Silence with caution

Article

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Silence with caution: The right to silence in police investigations in Belgium

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Abstract

This article is about the right to remain silent within Belgium. Although the right has always been considered applicable, both the courts and parliament have historically demonstrated a disinclination to define or engage with this. The right to silence is now formally recognised in the Belgian Code of Criminal Procedure, albeit with the classic distinction between those who are not (yet) accused of a crime and those who are formal suspects: while all enjoy the right not to incriminate themselves, only formal suspects in Belgium enjoy the explicit right to remain silent. Accordingly, whilst no one may be obliged to assist with their own conviction or be forced to co-operate with the authorities, it remains unclear how far the right not to cooperate effectively stretches. The case law seems to be moving, albeit slowly, in the direction of confining this right within narrower borders, particularly by excluding its applicability with regard to the unlocking and decryption of digital devices. This is not, however, the only idiosyncrasy concerning the right to silence in Belgium. Among those also addressed in this article are: the lack of caution on the right to remain silent given to arrested persons immediately following their deprivation of liberty (an absence striking for its apparent breach of Directive 2012/13/EU on the right to information in criminal

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proceedings); the possible inducement to breach the right to silence via the discretionary powers of the public prosecutor to offer a reduction or mitigation in sentence; the obscurity surrounding the definition of 'interrogation' and the consequences of this on both the caution and the obtaining of statements; and the extent to which judges can draw adverse inferences from the right to silence. The question remains: is the right to silence currently protected enough?

Keywords
Right to silence, privilege against self-incrimination, rights of the defence, right to a fair trial, police interrogations, criminal investigations, right to legal assistance, Directive 2013/48/EU, Directive 2016/343/EU

Introduction

While the right to silence is always present in Belgian law, its boundaries have been built slowly over time. The Belgian parliament and courts have, historically, demonstrated a disinclination to further either the definition of the right to remain silent, or clarify its limitations within the Belgian realm, beyond its expression and recognition in international treaties.[1] It was long the case that corollaries of the right, for example, the right to be informed (i.e. the duty to caution) were not a part of the broader right. As will be discussed, although the right to silence is now formally codified in Belgium – and more readily distinguishable from its legal kin, the privilege against self-incrimination – it cannot be said that the right enjoys an absolute protection. Rather, its recognition is a qualified one, subject as it is to a number of legislative omissions and exceptions.

As a federal state composed of multiple languages and communities, the Belgian legal system is a complex model. Broadly speaking, the Belgian legal system is a constitutional system, with compatibility scrutiny carried out by the Constitutional Court (Cour constitutionelle/Grondwettelijk Hof). Belgium is also considered a monist state, in which international law has direct application and effect over the Belgian legal order. Although the Constitution is the highest domestic norm, prevailing over all other levels of law, this is subordinate to any and all international legal norms which are of direct applicability. It is of note that while the Constitution prohibits arrest 'except by a reasoned order of the judge',[2] it contains no further provisions on the rights of the defence and excludes – perhaps fundamentally – the presumption of innocence.[3] In reviewing the compatibility of legislation, the Belgian Constitutional Court therefore draws heavily on the case law of the European Court of Human Rights ('ECtHR'), often reading the national constitutional provisions in line with the interpretations given by the Strasbourg Courts on the equivalent rights outlined in the

1. For example: art 14, International Covenant on Civil and Political Rights; art 6, European Convention on Human Rights.
2. Article 12, *La Constitution Belge/De Belgische Grondwet*. See < https://www.senate.be/doc/const_fr.html > accessed 31 July 2021.
3. The presumption of innocence is nevertheless given full protection, even if not constitutionally guaranteed, as it is contained within art 6(2) of the ECHR. See Raf Verstraeten and Phillip Traest, 'Het recht van verdediging in de onderzoeksfase [The right of defense in the investigation phase]' (2008) 2 Nullum Crimen 85. Further, it is considered a general principle of law: Court of Cassation, 17 September 2003, AR P.03.1018; Benoît Dejemeppe, 'La présomption d'innocence entre réalité et fiction' [The presumption of innocence between reality and fiction], in Benoît Dejemeppe, Patrick Henry, Ernest Krings (eds), *Liber amicorum Paul Martens. L'humanisme dans la résolution des conflits: utopie ou réalité ?* [*Liber amicorum Paul Martens*. Humanism in the resolution of conflicts: utopia or reality?] (Larcier 2007) 19.

European Convention on Human Rights ('ECHR'). It is also of note that the Constitutional Court has demonstrated a readiness to quash an act of parliament if it infringes a provision of the Belgian Constitution, when read 'in conjunction' with the ECHR.

The Belgian criminal codes date back to the 19th century. The procedural criminal law is still based on the Napoleonic Code of Criminal Procedure of 17 November 1808 ('CCP') (*Code d'instruction criminelle*/*Wetboek van Strafvordering*). Throughout the years the code has been significantly amended to align it with the changed societal and cultural conditions. It has also been complemented, more recently, by some germane pieces of legislation, such as the Law of 20 June 1990 on Pre-trial Custody ('Pre-Trial Custody Act' or 'PTCA') (*Loi relative à la détention preventive*/*Wet van betreffende de voorlopige hectenis*).[4] An important revision of the CCP also came about with the introduction – and later full redrafting – of art 47*bis*, the article created in response to the ECtHR's judgement in the watershed 2008 Grand Chamber decision *Salduz v Turkey*.[6] Pertinently, it is now art 47*bis* which encapsulates the right to silence, as it is presently expressed under Belgian law. As will be discussed, whether this encapsulation is complete, or even sufficient, is a matter of ongoing debate.

The right to silence in Belgium: a brief history

As will be explained, the right to remain silent is not a novel one; it is a right with a long and winding history. International treaties such as the ICCPR were among the first to expressly lay down the right 'not to be compelled to testify against himself or to confess guilt'.[7] Likewise, although not explicitly mentioned in the ECHR, the ECtHR has recognised, since 1993, that the right to remain silent constitutes a part of the right to fair trial, as guaranteed by art 6.[8] In Belgium, however, it would not be until 1986 that the Court of Cassation would indicate that the right to remain silent forms part of the rights of the defence.[9] Further progress was made with the law of 12 March 1998 – the so-called 'Franchimont-law' – which introduced a number of guarantees to persons undergoing interrogation. Prior to this, no provision existed which indicated, let alone stipulated, how the interviewing authority should proceed with an interrogation.[10] The notion, for example, that prosecutor or police

4. This is now the legal basis for arrest in Belgium.
6. *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008).
7. Article 14.3(g).
8. Cf. *Funke v France* App no 10828/84 (ECtHR, 25 February 1993) [44]; *Murray v United Kingdom* App no 14310/88 (ECtHR, 8 February 1996) [45]; *Saunders v United Kingdom* App no 19187/91 (ECtHR, 17 December 1996) [74]; *Weh v Austria* App no 38544/97 (ECtHR, 8 April 2004) [39]; *Jalloh v Germany* App no 54810/00 (ECtHR,11 July 2006) [100]; *Ibrahim and others v United Kingdom* App nos 50541/08 et al. (ECtHR, 13 September 2016) [272].
9. Judgement of 13 May 1986, Arr. Cass. 1985/86, III, 1230.
10. Court of Cassation, 23 June 2010, P.10.0421.F, where the Court of Cassation held that the *Franchimont* rules concerning the way in which suspects have to be interviewed are not mandatory and that any statements collected outside of these rules cannot be considered unlawful, and so can remain in the file.

should record the interview in writing, in a language comprehensible to the suspect in question, was a novel introduction.[11] Yet even with this act, no explicit mention was made of the fact that suspects could remain silent.

In 2011, the Court of Cassation clarified – albeit in relation to the *Loi relative aux matières premières pour l'agriculture, l'horticulture, la sylviculture et l'élevage*[12] – that while there may be obligations within the law to 'collaborate' with interviewing authorities (insofar as a suspect or accused may not knowingly provide inaccurate information or documentation), there is no obligation to otherwise incriminate oneself.[13] Indeed, the Court has stated – in relation to respect of the presumption of innocence – that a defendant has no burden to prove the alleged facts.[14] In other words, should they wish to remain silent, the case law suggests that a defendant may be protected in doing so both by the express right and by the presumption of innocence. The defendant is not required to even prove the existence of a defence or an excuse, although in such a case they have a burden of allegation,[15] which necessitates that either they or their counsel must raise the point.[16] There is nothing, however, to prevent the suspect from remaining silent while their counsel alleges the existence of a defence or excuse (although this might make the counsel's allegation devoid of credibility, a situation which would release the prosecutor from the duty to produce evidence to show the absence of the defence or excuse).

It was only in that same year – 2011 – that the right to silence was formally codified and an explicit reference to the right to silence and the privilege against self-incrimination included, for the first time, in the Code of Criminal Procedure.[17] The addition has given new life to a classic principle. Traditionally there was no difference between the privilege against self-incrimination and the right to silence. The two are now more clearly distinguished and their autonomy can today be captured by the distinction between a 'light' and a 'strong' (or 'full') version of the right to silence. As explained

11. See Law of 12 March 1998 'concerning the improvement of the criminal proceedings in the investigation and the judicial investigation', *B.S.* 2 April 1998. See also: Verstraeten and Traest (n 3); Henri D Bosly, 'La loi belge du 12 mars 1998 relative à l'amélioration de la procedure pénale au stade de l'information et de l'instruction [Belgian law of 12 March 1998 on the improvement of criminal procedure at the information and investigation stage]' (1998) 3 Revue de Droit Pénal et de Criminologie 23; Damien Vandermeersch and Olivier Klees, 'La reforme *Franchimont*: Commentaire de la loi du 12 mars 1998 relative à l'amélioration de la procedure pénale au stade de l'information et de l'instruction [The reform *Franchimont*: Commentary on the law of 12 March 1998 on the improvement of criminal procedure at the information and investigation stage]' (1998) Journal des tribunaux 417, 428.
12. Law of 11 July 1969. See art 8§1: « [C]elui qui s'oppose aux visites, inspections, saisies, contrôles, prises d'échantillons ou demandes de renseignements ou de documents par les agents de l'autorité prévus à l'article 6 de la présente loi ou qui, sciemment, fournit des renseignements ou communique des documents inexacts. »
13. Christine Guillain et al., *Chronique, De Droit Pénal, 2011–2016* (Larcier 2018) 331.
14. Cf. Court of Cassation 11 December 1984, RG P.6114.F; Court of Cassation 9 October 1990, RG P.3198.F; Court of Cassation 24 March 2010, RG P.10.0407.F.
15. See Court of Cassation, 20 June 2000, RG P.98.0965.N; 4 January 1994, *Arr. Cass.* 1994, nr. 5.
16. Once a defence or excuse is raised by the defence, the burden to prove that the defence or excuse did not subsist is on the prosecutor, unless the claim made by the defence is manifestly unfounded.
17. Law of 13 August 2011 amends the Code of Criminal Procedure and the law of 20 July 1990 on pre-trial detention, granting rights to anyone who is questioned and to anyone deprived of liberty, among which is the right to consult with and be assisted by a lawyer, *B.S.* 5 September 2012. (*Wet van 13 augustus 2011 tot wijziging van het Wetboek van Strafvordering en van de wet van 20 juli 1990 betreffende de voorlopige hechtenis, om aan elkeen die wordt verhoord en aan elkeen wiens vrijheid wordt benomen rechten te verlenen, waaronder het recht om een advocaat te raadplegen en door hem te worden bijgestaan.*)

in the paragraph which follows, the former corresponds to the right against self-incrimination, while the latter includes the traditional right to remain silent.[18]

The right to silence and the privilege against self-incrimination

In Belgium, the *nemo tenetur* principle encapsulates the 'light' version of the contemporary right, *vis-à-vis* art 47*bis* § 1 CCP: that is, the privilege against self-incrimination. It thus implies that no one – suspect or non-suspect – can be obliged to make a statement against his or herself, or be obliged to plead guilty.[19] In other words, it can be said to contain the right not to assist with one's own conviction.[20] The principle also covers the right not to cooperate with the authorities in a physical way,[21] that is, the right not to be forced to cooperate with other investigative acts (*mesures d'enquête*/*onderzoeksdaden*) when these have a self-incriminating character.[22] While narrower than *nemo tenetur*, the right to remain silent is nevertheless closely related.[23] As, however, neither the ECtHR nor the Court of Cassation may limit the scope of the principle, its role (and *ratio*) within Belgian law is not unambiguous. Consequently, its scope-at-large is difficult to define.[24]

The ECtHR has taken different stances on the scope of the *nemo tenetur* principle. In certain judgements, it established that it is not exclusively limited to incriminating statements (i.e. *statements à charge*/*belastende verklaringen*), but it also relates to providing documents and data.[25]

18. Marie-Aude Beernaert et al., *Introduction à la procedure pénale* (7th edn, La Charte 2019) 31.
19. Lonneke Stevens, *Het nemo-teneturbeginsel in strafzaken: van zwijgrecht naar containerbegrip*
20. Paul De Hert, 'Het zwijgrecht van verdachten en getuigen [The right to remain silent about suspects and witnesses]' (1990) 20 *Vigiles* 20. See also: Luc Huybrechts and Michel Rozie, 'De rechten van de verdediging bij de behandeling ten gronde [The rights of the defense when dealing with the substance]' (2008) (2) Nullum Crimen 106, 120; Joachim Meese, '*The sound of silence*. Het zwijgrecht en het *nemo tenetur*-beginsel in strafzaken. Een historisch en rechtsvergelijkend overzicht [The right to remain silent and the nemo tenetur principle in criminal cases. A historical and comparative overview]' in Joëlle Rozie, Stefan Rutten en Aloïs Van Oevelen (eds), *Zwijgrecht versus spreekplicht* [Right to remain silent versus compulsory speech] (Intersentia, 2013) 38.
21. See also Cass. 19 June 2013, [2013] *RDPC* 1021, concl. Damien Vandermeersch. « *Compris dans le droit au procès équitable, le droit au silence implique non seulement le droit de ne pas témoigner contre soi-même mais également celui pour tout inculpé de ne pas contribuer à sa propre incrimination…* »
22. The prohibition relates only to the use of force. Obviously, no one is strictly prohibited from incriminating theirself. This is proved in: Cass. 24 May 2011 in (2011) (1) Pas. 1454. See also: Cass. 25 November 2011 in 2012 (1) *Deontologie & Tuchtrecht (D&T)* 196; see also Beatrix Vanlerberghe and Johan Verbist (2011) 1 Pas. 2616, cited in Beatrix Vanlerberghe, 'Zwijgrecht versus spreekplicht in burgerlijke zaken en in tuchtzaken [The right to remain silent versus the obligation to speak in civil and disciplinary matters]' in Rozie, Rutten and Van Ovelen (n 20); Tom Decaigny en Jan Van Gaever, 'Salduz: Nemo tenetur en meer [*Salduz*: *Nemo tenetur* and more]' [2009] Tijdschrift voor Strafrecht (T.Strafr) 201, 203.
23. Huybrechts and Rozie (n 20); Meese (n 20), 37–38. The privilege is, in fact, both narrower and broader than the right to silence: narrower in that it allows a suspect to refuse to answer only some questions and not the totality of them; broader in that it applies to everyone, including non-suspects.
24. Chris Van Den Wijngaert, *Kennismaking met de rechten van de verdediging in strafzaken* [Introduction to the rights of the defense in criminal cases] (Maklu 2003) 29.
25. Catherine Van De Heyning and Jurgen Coppens, 'Noot—Het bevel tot medewerking van artikel 88*quater* Sv., het zwijgrecht en het verbod op zelfincriminatie [Note—The order to cooperate with Article 88*quater* Sv, the right to remain silent and the prohibition of self-discrimination]' (2016) 3 T. Strafr. 262. See also the ECtHR cases *Funke* (n 8) and *J.B. v Switzerland* App no 31827/96 (ECtHR, 3 August 2001). This is, of course, limited to such acts as are necessary to support the investigation of facts. The law does not apply if the non-issuance of documents or the provision of incorrect information is punishable in of itself, for example, an incorrect tax return. See ECtHR, *King* v. *United Kingdom* App no 13881/02 (ECtHR, 8 April 2003); *Allan* v. *United Kingdom* App no 48539/99 (ECtHR, 5 November 2002).

In other cases, however, the Court clarified that the right to silence does not extend to material that may be obtained from an accused 'through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents required pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing'.[26] The latter maxim is often quoted in Belgian court decisions.[27] Note that the privilege does not stretch beyond the criminal realm. While it is commonly accepted that statements obtained by means of legal compulsion in administrative proceedings cannot be thereafter used within criminal proceedings, this does not mean that a person cannot be required to cooperate in the context of an administrative investigation.[28]

As noted, the right to remain silent and the privilege against self-incrimination can be found, at least in part, in art 47*bis* of the CCP. The enactment of art 47*bis* – a response to both *Salduz v Turkey*[29] and later, the Directive 2013/48 on the right of access to legal assistance[30] – was not a smooth process, and it took a number of years before its provisions were sufficiently in line with the Directive.[31] As presently expressed, the provisions of art 47*bis* are applicable across the entire spectrum of Belgian criminal proceedings. The provisions distinguish, however, between those who are *not* (yet) accused of a crime (§ 1) and those who are formal suspects (§ 2). While all people enjoy the right not to incriminate themselves (art 47*bis* § 1(1) and § 2(3)), suspects also enjoy the explicit right to remain silent, which includes the choice 'of either giving a statement, answering the questions posed to him or remaining silent' (§ 2(2)). Given the form in which § 2(2) is expressed, the interviewed person can remain silent both in full and only partially.[32] It is also clear that legal entities can invoke the right to silence as explicitly recognised by the case law,[33] although there is debate about which individuals within an organisation may invoke the right to silence on behalf of the legal entity.[34]

The right against self-incrimination is *a part* of the right to remain silent; accordingly, the latter is limited (as art 47*bis* CCP stipulates) to the suspect and their statements. The right to remain silent does not cover the disclosing of the person's identity or identity details, nor does it exclude the use of

26. *Saunders* v. *United Kingdom* (n 8) [69].
27. Cf. Const., 12 October 2017, §B.14.4; Cass. 14 March 2017, P.14.1001.N, §3.
28. Const., 12 October 2017, §B.14.4.
29. The first 'form' of art 47*bis* was the *Loi de 13 août 2011*/*Wet van 13 augustus 2011* which was implemented immediately in the wake of *Salduz v Turkey*. Recognising the right to legal assistance too narrowly, the act was successfully challenged before the Constitutional Court in 2013: Const., 14 February 2013, No. 7/2013. The Court noted, inter alia, that the right was excluded for a number of offences that could potentially lead to a prison sentence.
30. In response to both the 2013 Constitutional Court judgement (ibid) and the Directive 2013/48/EU, a new act was introduced in 2014, the *Loi de 25 avril 2014*/*Wet van 25 april 2014*; this amended the provisions of art 47*bis*. Although this addressed the changes deemed necessary by the Constitutional Court (such as extending the right to cover offences that may lead to a prison sentence), it nonetheless fell short of enacting the Directive.
31. It was not until the *Loi de 21 novembre 2016/Wet van 21 november 2016* (published 24 November 2016) that art *47bis* was sufficiently amended and that the directive was implemented in full in Belgium. See: < https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32013L0048 > accessed 29 April 2021.
32. Beernaert et al. (n 18), 31.
33. Cass. 19 juni 2013, P.12.1150.F, concl. Damien Vandermeersch, 3–5. See also: Cass. 17 October 2017, P.16.0854.N in (2018) Nullum Crimen 304, 307, randnr. 26.
34. Stijn Lamberigts, 'Het zwijgrecht van rechtspersonen: aandachts- punten en (supra)nationale perspectieven' (2018) 5 T.Strafr. 302.

compulsory powers against a person in order to obtain either documents or bodily samples.[35] Likewise, the right does not apply to evidence independent of the will of the person, following the formula used by the ECtHR, which is also used by the Belgian Constitutional Court.[36] Consequently, the taking of documents is excluded from the scope of the right and the investigating authorities can seize all documents necessary to uncover the truth. However, it has been noted by commentators that the right to remain silent implies not only the right not to 'witness against oneself' (*témoigner contre soi-même*) but also the right not to 'contribute to one's own incrimination' (*ne pas contribuer à sa propre incrimination*).[37] Therefore, while the taking of documents is not prohibited, the suspect himself cannot be forced to produce evidence, nor can they be punished for a failure to do so.[38]

There is, furthermore, the Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings, art 7 of which addresses the right to remain silent. Although Belgium is, prima facie, largely compliant with the provisions of the Directive, especially those of art 7,[39] it should be noted that the Belgian lawmakers have not yet explicitly transposed this Directive with any formal legislative implementation.[40] Nonetheless, the Belgian government considers the law to be in accordance with the Directive as a whole.[41]

The right to silence and the concept of interrogation

Compared to the *nemo tenetur*, the right to silence offers a stronger protection. It only applies, however, to formal suspects. It follows that while the right to silence protects a suspect against cooperating with their own conviction,[42] and that they have the explicit right to remain silent, it can

35. Cf. *Saunders* v. *United Kingdom* and others (n 8); plus *Heaney and McGuiness v Ireland* App no 34720/97 (ECtHR, 21 December 2000) [40]; *Quinn v Ireland* App no 36887/87 (ECtHR, 21 December 2000) [40]; *J.B. v Switzerland* (n 25) [64].
36. Const. Court, 20 February 2020, No. 28/2020.
37. Marie-Aude Beernaert, Henri D Bosly and Damien Vandermeersch., *Droit de la procédure pénale* (8th edn, La Charte 2017), 33.
38. Cass. 14 March 2017, P.14.1001.N.
39. For a more detailed discussion, see the article by Anna Pivaty, Ashlee Beazley, Yvonne Daly, Dorris de Vocht and Peggy ter Vrugt, 'Strengthening the protection of the right to remain silent at the investigative stage: what role for the EU legislator?' in this Issue.
40. < https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32016L0343 > accessed 31 July 2021.
41. See 'Etat actuel du droit belge à la lumière des obligations contenues dans directive 2016/343/UE du Parlement européen et du Conseil du 9 mars 2016 portant renforcement de certains aspects de la présomption d'innocence et du droit d'assister à son procès dans le cadre des procédures pénales [Current state of Belgian law in the light of the obligations contained in Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be heard in criminal proceedings] (O.J. L 65/1, 11 March 2016)', 13 April 2021, Cabinet of the Minister of Justice.
42. De Hert (n 20), 533–534.

also be said to go a step further: no suspect can be obliged to speak.[43] (The criminalisation of the refusal to cooperate is indeed prohibited in Belgium.[44]) The right of a suspect not to involve his- or herself in the investigation against them (but instead to remain silent) thus includes the implicit recognition that a suspect can shape their attitude towards the process autonomously, by using their *negative liberty.*[45] In other words, a suspect can reveal only those elements that they deem useful ('*die hij nuttig acht*') for their defense.[46] A suspect cannot, however, be interrogated under oath,[47] even if they so request.[48] In this way, the suspect retains the possibility that they may influence the criminal procedure.[49]

As noted, the provisions of art 47*bis* are applicable across the full spectrum of Belgian criminal proceedings, including, most pertinently, during police interrogations. The concept of interrogation, however, is not expressly defined in Belgian law. Whether this legislative silence represents a gap is strongly debated in the literature,[50] although it is now accepted (even by the Constitutional Court[51]) that the concept can be fleshed out by means of interpretation. Further, it finds extensive definition in the circular letter of prosecutors (COL 8/2011), the official guidance issued by the College of Prosecutors. This defines an interview – or interrogation[52] – (*audition ou interrogatoire/verhoor*) as a form of systematic (*systematique/stelsematig*) questioning of a suspect or charge by an investigating judge or by a police officer with a view to collecting elements for finding the truth.[53] The circular also sets forth a number of criteria to be taken into account, including the capacity of the interviewing authority, who must be either a judicial authority, a police officer (an agent or a higher ranked officer) or an authority vested with equivalent powers in the prosecution of special crimes (e.g. environmental crimes).

43. Meese (n 20), 37.
44. See *infra*.
45. Isaiah Berlin, *Twee opvattingen van vrijheid* [Two views of freedom] (Boom 2010) 12 in Maarten Colette, 'Legitieme horizontale strafvordering en het verhoor als dwangcommunicatie. Over het strafprocesrechtelijke vrijheidsbegrip en participatie in het licht van de Salduz-rechtspraak [Legitimate horizontal criminal proceedings and the interrogation as forced communication. About the concept of criminal procedural freedom and participation in the light of the *Salduz* case law]' (2019) 4 Nullum Crimen 2014.
46. Marc Bockstaele, 'Voorlopige richtlijnen van het College van Procureurs-Generaal inzake de bijstand van een advocaat bij het eerste politionele verhoor van een verdachte' (2010) 4 *Panopticon* 72, 73; Bernard Bouloc, Réginald De Beco and Pierre Legros, *Le droit au silence et la détention provisoire* (Bruylant 1997) 13.
47. *Funke* (n 8) [44]. See also Beernaert et al. (2017) (n 37) [32].
48. Cass. 20 June 2000, *Arr. Cass*.2000, nr.382, in [2002–2003] *R.W.* 1095, Note A Vandeplas.
49. Bart De Smet, J Lathouwers and Karel Rimanque, 'Article 6§1 EVRM [ECHR art 6(1)]', in Johan Vande Lanotte and Yves Haeck (eds), *Handboek EVRM: Artikelsgewijze commentaar* [ECHR Handbook: Article-by-article Commentary] (Intersentia, 2004) 464–468.
50. In the literature, see Maarten Colette, 'Het begrip "verhoor" en het zwijgen' (2017) 6 Nullum Crimen 555.
51. Const. Court, 14 February 2013, No. 7/2013.
52. Note that the terms 'interview' and 'interrogation' are used interchangeably under Belgium law, with both translated as *l'audition/verhouden*, respectively.
53. See COL 8/2011, 60: « L'audition ainsi définie cadre par conséquent dans une information ou une instruction et est une interrogation systématique d'un suspect / inculpé par un juge d'instruction, un agent ou un officier de police judiciaire à compétence générale ou restreinte, afin de rassembler des preuves et de contribuer à la manifestation de la vérité. » In the Dutch text: 'Een verhoor kadert bijgevolg in een opsporings- of een gerechtelijk onderzoek en betreft een stelselmatige ondervraging van een verdachte/inverdenkinggestelde door een onderzoeksrechter of een agent of officier van gerechtelijke politie met algemene of bijzondere bevoegdheid, met het oog op het verzamelen van bewijselementen en de waarheidsvinding'. [The hearing thus defined is therefore part of an information or instruction and is a systematic interrogation of a suspect/accused by an investigating judge, an officer or a judicial police officer with general or restricted jurisdiction, in order to collect evidence and contribute to the manifestation of the truth.]

The case law, in contrast, interprets the definition of interview rather narrowly. It excludes, in particular, that an exchange between police officers and a future suspect in the context of a house search could qualify as an interview, without requiring that the person be given, in advance of the exchange, information on their rights in order for the statements to later be validly admitted into evidence.[54] The jurisprudence of the Court of Cassation clearly indicates that voluntary statements (*déclarations spontanées*/*spontaan afgelegde verklaringen*) do not fall under the concept of interrogation, which entails that they are not required to be preceded by any prior information on rights and that they constitute valid evidence even without such prior information.[55] Such holdings seem to leave room for improvement, particularly in light of the fact that the boundary between an informal interrogation and a voluntary statement is often a very fine line.

It has been stated by the Court of Cassation[56] that 'it is generally accepted' that in the course of their investigations, police officers may collect information about an offense outside of the formal setting of an interrogation (as defined by art 47*bis*). Any and all information gathering, however, must be recorded in the written record. This approach was confirmed by the Court in 2012,[57] in an appeal in which the appellate-accused claimed that his guilt had been established, in part, by statements he had made spontaneously to the police during his house search and that as he was not properly informed of his rights (including his right against self-incrimination), the statements should not have been relied upon. The Court disagreed, holding that the dialogue that is necessarily established between the officers conducting a search and the person against whom the duty is performed does not have the effect of raising such conversation to the level of an 'interview' within the meaning of art 47*bis;* and that the mere fact that, on the occasion of a home visit, the suspect spontaneously or incidentally makes a statement that could be self-incriminating, does not alter the nature of the (non-interrogative) exchange between the latter and the police officers.

Duty to inform and the right to silence

It is important to note that the provisions contained within art 47*bis* CCP provide for the rights enjoyed by (non-)suspects in an interview (or interrogation) to be timely communicated, *before* any questioning begins. This caution should also include information about the person's right to legal assistance; this is determined in part by the person's '*Salduz* category'. The circular from the College of General Prosecutors summarises the aforementioned distinctions made by art 47*bis*, according to the status of the person to be interviewed (see below).[58] The '*Salduz* I' category refers to interviews of people who are not suspects. Accordingly, they are not informed of the right to silence but only of the privilege against self-incrimination. The *Salduz* II category comprises the interviews of suspects under suspicion of having committed a crime(s) for which no prison sentence can be imposed; accordingly, such interviewees have no right to be informed of the right to legal assistance. The *Salduz* III category covers the interviewing regime of suspects of crimes for which a prison sentence (or other sentence of deprivation of liberty) can be imposed but who are not deprived of their liberty;

54. Cass. 14 March 2017, P.14.1001.N.
55. Cass. 23 June 2010, P.10.1009.F; Cass. 14 March 2012, P.12.0404.F; Cass. 10 April 2012, P.12.0584.N; Cass. 12 September 2012, P.12.1539.F; Cass. 14 October 2014, P.14.0666.N; Cass. 28 May 2019, P.19.0127.N; Cass. 5 November 2019, P.19.0384.N.
56. Cass. 23 June 2010, P.10.0421.F.
57. Cass. 14 March 2012, P.12.0404.F.
58. See *Circulaire du Collège des procureurs généraux*, CO10/2011 (*Version Revisee* 24.11.2016) 2.

Table 1. *Salduz* categories.

-*Salduz* I: No suspect	*-No right (to be informed) legal assistance*
-*Salduz* II: Suspect; offence without prison sentence; no deprivation of liberty	*-No right (to be informed) legal assistance*
-*Salduz* III: Suspect; offence with (prison) sentence; no deprivation of liberty	**-Right to be informed** but responsibility to arrange (own) legal assistance
-*Salduz* IV: Suspect; offence with (prison) sentence; deprived of liberty	**-Right to be informed and to be assisted with arrangement of legal assistance**

these persons ought to be informed of their right to counsel before the interrogation commences, but it is their entire responsibility to arrange the legal assistance. Finally, the *Salduz* IV category is reserved for suspects of crimes who, in addition to the aforementioned qualities, are also deprived of their liberty as they await the conclusion of the investigation and trial. The latter category of persons must be informed of their right to counsel and the authorities are required to actively assist the suspect in procuring their counsel of choice (where possible). See Table 1.

The strengthening of the right to legal assistance has indirectly contributed to a greater protection of the right to silence. The lawyer can remind the client of such right, explain its significance more clearly and suggest to the client whether or not it is advisable to exercise their right the context of the interrogation. Traces of such connection between the right to silence and the right to legal assistance can be found in the law as well. According to art 47*bis* § 3 CCP, if the suspect is invited for questioning – with the invite containing all proper information mentioned by art 47*bis* – and the suspect appears without a lawyer, the questioning can take place but only after that the person has been reminded of their right to remain silent and of their privilege against self-incrimination.[59]

Article 47*bis* § 6(5) CCP further provides that if, during the interview of a person who initially was not heard as a suspect (i.e. the *Salduz* I category), it now appears that there are elements that lead the interviewer to believe that an allegation may be raised against that person, then the person must be informed of the rights they enjoy in accordance with § 2 and, if applicable, § 4, and the person must be given the declaration of rights, as provided for by § 5.

As noted, art 47*bis* CCP stipulates that all persons subject to formal questioning, whether suspected of the commission of a crime (§ 2) or not (§ 1), must be informed *prior to* the beginning of the interview of their respective rights.[60] In particular, as dictated by art 47*bis*, suspects must be informed of: the facts upon which they will be interviewed; that they have the right to consult with a lawyer before the interrogation (if they fall within the appropriate *Salduz* category, as outlined above); that they may choose whether or not to answer the question posed to them (with the exception of questions as to their identity); that they are not compelled to incriminate themselves; that their statements can be used as evidence in judicial proceedings; that they can request all questions and answers be precisely recorded; that they are free to stay or leave the interrogation whenever they wish (unless they are in a state of arrest or custody); that they can request that investigative activities be carried out or that other be people be heard, in the context of the investigation; that they can make use of documents in their possession; that they can request that these

59. Note that appearing without a lawyer would in this case be taken as a form of implicit waiver of the safeguard, something which might be at odds with the rules of art 9 of Directive 2013/48/EU on the right to legal assistance.

60. Ministerial decision of 23 November 2016 (*Arrêté royal du 23 Novembre 2016 portant exécution de l'article 47bis, §5, du Code d'instruction criminelle/Koninklijk besluit van 23 november 2016 tot uitvoering van artikel 47bis, §5, van het Wetboek van Strafvordering*, published in the Official Bulletin on 25 November 2016).

documents be added to the case file; and that they are entitled to an interpreter.[61] Furthermore, persons deprived of their liberty should be informed that they enjoy, additionally, the rights provided for by art 2*bis* of the Pre-Trial Custody Act – that is, the right to confer confidentially with a lawyer of his or her choice without undue delay.[62] All oral cautions appear in the official (written) record of the interrogation.[63] Notably excluded from the caution are some broader rights, including the presumption of innocence, the right to a fair trial, the right against undue prosecution (art 12 of the Constitution), the right to be brought before a judge (also art 12), and the right against illegal or improperly obtained evidence (art 32, CCP), and the consequences of lying, giving false statement, or falsely accusing others.

Both art 47*bis* § 5 CCP and the Directive on the right to information in criminal proceedings (2012/13/EU) require that this information is to be given to the person in writing (although the latter only requires this for people deprived of their liberty: see art 4).[64] The form and the content of this declaration of rights is determined by a ministerial decision.[65] As to the temporal scope of these cautions, the duty to provide the suspect with the letter of rights is limited to before the first interrogation. Accordingly, if a suspect is questioned a second or third time, the interviewing authority is no longer under the duty to provide the written declaration. This, however, does not take away the general duty to inform suspects (orally) of their rights before the beginning of *any* interrogation. Furthermore, art 47*bis* § 5 CCP is not included in the list of provisions in art 47*bis* § 6(9) which exclude evidence founded on a statement obtained in breach of a suspect's rights, and thus in breach of the suspect's right to a fair trial (art 32, preliminary title, CCP; art 6 ECHR). If the evidence is to be excluded (in accordance with art 32), the judge must have found, for example, that the failure to give the letter of rights in breach of the suspect's right to a fair trial.[66] This is, however, unlikely to eventuate where a suspect has been informed of his or her rights orally.[67]

There is, furthermore, no separate information on the right to remain silent for those persons arrested. Indeed, there is no reference to the letter of rights in the Pre-Trial Custody Act when a person is arrested, an absence conspicuous for its apparent breach of Directive 2012/13/EU: member states are under obligation to ensure that 'suspects who are arrested or detained should be provided promptly with a letter of rights'. In addition, also in apparent breach of the 2012 Directive, neither the CPP nor the PTCA expressly stipulate that an arrested person has the right to remain silent, or the privilege against self-incrimination. Arrested suspects will receive a caution only when

61. Cf. ibid., and the 'explanation of your rights' documents issued by the Justice Department (as annexed to the decision); these are available in all official languages of the European Union. See: <https://justice.belgium.be/fr/themes_et_dossiers/documents/telecharger_des_documents/declaration_de_droits> accessed 31 July 2021. See also the *Circulaire du Collège des procurers généreaux*, COL 8/2011 (*Version Revisee* 29.09.2019), 76.
62. Article 2*bis* stipulates the conditions, especially the time limits, within which the right to access legal advice must be ensured to those in police custody and deprived of their liberty.
63. *Circulaire du Collège des procurers généreaux*, COL 8/2011 (*Version Revisee* 29.09.2019) 76.
64. Note that where there is insufficient time to properly caution a detained suspect, the *Circulaire* COL 10/2011 (112–133) advises that a 'conversation' may take place between the suspect and the interviewing authority, limited to the purpose of informing the person of their rights.
65. See also *Circulaire* (n 58) 85.
66. ibid.
67. Article 47*bis* has little to say on the language or content of the caution to be given. Exception is made, however, for the provision in art 47*bis* § 6(2) CCP. According to this, the interviewing authority should adjust the wording of the information on rights to the age of the suspect, and in any case, taking into account any vulnerabilities that might affect their understanding of their rights. The formal record will detail how the caution has been given.

the decision is taken to question them, and not immediately after the deprivation of liberty as required by the European Directive(s).

Moreover, the case law has stated that if the duty to caution with regard to the information on the right to remain silent is not respected whilst a suspect is deprived of their liberty, this does not lead to the inadmissibility of proceedings (that is, the discontinuance of the case) but only to the exclusion of evidence obtained in breach.[68]

Legal consequences of the use of the right to silence

While the law does not explicitly mention whether the silence of the suspect can lead to the drawing of adverse inferences, such a prohibition can be found in a consistent strand of case law.[69] In particular, the judge cannot rely on the silence of the suspect – even indirectly – and cannot draw any conclusions as to their guilt, nor use the silence to corroborate other pieces of evidence.[70] Some authors, however, point to the fact that the courts can attach probative value to the silence of the accused insofar as such silence does not challenge the incriminating evidence.[71] They emphasise that the right to silence is not absolute, and that while the judge cannot base their decision on the fact that the suspect remained silent, they can nonetheless use such silence to form arguments against the defendants.[72] Some decisions move in this direction by observing that the silent behaviour of the defendant can further confirm a fact which remains undisputed.[73]

The judge is also normally forbidden from taking into account the way in which the defendant has organised their defence when sentencing.[74] In a case before the Court of Cassation, the appeal was made against a sentence which had been based on the argument that the defendant had constantly denied the allegations. The Court found that such reasoning was in contrast with the right of the defendant to defend himself freely, a principle that in itself stems directly from the presumption of innocence. The statement that the silence of the defendant shall have no role in the sentencing decision is consolidated in the case law of the Court of Cassation.[75]

Right to silence and statements given by the suspect/defendant

While the *Salduz* laws have introduced rules concerning the exclusion of irregular evidence, these, strikingly, are limited to violations of the *Salduz* rights, that is, the rules on the suspect's right to a counsel (art 47*bis* § 6, § 9 CCP). There is no rule, however, that explicitly provides for the exclusion of evidence obtained in breach of the right to silence. Accordingly, one has to instead turn to the general rule of exclusive of evidence, found in art 32 of the preliminary title of the CCP. This states that evidence is only excluded in three circumstances: (a) if compliance with the relevant formal conditions is 'prescribed on pain of nullity' (*nullité/nietigheid*); (b) if the irregularity

68. Cass., 14 October 2014 AR P.14.0507.
69. See Beernaert et al. (2019) (n 18) 712.
70. Beernaert et al. (2017) (n 37), 34. Cf. Court of Cassation, 16 September 1998, in [1998] *J.L.M.B.* 1340.
71. Patrick Arnou, 'Bekentenis in strafzaken [Confession in criminal cases]' (2000) 33 OSS 109.; Meese (n 20), 42.
72. Raf Verstraeten and Frank Verbruggen, *Strafrecht en strafprocesrecht voor bachelors* (Intersentia 2020) 180.
73. Cass. 13 October 1993, AR P.93.0517.F.
74. Cass., 30 May 2017 (P.16.0783.N/1).
75. Pim Vanwalleghem, 'Rechter mag beklaagde niet straffen voor volgehouden ontkenning misdrijf [Court may not punish defendant for sustained crime denial]' (2017) 355 De Juristenkrant 3; Cass. 29 April 1997, in (1997–1998) 24(14) Rechtskundig Weekblad 112.

committed has affected the reliability of the evidence; or (c) if the use of the evidence violates the right to a fair trial. Exception made for the first criterion, the other two leave much room for judicial discretion.[76]

The courts have clarified the criteria that should be taken into account when assessing a violation of the right to a fair trial for the purposes of the exclusion of evidence, namely: the intentional character of irregularity, the relationship between the gravity of the crime and the procedural flaw, the fact that the tainted evidence concerns the existence of the crime and not the responsibility of the person, the influence that the procedural flaw had on the right to freedom that was protected by the violated rule, and finally the fact the flaw merely has a formal character.[77] It is difficult to predict the findings of the courts in the application of these criteria, since they are very much dependant on the concrete, factual circumstances of the case. Nonetheless, it seems plausible to conclude that not all violations of the right to silence might lead to the exclusion of evidence, particularly where the violation by the police was not premeditated or where the flaw was a minor one (for instance, if the police asked some partly misleading questions, or if the information on the right was only partly misleading or incorrect). In the very least, the case law makes clear that the use of unjustified pressure, coercion or violence would breach both the reliability of the evidence and the right to a fair trial.[78] The use of hypnosis or narcosis is also impermissible.[79]

The use of polygraphs occupies an interesting place in Belgian law, for they are allowed: not to collect evidence against a suspect, but to give 'direction' to the investigation, or if requested by the defence to demonstrate a defendant's innocence.[80] The use of polygraph first developed in practice and it was only later – in 2020 – that this use was codified by the law. Following the Polygraph Act of 4 February 2020 the use of polygraphs now has a legal basis in article 112*duodecies* CCP. The fairness of art 112 *duodecies* was challenged before the Constitutional Court on 1 October 2020, although the claim was dismissed without the merits of the law being debated.[81] The codification of art 112 *duodecies* more or less follows the standards developed in practiced, namely, that the polygraph examination must be carried out only on a voluntary basis, at the request of the person involved, and that the intervention of a third party during the test is not permitted. Further, before proceeding with the examination, the 'interested party' must sign a document in which they (a) voluntarily consent to take part in the polygraph examination; (b) confirm that the test is being performed at their explicit request; (c) confirm they have been informed that they may leave the premises and may decide to stop the test at any time; and (d) confirm that they have been informed

76. Indeed, according to the Court of Cassation, even art 6 of the ECHR does not requires that evidence obtained in violation of a fundamental right be always inadmissible (Cass., 21.11.2006, P060806N).
77. Verstraeten and Verbruggen (n 72) 339 ff.
78. Cass., 1 April 2014, P.12.1334.N, which states the following: 'The right of assistance by a counsel is connected with the duty to caution, the right to silence and the fact that nobody can be compelled to self-incriminate; these rights are applicable *in personam* [with regard to the single individual] so that the defendant in principle cannot invoke the violation of those rights concerning incriminating statements given by another defendant, who is just a witness with regard to the defendant, unless the other defendant himself enjoyed those rights, alleged their violation and on those grounds retracts the statements. This does prevent the defendant from being able to allege that the reliability of the evidence of the co-defendant is tainted and its use would breach the right of defence of the defendant in that the statements of the co-defendant were obtained by means of unjustified pressure, coercion or torture'. In the literature, see Arnou (n 71) 106.
79. Arnou, ibid.
80. *Circulaire*, COL 8/2011, 187.
81. Const., 1 October 2020, No. 132/2020.

that if they are assisted by a lawyer,[82] there is nothing to prevent the latter from being present in the control room, but they must not directly intervene or interrupt the test.[83] The polygraph examination is the subject of a complete audio-visual recording. Accordingly, it is possible that the person spontaneously confesses during the test or during the preparatory phase. In this case, the test will be terminated without delay and a hearing will be organised in which the rights of access to a lawyer must be respected (except where the person concerned has waived the aforementioned rights).[84] Most importantly, the Court of Cassation has confirmed that the use of a polygraph test as evidence (they can only be used for corroboration, art 112*duodecies* § 10) does not violate a person's right to silence as – fundamentally – the person must have voluntarily submitted to the test in the first instance, and been made aware that they could terminate it at any time.[85]

The confession is not explicitly mentioned in the law as a separate form of evidence. As such, it does not have greater legal value than regular evidence.[86] If the suspect admits to the crime the courts can base their decision solely upon this element. But the court can always discard the probative value of a confession, if it considers it to be unreliable or unwillingly given. A suspect can always retract and can always change their prior statements. However, the judge may then consider the first confession and consider it more reliable than a second version. The judge is not, however, obliged to take a confession into account.[87] The judge, in accordance with the principle of *intime conviction* decides whether the statement of confession is reliable and thus whether it can serve as the basis for a finding of guilt.

It should be noted that Belgium does not have a system of guilty pleas comparable to common law systems[88] and that even where a suspect 'pleads' guilty to the charges before them, the court still has a duty to review *ex officio* the regularity of the evidence before it, the possible prescription of the prosecution and whether the facts confessed indeed amount to an offence punishable by law. (A guilty 'plea' is only allowed where the offence does not appear likely to be punishable by a correctional sentence of more than 5 years: art 216 CCP. The procedure is any case precluded for some listed serious offences: art 216 § 1(3).) If the circumstances are such that a recognition of guilt can be made by the suspect, the public prosecutor can make a proposal to the suspect with the offering of a sentence (normally lower or, in any case, more favourable than the ordinary sentence that the suspect could get if found guilty).

If the suspect accepts the prosecutor's offer, they must sign an agreement accepting both the prosecutor's terms, and their own imputation of guilt. Once the agreement receives judicial validation, the sentence is final and binding (no appeal can be filed). It should be noted that when the judge refuses to validate the agreement (because of the lack of voluntariness, or because the sentence is disproportionate, or for absence of other essential legal requirements), the signed agreement and all other documents and information concerning this procedure should be taken out of the file, in order to prevent them negatively affecting the merits of the judgement(s). However, the

82. The Court of Cassation confirmed, in a judgement dated 9 April 2013 (P.12.2018.N.), that arts 6 § 1 and 6 § 3 of the ECHR do not require that an accused person have the assistance of a lawyer when subject to a polygraph test.
83. *Circulaire*, COL 8/2011, 188.
84. ibid.
85. Cass., 15 February 2006, P.05.1583.F.
86. Arnou (n 71), 102–104.
87. Ibid., 109.
88. Indeed, the literal translations of the title to art 216 of the CCP – *reconnaissance préalable de culpabilité/ voorafgaande erkenning van schuld* – are 'prior *recognition* of guilt'.

documents and information obtained may nevertheless be used in other proceedings, even other criminal proceedings (art 216 § 4/7). In practice, few (if any) suspects plead guilty.

There is the possibility that the defendant may strike an agreement with the prosecutor (*la transaction/minnelijke schikking*). This, however, contains no formal plea.[89] Note that the latter is only possible where the offence does not appear to be of a nature to be punishable by a correctional sentence of more than 2 years or a heavier sentence, including confiscation if any, and that it does not involve no serious injury to physical integrity (art 216*bis*).

Under art 216/1, the public prosecutor is permitted, where the 'necessities of the inquiry so require and if the other means of investigation do not appear to be sufficient for the manifestation of the truth' (*si les nécessités de l'enquête l'exigent et si les autres moyens d'investigation ne semblent pas suffire à la manifestation de la verité*...) to promise a reduction, mitigation or other consideration relevant to sentence or detention to any person 'who makes substantial, revealing, truthful and complete statements' (*des déclarations substantielles, révélatrices, sincères et completes*)[90] concerning either the participation of third parties or, where appropriate, his or her own participation. Such a promise may lead to an incentive for a suspect to speak (thus incentivising them against remaining silent). However, this is limited to a list of very serious offences (i.e. those punishable by a prison term of more than 5 years), and moreover, is subject to a strict proportionality and subsidiary control, and subsequent judicial scrutiny. These strict conditions do not allow the prosecutor to resort to this mechanism on a regular basis. (Furthermore, the possibility is not available during the prosecutorial investigation.) The list of possible promises that may be made is found in art 215/5.[91]

If art 261/1 could be described as containing an inducement to co-operate, then art 88*quater* contains an express duty to do so. The latter concerns the duty of cooperation in the context of digital investigations. Article 88*quater* § 1 allows the investigating judge to compel anyone who has special knowledge of computer systems to provide information about the functioning of the computer system under investigation, including on how to gain access to the system, and how to gain access to the data processed, transferred, stored and contained therein. The cooperation is mandated and a failure to comply is a criminal penalty. Further, the judge can also compel (under § 2) the digital expert to perform operations in the computer under investigation, including accessing, copying, removing, encrypting (or decrypting) the data therein. This too is mandated under threat of criminal penalty. Of note for our purposes is that art 88*quater* CCP § 2 explicitly provides that the latter type of cooperation cannot be requested from the suspect (or a relative of theirs), in order to protect their right against self-incrimination. The courts, furthermore, have chosen to extend this protection to cover the first type of cooperation as well, in order to ensure art 88*quater* is not in breach of the principles of the right against self-incrimination.[92] In both circumstances, under art

89. Article 216*bis* contains the requirements imposed upon the public prosecutor when reaching an agreement with a defendant. These include, inter alia, the determination of the specified sum of money to be paid by the defendant to the Federal Public Service Finance in exchange for the reaching of an agreement (and the subsequent avoidance of a trial), the terms and the payment period, and the 'facts' against which the payment is made in compensation.
90. If a suspect or defendant has given false statement against others (or in favour of themselves), they may then be subject to reprimand by way of art 196 (forgery in writing), art 215 (false testimony) or art 443 (slander) of the CCP.
91. These include, inter alia, promising a lower level of punishment, a lower sentence or a lower fine.
92. Cf. Correctional Court (Oost-Vlaanderen/East Flanders) (afd. Dendermonde) 17 November 2014 in (2016) 3 T.Strafr. 255; Court of Appeal (Ghent) 23 June 2015 (2016) NiW 336. Note that in both decisions, the judges emphasised that the privilege against self-incrimination prohibits a suspect from being required to cooperate actively with the prosecuting authority.

88*quater* cooperation is mandated under the threat of criminal penalty: § 3 states that a refusal to cooperate is an offence, which carries a penalty of 6 months to 3 years' imprisonment or a fine of €26 to €2000. If the cooperation might reduce and/or mitigate the consequences of an (serious) offence, and it is nevertheless refused, the penalty is aggravated: up to 5 years' imprisonment, and a fine between €50,000 and €500,000.

Such an approach seemed to find authoritative support in the earlier case law of the Constitutional Court.[93] In a 2015 decision, the Court quashed a provision concerning the 'financial investigation'[94] for finding criminal assets. The provisions allowed the public authority to compel anyone – including the person convicted of the crime and third persons who could be suspected of being involved in the criminal activity – to cooperate actively in the (digital) investigation. The Court found that the provision breached the privilege against self-incrimination. Interestingly, this conclusion is now at odds with more recent jurisprudence of both the Constitutional Court[95] and the Court of Cassation[96] on so-called 'decryption orders'. Here, if the investigative authorities encounter encoded data, they can command decryption pursuant to article 88*quater* CCP. Both Courts have argued that such an order, issued in accordance with art 88*quater*, does not infringe the privilege against self-incrimination because it relates to 'material that exists independently of the will of the suspect', via-à-vis the ECtHR test in *Saunders*, which expressly excluded such evidence from the scope of the privilege. Perhaps unsurprisingly, this jurisprudence has created a lot of controversy in the Belgian doctrine, with many debating whether in fact passwords can (and should) exist independently of the will of the suspect, the person who presumably created them.[97]

The right to silence and interrogations techniques, pressure and coercion

It has been noted that there is a lack of definition of 'interrogation' in Belgium, as well as a lack of clear guidance on how an interrogation should be carried out. The latter, in particular, is problematic: while art 47*bis* CCP now dictates some general rules, there is still a lack of a more specific set of guidelines on the methods of interrogation permitted; unsurprisingly, this also applies to the definition of pressure or coercion. While legislation such as art 2*bis* § 2(2) prohibit the suspect being coerced during the interrogation, what amounts to coercion is not clearly formulated in Belgium. Strictly speaking, the only form of unlawful coercion is that which can be identified with the use of physical force or violence, in contravention of art 3 of the ECHR.[98] Causing bodily harm will result in a breach of the prohibition against torture.[99] The limit of art 3 of the ECHR is a more absolute one, which applies not only to activities aimed at obtaining a confession, or more generally, a statement

93. Const., 17 December 2015, No. 178/2015.
94. A special type of investigations that can be conducted after a person has been convicted with a view to finding the profits of the crime.
95. Const., 20 February 2020, No. 28/2020.
96. Court of Cassation, 4 February 2020, P.19.1086.N.
97. François Koning, 'Droit au silence et à ne pas s'incriminer: *Quo vadis*?' (2020) JT 204, 206; Joachim Meese, 'Recht om te zwijgen maar toch verplicht om te spreken?' [2019–2020] RW 1322; Sofie Royer and Ward Yperman, 'Wankele argumenten van hoogste Belgische hoven in uitspraken over decryptiebevel' (2020) Nullum Crimen 7; see also Charlotte Conings and Jan Kerkhofs, 'U hebt het recht te zwijgen. Uw login kan en zal tegen u worden gebruikt? Over ontsleutelplicht, zwijgrecht en *nemo tenetur*' (2018) 5 Nullum Crimen 457; Ward Yperman, Sofie Royer and Frank Verbruggen, 'Vissen op de grote datazee: digitale informatievergaring in vooronderzoek en strafuitvoering' (2019) 5 Nullum Crimen 389
98. *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999).
99. Marc van Oosterhout and Joachim Meese, 'Balancing the Need for Protection and Punishment of Young Delinquents: Country Report of Belgium' in Michele Panzavolta, Dorris de Vocht, Marc van Oosterhout and Miet Vanderhallen (eds.), *Interrogating Young Suspects: Procedural Safeguards from a Legal Perspective* (Intersentia 2015) 102.

from the suspect, but also to those activities aimed at obtaining independence that exists independently of the will of the suspect (such as a DNA sample).[100]

The fact that police officers should refrain from the use of physical force is also laid down in the deontological code of the police, and the Penal Code (at arts 417*bis* and 417*quinquies*). Article 62(2) of the Police Code, for example, states that 'no violence, molestation or immoral acts may be used to extract information'.[101] Likewise, the presumption of innocence, and the right to remain silent (as elucidated above) prohibit the use of any unfair means in obtaining a suspect's confession or statement.[102] Nevertheless, it is clear from the case law (including that of the ECtHR) that 'improper' interrogation techniques may be found to have breached a suspect's rights to a fair trial. Lying to a suspect, for example, would be considered justifiably improper (and also breach the provision of loyal evidence gathering), as too would false promises.[103]

Nevertheless, some rules do exist in Belgium as to how information (or questions) is given to a suspect. Interrogation methods such as goading the suspect, repeating warnings to tell the truth (or confess, spontaneously), or emphasising on the seriousness of the facts are all considered a breach of the prohibition against coercing or pressuring a suspect.[104] While a suggestion that an arrest warrant may be brought against the person has, however, been held by the courts as insufficient to amount to undue pressure,[105] the extent to which 'intrusive' (but not ECHR-breaching) interrogation techniques – for example, a lengthy interrogation, the absence (or exaggeration) of light, interrogation during the night – may be used is not, however, clear.[106] What is certain is that misleading promises are viewed as a form of undue pressure.[107]

Additionally, there is the question of whether, if the right to remain silent is invoked, the interrogation is thereafter rendered 'impossible' or whether the interviewing authorities may nevertheless continue to try to persuade the suspect to answer the questions posed to them; Belgian legal doctrine is undecided on this. Some commentators have suggested that the suspect's choice not to make a statement signals the end of the interrogation, and that the police may ask no further questions unless the suspect takes the initiative to speak.[108] Others, on the other hand, suggest it is the duty of the police officer to collect as much information as possible for the purposes of the investigation, and that they may thus insist – albeit with legitimate pressure – that the suspect

100. Meese (n 20) 41.
101. Police Code (*Le code de déontologie des services de police*/ *De deontologische code van de politiediensten*), 10 May 2006.
102. Beernaert et al. (2019) (n 18) 31.
103. van Oosterhout and Meese (n 99) 102.
104. Marc Bockstaele, Elke Devroe and Paul Ponsaers, *Salduz: bijstand van advocaten bij verhoren* [*Salduz*: assistance of lawyers in interrogations] (Maklu 2011) 137.
105. Corr. Veurne 6 June 1986, FJF 1987, at 382. In dit vonnis werd het gebruik toegestaan van verklaringen, door de douane bekomen na ermee gedreigd te hebben dat de kinderen van de verhoorde verdachten in een home geplaatst zouden worden [In this judgement, the use of statements obtained by customs was allowed after threatening that the children of the suspects questioned would be placed in a home]. Cf. Cass. 23 December 1998, AR A.94.001.F.
106. See also: Cass. 19 December 1955, *Pas*. 1956, I, ; Cass. 5 June 1961, *Pas*. 1961, I, 1071; Cass. 11 December 1984, *Pas*. 1985, I, 452; Cass. 12 June 1991 in (1992) Dr.circ. 86; Corr. Neufchâteau 26 November 1992 in (1993) 231 Journ.proc. 28, note J Dermagne.
107. Judgement of 13 May 1986, Arr. Cass. 1985/86, III, 1230.
108. Tom Decaigny, 'Een algemeen beroep op het zwijgrecht beëindigt het verhoor [A general appeal to the right to remain silent ends the hearing]' [2013] *Vigiles* 3–4; 89–91.

answer.[109] This is the position of the Court of Cassation, who have also suggested that if the suspect has indicated that they wish for the interrogation to be terminated because they will remain silent, this must be respected, and the termination must be brought to an end.[110] The police may confirm this by questioning the suspect's decision, but this must be done in such a manner as to seek confirmation of the decision to terminate, not to coerce the suspect into changing their mind.[111]

Conclusion

The right to remain silent is one with a long and complex history in Belgium. Although the right has always been considered applicable within Belgium, both the courts and parliament have historically demonstrated a disinclination to define or engage much with this. It was long the case, for example, that the suspect was not informed of their right to remain silent before an interrogation, and still today no caution on this is given to arrested persons immediately following their deprivation of liberty. This absence is striking for its apparent breach of Directive 2012/13/EU on the right to information in criminal proceedings. Perhaps paradoxically, greater attention has been devoted to ensuring in full the right to legal assistance rather than to offering complete protection of the right to silence.

The right to silence is now formally recognised in the CCP and it is more readily distinguishable from the cognate privilege against self-incrimination. Article 47*bis* has formally codified the classic distinction between those are not (yet) accused of a crime and those who are formal suspects. While all enjoy the right not to incriminate themselves, only formal suspects enjoy the explicit right to remain silent. The principle of *nemo tenetur* is viewed as a 'lighter' version of the right to silence: no one may be obliged to make a statement against his- or herself, to assist with their own conviction, or be forced to co-operate with the authorities. No suspect can be obliged to speak, and the criminalisation of the refusal to cooperate is prohibited in Belgium. It remains unclear, however, how far the right not to cooperate effectively stretches. The case law seems to be moving, albeit slowly, in the direction of confining this right within narrower borders, particularly by excluding its applicability to the unlocking and decryption of digital devices.

The lack of written caution at the moment of arrest and the express duty for suspects to provide information in the context of digital investigations, pursuant to art 88*quater* § 1 CCP, are not the only idiosyncrasies of the Belgian legal structure in the context of the right to silence. Also of note are: (a) the possible inducement to breach the right to silence under art 216/1 vis-à-vis the discretionary powers of the public prosecutor to offer a reduction or mitigation in sentence; (b) the obscurity surrounding the definition of 'interrogation' and the consequences of this on both the caution and the obtaining of statements; (c) the role of voluntary statements; and (d) the unclear concept of coercion/pressure/trickery which renders a confession at odds with fair trial rights. Another element of obscurity is the extent to which judges can draw adverse inferences from the right to silence.

Accordingly, while Belgium is compliant with the main coordinates of the right to silence, at least on paper, it is not too much to suggest more could be done to clarify (and strengthen) this. The

109. Laurence Van Puyenbroeck, De invulling van het begrip ontoelaatbare druk bij het politioneel verdachtenverhoor. Praktische richtlijnen voor de bijstandverlenende advocaat [The interpretation of the concept of unacceptable pressure in police suspects' interrogation. Practical guidelines for the assisting lawyer] (2011) 1 *Reeks Veiligheidsstudies* 155.
110. Cf. Cass. 16 February 2016, the use of the right to silence doesn't hinder the investigative judge in his continued questioning'; Decaigny (n 108) 3–4; 89–91.
111. Pieter Tersago, *Verdachtenverklaringen in het strafproces: Een juridisch empirische verkenning van de wijze waarop strafrechters verdachtenverklaringen beoordelen* [Statements of suspects in the criminal trial: A legal empirical exploration of the way in which judges judge statements of suspects] (PhD thesis, University of Ghent 2019) 130.

question remains whether the law should go beyond the present offering of basic guarantee(s) of the right to silence and the privilege against self-incrimination: does such a paramount principle not deserve to be more clearly elucidated in some of its logical corollaries?

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