ARTICLE

The role of restorative justice *inside* and *outside* criminal law

*Jacques Claessen**

'So above, so below, so within, so without.'

1 The principle of subsidiarity

The principle of subsidiarity implies that criminal law and punishment should be a last resort: they should be used only when really necessary, that is, when all other, less intrusive means (e.g. information, education, training as well as civil law, administrative law, disciplinary law … and restorative justice) fail. While *external* subsidiarity looks at minimising the criminalisation of injustices and preventing and addressing them as much as possible through means other than criminal law, *internal* subsidiarity looks at minimising the use of coercive measures during the criminal process and minimising the imposition of punishment in the context of sanctioning (Blad, 2005: 14-29; Claessen, 2020b: 18-20). Restorative justice can thus contribute to the operationalisation of the principle of subsidiarity.

1.1 The role of restorative justice inside criminal law (internal subsidiarity)

Restorative justice can be defined as

> the enforcement of justice by repairing the damage caused by a (suspected) criminal offence, which is best achieved through forms of cooperation between (all) parties/persons involved in the conflict (Claessen et al., 2018: 42).

Like many definitions of restorative justice, this one looks at both the *goal* and the *process*. Restorative justice favours a voluntary (in)direct dialogue between the offender and the victim (mediation) or the offender, the victim and the community (conference). If restorative justice is identified with the *process* – which, according to Walgrave, is probably still 'the current mainstream vision on restorative justice' (Walgrave, this issue) – then its limits are already reached as soon as a dialogue between the conflicting parties proves impossible or produces unsatisfactory results. Consequence: 'the process-focused view keeps restorative justice at the margins' (Walgrave, this issue). Already in 2009, Walgrave wrote in the

* Jacques Claessen is endowed Professor of Restorative Justice (Restorative Justice Nederland Chair) and Associate Professor of Criminal Law in the Department of Criminal Law and Criminology of the Faculty of Law of Maastricht University, The Netherlands.
Corresponding author: Jacques Claessen at jacques.claessen@maastrichtuniversity.nl.

Dutch-Flemish *Tijdschrift voor Herstelrecht*: 'A restriction to voluntary deliberative processes locks restorative justice at the margins of the system …, an appendage to mainstream criminal justice' and he took the following view at the time:

> The priority given to deliberative processes is motivated by the fact that they can usually bring about a higher level of restoration. But if that is not possible, then coercive obligations with a view to reparation should also be considered (Walgrave, 2009: 20; see also: Walgrave, 2010: 25 and 33).

He now writes:

> The key to understanding restorative justice is its pursuit of justice through reparation/restoration. The process is nothing more than a – crucial – tool to achieve it as fully as possible (Walgrave, this issue).

Let me be clear right away: I agree wholeheartedly with Walgrave on this point, with the understanding that, in my view, the restorative process is not just 'a tool', but itself an expression of restorative justice. Nonetheless, also in my view, restorative justice *can* still exist when the restorative *goal* is realised without a voluntary deliberative *process* (think of the imposition of restorative sanctions by the public prosecutor or the judge), while the other way around this is not the case. As for this last phrase, Walgrave points to forms of 'innovative justice' whose aims and purposes may differ from the restorative goal that is central to restorative justice. While Walgrave stresses in this context the importance of the 'social-ethical and philosophical roots' of restorative justice, Zehr focuses on 'values': 'we must be explicit about these values. Otherwise, … we might use a restoratively based process but arrive at non-restorative outcomes' (Zehr, 2015: 46).

Expressing the foregoing using Walgrave's coffee-metaphor: when there is both a restorative *process* and a restorative *goal* and *outcome*, there is coffee in the form of a *double* espresso, a 'doppio'. When a voluntary deliberative process is lacking but the restorative *goal* is realised, there *can* still be coffee of good quality, albeit less strong; not every occasion is suitable for a double espresso. However, even though restorative justice *can* exist without a voluntary deliberative process, that does not mean, for example, that there are no limits to the coercion applied nor that procedural guarantees may be lacking: the goal – including a restorative one – does not justify all means, which follows from the 'social-ethical and philosophical roots' and 'values' of restorative justice. That is why, in my view, the process should not be seen as just 'a tool'; it has to be an expression of restorative justice, or, at a minimum, it should not conflict with restorative justice values, of which 'respect for all' is the most basic and at the same time the most essential one, according to Zehr (Zehr, 2015: 47), loving kindness for all, according to myself (Claessen, 2010 and 2020). In other words, restorative justice disqualifies certain means or forms of process in advance. Using these means or forms of process cannot lead to coffee, to put it metaphorically. Finally, when there is a voluntary deliberative process but not a restorative goal, this has nothing to do with coffee

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either. In conclusion: there is pure coffee, coffee and no-coffee; and, of course, there are grey areas between these three domains.[1]

In a maximalist, consequential or consistently thought-through restorative justice, the boundaries of restorative justice are drawn considerably wider: when voluntary deliberative *processes* prove impossible or unsuccessful, the restorative *goal* remains. It is then up to the public prosecutor or the judge to sanction *in the most restorative way possible*. Specifically, in the Netherlands, this could include the imposition of a measure involving the offender's obligation to pay the state a sum of money for the benefit of the victim (Art. 36f of the Dutch Penal Code); a measure consisting of the offender's obligation to carry out what has been unlawfully omitted, to nullify what has been unlawfully done and to perform achievements to make amends (Art. 8 sub c of the Dutch Economic Crimes Act); and/or a community service consisting of the offender's obligation to perform unpaid work, in which – more than is currently the case – a link is made between the work to be performed on the one hand, and the crime committed and/or the victim and/or the community on the other hand (Art. 22c of the Dutch Penal Code) (Claessen, 2020b: 23-25).

Even in a consistently thought-through restorative justice, *voluntary* or *consensual* restoration is preferable to *enforced* or *imposed* restoration, but the latter is preferable to punishment. Walgrave defines retribution as well as punishment in a classical way, which makes sense, as punishment *is* retribution and both concepts cannot therefore imply something essentially different (Claessen, 2010: Chapter 3). He defines retribution as the restoration of 'an imbalance … by imposing on the offender a suffering considered proportional to the suffering he/she has caused' (Walgrave, 2009: 27). Since Walgrave rejects the intentional infliction of suffering for ethical and functional reasons, he rejects punishment and retribution. Nevertheless, restorative justice also emphasises (reactively) restoring the imbalance created by the committed crime. However, restoration here does not consist of paying the offender 'with equal currency', but of having him or her repair the damage caused (Claessen, 2020b: 22-23; Walgrave, 2009: 27; Zehr, 2015: 75). The harm inflicted is therefore not duplicated; rather, an attempt is made to remove the harm. In Walgrave's words: 'Restorative justice can be seen as a form of reverse retribution' and 'Restorative justice appears … to be able to be a form of retributive justice, but in a constructive sense, serving the quality of social life' (Walgrave, 2009: 20; see also: Walgrave, 2010: 29). In short: restoration is *reverse* retribution. In other words, punishment is retribution for *evil* done to the victim and/or the community by the offender, with *evil* done to the offender by the government on behalf of the victim and/or the community. Restoration, on the other hand, is retribution for *evil* done to the victim and/or the community by the offender, with *good* done to the victim and/or the community by the offender – either voluntarily or enforced or imposed (Claessen, 2010 and 2023).

The question is whether restoration degenerates into punishment by bringing in *enforced* or *imposed* restoration. As mentioned, Walgrave defines punishment in

1 In fact, pure coffee stands for voluntary agreed restoration, coffee for imposed restoration and no-coffee for, among other things, the intentional infliction of suffering (punishment); see in the following text.

a classical way, rejecting the intentional infliction of suffering – at least as an *a priori* response to crime – for both ethical and functional reasons. In Walgrave's view, a restorative obligation is no punishment, because the intention to add suffering to the offender is absent; after all, the goal is restoration. That such an obligation involves suffering for the offender is perhaps unavoidable, but that is something other than intended. What is decisive is not the pain-filled experience of the one being obliged to make amends, but the restorative intent of the one imposing the restorative obligation: 'Ethical judgements are made about intentions' (Walgrave, 2009: 22). In response to Walgrave, Blad argues that imposed restorative sanctions do involve punishment:

> There is no punishment of the offender when the judge sanctions proposals made by the offender (preferably after consultation with those aggrieved by him), but there is punishment when he imposes restorative, but still painful, sanctions on a non-cooperative defendant (after conviction, which will then also be necessary) (Blad, 2009: 59; see also: Blad, 2011).

In short, in Blad's view, voluntarily agreed-upon restoration is not punishment; imposed restoration is. I myself wrote the following about this:

> Sanctions can have a twofold violent character: (1) when there is an intentional infliction of suffering (for retribution and/or prevention) and (2) when they are imposed against or regardless of the will of the offender. If both conditions are met, there is a punishment or punitive sanction. With regard to restorative sanctions, they too can have a (singular) violent character, namely when they are enforced. For this reason, several legal scholars also qualify these sanctions as punishments or punitive sanctions. The most moral (and effective?) are sanctions that do not contain an intentional infliction of suffering and that (with the help of information, encouragement and/or persuasion) are voluntarily accepted by the offender. The latter sanctions can hardly be said to have a punitive character (Claessen, 2012: 48).[2]

Thus, different answers are given to the question of whether or not *enforced* restoration should qualify as *punishment* because it involves coercion. I myself am inclined to side with Walgrave, since in my view coercion alone does not make a sanction a punishment. Were that the case, measures that can be imposed against the offender's will, including the treatment of insane offenders (Art. 37b of the Dutch Penal Code), the deprivation of illegally obtained benefit (Art. 36e of the Dutch Penal Code) and the compensation to the victim (Art. 36f of the Dutch Penal Code), would also have to be qualified as punishment – which is rightly not the case. Regardless, it is clear that imposed restoration lies between the intentional infliction of suffering on the one hand and voluntarily agreed restoration on the other. For me, not only is *voluntary* agreed-upon restoration ethically and effectively better than *imposed* restoration, but *imposed* restoration is ethically and effectively

2 Instead of voluntariness, it would be better to speak of *informed consent*.

better than the *intentional infliction of suffering*. I repeat: the obligation to restore is most likely painful for the offender, but this suffering is not intended as in the case of punishment; the goal is restoration, while suffering is an almost inevitable (negative) side effect – which should also remain as much as possible 'within proportion'.

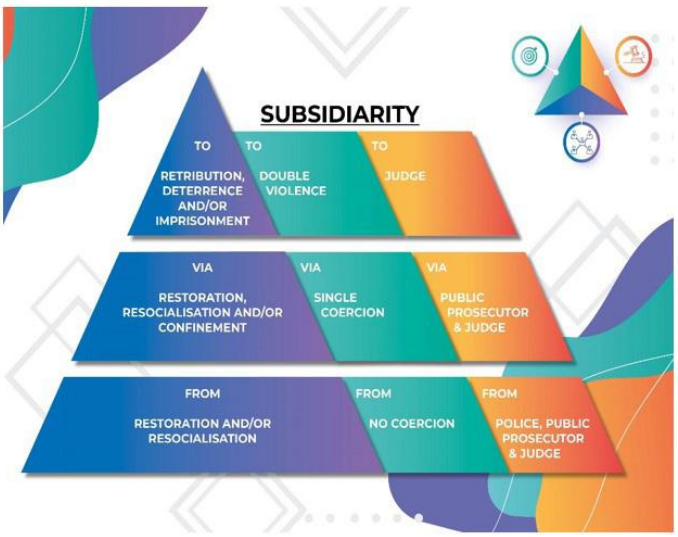
It can be argued that both restorative justice provisions and restorative sanctions in criminal law contribute to the operationalisation of *internal* subsidiarity. This conjunction of *internal* subsidiarity and *maximalist* restorative justice leads to the following hierarchy of sanctioning in criminal law: after crime, the focus is *primarily* on consensual restoration, *subsidiarily* on enforced restoration, and *tertiarily* – as an *ultimum remedium* – on punishment in the sense of the intentional infliction of suffering. In other words, the focus on sanctioning is primarily on 'no coercion' (restoration *bottom-up*), subsidiarily on 'single coercion' (restoration *top-down*) and tertiarily on 'double violence' (punishment *top-down*). Sanctions involving single coercion also include sanctions that are classified in criminal law as preventive and/or restorative measures (see in this context also Braithwaite, 2002: 30 onwards). Viewed from a maximalist restorative justice perspective, sanctions involving 'single coercion' are legitimate in certain cases, for example when consensual restoration proves impossible or when confinement is necessary to protect society from the offender and to treat him or her. Sanctions involving 'double violence' are in principle not justified, as they aim at inflicting suffering (read: harm) on the offender. Only by *transforming* these sanctions *into* restorative interventions – thereby increasing their restorative character as much as possible and reducing their retributive character as much as possible – can they be made legitimate to some extent; think of a *restorative* community service.

Furthermore, the combination of *internal* subsidiarity and *maximalist* restorative justice makes it possible to prioritise within the sanctioning goals, that is, retribution, restoration, norm-affirmation, deterrence, resocialisation and incapacitation. If, in terms of doing justice, *reverse* retribution (read: consensual or imposed restoration) is sufficient, this is preferable to *classic* retribution. Both forms of retribution aim to confirm norms through the message of moral disapproval of the crime. Deterrence and incapacitation naturally go best with retribution, while resocialisation goes best with restoration.[3] Consider, for example, the prison sentence, which is aimed at retribution, deterrence and incapacitation, while – especially in the case of short-term imprisonment – restoration and resocialisation can hardly ever take place. Community service is much more focused on restoration and resocialisation and less on retribution and deterrence – and not at all on incapacitation. In terms of doing justice, resocialisation is preferable to deterrence and incapacitation. Viewed from the legal-theoretical thinking in which retribution and prevention go hand in hand and which applies in current criminal law, it can be argued that if, in terms of doing justice, restoration and resocialisation can suffice, this is preferable to retribution, deterrence and incapacitation (Claessen 2012 and 2021; Claessen & Meijer, 2022: 2-4).

3 *Self-restoration* is closely related to resocialisation.

The pyramid in Figure 1 ranks (1) the sanctioning goals, (2) the (nature of the) sanctions and (3) the sanctioning authorities in criminal law. The ranking goes from 'no coercion' in the broad base (consisting of consensual restoration) through 'single coercion' in the middle (consisting of enforced restoration and the imposition of freedom-restricting and restraining measures) to 'double violence' (in particular consisting of imprisonment) at the top. Please note that the legal-theoretical framework described earlier and the corresponding pyramid are intended as a *guide*, not a *straitjacket*. It is and remains up to the sanctioning authorities to determine in the case at hand – with reasons – whether the first or second layer of the pyramid is sufficient or whether it is necessary to 'scale up' to the third layer. The pyramid is a means to encourage these authorities to sanction in a more purposeful way, in which the *optimal* punishment is the *minimum* punishment. It is a *maximalist* restorative justice that can concretise *internal* subsidiarity and transform criminal justice in a restorative direction so that restorative justice will become more mainstream (Claessen, 2012 and 2021; Claessen & Meijer, 2022: 2-4).

Figure 1 Subsidiarity pyramid



1.2 The role of restorative justice outside criminal law (external subsidiarity)

While Walgrave advocates a maximalist, consequential or consistently thought-through restorative justice *within* criminal law (Walgrave, 2021), he is more cautious when it comes to 'extrapolating' restorative justice *outside* criminal law. I admit that, as a criminal law scholar, I tend to link restorative justice to repairing the damage caused *by a (presumed) criminal offence* (see the definition given earlier). And I agree with Walgrave when he argues that restorative justice is about restoring injustices, not resolving mere conflicts (Walgrave, 2023: 10).

Nevertheless, I see a role for restorative justice that encompasses more than the reactive repair of damage in a concrete criminal case as well as a role that goes beyond (criminal) law. In my view, it is inherent in restorative justice to look and move wider and further.

Formulated negatively, restorative justice represents the rejection of punishment or retribution in the sense of the intentional infliction of suffering. After all, by punishment or retribution, the offender is intentionally harmed. In terms of *distributive justice*, restorative justice implies at least the rejection of harming (read: inflicting suffering on) the other person. *Formulated positively*, restorative justice stands for an approach to crime aimed at restoring harm suffered (*reactive* action) as well as – at least in my view – at preventing new harm, namely by restoring harm suffered as permanently as possible as well as by removing the causes that led to this harm as much as possible (*preventive* action). In short: not retribution of damage with damage, but restoration as well as prevention of damage are central to restorative justice (Claessen, 2023: 15-16 and 29-30). I therefore disagree with Walgrave when he writes with regard to restorative justice that '[i]ts preventive effect can only be "tertiary" prevention' (Walgrave, this issue). Zehr writes:

> Moreover, the community has responsibilities for the situations that are causing or encouraging crime … Putting right requires that we address the harms but also the causes of crime … Social injustices and other conditions that cause crime or create unsafe conditions are in part the responsibility of families, communities, and the larger society … In summary, an effort to put right the wrongs is the hub or core of restorative justice. Putting right has two dimensions: 1) addressing the harms that have been done, and 2) addressing the causes of those harms, including the contributing harms (Zehr, 2015: 39-40 and 42).

Zehr's six 'guiding questions of restorative justice' are not only about (1) harms, (2) needs, (3) obligations and (4) stakeholders, but also about (5) causes and (6) 'the appropriate process … to put things right and address underlying causes' (Zehr, 2015: 49).

Underlying restorative justice is the view that we are all connected in a web of relationships and that damaged relationships are both *causes* and *consequences* of crime (Zehr, 2015: 29 and 46). In my inaugural address, I explained that the view of mankind and the world behind restorative justice is identical to that behind the universal, timeless Golden Rule ('Treat another as you would like to be treated yourself'): 'To be is to be related' (Claessen, 2023: 12 and 28). This view of humankind and the world, which essentially assumes interconnectedness and, by extension, interdependencies, implies 'mutual obligations and responsibilities' (Zehr, 2015: 29). The question is whether this is really the case now in the legal domain. It does not seem so. The Belgian pedagogue Wielemans states in this regard:

> At the legal level, responsibility is usually limited to that of the individual … Interpersonal influence is rarely sanctioned … The judiciary still predominantly

> works with an unproblematised and very simplistic individual-concept, and still to a large extent uses a Cartesian egocentric view of man (Wielemans, 1993: 27).

This criticism would affect not only criminal law, but also restorative justice, *if* it focuses exclusively on the responsibility of the offender to make good what he has broken. In his definition of restorative justice, Zehr emphasises three concepts: harms, needs and obligations (Zehr, 2015: 48). What I am concerned with here are needs and obligations – better: responsibilities. *Needs* refer primarily to the needs of the victim, but also to the needs of the community and the government as well as to the needs of the offender. *Responsibilities* refer primarily to the responsibility of the offender to restore the damage caused by his crime, and also to the responsibility of the community and the government to take good care of both offenders and victims. And it is also about the victim's responsibility to show a degree of respect (or loving kindness) towards the offender as a fellow human being.

A crime has many conscious and unconscious, direct and indirect causes, and therefore guilt is a complicated concept, even if one does not completely dismiss the idea of freedom of will. Just as one speaks of *primary* victims (the direct victim), *secondary* victims (family and friends), and *tertiary* victims (the community and the government), one can speak of *primary* perpetrators (the direct offender), *secondary* perpetrators (family and friends) and *tertiary* perpetrators (the community and the government). Viewed this way, when a crime is committed, everyone is a victim and an offender at the same time. We know from criminological and victimological research that the roles of victim and offender are often interchangeable, but my statement goes beyond that, since it is based on the mystical-spiritual insight of interconnectedness and, ultimately (ontological), oneness (Claessen, 2010). For now, this view is not really common and accepted. The restorative justice provision that can give expression to this vision is the conference, in which not only the victim and the offender participate, but also family members and friends of both, as well as the community (and the government). It is not for nothing that the conference is seen by some restorative justice thinkers as the most complete restorative justice provision (McCold & Wachtel, 2003). Pre-eminently, it represents the public dimension of crime. It is precisely the conference model that makes it possible to uncover causes of crime not only at the micro-level, but also at the meso- and macro-level. Causes at a meso- and macro-level may be related to social injustice (think of opportunity inequality, poverty and housing problems) or to injustices arising from systems, structures and cultures within organisations or society that represent power imbalance, oppression and racism. A truly *holistic* vision and approach, for which restorative justice stands in my view, means addressing these – less visible, more indirect – causes of crime as well. Ideally, this is also done in a restorative manner, guided by the aforementioned 'guiding questions of restorative justice', which stem from respect for every human being (Zehr, 2015: 46-47).

Walgrave himself distinguishes between reparation (read: 'often material restitution or compensation of what has been damaged in the past') and restoration

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(read: 'a more holistic, more relational concept also oriented to the future') (Walgrave, this issue). Moreover, he defines restorative justice as 'justice that restores, meaning justice … that attempts to restore/repair as much as possible *all* harms and damages that have been caused by *injustices*' (Walgrave, this issue; my italics, JC). In short, restorative justice looks at more than the reactive repair of damage in a concrete criminal case.

Although as a criminal law scholar, I focus on a restorative justice approach to *crime*, I am aware that only a small part of all injustices is elevated to crime – sometimes also in a rather arbitrary manner. Like justice in general, restorative justice can also play a role *outside* criminal law, as in private, administrative and disciplinary law. Restorative justice can also be applied in civil society as soon as there is injustice that leads to a conflict or a conflict that leads to injustice (Claessen, 2023: 33). Is it not curious that restorative justice was exclusively launched in the 1950s 'as a particular way of responding to crime' (Walgrave, this issue) and that this was still the case in the time of restorative justice pioneers like Bianchi and Hulsman? Many of these pioneers drew inspiration from the mode of dispute resolution that exists in traditional cultures. What is striking is that these cultures generally do not have hard distinctions between crime and other forms of injustice; for instance, criminal law and private law are usually largely one jurisdiction. The way crime is responded to in traditional cultures – we tend to call that 'model' 'restorative' in nature – is essentially applied to other injustices, disputes and conflicts as well. For example, the *krutu* as used by the Indigenous people and the Maroons in the inlands of Suriname is not an exclusive 'conference model' in the case of crime, but a model that is used in many more cases – in slightly different ways each time – to get people to talk to each other, negotiate and reach peaceful settlements (Claessen & Djokarto, 2020; see also Baffero, Wardak & Williams, 2023). Viewed in this way, I think it would be strange if we, modern Westerners, want to apply this 'model' exclusively to crime or to call this 'model' restorative justice exclusively in the case of crime.

Could it not be that in many countries, including the Netherlands, restorative justice still plays only a marginal role in and around criminal law, not only because of a mostly purist or minimalist approach (focusing and limiting itself to voluntary deliberative processes), but also because restorative justice is still relatively unknown *outside* criminal justice as well? And could it not be that *more* restorative justice *outside* criminal law – namely in other areas of law as well as in civil society – ensures that: 1. fewer injustices occur over time; 2. fewer injustices end up in the criminal law system; and 3. the injustices that do end up in the criminal law system are dealt with more quickly and smoothly through restorative justice? Criminal law forms the top of 'the injustice-approach-pyramid'. Restorative justice can give effect to not only *internal* subsidiarity but also *external* subsidiarity. A greater operationalisation of *external* subsidiarity through restorative justice may result in the top of 'the *injustice*-approach pyramid', which is formed by criminal law becoming smaller. A greater operationalisation of *internal* subsidiarity may result in the top of 'the *crime*-approach pyramid', which consists of punishment in the sense of the intentional infliction of suffering becoming smaller.

2 Epilogue

Holism implies that everything is a whole and at the same time a part of a larger whole. Restorative justice is not there for a single part, that is, the tackling of crime. Of course, each part requires a restorative justice approach appropriate to that specific part. It makes little difference to me whether one then speaks of restorative *justice*, restorative *practice* or restorative *policy*. Although these are distinguishable concepts, they are not separable. Ultimately, it is about the 'overarching' vision, values and principles as well as the view of mankind and the world in which an approach is embedded to qualify an approach as restorative. This is not to say that restorative justice constitutes the only, let alone the only just, 'big meta-story'. It is *a* story that seeks to give expression to the universal, timeless Golden Rule ('Treat another as you would like to be treated yourself' or, more concretely: 'Harm no one; on the contrary, help everyone, as much as you can' [Schopenhauer, 2010: 120 and 138]), which lies embedded in a view of mankind and the world that is based on interconnectedness. Living by the Golden Rule both *inside* and *outside* criminal law leads to a society that is good (read: just and peaceful) (Claessen, 2023: 9). The same goes for living according to the vision, values and principles of restorative justice. Perhaps the activist in me is bigger than the scientist after all. Or maybe it is something in me that wants to go beyond boundaries and boxes, now that the Golden Rule is applicable in *any* relationship between people. I find it an honour and a challenge to be invited to reflect on Lode Walgrave's ever-stimulating thinking.

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