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**LETTER FROM THE STATE SECRETARY FOR EDUCATION, CULTURE AND SCIENCE**

To the President of the Lower House of the States General.

The Hague, 22 June 2012

In this letter I respond to the advice of the Council for Culture given at my request about the restitution of works of art that were handed over under duress from the Nazi regime and that are now still in the possession of the State<sup>1</sup>

In this matter the Council sought advice from an ad hoc advisory committee consisting of Professor R.E.O. Ekkart (chair), H. d’Ancona, J.C.E. Belinfante and R.M. Naftaniel.

The Council’s advice first answers the question of whether and, if so, how a distinction should be made in the restitution policy with regard to the assessment of applications for the restitution of NK objects on the one hand and of applications for the restitution of artworks that belong to other parts of the Dutch National Art Collection on the other.<sup>2</sup>

The Council’s advice also addresses the question of whether and, if so, within what timeframe and how the restitution policy can be terminated.

I shall begin by describing the creation of the existing restitution policy and the background to my request for advice from the Council for Culture. I then give my reaction to the Council’s policy recommendations.

**Creation of existing restitution policy**

<sup>1</sup> Available for perusal in the Lower House's Central Information Centre.

<sup>2</sup> The NK collection stands for the *Netherlands Art Property Collection*. It is the remainder of the works of art that were returned from Germany to the Netherlands after the Second World War and are still in the possession of the Dutch State.

During the second half of the nineteen-nineties a debate arose in the Netherlands and other countries about possessions looted by the Nazis and the extent to which the post-war restoration of rights in the Netherlands had succeeded in making reparations for material injustice done to the victims of persecution. The investigations that the government had had conducted from 1997 onwards by various committees showed

- with hindsight and knowing what we know now - that the post-war restoration of rights was formalistic, bureaucratic and unfeeling. In its letter to the Lower House of 21 March 2000 the government fully recognized this and took the position that conclusions had to be drawn from it, including starting to assess restitution applications from rightful claimants or their surviving relatives.<sup>1</sup>

As regards government policy on the restitution of looted artworks, at that time the Origins Unknown Committee, chaired by Professor R.E.O. Ekkart, played an important role. Under the supervision of this committee, between 1997 and 2004 there was an investigation into the provenance of the NK collection and the working practices of the Netherlands Art Property Foundation (SNK), which was charged in the post-war years with the recovery and restitution of items of cultural value. The Ekkart Committee was also assigned the task, based on what had been learned during its investigation, of making recommendations to the government with regard to the restitution policy to be applied to works of art from the NK collection.

At that time the Ekkart Committee's recommendations were largely adopted by the government. They are the basis of a generous restitution policy that serves as an assessment framework for evaluating restitution applications. For example a flexible burden of proof is employed with respect to the ownership issue and all sales of artworks on or after 10 May 1940 (in the Netherlands) by people who belonged to a persecuted population group were considered in principle as forced sales. If the requirements for restitution are met, the disputed work of art is returned by the State to the rightful claimants. In this regard I request advice from the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, or the Restitutions Committee for short.

The Restitutions Committee, currently under the chairmanship of former Supreme Court President W.J.M. Davids, was established in 2001 in order to make the decision making about restitution as independent as possible. The Restitutions Committee's primary task is to advise the Minister of OCW (Education, Culture and Science) at the Minister's request about individual applications for restitution of artworks in the possession of the State.

In addition the Restitutions Committee gives opinions about restitution issues in which the State is not involved, such as claims to works of art in the collections of provincial or local authorities. The assessment framework used for such claims is different from the one employed for artworks held by the State. When addressing such requests, the Restitutions Committee advises on the basis of the 'yardsticks of reasonableness and fairness'.<sup>2</sup> Here the Restitutions Committee therefore has more discretionary assessment leeway. It can weigh up the interests of the different parties and it can also recommend solutions other than solely the return of the claimed artwork.

### **The NK collection as opposed to other works of art held by the State**

At the time the Ekkart Committee's policy recommendations were made with a view to the generous restitution of artworks from the NK collection. After all, the primary reason for the government's instructions to the Ekkart Committee was the criticism that had arisen in the community of the flawed post-war restitution policy concerning these works of art, which had been returned by the allies from Germany and entrusted to the Dutch State. In response to the first set of recommendations by the

<sup>1</sup> Parliamentary Papers II 1999–2000, 25 839, no. 13.

<sup>2</sup> See article 2, paragraph 5 of the Decree Establishing the Restitutions Committee.

Ekkart Committee the government decided at the time, however, that the more liberal restitutions policy would also apply to claims to artworks held by the State that are not in the NK collection.<sup>1</sup>

So far the Restitutions Committee has only assessed one such claim to works of art held by the State but not in the NK collection.. It is to be expected, though, that this number will increase as soon as the final results of the current museum investigation are published.<sup>2</sup>

As already stated, under the current policy the same restitution policy applies to all claims to objects held by the State, irrespective of whether it is a claim to an item in the NK collection or a claim to something in another part of the Dutch National Art Collection. The latter category, for example, also covers works of art that—unlike the NK collection—were not acquired until many years after the Second World War and through normal channels, such as purchase in good faith at an auction. The question therefore arises as to whether the difference in the way the latter category of works of art were acquired should be expressed in the restitution policy.

The Council for Culture makes two recommendations concerning this point, which I shall address below.

### **Recommendations 1 and 2: amendment of the restitution policy in regard to works of art that do not belong to the NK collection**

In its advice, the Council remarks that the current restitution policy is less suitable for handling claims to works of art held by the State that do not belong to the NK collection. This is because the existing policy provides no scope for making allowances in the result of a restitution case for the way in which a work was acquired by the State. Within the present policy framework, for example, it is not important whether an object was purchased many years after the war through normal channels. There is similarly no place for considering the interests of other parties who might be involved. When honouring a claim, the Restitutions Committee therefore has no choice but to recommend the return of the work of art concerned.

Things are different when handling claims to items that are not in the possession of the State, but are the property of a local authority, province, a museum foundation or other foundation. In this last category of cases, the Restitutions Committee advises on the basis of the yardsticks of 'reasonableness and fairness', as prescribed in article 2, paragraph 5 of the Decree Establishing the Restitutions Committee. In these cases the Committee has more leeway in its assessment and it can—apart from the restitution of a work of art without further ado—also recommend other desired solutions. The Council considers this dissimilar treatment of claims to works of art to be extremely confusing and undesirable.

The Council therefore recommends that the policy for claims to works of art held by the State (not being items in the NK collection) should be brought into line with that for handling claims to artworks in the possession of 'third parties'. To this end the Council recommends that the Restitutions Committee's task description, as specified in article 2 of the Decree Establishing the Restitutions Committee, should be amended. What the amendment of this article amounts to is that claims to works of art held by the State that are not in the NK collection should be assessed on the same basis as works of art held by parties other than the State.

I share the Council's opinion that the difference in provenance of the NK collection on the one hand and the normal State collections on the other justifies a more differentiated way to assess claims. In line with

<sup>1</sup> Parliamentary Papers II 2001–2002, 25 839, no. 28.

<sup>2</sup> Under the auspices of the Netherlands Museum Association, in 2009 the Dutch museum world started a four-year investigation into museum acquisitions during the 1933–1940 period and between 1948 and today. It is expected that the final results of this investigation will be published in mid-2013.

the advice I shall therefore amend the Restitutions Committee's task description in article 2 of the Decree Establishing the Restitutions Committee such that claims to works of art that do not belong to the NK collection can also be assessed by the Restitutions Committee in accordance with the broader assessment framework for non-State collections. This gives the Restitutions Committee greater scope to weigh up facts/circumstances and the different interests concerned, which in turn can be expressed in the formulation of the opinion.

It goes without saying that such a weighing up of interests becomes less appropriate the more likely it appears that the owner of a work of art had or could reasonably have had more knowledge about its possible suspect provenance when acquiring it. The possibility of knowledge about a suspect provenance is therefore a weighty factor. Although the Restitutions Committee is already taking this element into its considerations, I shall expressly refer to it in article 2 of the Decree Establishing the Restitutions Committee.<sup>1</sup> In it I shall state that the Restitutions Committee will give great weight in its considerations to the circumstances of the acquisition by the owner and the possibility that there was knowledge about the suspect provenance of the item of cultural value concerned at the time of the acquisition.

Under this new policy the Committee will also always be able to recommend restitution (unreservedly) of a tainted work of art, but it will also be able to recommend another satisfactory solution. The outcome depends on the specific facts and circumstances of every individual case. I therefore endorse the opinion of the Council that it is undesirable to give the Restitutions Committee a list of assessment criteria beforehand. It emerges from the Restitutions Committee's work over the last ten years that it can give excellent substance to the concepts of reasonableness and fairness.<sup>2</sup>

A broader assessment framework like this likewise does justice to the Washington Principles on Nazi Confiscated Art, according to which the restitutions policy must be aimed at achieving 'a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case'.

### **Recommendation 3: time limit for claims**

<sup>1</sup> In this regard see article 3 of the Committee's Regulations for opinion procedure under article 2, paragraph 2, and article 4, paragraph 2 of the Decree Establishing the Restitutions Committee. Available on [www.restitutiecommissie.nl](http://www.restitutiecommissie.nl).

<sup>2</sup> See for example the Restitutions Committee's binding opinion in the case of *A Prayer before Supper* by Jan Toorop formerly in the possession of E. Flersheim in the possession of the Zeeuws Museum Foundation ([http://www.restitutiecommissie.nl/rc\\_3.45/bindend\\_advies\\_rc\\_3.45.html](http://www.restitutiecommissie.nl/rc_3.45/bindend_advies_rc_3.45.html)).

<sup>3</sup> Parliamentary Papers II 2004–2005, 25 839, no. 36.

<sup>4</sup> Parliamentary Papers II 2008–2009, 25 839, no. 40.

<sup>5</sup> The Rijksmuseum in Amsterdam has stated that it needs more time to investigate its collection, which includes over 100,000 objects. It is expected that the Rijksmuseum in Amsterdam will have investigated its paintings and drawings - an important part of its collection - in the first half of 2013. The other parts of the collection will then follow.

In its final recommendations of December 2004 the then Ekkart Committee proposed a time limit for submitting restitution applications under the more liberal restitutions policy of two years after publication of the government's response to these final recommendations in the Netherlands Government Gazette.<sup>3</sup> The closing date for the more liberal restitutions policy was consequently 4 April 2007. The date of 4 April 2007 emerged as being too soon, however, in view of the unexpectedly large number of claims that were submitted after 4 April 2007 and the national and international criticism that arose about the introduction of this closing date. The government therefore then decided to continue the more liberal restitutions policy for the time being.<sup>4</sup> This decision was partly prompted by the national museum investigation and the assessment of claims that have yet to arise from it. At the time, the government decided not to set a closing date for the restitution policy and to wait for the results of the museum investigation first.

It is expected that the final results of this investigation will be published in mid-2013, with the exception of one single museum.<sup>5</sup> In view of this I have asked the Council to give me advice about the question of what time limit for claims would be reasonable.

According to the Council it is still too early to determine a closing date for the restitution policy. As yet there is barely any discussion in international restitution circles about closing dates and opinions are even expressed on a regular basis that there cannot be a closing date. If the Netherlands were to shut down its restitution machinery independently, it would therefore encounter international incomprehension. The Council takes the view that a time limit for claims cannot be determined until international consensus about it has developed.

I endorse the Council's advice. Indeed, the Washington Principles, which were adopted in 1998, are still applicable in full as the international standard for restitution issues. As recently as 2009 the Washington Principles were reconfirmed during an international conference in Prague, resulting in the Terezin Declaration. In view of the international dimension of the restitution question, I agree with the Council that termination of the possibility of submitting claims cannot be considered until there is international consensus about it that replaces the Washington Principles.

Nevertheless the Council considers that a change to the current restitution policy for the NK collection would be appropriate within a few years. Below I address the recommendation the Council makes in this regard.

### **Recommendation 3: change of the restitution policy for items in the NK collection**

In the Council's opinion the fact that a time limit for claims is not on the table for the time being does not mean that the more liberal restitutions policy for the NK collection needs to be drawn out indefinitely. In the opinion of the Council, the more liberal restitutions policy can be terminated two years after the full results of the current museum study have been published, provided that a hardship clause is incorporated for distressing new cases. This hardship clause would also apply to cases in which new facts come to light and in which the claimant can prove that he or she could not have submitted the claim any earlier. In the assessment of claims that meet these requirements, consideration can then be given to whether they can be dealt with according to the yardsticks of reasonableness and fairness through the application of aspects of the more liberal restitutions policy. This is recommendation 3 in the Council's advice.

All things considered, what this recommendation means is that the present restitution policy with regard to the NK collection will be given a different form as of mid-2015 (two years after the publication of the final results of the museum study ) in the sense that claims to NK objects from then on will also be dealt with within the assessment framework discussed above with regard to recommendations 2 and 3, in which multiple interests can be weighed up.

I agree with this recommendation. This means that with effect from 30 June 2015 the claims to items in the NK collection will also be evaluated according to the yardsticks of reasonableness and fairness. As a result of this there will be one policy for all works of art held by the State, whether they are in the NK collection or another State collection.

Needless to say, the Restitutions Committee can take the specific provenance of works of art into account during the substantive assessment of a claim. This means that considerable weight will be given to the fact that a particular item comes from the NK collection. It goes without saying that there is also scope to permit a flexible approach, for example to the burden of proof

in respect of the descendants of persecuted groups in the population when it comes to evidence of ownership and involuntary loss of possession. Substantive aspects such as these, which are also part of the current NK policy, remain important. But the degree to which these aspects are applied depends on the specific cases that are being addressed. I am willing to leave these considerations as they relate to specific cases to the Restitutions Committee.

I also strongly prefer this last approach with regard to weighing up whether a particular case can be described as 'distressing'. The Council suggests using this criterion as an entry requirement for a claim (admissibility). However, I would prefer to include such considerations in the Restitutions Committee's overall task of *substantively* weighing up facts and circumstances. For example, during the assessment of claims to items not held by the State, the Restitutions Committee already takes into account the degree to which a claimant has made efforts to recover the artwork and the importance of a particular artwork to the museum collection concerned.

As regards the formal criteria for dealing with claims (admissibility), I employ the existing government policy, which for that matter was also applicable before the more liberal restitutions policy.<sup>1</sup> Summarizing, this means that restitution applications will continue to be dealt with after 30 June 2015 if:

- it is a new application, in other words not an application that has already been dealt with by means of a decision by a competent restoration of rights authority or through amicable restoration of rights (settlement);
- it concerns an application that has already been dealt with in the context of restoration of rights in regard to which new, relevant facts ('nova') have become known.

Incidentally it is expected that the number of claims to artworks in the NK collection will slowly but surely dry up. A great deal of work has already been done over the last ten years. Only a couple of claims to works of art in the NK collection have been submitted during the last two years. The new NK policy, which will come into effect on 30 June 2015, will therefore most probably only concern a few incidental claims.

#### **Recommendation 4: lifetime of the Restitutions Committee**

Finally the Council makes a supplementary recommendation about the lifetime of the Restitutions Committee. The Council recommends retaining the Restitutions Committee until all claims submitted within two years after the museum study have been dealt with. As regards incidental claims that are submitted thereafter, the government could seek advice from an ad hoc committee.

This concerns an organizational measure that has no affect on the duration of the restitution issue. It is indeed my intention in any event to get the Restitutions Committee to deal with claims that arise out of the museum study. In my opinion the handling of restitution claims, including those involving provincial and local authorities, by the Restitutions Committee always represents a proper response to the international call for alternative dispute resolution and independent research.

It is not yet possible to estimate how many claims will arise out of the museum investigation because the results of the research are still awaited. The period of two years after completion of the museum study referred to by the Council is a realistic prospect. Unless the number of claims turns out to be small, the Restitutions Committee and its

<sup>1</sup> Parliamentary Papers II 1999–2000, 25 839, no. 16; Parliamentary Papers II, 2000–2001, 25 839, nos. 26 and 27.

office will need the current research capacity for the time being. As the Restitutions Committee's workload decreases, the organization around the Committee can nevertheless be changed at any desired moment. I shall continue to consult with the Restitutions Committee about this in the future. If, at a certain point, there are only incidental claims, a switch can be made to an ad hoc committee.

The State Secretary for Education, Culture and Science,  
H. Zijlstra