

25 839**Claims from the Second World War**

No. 41

**LETTER FROM THE STATE SECRETARY FOR EDUCATION,
CULTURE AND SCIENCE****To the President of the House of Representatives of the States-General****The Hague, 22 June 2012**

This letter sets out my reaction to the advisory opinion published by the Council for Culture at my request concerning the policy towards the restitution of works of art that were surrendered by the owners under duress from the Nazi regime and which are currently still in the possession of the State.¹

The Council was advised in this matter by an ad hoc advisory committee comprising Professor R.E.O. Ekkart (chair), H. d'Ancona, J.C.E. Belinfante and R.M. Naftaniel.

The Council's advisory opinion first answers the question of whether, and if so how, a distinction should be made in the policy on restitution between the treatment of requests for restitution of works that are now part of the National Art Property Collection (the so-called NK Collection)² and of claims for restitution relating to works of art belonging to other parts of the National Art Collection.

The Council's advisory opinion also addresses the issue of whether, and if so, how and within what period the restitution policy can be terminated.

In this letter I shall first explain the history of the existing restitution policy and the background to my request for the Council of Culture's opinion, before giving my reaction to the Council's policy recommendations.

History of the existing restitution policy

In the second half of the 1990s a discussion arose in the Netherlands and abroad about the property that had been stolen by the Nazis and the question of whether the post-war restoration of rights in the Netherlands had succeeded in remedying the material injustice suffered by the victims of persecution. The investigations conducted for the government by various committees since 1997 have shown that – in hindsight and in light of current knowledge and perceptions – the post-war process of restitution of rights was formalistic, bureaucratic and unfeeling. In its letter to the House of Representatives on 21 March 2000,³ the government fully acknowledged this and adopted the position that this conclusion should have consequences, for example that claims for restitution from the rightful claimants or their heirs should as yet be dealt with.

As regards the government's policy towards the restitution of stolen works of art, at the time the Origins Unknown Committee chaired by Professor R.E.O. Ekkart played

1 Available for inspection in the House of Representative's Information Centre.

2 NK Collection stands for Netherlands Art Property Collection. This collection comprises the remainder of the works of art that were returned to the Netherlands from Germany after the Second World War and are still in the possession of the State of the Netherlands.

3 Parliamentary Documents II 1999–2000, 25 839, no. 13.

an important role. From 1997 until 2004, that committee supervised an investigation into the origins of the NK Collection and the procedures of the Netherlands Art Property Foundation (*Stichting Nederlands Kunstbezit*, SNK), which was responsible for the recovery and restitution of items of cultural interest in the post-war years. The Ekkart Committee was also assigned the task of making recommendations to the government regarding the appropriate restitution policy in relation to works of art in the NK Collection on the basis of the findings from its investigation.

The government of the time adopted most of the Ekkart Committee's recommendations, which form the basis of a generous restitution policy that serves as the framework for the assessment of claims for restitution. For example, the burden of proof with regard to ownership is lenient and all sales of works of art (in the Netherlands) from 10 May 1940 onwards by persons who belonged to a persecuted population group are in principle regarded as forced sales. If the conditions for restitution are met, the State returns the relevant work of art to the rightful owner. I am advised in this matter by the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, referred to in brief as the Restitutions Committee.

The Restitutions Committee, which is currently chaired by the former president of the Supreme Court, W.J.M. Davids, was established in 2001 to ensure that decisions regarding restitution are made as independently as possible. The Restitutions Committee's primary task is to advise the Minister of Education, Culture and Science, on request, with respect to individual claims for the restitution of works of art that are in the State's possession.

The Restitutions Committee also provides advice on issues relating to restitution where the State is not involved, for example claims to works of art in provincial or municipal collections. These works are covered by a different framework of assessment than claims to works in the possession of the State: in the former case the Restitutions Committee bases its advice on 'standards of reasonableness and fairness'.⁴ The Restitutions Committee therefore has greater discretion in those cases and is able to weigh the interests of the various parties. Consequently, it is able to recommend solutions other than the return of the work of art that is being claimed.

The distinction between the NK Collection and other works of art in the State's possession

The recommendations made by the Ekkart Committee at the time envisaged a generous policy with regard to the restitution of works of art from the NK Collection. After all, the immediate pretext for the government's appointment of the Ekkart Committee was the public criticism of the shortcomings in the post-war policy with respect to the return of these works of art, which had been returned from Germany by the allies and entrusted to the custody of the State of the Netherlands. In response to the first set of recommendations by the Ekkart Committee, however, the government decided that the more generous restitution policy would also apply to claims to works in the possession of the government that were not part of the NK Collection.⁵

Up to now, the Restitutions Committee has only dealt with a single claim to works of art that are in the government's possession but are not part of the NK Collection. However, the number of such claims is likely to increase when the results of the current investigation of collections in museums⁶ are published.

⁴ See Article 2, fifth paragraph, of the Restitutions Committee (Establishment) Decree.

⁵ Parliamentary Documents II 2001–2002, 25 839, no. 28.

⁶ In 2009, the Dutch museums launched a four-year investigation, under the auspices of the Dutch Association of Museums, into the provenance of works of art they had acquired in the period 1933–1940 and from 1948 to the present day. The final results of that investigation will probably be published in the middle of 2013.

As already mentioned, under the current policy the same restitution policy applies to all claims to items in the government's possession, regardless of whether the claim relates to an item in the NK Collection or to a work of art in another part of the National Art Collection. The latter category includes, for example, works of art that – in contrast to the NK collection – were only acquired years after the Second World War and were acquired through regular channels, for example by being purchased in good faith at an auction. This raises the question of whether the difference in the method by which works in the latter category were acquired should be reflected in the restitution policy.

The Council for Culture makes two recommendations on this point, which I will address below.

Recommendations 1 and 2: amendment of the restitution policy for work of art that are not part of the NK Collection

In its advisory opinion, the Council notes that the current restitution policy is less suitable for resolving claims to works of art in the State's possession that are not part of the NK Collection, since under the existing policy it is not possible to take account of the method by which the State acquired the work of art in the ruling in a restitution case. For example, in the existing policy framework it is irrelevant whether an object was purchased many years after the war through regular channels. Nor is there any scope to consider the interests of any other parties. If it upholds a claim, therefore, the Restitutions Committee is unable to make any recommendation other than to return the work of art concerned.

The situation is different when the Committee is dealing with claims to works of art that are not in the possession of the State, but are the property of a municipality, a province or a foundation (on behalf of a museum), since in the latter cases the Restitutions Committee assesses a case according to 'standards of reasonableness and fairness', as prescribed by Article 2, fifth paragraph, of the Restitutions Committee (Establishment) Decree. In those cases, the Committee has greater discretion and can recommend alternative solutions – other than the automatic return of the work of art. The Council regards this divergent treatment of claims to works of art as extremely confusing and undesirable.

The Council therefore recommends that the policy on claims to works of art in the government's possession (not being items in the NK Collection) should be harmonised with the treatment of claims to works of art in the possession of 'third parties'. To this end, the Council recommends an amendment of the terms of reference of the Restitutions Committee, as laid down in Section 2 of the Restitutions Committee (Establishment) Decree. Essentially, the effect of the amendment of this article would be that claims to works of art in the possession of the State that are not part of the NK Collection would be assessed on the same grounds as claims to works held by parties other than the State.

I share the Council's opinion that the difference in the provenance of items in the NK Collection on the one hand, and the regular State art collections on the other, justifies greater differentiation in the method of assessing claims. In line with that recommendation, I will therefore amend the terms of reference of the Restitutions Committee in Article 2 of the Restitutions Committee (Establishment) Decree in such a way as to allow the Restitutions Committee to deal with claims to works of art that are not part of the NK Collection in accordance with the broader framework of assessment for non-State collections. This will give the Restitutions Committee greater scope to consider the facts and circumstances of a case and the various interests involved, which can then be reflected in its final recommendation.

Naturally, the more that the owner of a work of art knew or reasonably could have known about the suspect provenance of an item at the time of its acquisition, the less relevant that weighing up of interests will become. The possibility that a person knew of the suspect provenance of an item is therefore a factor that will weigh heavily. Although this aspect is already assessed by the Restitutions Committee in its decision,⁷ I will make this an explicit requirement in Section 2 of the Restitutions Committee (Establishment) Decree by stipulating that the Restitutions Committee shall assign considerable weight in its decision to the circumstances of the acquisition by the owner and the possibility that he knew of the suspect provenance at the time of the acquisition of the item of cultural value concerned.

Under this new policy, the Committee will still be able to recommend the (automatic) return of a tainted work of art, but will also be able to recommend an alternative satisfactory solution. The outcome will depend on the specific facts and circumstances of each individual case. I therefore share the Council's opinion that it is undesirable to issue a list of assessment criteria for the Restitutions Committee. It is apparent from the work performed by the Restitutions Committee in the last ten years that it is perfectly capable of interpreting the concepts of reasonableness and fairness.⁸

A broader framework of assessment of this nature also reflects the Washington Principles on Nazi Confiscated Art, which state that a restitution policy should 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 making a claim

In its final recommendations in December 2004, the Ekkart Committee proposed that the deadline for filing a claim for restitution under the relaxed restitutions policy should expire two years after publication of the government's reaction to the final recommendations in the Government Gazette.⁹ Consequently, the closing date for claims under the more liberal restitution policy was 4 April 2007. However, 4 April 2007 proved to be too early in light of the unexpectedly large number of claims that were still being received after that date and the national and international criticism that ensued from the introduction of that closing date. The government therefore then decided to extend the period of application of the relaxed restitution policy.¹⁰ That decision was dictated in part by the national investigation by the museums and the handling of any claims that might ensue from it. The government then decided not to fix a closing date for the restitution policy and instead await the outcome of the museum investigation. The final results of the museum investigation (with the exception of one museum¹¹) are expected to be announced in mid-2013. With that in mind, I asked the Council to advise me on what would be a reasonable time limit for submitting claims.

According to the Council, it is still too soon to fix an expiry date for the restitution policy. At international level, there is seldom any discussion of closing dates for claims for restitution and in fact the view is regularly expressed that there should not be a final deadline. The unilateral decision by the Netherlands to end the mechanism for restitution would therefore lead to incomprehension in the international

⁷ On this point, see Article 3 of the Committee's Regulations on the procedure for a binding expert opinion in the context of Article 2, second paragraph, and Article 4, second paragraph of the Restitutions Committee (Establishment) Decree, which can be found on the website: www.restitutiecommissie.nl.

⁸ See, for example, the Restitution Committee's binding opinion in the case of *A Prayer before Supper (Gebed voor de maaltijd)* by Jan Toorop from the collection of E. Flersheim in the possession of Zeeuwse Museum Foundation (http://www.restitutiecommissie.nl/rc_3.45/bindend_advies_rc_3.45.html).

⁹ Parliamentary Documents II, 2004–2005, 25 839, no. 36.

¹⁰ Parliamentary Documents II, 2008–2009 25 839, no. 40.

¹¹ The Rijksmuseum in Amsterdam has said it needs more time to investigate the more than 100 000 items in its collection. The Rijksmuseum is expected to have completed its investigation of an important part of its collection, the paintings and drawings, in the first half of 2013 and will then continue with its investigation of the other parts of its collection.

community. According to the Council, a deadline for submitting claims can only be fixed if international consensus has been reached on the subject.

I endorse the Council's opinion. The Washington Principles adopted in 1998 are still the international standard for addressing issues relating to restitution. As recently as 2009 the Washington Principles were reaffirmed at an international conference in Prague, resulting in the Terezin Declaration. In light of this international dimension to the issue of restitution, I agree with the Council that ending the possibility of submitting claims can only be considered if international consensus is reached on an alternative to the Washington Principles on this point.

Nevertheless, the Council takes the view that amendment of the existing restitution policy for the NK Collection would be appropriate within a few years. I will discuss the Council's recommendation on this point below.

Recommendation 3: changes in the restitution policy for items in the NK Collection

In the Council's opinion, the fact that the deadline for submitting claims will not lapse for the time being does not mean that the liberal restitution policy for items in the NK collection should be extended indefinitely. The Council takes the view that the more liberal restitution policy can be terminated two years after the final results of the current investigation by the museums have been published, provided a hardship clause is inserted for 'distressing' new cases. The hardship clause would then apply for cases in which new facts have emerged and in which the claimant can demonstrate that the claim could not have been submitted sooner. In assessing claims that meet these criteria, it will then be possible to consider whether they can still be assessed in accordance with the standards of reasonableness and fairness by applying aspects of the more liberal restitution policy, as the Council states in recommendation 3.

All things considered, this recommendation means that the current restitution policy with respect to the NK Collection will be to assume a different form from the middle of 2015 (two years after publication of the results of the museum investigation), in the sense that from that date claims to items in the NK Collection can also be assessed in accordance with the framework of assessment described above in the context of recommendations 2 and 3, whereby multiple interests can be weighed.

I agree with this recommendation and accordingly, with effect from 30 June 2015, claims to items in the NK Collection will be assessed according to the standards of reasonableness and fairness. Thus there will be a uniform policy for all works of art in the possession of the State, regardless of whether an item is part of the NK Collection or belongs to another national collection.

Naturally, in assessing a specific claim the Restitutions Committee will still be able to take account of the provenance of a work of art. Consequently, the fact that a particular item is part of the NK Collection will have considerable weight. It goes without saying that there will also be scope to adopt a lighter burden of proof for the heirs of members of persecuted population groups in terms of proving ownership and involuntary loss of possession. Substantive aspects of this nature, which are already inherent to the existing policy relating to the NK Collection, will continue to be relevant. However, the extent to which those aspects apply will depend on the specific case that is being dealt with. I am happy to leave that decision to the Restitutions Committee in individual cases.

This is also my preferred approach in relation to decisions about whether a particular case can be defined as 'distressing'. The Council suggests that this criterion should be adopted as a requirement for making a claim (admissibility). However, I would prefer

that such considerations are reviewed in the context of all the facts and circumstances that the Restitutions Committee has to consider in its substantive assessment. For example, in assessing claims to property not in the possession of the State the Restitutions Committee already takes into account the efforts that a claimant has made to recover the work of art and the importance of a particular work for the relevant museum collection.

As regards the formal criteria for dealing with claims (admissibility), I am preserving the existing government policy,¹² which in fact already applied before the relaxation of the restitution policy. Briefly, this means that applications for restitution will continue to be handled after 30 June 2015 if:

- it is a new application, in other words not an application that has already been dealt with by a decision of a competent authority in the field of restoration of rights or by means of an amicable settlement;
- It is a claim that has been dealt with previously in the context of restoration of rights with respect to which new, relevant facts ('nova') have emerged.

The number of claims to works of art from the NK Collection is in fact gradually expected to dry up. A great deal of work has already been done in the last ten years. There have only been a couple of claims to works of art in the NK Collection in the last two years. The new NK policy that will apply from 30 June 2015 will therefore very probably only involve a few incidental claims.

Recommendation 4: term of the Restitutions Committee

Finally, the Council made a recommendation concerning the life of the Restitutions Committee. The Council recommends that the Restitutions Committee should remain in place until all claims that have been submitted within two years of the completion of the museum investigation have been handled. For any (incidental) claims that are received subsequently, the government could seek the advice of an ad hoc committee.

This is an organisational measure that does not affect the duration of the issue of restitution. It is indeed my intention to allow the Restitutions Committee to assess any claims that arise from the museum investigation. In my view, the handling of restitution claims by the Restitutions Committee, including those involving local authorities, still provides an adequate response to the international call for alternative dispute resolution and independent investigation.

It is not yet possible to estimate how many claims will arise from the museum investigation, since the results of the investigation are still awaited. The period of two years after completion of the museum investigation referred to by the Council is a realistic horizon. Unless there are actually only a few claims, for the time being the Restitutions Committee and its secretariat will need its existing capacity for investigations. As the Commission's workload declines, however, the organisation of the Restitutions Committee can be reformed at any time. I will continue to consult the Restitutions Committee about this in the coming years. If, at some point, there are only incidental claims, the transition can be made to an ad hoc committee.

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H. Zijlstra

¹² Parliamentary Documents II, 1999–2000, 25 839, no. 16; Parliamentary Documents II, 2000–2001, 25 839, no. 26 and 27.