

## **International Association of Democratic Lawyers – Lawyering for people’s rights - IADL Congress Brussels – April 15-17 Brussels.**

### **Commission 5: The right on resistance, protest and organization.**

Jan Nolf (Hon. Justice of the Peace<sup>1</sup>) : The right on resistance, protest and organization in the context of MAS (Municipal Administrative Sanctions) in Belgium.

## **INTRODUCTION**

If this congress would have been held in Antwerp, MAS might be on your cultural agenda: a stunning building that houses the Museum Aan de Stroom (Museum Along the Stream) in its harbour.

I invite you to visit MAS and Antwerp anyway, but in another context. MAS is also the literal translation in English of the Dutch #GAS ‘Gemeentelijke Administratieve Sancties’ or the French #SAC ‘Sanctions Administratives Communales’.

And in that respect, Antwerp is the Belgian capital of MAS.

The third version of MAS was voted in a (Federal) Belgian law on May 30 2013 amidst general protest by the actual government coalition with the support of the biggest opposition party, the Flemish nationalist NV-A.

Just 2 examples to show you the extent of this protest:

- On May 30<sup>th</sup> 2013, the day of the vote, the 4 presidents of the youth movements of the parties in the government coalition published in De Morgen a joint appeal<sup>2</sup> not to vote the project of the new MAS-law, proposed by the government, and went so far as citing one of my legal opinions<sup>3</sup>;
- On March 31<sup>st</sup> 2014, the Flemish public television broadcasted its survey #FOTO14 about the worries of the public and their priorities for the next elections on May 25<sup>th</sup> 2014. Failing justice was the second top priority (after pensions and before health care) on all for 80% of the public. At the same times, confidence in Justice ranked 3<sup>rd</sup> last (22%), just before banks (18%). Overall there was a sentiment of injustice about rich versus poor for 82 %. Up to 78% were opposed to the MAS-sanctions. 70% were opposed to it in big cities and 77% in small ones.

In my opinion accompanying this survey, I concluded that MAS reflects for a large public the fundamental injustice of the justice system: Justice where the role of the independent, impartial judge erodes<sup>4</sup> and had become “a MAS-sanctions – shopping center”<sup>5</sup>.

So it is quite clear the MAS touches the very nerve of the citizen mood. Let’s now check why and what is all about, and finally focus on our topic: the right on resistance, protest and organization.

## **WHAT IS MAS ?**

**Administrative Sanctions** are not so exceptional as such.

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<sup>2</sup> De Morgen, 30 05 2013, ‘Jongerenvoorzitters meerderheid: "Wij passen voor de nieuwe GAS-wet’

<sup>3</sup> De Juristenkrant (Kluwer) 30 05 2012, p. 11, J. Nolf, ‘Administratieve Sancties, de tweede AS van Justitie ? ‘

<sup>4</sup> Read also on this : Folkert Jensma, ‘De rechter verliest terrein op het bestuur’, NRC Handelsblad 25 01 2014 ; my interview in Knack, 23 01 2013 ‘Rechters verliezen terrein. We evolueren langzaam naar een politiestaat’.

<sup>5</sup> VRTDeRedactie 31 03 2014 J. Nolf, ‘De haat-liefde verhouding met Justitie’.

They exist worldwide in specific sectors to regulate daily processing, foremost in specialised contexts as media<sup>6</sup>, transport<sup>7</sup>, environment<sup>8</sup>, and yes, Stock Exchange and banking. As I like to repeat, the last one is not a very assuring example. In Belgium this is organized by the FSMA<sup>9</sup>, the Financial Services and Markets Authority. One of Belgium's top economical opinion makers, Ivan Van de Cloot of Itinera Institute, cried out his anger about how FSMA failed to protect the clients of Dexia, losing tens of thousand million €<sup>10</sup>. That was even before the press discovered its reappointed boss, Jean-Paul Servais, received an illegal salary, which the government finally sliced down with 30%, ending at €290.000, but after the Rekenhof (Belgian Court of Audit) declared that the director "*was no help in any way in detecting (banking) risks, nor in noticing, nor in punishing negligences*"<sup>11</sup>.

The Romans used geese to guard the Capitol, they were so wise as not to use foxes to guard their chickenhouses ...

I described<sup>12</sup> those Administrative Sanctions, discussed in secretive pseudo-courts, with always the same lawyers in general as a form of 'bling-bling-justice'<sup>13</sup>, or as a technique of pushing the judge aside. It sure becomes an infringement on basic democratic rights when applied on average citizens.

**Municipal administrative sanctions** indeed elevate the problem on an even larger demographic scale, but discriminating the more.

First of all, there is the endless scope of sanctioning. For any thinkable – or unthinkable – silly fact, anyone can be fined by his/her local city administration. Together with the editor in chief of Knack.be I published the TOP100 of most absurd MAS in Belgium<sup>14</sup>. The examples vary from throwing snowballs, sitting on the wrong bench, or wrongly on a bench, to throwing a cherry nut. Finally, this is hardly funny. It illustrates what I called the mysophobia of conservative Flanders: the neurotic obsessive-compulsive disorder to clean<sup>15</sup> our streets and parks from all spontaneous behaviour. Although "some amount of chaos is human" I wrote<sup>16</sup>, and "even healthy" may I add.

However, there is much more. Zero-tolerance is about the best concealed technique of discrimination in security management as it pretends to strike at everyone at the same time in a given area but always hits selected populations. The same it goes with GAS, as the rules are designed to focus on young people and applied in that logic. The technique of VIP (Very Irritating Police) and the open demand of some

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<sup>6</sup> The Twitter – ban in Turkey, was originally a administrative order.

<sup>7</sup> In *Oceanic Steam Navigation Co. V. Stranahan*, 214 U.S. 320 (1909) the US Supreme Court already recognized it was commonplace for agencies tot exercise judicial type powers in imposing appropriate monetary penalties and enforcing such penalties.

<sup>8</sup> One of the earliest examples might be the French Basic Marine Fisheries Law of 1852, providing in addition to criminal sanctions, the power of the State representative in the region to suspend fishing licences.

<sup>9</sup> Text of its internet page : « *the successor to the CBFA, gains a more robust role in the supervision of the rules of conduct applicable to financial institutions, in view of ensuring that all clients are treated honestly, fairly and professionally* ».

<sup>10</sup> Knack, 02 03 2013 '*Herbenoeming topman financiële waakhond is slag in het gezicht*'.

<sup>11</sup> Knack 07 10 2013 '*Topman FSMA Jean-Paul Servais levert 30 procent loon in*'.

<sup>12</sup> De Juristenkrant (Kluwer) 30 05 2012, p. 11, J. Nolf, '*Administratieve Sancties, de tweede AS van Justitie ?*'

<sup>13</sup> Referring to the Sarkozy style and technique of settling the Tapie – Adidas claim in illegal arbitration with the agreement of then minister Lagarde : see my opinions LeVif/L'Express 29 10 2012 '*Christine Lagarde, docteur doloris causa*' ; Knack 02 11 2012 '*De kers op de fraudetaart*'.

<sup>14</sup> Knack 22 12 2013 '*Top 100 van de GAS-boetes, een klucht zonder weerga*' : LeVif/L'Express '23 12 2013 '*Le top 25 des SAC les plus absurdes*'.

<sup>15</sup> Remember the « Kärcher » of Sarkozy.

<sup>16</sup> Interview Kerk & Leven J. Nolf & L. De Weerd, 02 02 2014

police officers for the Mosquito device against ‘hanging-around-youngsters’ reads as a confession of anti-pedagogic and conflictual tactics by authorities themselves.

## HOW DOES MAS WORK: THE LEGAL ESSENTIALS

Only despots rely on fear and anyway, all concentration of power will once be misused, is the essence of **Montesquieu’s** teachings. This aspect seems to me the essential shortcoming of the MAS-system. Precisely because of anti-democratic fundamentals are part of its DNA, MAS-sanctions will corrupt the best of policies even with the best of politicians and the best of their intentions.

I will start however by admitting that finally the law of 2013 forbade the same city administrator could report behavior subject to MAS and also pronounce the MAS-fine itself. As we are now about 250 years – a quarter of a millennium after the death of the author of ‘L’Esprit des Lois’ is almost funny this change is seen by the MAS-defenders as a giant step towards a local respect of the Trias Politica<sup>17</sup>.

**The essence of the MAS-system is still that a local administrator and not an independent judge fines citizens with sanctions that are penal sanctions in the terms of art. 6 ECHR.**

When the Commission for the Interior of the Chamber of Representatives asked for written advice, I was not the only one making the point *“that elementary principles of the rule of law can not any more be explained to the young generation, confronted with #MAS. This turns out to be anti-pedagogic for our young and vulnerable citizens. Those are the seeds of cynism, frustration and revolt”*<sup>18</sup>.

The same position was held by the **Children’s Rights Commissioners** Bruno Van Obbergen<sup>19</sup> and Bernard De Vos<sup>20</sup>, and many academics, specialised in law and criminology, as **LINC** that devotes an academic web page to the subject<sup>21</sup>.

Only later, I discovered **all Attorney-Generals of Belgium** had made unanimously, exactly the same point, and I was glad to publish it their well hidden advice<sup>22</sup>.

It is very remarkable that the Government pushed the new MAS-law through Parliament in the urgency-procedure, which limited the advice of the **Council of State** to formalities. However, the failure of the Government’s legal project in guaranteeing a minimum of independence to the MAS-sanctioning city official was so flagrant the Council of State pointed at this blatant lack<sup>23</sup>.

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<sup>17</sup> As even in the note of the Legal Service to the Mayor of Ghent of 13 03 2014, p. 2.

<sup>18</sup> My report on demand of the Commission, 15 04 2013, p. 5, on line on justwatch.be, click GAS.

<sup>19</sup> The Office of the Children’s Rights Commissioner was created by Flemish Parliament Act. The Children’s Rights Commissioner is appointed by the Flemish Parliament. Within the limits of his powers, the Children’s Rights Commissioner does not receive instructions from any public authority. The Children’s Rights Commissioner is entirely independent in the exercise of his functions. The Office of the Children’s Rights Commissioner reports on its work through an annual report submitted to the Flemish Parliament.

<sup>20</sup> Idem for the French speaking part of Belgium, in relation to the other regional Parliaments.

<sup>21</sup> LINC stands for Leuven’s Instituut voor Criminologie, of the Faculty of Law of the Leuven University. On the web page ‘De faculteit en GAS’ you find their outstanding publications of professors D. Cops, S. Pleysier e.a.

<sup>22</sup> Knack 17 01 2014, J. Nolf, ‘De mysterieuze verdwijning van vernietigende adviezen van de justitietop over de wet op GAS-boetes’. Also published then in De Morgen, Het Laatste Nieuws, and 18 01 2014 in De Standaard ‘Negatief advies over GAS-wet werd nooit behandeld’, and frontpage Gazet van Antwerpen ‘GAS-boetes nog eens onder vuur’.

<sup>23</sup> Advice Council of State 28 01 2013, Chamber of Representatives, DOC 53 2712/001, p. 54 : « L’indépendance dépendant des garanties aménagées et des conditions dans lesquelles la mission à accomplir est exercée, l’avant-projet doit mieux préciser en quoi consiste l’indépendance du fonctionnaire sanctionnateur ».

The Government turned a blind eye to this advice and no amendments to repair this essential deficiency were accepted<sup>24</sup>. Finally the new MAS-law does not even directly mention the independence of the MAS-sanctioning city official: it merely refers<sup>25</sup> to the criteria on qualifications and independence, to be defined by a Royal Decree<sup>26</sup>.

When that **Royal Decree** was finally published, it failed to organize any minimum of a statute for the city official concerned, merely mentioning the word ‘independence’<sup>27</sup>. This hardly can be assuring, as art. 6 allowed the earlier appointed MAS-sanctioning officials to operate further, with the only obligation of participating in a legal training of a ridicule 20 hours, and are even exempted of any examination on it...

I may add many of them needed a more profound legal upgrade. Indeed, in my report to the Commission of the Interior of the Chamber I indicated incomprehensible errors and systematic negation of elementary rights of defense by MAS-city-officials.

One of the most flagrant abuses concerned thousands of MAS-fines, decided by officials who were not even entitled to do so, because they were part of **inter-city-agreements** that in the best of any legal hypothesis were only allowed since October 3<sup>rd</sup> 2013<sup>28</sup>. But no jurisprudence could halt them: the “independent” city officials did not listen for the very simple reason their mayors did not want to, even not after the strongest warnings of the very official (and pro-MAS) VVSG, the Flemish Union of Cities and Municipalities<sup>29</sup>.

**Of course, after being fined by this “independent” #MAS-sanctioning city official, you may want to try your case in a real court.**

Not so simple. Although this concerns penal sanctions, it is legally designed as a civil procedure (although in the Police Court, but the Civil, and not the Penal Chambers of it), where the papers of procedure build a huge barrier only 1 out of 1000 plaintiffs even try to pass<sup>30</sup>. This procedure is inaptly called an “appeal” although it is the first glance at the case by an independent judge.

If citizens do not succeed, they have to pay on the top of the MAS-fine the costs of the city lawyer à €1.320 (legal forfait)<sup>31</sup> on top of the costs à €40 they already had to pay at the Police Court to get the case notified.

As Latin seems to become the new Flemish language in justice, let’s call this ‘**timor litis**’: scare people the guts out of their rights. It will learn them never to dare to court again...

**SO, AS WE COULD PREDICT FROM THE LEGAL DNA OF #MAS, THE PROOF IS ALREADY IN THE PUDDING: THE RIGHTS OF RESISTANCE, PROTEST, AND ORGANISATION ARE IN CRITICAL DANGER**

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<sup>24</sup> Chamber of Representatives, Report DOC 53 2471/006, p. 60-62, mentioning remarks by Koenraad Degroote (N-VA) Eva Brems and Zoé Genot (Ecolo-Groen).

<sup>25</sup> Law of 24 06 2013, BS 01 07 2013, art. 6, §2.

<sup>26</sup> De facto decided and (co-)signed by the Minister of the Interior, thus the Executive Branch and not Parliament.

<sup>27</sup> KB 21 12 2013, BS 27 12 2013, art. 4 : »*le fonctionnaire sanctionnateur exerce en toute indépendance ses compétences* ».

<sup>28</sup> As I pointed out in my legal opinion in De Juristenkrant 26 02 2014 ‘*Het probleem is GAS, maar soms ook de ambtenaren*’, see also Knack 26 02 2014 ‘*Duizenden GAS-boetes illegaal uitgeschreven*’; Knack interview on the same problem 22 10 2012, following jurisprudence on that matter.

<sup>29</sup> In the VVSG advice of March 22, 2013, mentioned in my legal opinion in note 18. It may be noted for the record even the president of the VVSG, mayor of the city of Roeselare, did not even heed the advice of his own union.

<sup>30</sup> Interview De Morgen 28 10 2013.

<sup>31</sup> Knack 26 10 2013 J. Nolf, ‘3 redenen om tegen GAS te blijven’.

When the system does not stand up to the test of the Rule of Law, abuse, arbitrariness and discrimination is the inevitable consequence. In this logic, I will end with 10 recent examples in Belgium.

(1) **24 10 2011** Action of '**Geneeskunde voor het volk**' (Medical Care for the people) refused by Mayor of **Antwerp** (contrary to earlier years) and moved into a café, but still fined with MAS (first €150, later reduced to €75) on 04 05 2012. Acquittal by Police Court Antwerp on 19 03 2013.

(2) **15 04 2012** MAS-fines for Palestine protester at **Brussels Airport** declared illegal by Police Court Vilvoorde-Zaventem on 05 09 2013<sup>32</sup>.

(3) **21 07 2012** Flemish activists with Flemish flag on Belgian National holiday, fined with GAS by the City Secretary of **Brussels** (also MAS-official) but acquitted by the Brussels Police Court on 07 01 2014<sup>33</sup>.

(4) **25 09 2012 Antwerp** police finds on the street a booklet of the student organization UNIFAC at one km distance of the university campus. The student organization is fined with MAS. During the procedure in "appeal" before the Police Court, the fine is annulled to save the city a negative judgment in public. The organization was invited mid november 2013 by mayor Bart De Wever for 'a talk' on condition of secrecy to the press.

(5) **31 10 2012** Still pending in Police Court Genk (scheduled for May 12<sup>th</sup> 2014): PVDA action for **FORD Genk**<sup>34</sup>. At the KULeuven MAS-Congress on November 28<sup>th</sup> 2013, the mayor defended his position (or the one of his independent MAS-sanctioning city official) by explaining flyers of the PVDA-activists were not so much about the FORD-Genk social problems but about recruiting for their union cause. How criminal this might be...

(6) **27 05 2013 Antwerp, Monsanto protest**. Just a quote of my Law Blog<sup>35</sup> of that day: *"It was only arriving at the Groenplaats that other police cars closed in and a police zone appeared to have been organized to trap the remaining participants. Women with children and wheelchair patients were allowed to leave. 80 others were arrested, transported to police headquarters and confined in cells to be charged with a #GAS sanction, to be defined by the #GAS official of the city (between €50 - €250 now). An agent excused himself with the comment: "we are only the puppets on strings held high above us". I wondered on Twitter how long ago it was that such an overkill capacity of police officers was mobilized to attack tax fraud in Antwerp, where the diamond sector is at the heart of a long series of gigantic financial scandals"*.

But, no worries: the media scandal went so loud that after written questions in the City Council by PVDA<sup>36</sup> finally the fines were reconsidered<sup>37</sup>: just the intimidation of police power will remain. How media and politics help the #MAS-sanctioning official arriving at the right conclusion...

<sup>32</sup> Knack 10 09 2013 J. Nolf, 'Trein der traagheid waarmee rechtspraak gepubliceerd raakt, remt vernieuwing'.

<sup>33</sup> Knack 11 01 2014 J. Nolf, 'GAS-boete voor wie Vlaamse vlag ontplooit'.

<sup>34</sup> Het Nieuwsblad, 15 12 2012 'GAS-boete voor PVDA-militanten die flyers uitdelen'.

<sup>35</sup> Check Law Blog justwatch.be 27 05 2013 'Monsanto protesters fined with #GAS'. View also the You Tubes of police action then.

<sup>36</sup> By Peter Mertens (PVDA) on 27 09 2013; the cabinet of mayor Bart De Wever (N-VA) informed no sanction would be applied on 04 10 2013.

<sup>37</sup> Knack 09 11 2013 J. Nolf, 'Kille intimidaties illustreren echte bedoeling van GAS-boetes'.

(7) **22 07 2013 'Plasactie'** (woman organization urging against discrimination in urinoirs<sup>38</sup>) gets MAS à (2x) €250 in **Ghent** at their legitimate stand at the 'Gentse Feesten'. Reason: they had the right to sell ballpoints with their logo and 'plastuiten' (mobile urinoirs) but not ... the badges and calendars for their movement. Were seized immediately by the police: 7 badges, 45 calendars (in fact birthday posters) and 35 stickers. Case will be heard in "appeal" by the Police Court on 06 05 2014.

(8) **03 12 2013 Verviers:** MAS-fines for comment about police on newspaper web site<sup>39</sup>. Still under investigation. The MAS-official (the local City Secretary) did not answer my questions by mail.

(9) **05 04 2014 Wervik.** The mayor (!) wants a MAS-fine for the opposition party that staged a symbolic protest against the traffic problems: town hall was surrounded by white and blue police tape....<sup>40</sup>. Also here, the MAS official is the City Secretary himself.

(10...) **07 04 2014 Gent.** Mayor Termont announces he will not lower the MAS-age under 16, but installs "*warning letters*" by himself to children even under 12 years<sup>41</sup>.

#### **But I will conclude by a positive note.**

At least, there was a MAS-fine not given to a Brussels demonstration. The one against **Vredesactie** (Action for Peace) that painted the ministry of Defense red to the colour of blood. The Brussels City MAS-official did not react for what was an impressive street theater act against war. But Minister of War, alias #Crembo took over and claimed damages à €233 in a spectacular and expensive court case<sup>42</sup>. It ended with the Prosecutor himself asking for an acquittal of the organisation and the Brussels Court wisely followed on I noted in an opinion that judges are not 'tinnen soldaatjes' (miniature tin soldiers): this is exactly my hope and my appeal for the Rule of Law.

But it is my firm conviction that MAS-sanctions are in fact MASS-sanctions against free speech and democracy. Quite in the tradition of La Loi 78 au Quebec, also known as **la Loi Matraque**<sup>43</sup>.

It is no wonder this infamous MAS-law here, is under attack at the Belgian Constitutional Court on demand of the League for Human Rights, the Coalition for Children's Rights, and the two biggest syndicates.

Je finirai donc en français, et pas par hasard. Comme au Quebec, avec l'appui de la jeune génération, nous arrêterons cette dérive: au Nom de la Loi, non à la MASTraque.

<sup>38</sup> Read on an earlier procedure (Voorz. Rb. Gent 14 07 2011) by this group : Jogchum Vrielynck & prof. Stefan Sottiaux, 'Discriminatoire urinoirs : 'potty parity in België, De Juristenkrant 26 10 2011.

<sup>39</sup> Knack 03 12 2013 J. Nolf, 'Vrijheid van meningsuiting toevertrouwen aan GAS-ambtenaar is de democratie onwaardig'.

<sup>40</sup> Het Nieuwsblad 05 04 2014 'Burgemeester begeeft zich op glad ijs'; VRT Nieuws 'Burgemeester Wervik wil GAS-boete voor oppositiepartij.

<sup>41</sup> Knack, 08 04 2014 J. Nolf, Bureacratich paternalisme in Gent ; It must be said aotner mayor went so far as warning for MAS fines against specified citizens on his personal blog : Knack 21 02 2014, J. Nolf. Burgemeester De Block nagelt eigen burgers aan de schandpaal'.

<sup>42</sup> Knack 03 02 2014 J. Nolf, 'Pieter De Crem trekt ten oorlog voor 233,86€'; my Humo interview 04 02 2014 'De Poetin in Crembo'.

<sup>43</sup> VRTDeRedactie 22 05 2012 J. Nolf, 'Vive le Québec libre !'. Read on this : Le Devoir.com 18 05 2012 'Projet de loi 78 : des atteintes injustifiées aux libertés fondamentales, selon le Barreau'; Le Devoir.com 19 05 2012 'Le professeur de droit Charles-Maxime Panaccio dénonce une loi qui participe à la mise en place d'un régime de répression et de peur'; Mediapart 18 05 2012 'Face aux étudiants, le gouvernement québécois envisage « une loi spéciale »'.