying interests*”¹¹⁵¹. The technique of reframing is applied through mediator’s understated restrictions, encouragements, and recompenses. For instance, if an “*emotional or accusatory statement from one party to another is reframed by a mediator and the party subsequently adopts a more conciliatory tone, mediator intervention will be relaxed- signaling appropriate behavior by the party*”¹¹⁵². On the other hand, if a party overlooks a reframe, more reframes and other stronger interventions may be used in order to indicate censure for that behaviour. In this way, “*reframing encourages parties to reposition themselves as rational rather than emotional, constructive rather than destructive, conciliatory rather than combative*”¹¹⁵³.

The technique of translation/verbalization of emotions is another typical way in which the confessional character of VOM is deployed. A basic mediator task is to help parties to express ‘correctly’ their emotions. This means to establish implicit or explicit parameters of manifesting and discussing emotions as crucial issues at stake during the exchange phase. Parties are encouraged to express and elaborate their emotions in ‘constructive’, ‘positive’, ‘future-centered’ ways. A kind of intimacy between the mediators and the parties is henceforth created. Such an intimate sharing of emotions on the other side, does not directly involve the mediator, who will never declare his/her emotions to the parties. This generates a singular power asymmetry ‘in favor’ of the mediator (see next paragraph). The translation/verbalization of emotions is nothing but a way to produce controlled channels for emphasizing the ‘warm side’ of the conflict as well as for shaping the parties’ self-image as subjects deeply concerned with their inner world. Moreover, the necessity of an external normative regulation of own emotions conveys the message of deficiency of self-management and accordingly (tautologically) it justifies the mediator’s intervention. ‘Offender’ and ‘victim’ as subject positions, come to be characterized by a strong emotional dimension, and as implicitly lacking of that crucial ethopolitical quality which is the self-control.

5.3.2. Victim-Offender Mediation, confession and power

The systematic, confessional pressure on disputants to express their stories and selves in ways understandable to the mediators and intelligible within the goals of the mediation session, presents itself as deeply power-embedded. As Foucault argues, power relations are integral to the confessional: “*one does not confess without the presence (or virtual presence) of a partner who is not simply the interlocutor but the authority who requires the confession, prescribes and appreciates it, and intervenes in order to judge, punish, forgive, console and reconcile*”¹¹⁵⁴. In other words, for Foucault confession attributes a specific power to the silent interlocutor, i.e. the mediator¹¹⁵⁵. As Schehr argues¹¹⁵⁶, among the factors Foucault names for

¹¹⁵⁰ Brigg, M. (2003). *Mediation, Power, and Cultural Difference*, cit., p. 295.

¹¹⁵¹ Ibidem.

¹¹⁵² Ibidem.

¹¹⁵³ Ibidem.

¹¹⁵⁴ Foucault, M. (1981). *The History of Sexuality. An Introduction, The Will to Knowledge*, Vol. 1, cit., pp. 61-62.

¹¹⁵⁵ Brigg, M. (2003). *Mediation, Power, and Cultural Difference*, cit., p. 291.

producing a power through confession, at least one is applicable to VOM, the “clinical codification of the inducement to speak¹¹⁵⁷”. The clinical codification within VOM entails the “narrative reconstructions of events, feelings, attitudes, thoughts, and actions are listed, organized, and interpreted consistent with scientific principles¹¹⁵⁸”. This technical aspect of VOM induces a power relationship insofar as demands “a subject’s confession through force or coercion and the construction of the facade of neutrality through the emphasis on procedural detail¹¹⁵⁹”. Parties are encouraged to confess their innermost emotions, feelings opinions to a subject (the mediator) who is not an equal partner in the communicative act but rather “the authority who requires the confession, prescribes and appreciates it, and intervenes in order to judge, punish, forgive, console, and reconcile¹¹⁶⁰”. The mediator translates the confession received in apparently neutral bureaucratic and rational codes, retaining a position of ethical neutrality which amplifies his/her role as benevolent and trustworthy authority, whose indictments, rewards and sanctions cannot be discharged or even doubted. Broadly speaking, VOM’s confessional structure implies forms of normalization and individualization which ‘oblige’ VOM’s participants to be free but regulated, experiencing the liberating effects of self-inspection and of self-regulation¹¹⁶¹. Confession here works as an affirmation of our self and our identity that involves “contemporary procedures of individualization” that “binds us to others at the very moment we affirm our identity. In truthfully confessing who one is to others (e.g. to parents, teachers, friends, lovers and oneself) ‘one is subjectified by another [...] who prescribes the form of the confession, the words and rituals through which it should be made, who appreciates, judges, consoles, or understands¹¹⁶²”. The confessional procedure of VOM is the site of formulation, assignment of (but also resistance to) subject positions which potentially shape the parties’ selves as emotionally laden, aiming at becoming responsible, autonomous, self-actualizing. Confession then is a pivotal channel for (re)creating ourselves “by creating our own narrative, reworking the past, in public, or at least in dialogue with another¹¹⁶³”. When the subject is confessing to the mediator and the other party, creating its ‘self’, it seems to feel compelled to tell the truth about itself. Therefore, confession involves a type of ‘discipline’ that “entails training in the minute arts of self-scrutiny, self-evaluation and self-regulation¹¹⁶⁴”. Within the VOM session this means to push parties to comply with specific the rules of control of the body, speech, and movement dictated by the mediator. The VOM as a confessional procedure appears then an “autobiographical enterprise¹¹⁶⁵” which mobilizes certain subject positions, “compelling us to narratively recreate ourselves, it is also about assigning truth-seeking meaning to our lives¹¹⁶⁶”.

¹¹⁵⁶ Schehr, R.C. (2000). From Restoration to Transformation: Victim-Offender Mediation as Transformative Justice, cit., p. 158.

¹¹⁵⁷ Foucault, M. *The History of Sexuality: An Introduction*, cit., pp. 65-66.

¹¹⁵⁸ Schehr, R.C. (2000). From Restoration to Transformation: Victim-Offender Mediation as Transformative Justice, cit., p. 158.

¹¹⁵⁹ Ibidem.

¹¹⁶⁰ Foucault, M. (1980). *The History of Sexuality. An Introduction, The Will to Knowledge*, Vol. 1, cit., pp. 61-62.

¹¹⁶¹ Besley, T. (2005). Foucault, truth telling and technologies of the self in schools. *Journal of Educational Enquiry*, 6(1), 76-89.

¹¹⁶² Rose, N. (1989). *Governing the soul: the shaping of the private self*, cit., p. 240.

¹¹⁶³ Besley, T. (1980). Foucault, truth telling and technologies of the self in schools, cit., p. 85.

¹¹⁶⁴ Rose, N. (1989). *Governing the soul: the shaping of the private self*, cit., p. 222.

¹¹⁶⁵ Ibidem.

¹¹⁶⁶ Ibidem.

5.3.3. Other subjectivating techniques in Victim-Offender Mediation: documentation and individualization

Other subjectivating techniques in VOM underscore the procedural aspects of *documentation*, i.e. the note taking activities throughout the VOM process¹¹⁶⁷. As Schehr notices, especially pre-mediation private meetings with the parties are fundamental for gathering data¹¹⁶⁸. From these data it is possible to infer “*the formulation of narrative used in the mediation session. It is these data that will provide the guideposts for distinguishing matters of fact from fiction. As the mediation session will be contextualized within recognition of the known facts and subject positions, these data also allow the mediator to retain the perception of neutrality*”¹¹⁶⁹. In short, the mediator by ‘neutrally’ documenting the ‘facts’ establishes what is relevant, and how to legitimately treat it. In this indirect way the mediator decides “*based on previously gathered data, who is more accurately, and perhaps compassionately, telling the truth*”¹¹⁷⁰, exercising a powerful control over the mediation session, concealed by the neutrality’s mantle. Another subjectivating technique must be analyzed when we focus on VOM. During the early stages of the mediation session the parties come to be separated “*from broader politics and networks, coupled with a focus on the individual person or group as the locus of the dispute and its resolution*”¹¹⁷¹. The basic non-negotiable assumption of VOM as such, is that parties resolve the dispute by themselves; they have the power to create peaceful solutions, enabled by the mediator. The mediator since the beginning avoids entering into discussions with parties regarding the injustice, unfairness and censurability of behaviours, clearly distinguishing between “*the ‘process’ and ‘content’ dimensions of the dispute and resolution process*”¹¹⁷². Only the ‘process’ is the mediator’s field of action: he/she cannot recommend the ‘content’ of solutions, because, from his/her perspective, the process *is* the content. At the same time through the documentation procedure, the mediator indeed separates legitimate issues from prohibited ones, actually affecting the content through the process. In this paradoxical way, parties are stimulated to feel as responsible of the VOM’s outcomes, but also as lacking of that control over the ‘process’ which is the mediator’s exclusive domain. One of the effect of such a regulation of the ‘content’ through the guide of the ‘process’ is the detachment of the parties’ issues “*from broader political forces and other (for example, family and communal) networks, in combination with an emphasis on individual responsibility, mark out the terrain for the operation of power in the mediation session proper*”¹¹⁷³. In fact if the mediator is able to make the preparatory stages successful, “*disputants are less likely to interpret their dispute as part of a broader social issue relating to race, culture, gender, class, power, and so on. Instead, they will tend to focus on their role in the dispute and what they can possibly do in mediation to resolve it*”¹¹⁷⁴. The purported mediator’s substantive neutrality, the documentation as truth-making process concealed by the fictional separation between ‘content’ and ‘process’, operative since the introductory phases of the mediation process, contribute to produce power relationships between mediator and parties with subjectivating effect. It

¹¹⁶⁷ Schehr, R.C. (2000). From Restoration to Transformation: Victim-Offender Mediation as Transformative Justice, cit., p. 158.

¹¹⁶⁸ Ibidem, p. 159.

¹¹⁶⁹ Ibidem.

¹¹⁷⁰ Ibidem.

¹¹⁷¹ Brigg, M. (2003). Mediation, Power, and Cultural Difference, cit., p. 292.

¹¹⁷² Ibidem.

¹¹⁷³ Ibidem.

¹¹⁷⁴ Ibidem, p. 293.

emerges an image of disputing subjects as morally deficient in need of the mediator's guide substantive/procedural, which conveys a parties' self-image as lacking of control and emotionally laden. The necessity of self-examination, self-regulation, and responsabilization within the apparently apolitical, neutral and procedural framework drafted by the mediator, becomes then the channel for the molding of a restorative subject as well as the target of specific forms of resistance.

5.4. Resistance (parties)

The 'restorative' subjectivation implies the possibility of counteracting and resisting to the discursive assignation of the subject positions of 'victim', 'offender' and 'community', acting on the power relations they become involved in, for example during VOM sessions. The 'subjection' to normalizing discourses is, indeed, only one dimension of that *becoming*. The other, complementary side of this process, are the practices of resistance as self-constitution. Discourses in fact, can be contested, challenged and resisted. As Butler states "[I]o claim that the subject is constituted is not to claim that it is determined; on the contrary, the constituted character of the subject is the very precondition of its agency"¹¹⁷⁵. According to Foucault, relations of power cannot exist in the absence of freedom which gives rise to the possibility of resistance¹¹⁷⁶. Foucault describes a situation within which "different actions, in given power relations, can be used as forms of transformation, which consequently change the possible future effects"¹¹⁷⁷. This perspective "does not reduce the living individual to the power practices that secure its intelligibility, and thus does not imply a determinism or dispensability of the individual"¹¹⁷⁸. Individuals are actually thought as free, because agents of power, actors of contingent practices with a contingent effect. Freedom, in this context, "is neither an essential nor an a priori attribute of humans. Rather, it is an integral part of the description of social reality in terms of effects, in which freedom designates practices that challenge the regularity of power"¹¹⁷⁹. Freedom is then immanent to the dynamic of power as the space of contingency the power itself continuously creates. To be aware and to take possession of such a space, directly contributing to the production of own individuality, is to exercise resistance. Resistance, then, can be thought as a paradigmatic way of performing self-constitution. It consists not in finding the true 'us' behind ideological façades, but in actively contributing to the process of self-production, which as such involves always the exercise of power-knowledge. It is possible to resist the discursive subjection drawing upon counter-discourses, different narratives that shape self-images in many and deeply diverse ways. Subjectivities are always *in-relation*, and as such, are never isolated but instead the product of several discursive influences. This entails that people can see themselves as different people in different discursive contexts, choosing and/or nuancing their subjective subjectivities. In the case of the RJ, this means that individuals involved in restorative processes are faced with a field of possibilities in which several kinds of conduct, several ways of reacting and modes of behaviour are available. Resistance in this context means to oppose a subject position to

¹¹⁷⁵ Butler, J. (1994). Contingent Foundations: Feminism and the Question of 'Postmodernism', cit., p. 164.

¹¹⁷⁶ Foucault, M. (1982). The subject and power, cit., p. 211.

¹¹⁷⁷ Ibidem, p. 220.

¹¹⁷⁸ Rozmarin, M. (2005). Power, Freedom, and Individuality: Foucault and Sexual Difference. *Human Studies*, 28, 1-14, p. 4.

¹¹⁷⁹ Ibidem.

another externally imposed, creating space of freedom through the active re-inscription of subjectivities. It is a specific kind of ‘struggle for the acknowledgement’ of a different subjectivity (or subjectivities’ traits), based on different discursive resources, which express new possibilities of being. Through the production of new and different meanings, it is possible to re-define subjectivities against subjugating effects of heteronomous discourses. Concretely, the possibility of drawing upon diverse and even oppositional repertoires of being and behaving, is affected by several factors. The social, cultural and economic *habitus* of the individuals involved in restorative processes, might play a relevant role in activating (or reducing) any form of resistance. Moreover, as we have seen, the conveners of restorative processes (e.g. victim-offender mediators, facilitators, etc.) might enable or hamper the re-inscription of subjectivities tentatively performed by stakeholders. Accordingly, the tension between the discourses which aim at subjugating and the attempts of self-constitution, remains linked to the possibility to access and actively use different “*discursive environments*”¹¹⁸⁰. This makes the strategy of resistance precarious, unresolved or potentially never-ending. Here, the matter of power relationships involved in the production of subjectivities comes into light¹¹⁸¹. In the case of restorative ‘practices’, one might think that the assessment of power ‘balance’ between parties must be a precondition of any intervention. If one of the parties is not enabled to access alternative discursive resources to constitute his/her subject position, the restorative process seems doomed to generate the pure subjugation of more ‘vulnerable’ individuals. Accordingly, the role of the RJ’s conveners as well as the awareness of their cultural and social ‘embeddeness’, emerge as crucial and problematic issues¹¹⁸².

5.5. Resistance (practitioners)

How practitioners should handle the power effects of the restorative subjectivation? Mary Swigonski¹¹⁸³ outlines some interesting conditions for the action of a mediator working with marginalized or disempowered individuals or groups, which to some extent can be re-shaped as concrete possibilities of resistance to the power the mediator himself/herself conveys. The first condition, is to accept that there are many ‘truths’, i.e. there is no overarching truth and there are no universal principles, meta-theories, or metanarratives. Additionally mediators should resist expressions of normalizing power acknowledging that the celebration of difference takes precedence over normative goals. To be aware and understand how power relationships both produce and are produced by discourses as beforehand stated, is also of crucial importance additionally knowing how to challenge the dominant discourses/practices avoiding to collude with them¹¹⁸⁴. Moreover, mediators

¹¹⁸⁰ Gubrium, J.F., Holstein, J.A. (Eds.) (2001). *Institutional selves: Troubled identities in a postmodern world*. New York: Oxford University Press, p. 13.

¹¹⁸¹ It is worthy of consideration to stress that the ‘act’ of resistance does not exhaust the ‘dynamics’ of resistances entailed in the subjectivation processes of RJ. Counter-resistances acts can be brought up by the involved actors, re-defining, potentially *ad infinitum*, the spectrum of specific power relationships concerned.

¹¹⁸² Astor, H. (2007). Mediator Neutrality: Making Sense of Theory and Practice. *Social & Legal Studies*, 16(2), 221-239.

¹¹⁸³ Swigonski, M. (1994). The Logic of Feminist Standpoint Theory for Social Work Research. *Social Work Journal of the National Association of Social Workers*, 39, 387-397. Quoted in Bagshaw, D. (2001). The Three M’s-Mediation, Postmodernism, and the New Millennium. *Mediation Quarterly*, 18(3), 205-220, p. 216.

¹¹⁸⁴ Bagshaw, D. (2001). The three M’s-mediation, postmodernism, and the new millennium, cit., p. 218.

should be interested in the lived experience of people and discursive effects on the subjectivities, and place emphasis on allowing people to construct their own identity within the mediation, offering as many discursive environments as possible to them. They should be willing to negotiate with parties the interpretive framework that is necessary for determining the mediation's outcome, enabling ways of working, facilitating inclusive strategies of decision-making for whom might be potentially unable to develop counter-discourses. Acknowledging tensions and value conflicts associated with recognition of diverse values and difference as part of the negotiating process is another remarkable way of resisting the power effects of subjectivation processes identified by Swigonski. Finally, avoiding the self-definition and own role as 'neutral' (being formal, professional, and avoiding being affected by people's emotions are not neutral behaviors), emphasizing the importance of self-reflexivity in the mediator, while valuing the creative use of self, might work out as effective tools for the resistance of VOM practitioners.

Brigg has come up with a long list of recommendation for mediators willing to take control over subjectivating processes embodied in mediation¹¹⁸⁵. He argues that agendas as well as technical and analytical language may be eliminated, "*reflecting the importance of poetic, affective, metaphorical, and nonlinear understandings and stories as ways of dealing with conflict*"¹¹⁸⁶. Moreover "*emotional and spiritual spheres may be integral to the mediation rather than being viewed as disturbing factors or problems to move beyond*"¹¹⁸⁷. Apparently 'external' political and social contexts may enter into the mediation process. For instance, the mediation may not occur as a discrete process but could be part of a broader facilitated negotiation process that may include visits to individuals' or families' homes¹¹⁸⁸. It may not be expected that parties will be consistent in their contributions to the mediation process¹¹⁸⁹. Mediators may become more personally involved with the parties than traditional notions of professionalism and neutrality recommend. They should allow VOM's session to become be a site for the reconstruction of meaning through conflict¹¹⁹⁰. This may involve greater acceptance of (including resisting intervening into) expressions of anger and similar feelings. Outbursts can signal important boundaries and the fault lines of (currently) irreconcilable differences that speak to participants' identities and political orientations¹¹⁹¹. To attempt to address these can violate participants' perspectives and undermine political and personal goals they may be pursuing both through and beyond mediation¹¹⁹². Mediators should allow subjectivities to combine or fragment in ways contrary to see either promoted by or accepted in standard VOM practice. For instance, in some cases it should be allowed that the person and the problem are one, rather than attempting to separate them as a recurrent mediation's ground rule says. This makes possible to acknowledge the integral nature that emotion and affect may play for some people and mitigates the extent to which participants' subjectivities are available for examination by mediators. At other times, it may be appropriate to allow subjectivities to fragment rather than combine¹¹⁹³. For example, rather

¹¹⁸⁵ Brigg, M. (2003). *Mediation, Power, and Cultural Difference*, cit., pp. 302-304.

¹¹⁸⁶ *Ibidem*, p. 302.

¹¹⁸⁷ *Ibidem*.

¹¹⁸⁸ *Ibidem*.

¹¹⁸⁹ *Ibidem*.

¹¹⁹⁰ *Ibidem*.

¹¹⁹¹ *Ibidem*.

¹¹⁹² *Ibidem*, p. 303.

¹¹⁹³ *Ibidem*.

than valuing consistent and coherent performances by participants, it may be suitable to accept that a person's behaviors will change throughout a session because of different contexts coming into operation. Brigg moreover suggests being aware that participation by previously excluded groups is not sufficient basis to ensure ethical practice¹¹⁹⁴. Involving people, for instance, in setting their own agenda does not address the operation of power that occurs through the process of organizing interactions in this way. Finally to experiment with different conversational and organizing structures might facilitate this form of resistance¹¹⁹⁵. This can include resisting ordering strategies drawn from one tradition or heritage and experimentation with non-standard approaches, or stimulating parties to identify phases of the mediation process which might be problematic for them, seeking -and be responsive to- their input¹¹⁹⁶. To the persuasive Swigonski's and Brigg's recommendations, it is lastly possible to add the necessity for the mediator to transform the legal statuses as a matter of discussion and not as coercive projection of the criminal/legal discourse in the restorative process. Of course all these concrete forms of practitioners' resistance, clearly intertwined with the parties' ones, are not immune of creating other power relationships, potentially determining asymmetries, unbalances, discriminations. This list is just an attempt to show some of the countless possibilities of redefining the practitioners' field of possible actions and of contingently acting upon others' behaviours in a RJ setting.

5.6. The Restorative subject

The restorative subjectivation as conveyed by the VOM process, profiles a somehow overall image of the 'restorative' subject. Its features exemplify the ethopolitical post-social citizen as "*a moral individual [...] both self responsible and subject to certain emotional bonds of affinity to a circumscribed network of other individuals*¹¹⁹⁷". It emerges in fact, the image of a *self-governing* subject, further characterized by a particular *emotional* dimension. A subject constitutively engaged in practices of choice, enterprise, and self-actualization, responsible for managing the outcomes of his life¹¹⁹⁸, continuously undertaking subjectivity-crafting decisions and actions¹¹⁹⁹. 'Self-governing subject' means two things: first that from the discursive formation of the RJ emerges a subject prone to *self-surveillance* and second, to *self-regulation*. Self-surveillance denotes the fashioning of individuals' care to their actions and thoughts when constituting themselves as subjects of their conduct¹²⁰⁰. This concept of self-surveillance implies the stipulation that individuals might be 'dangerous' to themselves, and therefore must be cared for and worked upon, producing in this manner a specific ethical substance¹²⁰¹. For this reason it is necessary to shape the subjects to constantly 'survey' themselves, delimitating in this way an

¹¹⁹⁴ Brigg, M. (2003). Mediation, Power, and Cultural Difference, cit., p. 303.

¹¹⁹⁵ Ibidem.

¹¹⁹⁶ Ibidem, p. 304.

¹¹⁹⁷ Ibidem, p. 176.

¹¹⁹⁸ Novas, C., Rose, N. (2000). Genetic risk and the birth of the somatic individual. *Economy and Society*, 29(4), 485-513, p. 505; Rose, N. Novas, C. (2005). Biological Citizenship. In A. Ong, S. Collier (Eds.), *Global Assemblages: Technology, Politics and Ethics as Anthropological Problems*, (439-463). Malden: Blackwell.

¹¹⁹⁹ Roberts, C. (2006). 'What Can I Do to Help Myself?' Somatic Individuality and Contemporary Hormonal Bodies. *Science Studies*, 19(2), 54-76, p. 57.

¹²⁰⁰ Vaz, P., Bruno, F. (2003). Types of Self-Surveillance: from abnormality to individuals 'at risk', *Surveillance & Society*, 1(3), 272-291, p. 273.

¹²⁰¹ Foucault, M. (1985). *The History of Sexuality. The Use of Pleasure*, Vol. 2. New York: Pantheon Books.

ethical substance that comprises both constituting an internal danger and defining the practices for containing it. The second dimension concerns the self-regulative aim of restorative subjects. The RJ gives opportunity for ‘choice’, for ‘autonomous’ life plans and the ‘freedom’ to be the persons they want to be¹²⁰². This model assumes that ‘good’ government is “*a republic of autonomous self-governors*¹²⁰³”. The RJ ensures choice, freedom and autonomy, conveying the message that norms of obligation, accountability and responsibility continually turn the subject back on itself. This perspective shifts the necessity for social responsibilities to the domain of hyper-individual responsibility. Through these norms, subjects are induced to assume the ultimate politics of personal self-rule. Within this process of self-constitution, individuals ‘naturally’ choose to fashion a unique, better, more productive and regulated self. As Rose writes: “*Incorporating, shaping, channeling, and enhancing subjectivity have been intrinsic to the operations of government. [...] Rather, the government of subjectivity has taken shape through the proliferation of a complex and heterogenous assemblage of technologies. These have acted as relays, bringing the varied ambitions of [...] authorities into alignment with the ideals and aspirations of individuals, with the selves each of us want to be*¹²⁰⁴”. But restorative subjects are not simply just ‘free to choose’, they are *obliged to be free*. The link between the spheres of government and the ‘free’ individual is not just an external imposition but also an internal one¹²⁰⁵. The RJ centres on ‘healthy subjectivities’, which are designated as the sources of freedom, responsibility and choice. In order to help individuals realize their potential and dreams, the RJ emphasizes the role played by liberty of choice in individual attempts to deal with ‘problematic situations’. Lastly, it is possible to argue that the RJ promotes *emotional* subjects. Emotions are socially and institutionally produced and amplified, intimately related to the social institutions of power, i.e. to mechanisms of power for inculcating new emotional and moral imperatives -rather than to moral ideas and ethical prohibitions. Through the RJ, mechanisms of power such as the confession structure of VOM, inculcate new emotional imperatives of greater consequence than ideas about the emotions and emotional prohibitions. Particularly, the RJ, via the discourse of the centrality of emotions, may contribute to render subjects increasingly governable¹²⁰⁶. Their field of action may be structured as wide range of possible actions to be ‘enjoyed’ insofar as the emotions are liberated but harnessed, enfranchised but controlled¹²⁰⁷. The conduct of ‘emotional’ subjects comes to be understood as in need of direction¹²⁰⁸, paralleled by a purported increased responsabilization¹²⁰⁹ which derives from the fact that the first controller of the emotional subject is the subject himself/herself. But the restorative subject is not only a unidirectional product of external forces which shape it as self-governing. Indeed the

¹²⁰² Rimke, H.M. (2000). Governing Citizens through self-help literature, cit., p. 72.

¹²⁰³ Ibidem.

¹²⁰⁴ Rose, N. (1990). *Governing the Soul: The Shaping of the Private Self*, cit., p. 213.

¹²⁰⁵ See Foucault, M. (1983). The subject and power. In H.L. Dreyfus, P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, cit.

¹²⁰⁶ See Richards, K., (2010). Restorative Justice and “Empowerment”: Producing and Governing Active Subjects through “Empowering” Practices. *Critical Criminology* 19, 91-105.

¹²⁰⁷ Foucault, M. (1982). The Subject and Power, cit.

¹²⁰⁸ Foucault, M. (1991). *Governmentality*. In G. Burchell, C. Gordon, P. Miller (Eds.), *The Foucault Effect* (pp. 87-104). London: Harvester Wheatsheaf.

¹²⁰⁹ see Crawford, A., Newburn, T. (2003). *Youth Offending and Restorative Justice: Implementing reform in youth justice*. Devon: Willan; Prichard, J. (2002). Parent-Child Dynamics in Community Conferences -Some Questions for Reintegrative Shaming, Practice and Restorative Justice. *Australian And New Zealand Journal Of Criminology*, 35(3), 330-346.

possibility of resistance to such forces is always possible as attempts to self-constitution, the construction of new or different truths about himself/herself, the production of a new or different self.

CHAPTER 6

CONCLUSIONS: THE *RESTORATIVE JUSTICE APPARATUS*

“*Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint*”¹²¹⁰”

6.0. Introductory remarks

This work started out with a reformulation of the foucauldian meta/theories, toward the definition of the problematization as historical and critical approach to the RJ. The goal has been to reconstruct the authority of the archive of the RJ, as well as its historical emergence and conceptual features as contingent, historical, and contextual¹²¹¹. The main effect of mapping the constitution and historically situating the archive of the RJ is to relativize its taken-for-grantedness, de-familiarizing the ‘present’ of the RJ. From the deployment of this approach emerges an epistemological/conceptual tension field within which the RJ gains consistence as a four-dimensional historical object. The dimension of the archive, as system of authoritative discourses on the historical explanation, conceptual justification and procedural aspects of the RJ; the dimension of the discursive formation, as the development of the archive and its historical set-in-motion; the dimension of the post-social ethopolitical rationality integral to the RJ as discursive formation; the dimension of the restorative subjectivation deployed by the restorative ‘practices’. Each dimension ‘causes’ the others, depending, as a meaningful configuration, on them. In these last pages I propose to ‘sublimate’ the four dimensions using a different conceptual construct/analytical tool, the *apparatus* of the RJ. This expression refers to the network of relationships between the object researched (RJ) and its effects of promoting and sustaining certain types of power-knowledge¹²¹². In this way it is possible to comprehensively look back to the path taken, acknowledging its achievements as well as doubting of its *authority* and its *truths*. In cutting across the RJ through the ‘apparatus-view’ (i.e. to reconstruct the RJ as apparatus), new and rather different elements, problems, associations and relations can be seen and a ‘diagonal’ understanding of the power-knowledge embeddeness of the RJ it is possible to achieve.

6.1. What is an apparatus?

The concept of apparatus (or *dispositif*) plays the role of a “*grid of analysis*”¹²¹³ which comprises all the constitutive elements, power and knowledges, contingently linked together by the apparatus itself. As Foucault wrote,

“What I’m trying to pick out with this term is, firstly, a thoroughly heterogenous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions—in short, the said as much as the unsaid. Such are the elements of the apparatus. The apparatus itself is the system of relations that can be

¹²¹⁰ Foucault, M. (1980). Truth and Power. In C. Gordon (Ed.), *Power/knowledge. Selected Interviews & Other Writings 1972-1977 By Michel Foucault*, (pp. 109-133), cit.

¹²¹¹ Geuss, R. (2002). Genealogy as Critique. *European Journal of Philosophy*, 10(2), 209-215.

¹²¹² Tambouktou, M. (1999). Writing Genealogies: an exploration of Foucault’s strategies for doing research”, cit.

¹²¹³ Dreyfus, H. L., Rabinow, P. (1983). *Michel Foucault: Beyond Structuralism and Hermeneutics*, cit. p. 121.

established between these elements. Secondly, what I am trying to identify in this apparatus is precisely the nature of the connection that can exist between these heterogenous elements. Thus, a particular discourse can figure at one time as the program of an institution, and at another it can function as a means of justifying or masking a practice which itself remains silent, or as a secondary re-interpretation of this practice, opening out for it a new field of rationality. In short, between these elements, whether discursive or non-discursive, there is a sort of interplay of shifts of position and modifications of function which can also vary very widely. Thirdly, I understand by the term “apparatus” a sort of -shall we say- formation which has as its major function at a given historical moment that of responding to an urgent need. The apparatus thus has a dominant strategic function. This may have been, for example, the assimilation of a floating population found to be burdensome for an essentially mercantilist economy: there was a strategic imperative acting here as the matrix for an apparatus which gradually undertook the control or subjection of madness, sexual illness and neurosis¹²¹⁴.

An apparatus is then not only a ‘re-writing’ of existing meanings, but also the ‘imposition’ of new meanings between a range of heterogeneous elements (practices, institutions, conducts, subjectivities). It is a research strategy but also the product of such an approach. It is a perspective, an analytical lens, which re-shapes specific research objects, enabling the researcher to account for the emergence of practices, institutions, conducts, subjectivities, and to place these elements in a broader perspective¹²¹⁵. In Foucault’s view, the researcher ‘has’ an apparatus when he or she succeeds in isolating a network of power relations sustaining and being sustained by certain types of knowledge, joined and disjoined by a strategic logic operating against a background of discursive formations¹²¹⁶. What keeps together these heterogenous elements, is a play of power linked to certain coordinates of knowledge which depend on it but, at the same time, are condition it. Furthermore, the apparatus-view allows to see the strategic orientation of those networks of elements, how their power-knowledge relations manage to give them and maintain a dominant position, elevating and enabling particular discourses to ‘explain’ (and therefore define) them as necessary, normal, natural etc.¹²¹⁷. Moreover, through the apparatus, the researcher is facilitated to capture the “urgent need¹²¹⁸”, the specific historical ‘problem’, to which the power-knowledge embedded networks respond, in a given time and space. Such an initial response to a pressing situation can gradually have a more general rationality extracted from it, and hence be turned into a technology of power applicable to other situations. The apparatus appears then as a powerful conceptual/methodological tool, apt to “cut reality in a different way¹²¹⁹”, in our case to re-think the RJ as a complex of power-knowledge relationships with a strategic logic responding a specific historical ‘problem’.

¹²¹⁴ Foucault, M. (1980). *The Confession of the Flesh*, cit., p. 194.

¹²¹⁵ Howarth, D. (2000). *Discourse*, cit. p. 79.

¹²¹⁶ Ibidem, p. 196.

¹²¹⁷ Ibidem.

¹²¹⁸ Ibidem, p.195.

¹²¹⁹ R. Rabinow, N. Rose (2003). *Foucault today*, cit., p. XVI.

6.2. The Restorative Justice Apparatus

In this perspective the RJ refers to the network of all the elements, “*the said and the not-said*”¹²²⁰, which contribute to enhance and maintain the exercise of power within the social body, according to a strategic logic¹²²¹. It functions to define and to regulate targets constituted through a mixed economy of power and knowledge. At the same time is a tool for analyzing or understanding a multiplicity of forces in movement and contest. These strategic assemblages are initially formed as responses to crises, problems or perceived challenges to those who govern. The RJ apparatus must be thought then, as a specific strategic response (or at least a part of it) to a specific historical ‘problem’. But such a response to a given state of affairs can progressively reach a more general rationality, and therefore be turned into a technology of power applicable to other situations. Further, despite the initial intention that an apparatus will respond in a targeted way to a particular problem to achieve a specific strategic objective, diverse and unplanned effects can and do result. In the next pages I shortly re-formulate the discourse so far developed, in the apparatus perspective, emphasizing two dimensions integral to this viewpoint: the kind of power-knowledge of the RJ and the ‘urgent need’ it responds. The first step is to identify and analyze which knowledges have been called out and developed in terms of certain imperatives of power¹²²² by the discursive formation of the RJ. The RJ, in fact, from the ‘apparatus’ perspective (i.e. the RJ apparatus), appears a tangle of knowledges supported and supportive of specific power relationships, characterized to be productive, diffused, infinitesimal. The second step is to conceptualize the *urgent need* such epistemic-power structures responds.

6.2.1. ‘Partial’ power-knowledge

As a recurrent epistemic structure in the discursive formation of the RJ, the ‘*partial*’ *power-knowledge* constructs the RJ as a precise approach to non-functioning social relationships between actors ontologically opposed (‘weak’ *versus* ‘strong’ actor), i.e. defining a power relationship essentially unbalanced, dichotomic, and amenable to transformation on condition of parties’ self-improvement. This knowledge individualizes social issues, connecting their causes and effects to the individual ethos. On the other side, it portrays the necessity of ‘being directed’ from outside as the ‘procedural’ condition for realizing that self-improvement. In this way, it instills a specific freedom which is constitutively *lacking*, an individual responsibility for managing social relationships which is always in need of external support. The partial knowledge plays the role of main epistemic viewpoint in the definition of the authoritative historical explanations, theoretical conceptualizations and procedural discourses on the RJ. As for the historical explanations, it mainly permeates the explications of the crisis of criminal justice as its impossibility to satisfy the ‘weak’ party. Moreover several core conceptual features of the RJ seem orientated by this knowledge. Examples are the characteristics of different subject positions within the authoritative discourses, the harmization of crime (i.e. harming the ‘weak’ party as ‘trigger event’ of the RJ), and the idea of reparation/restoration (i.e. how to deal with the harms suffered by the ‘weak’ party). As for the authoritative discourses on ‘how doing’ RJ, the centrality in VORP or VOM of the storytelling phase is, for instance, based on

¹²²⁰ Foucault, M. (1980). *The Confession of the Flesh*, cit.

¹²²¹ Ibidem, p. XVIII.

¹²²² See Bussolini, J. (2010). What is a Dispositive? *Foucault Studies*, 10, 85-107.

this epistemic perspective, insofar as it is used to allow parties to individualize their relationship and to draw boundaries between the ‘weak’ and ‘strong’ positions. Such an epistemic orientation is embedded in specific power relationships. This means that it is integral to a mobile network of ‘conducts’¹²²³ (in the double meaning of behavior and the shaping of behavior¹²²⁴), of attempts to structure the terrain of action of others¹²²⁵. The ‘strong’ party is constructed as the actor with a greater decision-making power, he/she ‘decides’ the relationship with the counterpart, structuring him/her as ‘weak’. Furthermore, an ethical qualification is associated to the two positions (‘weak’ is ‘good’, ‘strong’ is ‘bad’). The ‘weak’ party is thought to naturally undergo an undeserved situation, and accordingly the fulfillment of his/her needs becomes the parameter for the restorative interventions. The ‘strong’ actor’s behaviours, in fact, are the conditions for the unjustified situation that the ‘weak’ party is undergoing. This differential of power must be balanced by the restorative intervention, which essentially overturns that differential creating another power unbalance but this time in favor of the ‘weak’ party. The ‘weak’ party becomes then the leading epistemic position in the definition of the field of the RJ, shaping a particular power relationship with the ‘strong’ actor. This power relationship affects the explanations of the RJ, ruling out any decisive role of the ‘strong’ party as condition of its possibility. It affects the justifications of the RJ, reducing the relevance of the ‘strong’ party’s needs in the definitions of core conceptual features of the RJ. When the ‘strong’ party comes on the spot, it is because it needs to do something for the ‘weak’, (serving the victim), to be reformed/improved/shamed reestablishing a ‘balanced’ power relationship. This perspective affects also the procedural discourses on the RJ. In many RJ ‘practices’ in fact, the ‘strong’ has to address pre-defined issues, enlisted in a script made by the convener/mediator, implying the dichotomic choice between acknowledgement of guilt and apology/restoration or non-acknowledgement and self-justification. In many cases to plead guilty or a general statement on personal responsibility is the premise of the activation of the practice. Therefore, a visible pressure on the ethos of the ‘strong’ party is clearly exercised. What must be lastly emphasized is that the couple ‘weak’/‘strong’ is evidently overlapping the ‘victim’/‘offender’ dichotomy. The victim, as subject position, implies his/her ontological weakness whereas the ‘offender’, as holder of the decision-making power to create a non-functioning social relationship, is the ‘strong’ actor. The practical and theoretical implications of such overlapping are clear: the RJ is a system of dealing with power unbalances caused by the individual embracing the subject position of ‘offender’; accordingly, all the efforts must be put in re-balancing that power relationship, ‘empowering’ the victim.

6.2.2. ‘Societal’ power-knowledge

The second epistemic structure which informs the discursive formation of the RJ is the ‘societal’ *view-knowledge*. This expression refers to the knowledge that an ideal ‘third’ actor holds of the social relationships at stake. ‘Third’ means indirectly involved in non-functioning social relationships. In this perspective, the RJ is thought as concerning power unbalances which naturally involve

¹²²³ Foucault, M. (1977). *Discipline and Punish, the birth of the prison*, cit., pp. 26-27.

¹²²⁴ Shiner, L. (1982). Reading Foucault: Anti-Method and the Genealogy of Power-Knowledge. *History and Theory*, 21(3), 382-398, p. 391.

¹²²⁵ Foucault, M. (1980). Two Lectures. In C. Gordon (Ed.), *Power/Knowledge* (pp. 78-108), cit., pp. 90-92.

specific actors 'belonging' to wide human groups, and at 'societal' level must be addressed. Here human beings are thought as interlinked social actors in search of a 'communal good' and depending on it for their self-actualization. What is characteristic of this epistemic viewpoint is its 'thirdness' and 'disjunction-conjunction' with the other knowledges constitutive of the discursive formation of the RJ. The first feature denotes the qualitative difference between the knowledge of social relationships held by the 'third view' and the views of the direct actors of the relationships. It seems that this knowledge is based upon (and supportive of) a different experience of social reality, different ways of addressing human relationships, different understanding of the human world respect to the direct-actor knowledges. The 'disjunction-conjunction' quality refers to the singular capacity of the societal knowledge to become direct-knowledge under certain circumstances and to re-obtain the indirect status under others. The explanation of the historical emergence of the RJ as a necessity of changing the systems of dealing with dysfunctional social relationships, seems widely inspired by this view. The conceptualization of the community as an actor (problematic or not) of the RJ histories and theories is clearly grounded on the societal knowledge. Several discursive objects identified and analyzed in the discursive formation of the RJ, are shaped by the epistemic structure under examination. The crisis of the criminal justice system, the concepts of harm/and conflict, the dichotomy state/community, the understanding of the 'criminal approach', are all shaped by this epistemic view. The societal-knowledge is embedded in, and functional to, specific power relationships. In this case power relationships are elicited by framing the actors of any 'problematic' situation as 'inserted' in a societal realm, supposedly sharing its core characteristics. Human beings are firmly entrenched in a network of values, beliefs, and moral principles community-based. An example of such power-knowledge relationship is the understanding of the trigger events of the restorative interventions as anti-societal behaviours performed from the 'strong' party against the 'weak' one. An 'anti-societal' behaviour is *par excellence* a behaviour which breaks the ethical substance of the societal network, and, as such, blamed and ethically censored. As a consequence, the societal orientation 'supports' the partial knowledge in ethically de-qualifying the 'strong' party (as actor of the anti-societal behaviour), strengthening the power imbalance between the direct actors which is the goal of restorative thinking and interventions, as the only way to re-balance the ontological differential of power between the 'strong' and the 'weak' parties.

6.2.3. 'Neutral' power-knowledge

The third type of knowledge constitutive of the RJ apparatus is what I call the '*neutral*' power-knowledge. The neutral knowledge is always qualitatively different from the partial one, because 'not involved', not concerning the issues at stake, it is knowledge *from nowhere*. The main feature of the neutral knowledge is its nature of procedural form of knowledge. This means that the RJ is seen as a specific 'know-how' to address the different questions at stake. It is posited on a kind of meta-level, from where to experience the 'true' problems and solutions, without mixing its viewpoint with the contextual actors' ones. This viewpoint basically inspires all the authoritative procedural discourses on RJ. Particularly, the presence of a convener/mediator as a recurrent element in the restorative 'practices' is an expression of the neutral-knowledge. The configuration of the ways of 'doing' RJ and the definitions of the restorative solutions rely on the essential capacity of looking at the issues at stake, from a

neutral perspective. This view informs the techniques of addressing not the ‘content’ of the problems, but only working on the ‘procedures’ and ‘frames’ to develop the eventual settlement. As a commonplace, a neutral-knowledge is supposed to be characterized by its immunity to ‘power’. Indeed it is actually productive of power relationships as the former two epistemic views. First of all, it supports and endorses the power relationships brought up from the other knowledges embodied by the RJ apparatus. This means that it reproduces the power imbalance between the societal/weak party and the ‘strong’ one, endorsing the ethical pressure to self-management and self-surveillance. The knowledge *from nowhere* is particularly operative at level of procedural discourses on the RJ, pervading other kinds of authoritative discourses as well. The figures of conveners, mediators, facilitators, inspired by this knowledge, are constructed as external to the relationships between the direct parties. At the same time, endorsing the ethical-disqualification of the ‘strong’ party, reproduces and re-enacts the power imbalances constitutive of the restorative framework.

6.2.4. The strategic orientation

The combination between the ‘partial’, ‘societal’ and ‘neutral’ power-knowledge, constitutes the epistemic backbone of the RJ apparatus. It represents the structure which ‘holds together’ (of course not without tensions) the RJ as a complex of elements power-embedded. Such an epistemic-power structure is characterized by a specific overall strategic orientation. Recalling one of the achievements of the previous pages, we might conceptualize this overall orientation as *ethopower*: “*ethopower works through the values, beliefs, and sentiments thought to underpin the techniques of responsible self-government and the management of one’s obligations to others*”¹²²⁶. Ethopower is the hardcore of ethopolitical technologies, their common rationality explored from an epistemic-power perspective. It claims to preserve individual autonomy and self-control, inscribing them simultaneously more deeply into the soul of each citizen than can be done through disciplinary or biopolitical technologies¹²²⁷. Whereas Foucault’s biopower implies a separation between those who exercise the power and those who are its subjects, ethopower intertwines political aspirations and personal aspirations to ‘be well’, electing the *ethos*, individual and collective, as site of intervention¹²²⁸. Ethopower is diffuse; it is exercised by everyone; it forms a complex mosaic in which each local piece plays its relatively autonomous role. It expresses itself in the ethical pressure to responsabilize parties, using as epistemic pre-condition to envisage their relationships according to the abovementioned parameters (epistemic: partial/neutral; power: weak/strong; moral: good/bad). In case of the strong/partial/bad actor, the ethical pressure is toward his/her transformation in weak/good, *to become victim* (of himself/herself, of the society) acknowledging to be individually responsible, controlling his/her emotions and actions, engaging in constructive solutions according the ‘societal’ guidelines. The weak/partial/good actor is compelled to the confession of his/her ‘vulnerability’ and disempowerment, the self-control of his/her emotions, the identification of a necessary ‘constructive’ solution. Moreover, the societal-knowledge exercises ethical pressure on the parties, from a peculiar ‘inside’, starting from the premise of their societal embeddedness. They *have to share*

¹²²⁶ Rose, N. (2001). Community, Citizenship, and the Third Way, cit., p. 5.

¹²²⁷ Ibidem, p. 15.

¹²²⁸ Rose, N. (2001). The Politics of Life Itself, cit., p. 17.

societal values, belief, guiding principles. They *have to* be re-conducted to the societal ethos, a combination of responsibility, self-discipline, integration, even love. The neutral-knowledge, third and impartial by definition, performs an ethical pressure on the various epistemic actors (including a pressure on the convener/mediator/facilitator). The procedures inspired by the ‘thirdness’ of necessary component for deploying concepts and strategies of the RJ, impose the third actor as the out-of-processes driving force, compelling parties to be the only ‘makers’ of their destiny, forcing them to be *free*. Here the responsabilization strategy is evident: pushing towards the self-control, controlling at distance. As power relationships circulate, epistemic positions shift dynamically, possibilities of resistance and counter-resistance are always present. Within the contest of the apparatus we “*have to do the most often with mobile and transitory points of resistance, introducing moving cleavages in a society, breaking unities and creating regroupings, cutting across individuals themselves, cutting them and reshaping them, tracing in them, in their bodies and their souls, indomitable regions*”¹²²⁹. Ethopower is a game of power, where actors might reformulate their epistemic positions-power relations. The ‘weak’ party might refuse his/her disempowered status, *knowing* himself/herself as an agentic actor, the ‘strong’ party might claim his/her ‘weakness’, the ‘neutral’ party might refuse his/her status of ‘third’. From this overview, the RJ apparatus simultaneously emerges as a particular alignment of power and incitement to knowledge, at a certain time. There is a last element of such alignment to be highlighted and investigated. This is the specific historical emergency to which the RJ responds, its “*urgent need*”¹²³⁰.

6.3. The *urgent need* of the Restorative Justice: an ‘inclusive’ neo-liberal justice?

As Pat O’Malley writes, “*it takes comparatively little effort to see that restorative justice could be regarded as the inclusive side of a bifurcated neo-liberal politics of crime control, for it reflects much that is valued in neo-liberalism*”¹²³¹. The ethopolitical focus on individual responsibility, the centrality of emotional dimensions, relationships, ‘communities’, seem echo the parallel emphases in neo-liberalism. The RJ, from the apparatus perspective, appears an answer to (and expression of) the neo-liberal project of constructing a specific realm of human -individual and social- existence. This is possible by molding power-knowledges, modes of existence and subjectivity, practices, reflexive modes of action. The RJ is part of the deployment of neo-liberalism, as understanding and transformation of human nature and social existence. Neo-liberalism constitutes a new mode of governmentality, in which people are governed and govern themselves¹²³². The operative terms of this governmentality are no longer rights and laws but interest and competition or the spreading of ethical imperatives of responsabilization and self-actualization. Politics of control of social conflicts are basic part of such governmentality. The state, which remains an actor of such paradigm, channels flows of interest and desire by making desirable activities, and activates anti-citizenship technologies of control for whom is

¹²²⁹ Foucault, M. (1980). *The History of Sexuality. An Introduction, The Will to Knowledge*, Vol. 1, cit., p. 127.

¹²³⁰ Ibidem, pp. 194-195.

¹²³¹ O’Malley, P. (2009). *Risk and Restorative Justice: Governing Through the democratic Minimization of Harms*. Sydney Law School, Legal Studies Research Paper No. 09/88. Retrieved 5 May 2012 from <http://ssrn.com/abstract=1473583>.

¹²³² Read, J. (2009). A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity. *Foucault Studies*, 6, 25-36, p. 29.

reluctant to accept such values. On the other side, non-state actors are involved in inclusive technologies of control, and the RJ is a clear example of such post-social mechanisms. As a form of governmentality, neo-liberalism would seem paradoxically to govern without governing; that is, in order to function its subjects must have a great deal of freedom to act -to choose between competing strategies. As Foucault stated:

“The new governmental reason needs freedom; therefore, the new art of government consumes freedom. It must produce it, it must organize it. The new art of government therefore appears as the management of freedom, not in the sense of the imperative: “be free”, with the immediate contradiction that this imperative may contain [...] the liberalism we can describe as the art of government formed in the eighteenth century entails at its heart a productive/destructive relationship with freedom. Liberalism must produce freedom, but this very act entails the establishment of limitations, controls, forms of coercion, and obligations relying on threats, etcetera¹²³³”.

The RJ seems to respond to this need of ‘governing without governing’, by instilling a certain kind of freedom, exercising a responsabilizing ethical control as political mean, on the individual and social body. It works as one of the conditions for the stabilization of the neo-liberal governmentality, contributing to the constitution of a self-governing form of subjectivity. In this context, *“those who fail to thrive under such social conditions have no one and nothing to blame but themselves¹²³⁴”*. It is exactly here that lies the ethopolitical dimension of the ‘restorative subject’ as enjoying a constitutively *lacking* freedom, burdened by the duty of self-actualization, shaped by power-knowledge relationships. The RJ is also aligned with neo-liberal governance because of the ways in which it deals with the crucial category of risk. Neo-liberalism has promoted diffused and institutionalized forms of risk, constructed as in need of community-based forms of prevention¹²³⁵. A marked feature of the RJ is that it works as an effective means of securing order in the future, in the community, seeking to ensure that the anti-social (and then a-moral) behaviours do not recur¹²³⁶. It is therefore reasonably simple *“to see how restorative justice could appear as the favored inclusive technique of crime control in a neo-liberal polity where, for instance, actuarial justice constitutes the exclusionary technique for dealing with the recalcitrant and the high risks¹²³⁷”*. The RJ contributes to the neo-liberal re-configuration of all activity as forms of personal investment, and transforming all actors as entrepreneurs of the self. In short, neo-liberal governmentality creates a specific programmable reality, by introducing regularities into reality: moral forms, epistemological structures and specific languages¹²³⁸. The RJ, in its authoritative versions, is one of the neo-liberal technologies which shape human subjectivity producing ideas of

¹²³³ Foucault, M. (2008). *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*, cit., p. 63.

¹²³⁴ Hamann, T.H. (2009). Neoliberalism, Governmentality, and Ethics. *Foucault Studies*, 6, 37-59, p. 38.

¹²³⁵ O'Malley P., Palmer D. (1996). Post Keynesian Policing. *Economy and Society*, 25, 137-155.

¹²³⁶ O'Malley P., *Risk and Restorative Justice: Governing Through the Democratic Minimisation of Harms*, cit., p. 11.

¹²³⁷ Ibidem.

¹²³⁸ Cotoi, C. (2011). Neoliberalism: a Foucauldian Perspective. *International Review of Social Research*, 1(2), 109-124, p. 117.

freedom, responsibility, moral autonomy and justice¹²³⁹. The RJ works then as one of the neo-liberal “*discursive fields characterized by a shared vocabulary within which disputes can be organized, by ethical principles that can communicate with one another, by mutually intelligible explanatory logics, by commonly accepted facts, by significant agreement on key political problems [from which] derive different conclusions as to what should be done, by whom and how*”¹²⁴⁰”.

6.4. Words of closure

The question ‘*what is RJ?*’ is a genuine philosophical problem, in a Wittgenstein sense. This is because proponents and opponents, usually do not hold any common ‘way around’ about that question. A set of moral principles? A theory of justice? A theory of criminal justice? A *Weltanschauung*? A lifestyle? Insofar as they look for a common frame at a mere theoretical level, they seem condemned to the disagreement or even to the incommensurability of their stances. As Wittgenstein suggests, philosophical problems are mental knots we create by thinking theoretically, and untying it requires considerable mental clarity and simplification efforts. Here, the general ‘way around’ regarding the meaning of ‘RJ’ is that the RJ is nothing but *all the discourses on the RJ*. Discourses on the history, concepts, practices, supporting, opposing or discharging, celebrating or contesting the RJ, *is* the RJ. However, *some discourses are more equal than others*. To understand the epistemic/conceptual features of these ‘special’ discourses, the conditions of their authority and the truths they are able to produce, has been the main goal of this study. The ‘order of the RJ’, as a tangle of authoritative discourses, informed by specific knowledges and power relations, is not immanent in history, is not grounded in or constituted by a transcendent natural or subjective ordering. Rather, I have proposed a value-based ‘grid of intelligibility’ that re-constructs these historical orders by showing how they were as contingent as possible. The main focus then, has been not so much on the significance of fundamental texts and concepts of the RJ but on bringing to light the possible discursive practices that connect and make visible and intelligible the close relationships between epistemic and conceptual dimensions, the conditions of intelligibility/possibility for enouncing “*serious statements*”¹²⁴¹ on the RJ. I have tried to conduct a critical examination of the role of authoritative discourses as the dominant matrix for organizing scholarly, practical and advocacy activity on the RJ and for setting of research agendas and priorities for studying the RJ. In this way, spaces for a self-critical reflection upon the ‘truths’ on the RJ might open up. Destabilizing the present of the RJ, revealing its ‘natural’ and ‘essential’ qualities as produced in specific discourses, embedded in particular power-knowledge relationships, lets emerge the possibilities for self-problematizing accounts on the RJ. The meta/theoretical infra-structures which orientate our understanding of the RJ, often unconsciously, are more visible and modifiable. The Wittgenstein’s knots on the meaning of the RJ are at least brought on the surface, favoring different lines of interpretation at a meta/theoretical level. This awareness is the first stage of liberation from the ‘mental cramps’ inducted by whom or what holds the ‘authority’ to define what matters and what does not, and as such the

¹²³⁹ Rose, N. (1999). *Powers of Freedom: Reframing Political Thought*, cit., p. 42; Rose, N., Miller, P. (1992). Political power beyond the state: problematics of government, cit., p. 179.

¹²⁴⁰ Rose, N. (1999). *Powers of Freedom: Reframing Political Thought*, cit., p. 42.

¹²⁴¹ Dreyfuss, H.L., Rabinow, P. (1983). *Michel Foucault: Beyond Structuralism and Hermeneutics*, cit., p. 47.

condition for new and different engagements¹²⁴². At this point, new applied ethics which reformulate the conceptualizations, uses and applications of the RJ can be more simply devised. New discourses on histories, justifications and procedures can be more definitely brought forward. Actions, drawing upon such possibilities, to mold in different ways the power-knowledge relationships, and subjectivating processes in and through the RJ 'practices', can be more hopefully undertaken.

¹²⁴² Wittgenstein, L. (1960). *The Blue and Brown Books*. Oxford: Blackwell, p. 1; Berger, P. (1968). *Invitation to Sociology: A Humanistic Perspective*. Harmondsworth: Penguin, p. 41.

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