Origins Unknown

Recommendations Ekkart Committee

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RECOMMENDATIONS REGARDING THE RESTITUTION OF WORKS OF ART

Recommendations:

1. The committee recommends that the notion of "settled cases" be restricted to those cases in which the Council for the Restoration of Property Rights or another competent court has pronounced judgment or in which a formal settlement was made between the lawful owners and the bodies which in hierarchy rank above the SNK.

2. The committee recommends that the notion of *new facts* be given a broader interpretation than has been the usual policy so far and that the notion be extended to include any differences compared to judgments pronounced by the Council for the Restoration of Property Rights as well as the results of changed (historic) views of justice and the consequences of the policy conducted at the time.

3. The Committee recommends that sales of works of art by Jewish private persons in the Netherlands from 10 May 1940 onwards be treated as forced sales, unless there is express evidence to the contrary. The same principle should be applied in respect of sales by Jewish private persons in Germany and Austria from 1933 and 1938 onwards, respectively.

4. The Committee recommends that the sales proceeds be brought into the discussion only if and to the extent that the then seller or his heirs actually obtained the free disposal of said proceeds.

5. The Committee recommends that for the purposes of applying this rule the rightful claimants be given the benefit of the doubt whenever it is uncertain whether the seller actually enjoyed the proceeds.

6. The Committee recommends that whenever it is necessary to couple a restitution to the partial or full repayment of the sales proceeds, the amount involved be indexed in accordance with the general price-index figure.

7. The Committee recommends that the authorities, when restituting works of art, refrain from passing on the administration costs fixed by the SNK at the time.

8. The Committee recommends that a work of art be restituted if the title thereto has been proved with a high degree of probability and there are no indications of the contrary.

9. The Committee recommends that owners who did not use an earlier opportunity of repurchasing works of art be reafforded such opportunity, at any rate insofar as the works of art do not qualify for restitution without any financial compensation according to other applicable criterions.

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1. Introduction

The primary task of the supervisory committee*: Origins Unknown,* usually designated as the Ekkart Committee, is to instigate investigations into the provenance of what is known as the NK collection, which consists of the works of art repatriated from Germany after World War II that are still in the custody of the State. In addition, the committee has been assigned the task of investigating the working methods of the Netherlands Art Property Foundation (abbreviated as "SNK") which in the years 1945-1952 was responsible for the recovery and restitution of works of art; and the task of making recommendations to the Dutch government, based on the insights gained by the research, for the policy to be pursued on the restitution of works of art of the NK collection.

The investigations into the provenance of the individual works of art were initiated in September 1998. Research is carried out under the substantive responsibility of the Committee by the project bureau *Origins Unknown*, which comes under the jurisdiction of Cultural Heritage Inspectorate. In the mean time two subreports (dated October 1999 and October 2000) have been published, recording the traced provenance information of approximately 1000 items. As from the end of April 2001 the information contained in the subreports will also be available on the Internet in two languages. The provenance research will be completed in the autumn of 2002. The historical inquiry into the SNK, carried out by two researchers of the same project bureau, has also been taken in hand and will be completed in the autumn of 2001.

Initially, the intention was to include the restitution policy recommendations to the government in the Committee's final report, which is expected in the fourth quarter of 2002 after the completion of the provenance investigations. The Committee believes, however, that it is extremely desirable to speed up the restitution policy advisory process, provided that this does not harm the carefulness with which the process is carried out. The Committee is confirmed in its view by the concern, appearing from the questions asked by several parliamentary parties in February of this year, that the restitution process will be

seriously hampered if a revised restitution policy is too long in forthcoming. In spite of the fact that the investigations into the provenance of the works of art of the NK collection are still in full progress, as is the historical inquiry into the working method of the SNK that is partially based on these investigations, the Committee has decided to submit part of its recommendations ahead of its final report and to bring forward its report on those inter-related aspects of the restitution policy that have already been sufficiently clarified by the research done so far. This phased presentation of recommendations is aimed at giving the government the opportunity to adopt a new policy for immediate implementation, allowing at least part of the restitution cases to be settled in the near future based on the wider criterions which are considered advisable.

It is true that at the present stage of the investigations it is not yet feasible to present balanced and unambiguous policy recommendations regarding certain elements of the restitution policy, for instance with respect to the Jewish art shops that were placed under the supervision of Verwalters; yet thanks to the work done so far we now do have a clear picture of the policies to be followed with respect to private Jewish art property which got out of the owners' possession during the war years. Since the Ekkart Committee holds the opinion that precisely this aspect is a matter of the greatest urgency, this first set of its recommendations is devoted to this aspect. The designation private art property is used here to include all art works owned for non-commercial purposes, whether held as purely private property or with legal title vested in the collector's family business.

We state emphatically that the fact that we are not yet making any recommendations about other aspects must not have the effect of postponing decisions on cases which already qualify for restitution under the policy that has been followed so far by the government, as set forth in the letter dated 14 July 2000 from the State Secretary of Education, Culture and Science to the Speaker of the Lower Chamber of Parliament. It is only in the case of claims belonging to a category on which the Committee has not yet made any recommendations and falling outside the scope of the restitution policy currently followed by the government, that it may be advisable for the State Secretary to defer his decision until a revised policy has been adopted in respect of the category in question as well. This applies in particular, therefore, to claims concerning works of art sold in the war years by Jewish art dealers.

2. General research findings

In general, the research work done since September 1998 in implementation of the project *Origins Unknown* confirms the conclusions laid down in the pilot study report of April 1998. Meticulous provenance research often makes it possible to recover information concerning the history of works of art that was unknown to the SNK and in some cases such new information will produce evidence of property having been lost involuntarily while the rightful owners did not submit a claim for such loss after the war. In some cases it also turns out to be possible after all to establish a link between objects still present and objects whose involuntarily loss was reported by the original owners but which were not recognised at the time. In such cases the concepts of *new claim* and *new facts* used in the current government restitution policy may serve to initiate a restitution procedure.

As was already observed in the pilot study report, apart from the items referred to above there are many items whose origin can be traced with certainty and which came into German hands for instance because they were sold voluntarily by Dutch persons not belonging to the persecuted population groups and which therefore came and remained in the custody of the Dutch State quite lawfully after their recuperation. The investigations also confirm the finding that there is a large number of works of art from the NK collection for which it is impossible to reconstruct a full provenance history, so that only reactions to the publication of the information that is now available may cause evidence of the possible involuntary loss of the property to emerge. For this reason the full publication of the research that has been done so far in reports including publication via the Internet must still be considered an important instrument for discovering cases of looting, confiscation and forced sale. The fact that the investigations occasionally make it possible to unearth unknown and/or unidentified information which may lead to restitutions makes it clear that these investigations must be continued and completed in conformity with the project plan. At the same time, moreover, the investigations are producing a lot of information about the methods used for the restitution of works of art in the years 1945-1952 and thus provide material for formulating recommendations to the government on the policy to be conducted henceforth.

The findings are entirely in agreement with those of other government committees that have tackled the issues of war losses and restoration of property rights. In general, the

finding of the Scholten Committee that in several respects the system of legal restitution was characterised by a strictly bureaucratic approach without any flexibility and turning a blind eye on the exceptional position and interests of the victims, is very much applicable to the conduct of the Netherlands Art Property Foundation (hereinafter referred to as the SNK). The remarks of the Kordes Committee about the formal and businesslike approach taken by the authorities and others are fully applicable to the SNK, while the critical comments of the same committee about the fact that the administration costs of the system for the restoration of property rights were charged to Jewish estates are directly applicable to the guidelines adopted by the SNK for charging the costs of the art restitution process to the rightful owners when restituting works of art.
Based on our examination of the documents relating to a great number of post-war claims we must describe the way in which the Netherlands Art Property Foundation generally dealt with the problems of restitution as legalistic, bureaucratic, cold and often even callous.

3. Private art property: basic principles

The current restitution policy of the Dutch government in respect of items from the NK collection is based on the principle that a claim may be submitted only if it is a *new claim* or if *new facts* have become available in respect of a claim already dealt with before. Another condition is that the rightful owner must have lost the property *involuntarily*. Of these requirements only the notion of *new claim* is capable of unambiguous and systematic application. Different views may be held of the concept of *new facts*, while different interpretations of the concept of *involuntary loss of the property* were already used as early as in the period 1945-1952.

The general government position on World War II Assets dated 21 March 2000 is based on the principle that the process of restoring property rights will not as such be repeated. It follows that *settled cases* will not be reopened. Since there may be serious uncertainty about the question what must be considered to fall within the category of settled cases, the committee, having examined a large number of files, recommends that the term "settled case" be restricted to the two categories regarding which a general consensus does exist, namely judicial decisions and formal settlements made between the bodies which in hierarchy rank above the SNK (Council for the Restoration of Property Rights and the

Netherlands Custodian Office) and claimants and signed by both parties. Formal settlements made at a later date with the Kingdom of the Netherlands likewise belong to the category of settled cases. According to this view a decision taken by the SNK does not make a case a settled case, and even less does an unsigned note made by an SNK official on a document stating that the case has been (officially) settled. On the same principle decisions of the SNK followed by a letter from the claimants communicating that under the conditions stipulated by the SNK they have decided not to accept restitution, likewise do not fall within the category of formal settlements.

It has been found that in only a few cases claims refused by the SNK were eventually submitted to the court, in this case the Judicial Division of the Council for the Restoration of Property. This happened mainly in a period in which the SNK already considered most cases as closed. It is the opinion of the committee that the judgments given in these cases must be viewed as containing criterions for reviewing the assessments by the SNK that were never submitted to the court by the claimants concerned. The resulting differences between judicial judgments and SNK decisions must be considered to constitute *new facts* in any claims that may be submitted. A judgment like the one given in the Gutmann case (1952), for instance, expresses a clearly broader interpretation of the notion of involuntary loss of the property than was usually given to the notion by the SNK. This is expressed in the finding that a sale "under the influence of the special circumstances of the war" also qualifies for annulment. Although the other judicial judgments may operate less directly as precedents, they do make it clear that the courts took a more lenient view of the matter than the SNK (see e.g. the judgment in the case of Rebholtz, 1953, which annulled the decisions of the SNK and the Netherlands Custodian Office). Whenever a claim is submitted by a claimant who invokes such a judgment and makes a reasonable case for the view that the application of the norms used in that judgment might have resulted in a different decision than the one taken by the SNK, such claim should qualify for consideration on these grounds.

The concept of *new facts* must likewise be given a broader interpretation than has been customary so far, since at present only new, hard facts about the history of the work of art, i.e. new information obtained from the provenance research, are considered to be *new facts*.

Although we must take great care that the application of new norms does not result in legal inequality in comparison to cases fully disposed of at the time, it must also be examined whether according to our present-day sense of justice the methods used by the SNK at the time are sufficiently in agreement with the then existing legal principles as laid down in Royal Decree E 100. There is no need to call into question these basic principles of the restitution policy, but we should examine their implementation by the SNK. In this connection it is important to point out that the ministries involved never gave the draft guidelines set up in late 1946 by the SNK based on the informal 1945 guidelines to help establish the foundation's actual procedure, the official status of instructions to the SNK. It is clear, moreover, that these draft guidelines, which the SNK by all appearances used in practice as rules of conduct, also left much room for different interpretations.

Summarising, it may be stated that the criterions used by the government for not pleading the statute of limitation in respect of claims are practicable, but that the notions of *settled case* and *new facts* need to be given a broader interpretation.
In addition the committee would like to make recommendations for the following points:
- the interpretation of the term forced sale (§ 4)
- the need to repay the sales price (§ 5)
- the use of the concept of proof (§ 6).

Furthermore, a recommendation will be made in respect of a rule which is not laid down anywhere but which the investigations show the SNK to have applied in practice, viz. that where the SNK was willing to restitute an object, the right to "repurchase" the object was valid only for a short period (§ 7).

Recommendations:

- **The committee recommends that the notion of "settled cases" be restricted to those cases in which the Council for the Restoration of Property Rights or another competent court has pronounced judgment or in which a formal settlement was made between the lawful owners and the bodies which in hierarchy rank above the SNK.**

- **The committee recommends that the notion of *new facts* be given a broader interpretation than has been the usual policy so far and that the notion be extended to include any differences compared to judgments pronounced by the Council for the Restoration of Property Rights as well as the results of changed (historic) views of justice and the consequences of the policy adopted at the time.**

4. Forced sale

Article 11 of the last draft of the *General Policy Guidelines for the Netherlands Art Property Foundation* of 1946 formulates as a condition for restitution that "there must be no doubt as to the involuntary nature of the loss of the property". In explanation hereof the same article 11 adds:

> "Involuntary loss of the property will be basically defined as cases in which the original owners did not lend their co-operation to the loss of the work or works of art belonging to them. Cases will also be included in which such co-operation was given, but where it can be demonstrated to the satisfaction of the Foundation that this took place under force, duress or improper influence, direct or indirect, of the enemy. If in the opinion of the Foundation the conditions stated here have not been satisfied, no restitution shall be made for as long as the claims of the applicants have not been recognised by the competent court."

In carrying out its activities the SNK seems to have acted in accordance with this rather narrow definition of the term "involuntary loss of the property".
It must also be recalled, moreover, that a very high number of registration forms about war-time sales of works of art were filled out by the SNK itself by way of "internal registration forms" and that consequently the only significance that may be attached to the designation *free sale* on such forms is that this was the view taken by the SNK.

It was already pointed out before that only very few cases were eventually submitted to the courts, but there is at least one judgment which makes it clear that the courts took a broader position in this matter than the SNK. This is the judgment given on 1 July 1952 by the Council for the Restoration of Property Rights in the Gutmann case. In this judgment the Council reversed the judgment of the SNK that sales made in 1941 and in the first quarter of 1942 could not have been forced sales. In reaching its decision the Council took the

ground that even though the buyers of the works of art may not have used any direct coercion, the special circumstances might nevertheless warrant the plea of forced sale. This judgment provides an unambiguous basis for a policy principle to the effect that the characterisation of forced sale may be applied to all sales of works of art by Dutch Jews from 10 May 1940 onwards, unless there is express evidence to the contrary. For the fact is that often the driving motives for selling off works of art consisted of existing or imminent measures of the occupying forces ordering the surrender of works of art to an occupation agency and the fact that possessions left behind be a person fleeing to save his life would be confiscated. So in this respect it is immaterial whether the initiative for the sale came from the buyer or from the seller and likewise immaterial whether the buyer must be deemed to have been acting in good faith or in bad faith. Sales by Jewish owners in Germany and Austria from 1933 and 1938 onwards, respectively, can also be deemed to have been forced sales except for proof to the contrary.
In the case of other private persons the current principle, viz. that it must be proved that a sale was definitely or in all probability made involuntarily, will continue to apply.

Recommendation:

- **The Committee recommends that sales of works of art by Jewish private persons in the Netherlands from 10 May 1940 onwards be treated as forced sales, unless there is express evidence to the contrary. The same principle should be applied in respect of sales by Jewish private persons in Germany and Austria from 1933 and 1938 onwards, respectively.**

5. Repayment of sales proceeds

As already stated, one of the features of the SNK policy was that in the case of works of art that had been sold, the owner had to refund the price paid therefor if he wanted to repossess the works of art sold involuntarily. The Committee holds that the strict application of this principle can only be described as extremely cold and unjust, in particular because many Jewish owners used the proceeds exclusively to try and flee the country and because in many cases the proceeds did not actually benefit the owners of the works of art.

Although it would seem to be a simple solution just to refrain from demanding any repayment, in the opinion of the Committee this would conflict with the principles of equality before the law, since in the years after 1945 some owners of works of art did in fact repay the asked price and since it was precisely the requirement of repayment which in many cases presented an obstacle that frustrated the actual restitution of works of art. Entirely declining all repayments would therefore be diametrically opposed to the principles of the restoration of property rights applying at the time and would stamp with pointlessness the efforts of rightful claimants who in those days scraped together money, often clearly at very great pains, to buy back works of art. It is however necessary to relax the implementation of the repayment rule considerably. The basic principle governing this point should be that repayment of the sales proceeds is required only if it can be proved that the then owners or their heirs received money which they were free to spend, including any sums used in repayment of prior, normal debts or loans. There are no grounds for requiring any repayment in all cases in which the money received was probably spent solely on attempts, whether or not successful, to leave the country or to go into hiding. Likewise, no repayment should be demanded if the sales proceeds never directly reached the persons entitled (payment into an inaccessible account).

Such a relaxation of the rules is entirely within the policy lines established after the war, since article 27(5) of Royal Decree E 100 (Restitution of Legal Rights Decree) provides expressly that the Council for the Restoration of Property Rights "*may* direct that the sales price must be transferred in part or in full to the State (…)", contrary to an earlier wording of this article which provided for the compulsory reclamation of the sales price.

Under the rules of such a policy, only sums received in connection with forced sales that actually accrued to the seller's capital as well as sums received after the war by the entitled parties by way of payment of blocked accounts would have to be repaid, at any rate to the extent that there is any certainty on these points. In deciding whether there are grounds for demanding repayment, the rightful claimants should, where necessary, always be given the benefit of the doubt: if there are sufficient grounds to doubt whether the party concerned actually made some money out of a sale at the time, no repayment should be required.

If the inquiry results in the conclusion that it is justified to require partial or full repayment of the sales price, such repayment should be indexed in conformity with the general price-

index figure. Such indexation is necessary for the sake of equality before the law compared to those who did buy back their property in the after-war years and will moreover prevent extra profits being gained now by those who at the time very consciously opted for money instead of restitution of works of art. The Committee is aware that for some rightful claimants changes in the market value of the individual works of art concerned may bring either a profit or a loss, but it sees no possible way of also incorporating this factor, which varies from one object to the next, in a general policy,
Any sums still to be paid should be appropriated to a specific cause, which may be identified at a later stage. In the opinion of the Committee these sums must not be added to the general public fund in order to avoid even the semblance of any profit coming to the State from the sufferings of war.

The Ekkart Committee, like the Kordes Committee, takes an extremely critical attitude toward passing on the costs of the restitution machinery to the rightful claimants, as the SNK did in the years 1945-1952 because the Dutch government expected the foundation to be self-supporting in the matter of costs. Whenever a restitution is made, whether or not coupled to repayment of the sales price, the authorities should always refrain from charging any such costs.

Recommendations:

- **The Committee recommends that the sales proceeds be brought into the discussion only if and to the extent that the then seller or his heirs actually obtained the free disposal of said proceeds.**

- **The Committee recommends that for the purposes of applying this rule the rightful claimants be given the benefit of the doubt whenever it is uncertain whether the seller actually enjoyed the proceeds.**

- **The Committee recommends that whenever it is necessary to couple a restitution to the partial or full repayment of the sales proceeds, the amount involved be indexed in accordance with the general price-index figure.**

- **The Committee recommends that the authorities, when restituting works of art, refrain from passing on the administration costs fixed by the SNK at the time.**

6. Proof of title

It is clear that it will often be difficult to produce conclusive evidence of title and of the truth of the facts stated by the former owners concerning the loss of the property, among other things because in many cases the relative documentary evidence will have been lost due to the war situation. In assessing the evidence the benefit of the doubt should be given to the private person and not to the State. When it is proved that a claim is probably valid and there are no indications of the contrary, the claim should not meet with a blunt refusal. In this type of cases the judgment given by the Council for the Restoration of Property Rights in the Rebholtz judgment of 23 November 1953 may be taken as a precedent; one of the grounds taken in this judgment reads as follows: "Whereas with respect to this issue: in the first place the Council holds that the applicants have produced sufficient prima facie evidence that the painting at issue was the property of Mrs Rebholtz, while it is not possible to infer sufficient indications of the contrary from the exhibits submitted in evidence by the State after the oral hearing; furthermore ….".

Nevertheless, a more lenient interpretation of the concept of "proof" must leave fully intact one basic principle that was quite rightly applied by the SNK, namely that "there must be no mutually inconsistent claims submitted and there should be no reason to suppose that such claims will be entered in the future" (draft Guidelines SNK, article 11(b). This basic principle led to the requirement, which was also applied by the SNK, that the restitution of a work of art must be preceded by a careful examination whether there is sufficient certainty that the claim does in fact relate to the designated work of art. Based on the present research it may be added that it must also be examined, perhaps more thoroughly than was done by the SNK, whether the work of art in question may not have changed hands involuntarily a second time during the war. Cases of conflicting claims should be submitted to the regular courts or to arbitration.

Recommendation:

- **The Committee recommends that a work of art be restituted if the title thereto has been proved with a high degree of probability and there are no indications of the contrary.**

7. Period allowed for repurchasing

The research done so far has revealed a number of cases in which the SNK recognised claims to recovered items and gave the rightful claimants the opportunity to "repurchase" these items, which items were however never actually restituted. In some cases there is a letter from or on behalf of the owners saying that they have decided not to make use of the opportunity offered them in view of the conditions attached thereto, sometimes there are only indirect indications that the owners renounced their rights.
In some cases owners who initially did not have sufficient funds to repurchase their property, subsequently still tried to do so on the conditions stated on the earlier occasion. In 1958 the application of Wassermann was refused over the telephone following an opinion of the State Inspector that restitution would create a precedent (Subreport of October 2000, p. 109) and the applications of Busch were likewise refused in 1965 and in 1973, in 1965 among other things based on an opinion of the State Inspector that "it is desirable for the painting of Floris van Schooten to be retained in the possession of the State " (Subreport of October 2000, p. 71).

If the policy criterions are revised in conformity with the recommendation set forth in § 5, it is probable that in some of such cases the condition of repayment of the sales price would no longer apply. Where such a condition would still apply, it is advisable in accordance with the above recommendations to allow the rightful claimants an ample period, to be determined at a later stage, in which they may still repurchase the works of art in all those cases in which the owners were given the opportunity of repurchasing works of art and in which no formal settlement was made but the owners merely acquiesced in the fact that they were forced to decide not to use the opportunity offered by the SNK. For this purpose, moreover, the recommendations for price indexation and not passing on administration costs set forth in § 5 must also be taken into account.

Recommendation:

- **The Committee recommends that owners who did not use an earlier opportunity of repurchasing works of art be reafforded such opportunity, at any rate insofar as the works of art do not qualify for restitution without any financial compensation according to other applicable criterions.**