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### Friends of the Earth Netherlands versus Royal Dutch Shell

*All companies must act against climate change*

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#### Publication date

2021

#### Document Version

Final published version

[Link to publication](#)

#### Citation for published version (APA):

Burgers, L. (Author). (2021). Friends of the Earth Netherlands versus Royal Dutch Shell: All companies must act against climate change. Web publication or website, Transformative Private Law Blog. <https://transformativeprivatelaw.com/friends-of-the-earth-netherlands-versus-royal-dutch-shell-all-companies-must-act-against-climate-change/>

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# Friends of the Earth Netherlands versus Royal Dutch Shell: All companies must act against climate change

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## Friends of the Earth Netherlands versus Royal Dutch Shell: All companies must act against climate change

**Reading Time: 9 minutes**

The 26th of May 2021, the Court of First Instance of The Hague rendered a ground-breaking judgment in a climate case against the oil giant *Royal Dutch Shell* (RDS).[2] The Court ruled that RDS has an independent obligation to do its share against dangerous climate change. The legal basis of the judgment is international human rights law, which applies indirectly to a private entity like RDS through an open norm of Dutch private law.[3] Importantly, the Court stressed that not only Shell, but ‘all companies, no matter size, sector, operational context, property relations or structure’ have an obligation to respect human rights,[4] implying all of them must do their share against climate change.

RDS has already announced to appeal the judgment. It is safe to assume that this judgment will spur a whole new wave of climate change litigation. Even safer it is to assume that many academic texts about this judgment will be produced, inter alia from the perspective of business & human rights, in the context of corporate due diligence obligations, private international law, and in debates on constitutional ordering in our post-national legal system.[5] In this

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May 29th, 2021

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blogpost, I give a short explanation as to how the Court could come to this decision, by highlighting some of its most striking aspects.

### **Climate change is a human rights matter**

The same district court (albeit with different judges on it) had already rendered a landmark ruling in 2015 in the famous *Urgenda* case, ordering the Dutch State to come up with more ambitious climate policy for the year 2020. Both the Court of Appeal and the Dutch Supreme Court upheld this order, reasoning that climate change will heavily impact Dutch citizens' rights to life and to private life enshrined in Articles 2 and 8 of the European Convention on Human Rights.[6] Thus, it was already a matter of Dutch law the *State* has a positive duty under human rights law to act against climate change. The question in the case against RSD is whether this equally applies to *private entities* like Shell.

Yes, said the Court, basing itself on Article 6:162 of the Dutch Civil Code. This provision stipulates inter alia that tortious behavior can consist of 'what according to unwritten law is contrary to what is required in societal interrelations'.[7] From its formulation, one can see that this is a very open norm, the interpretation of which thus strongly depends on case-law. In this case, the Court uses fourteen elements to fill in this open norm.[8] One of these elements is precisely that human rights will be heavily impacted if global warming exceeds 1,5 or 2 degrees Celsius, as recognized by the Supreme Court in *Urgenda*. Another one of these elements consist of the United Nations Guiding Principles of Human Rights (UNGPR), which emphasize that corporations have the obligation to *respect* human rights.[9] Thus, RDS must refrain from behavior that will likely have a negative impact on human rights, and so the company has a self-standing obligation to do its share against dangerous climate change.

The Court thus issues the injunction that was requested by the claimants, and orders RDS to make reduce its emissions with net 45% by 2030, compared to the year 2019. This number corresponds to what States must do, and it is derived from relevant reports of the Intergovernmental Panel on Climate Change (IPCC) – the independent UN body collecting and reporting on all climate change research globally. *Net 45%* means that the reduction target is not absolute, i.e. that it is allowed to resort to compensatory measures, notably carbon capture and storage.[10]

### **Shell must do its best to reduce emissions of its consumers, globally**

Other elements to fill in the open norm of Article 6:162 include: the consideration that RDS can exercise control over the business strategy of all of its subsidiaries in the Shell Group;[11] that Shell can influence emissions of its business relations;[12] and science-based observations regarding what needs to be done to prevent dangerous climate change.[13] They lead to Court to say that RDS has a so-called 'obligation of result' to reduce its *own* emissions – i.e. the emissions resulting from activities on Shell premises, called 'Scope 1' emissions by the standard emissions reporting scheme: the Greenhouse Gas

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Protocol.[14] The Court says RDS has an 'obligation of best efforts' to reduce its Scope 2 and 3 emissions, i.e. respectively, the emissions resulting from the production of the energy that the Shell group uses, and the emissions resulting from Shell consumers using its products. It remains to be seen whether this distinction between the two types of obligations will be upheld by the Court of Appeal, once the case will be brought there.

This means that RDS must do its best to reduce the emissions of its consumers. The Court stresses this obligation does not reduce the obligation of any other party to do their share against climate change. It raises interesting questions about the moral responsibility & legal liability of individuals in the context of global warming, on which my colleague Tim Bleeker and I hope to publish a piece later this year.

In light of this wide scope of RDS' obligation, an important consideration for the Court is that no matter where greenhouse gasses are emitted, they will cause *global* warming that can also impact the Netherlands.[15] That consideration is echoing but not explicitly referring to the interesting argumentation concerning future generations used by the Court of Appeal in the Norwegian climate case against the State.[16] This case was based on Section 112 of the Norwegian Constitution, which enshrines a human right to a healthy environment for future generations. At stake was whether the Courts could, based on this Section, strike down a governmental authorization for exploration of more petroleum fields. The petroleum to be found thanks to these explorations was likely to be exported, hence the question whether Norway was responsible for the emissions that would result from burning the petroleum abroad. The Court of Appeal answered affirmative, reasoning that for future generations of Norwegians it does not matter where greenhouse gasses are released, as climate change is a global phenomenon that will also impact Norway. However, in the end, all three instances of Norwegian courts, including the Court of Appeal, ruled that the authorization was not unconstitutional.[17]

### **Relation to the EU Emissions Trading Scheme**

RDS had argued that the court could not ask RSD to do more than what is allowed under the EU emissions trading scheme. The Court agrees, but it points out that RDS' obligation to reduce 45% of its emissions by 2030 applies to the emissions of the Shell group as a whole, meaning – if I understand correctly this somewhat opaquely formulated part of the judgment – that even if RDS may reduce less emissions within the EU, it still must make sure that the emissions of the Shell group as a whole are reduced with 45% globally.[18]

### **The level playing field: all companies obliged**

Elsewhere, the Court stresses that RDS' obligation is *self-standing*, i.e. independent from what States or the rest of society does. RDS had pointed out that the injunction at issue would significantly impact its level playing field, and that as soon as RDS retreats from oil and gas, other companies would fill that gap. The Court is not convinced, saying it is questionable that this will actually

happen.[19] After all, studies do show that restricting production actually reduces emissions, and it is likely that the decarbonization trend will pursue thanks to a number of other factors, including pressure by shareholders.[20] Plus, says the Court: 'Also other companies must respect human rights'.[21] Thus, the Court implies that *all other companies in the world* also have a self-standing obligation to do their share against climate change.

### **Judicial law-making & democratic legitimacy**

Now of course it is true that international consensus (as laid down inter alia in the UNGP) reads, like the Court stresses numerous times, that companies have the obligation to respect human rights. That the Court connects this consensus to climate change and translates this into a specific emissions reduction order, makes its judgement an undeniable instance of judicial law-making. This is especially so since the Court does not limit itself to say something about the relationship between the two parties before it, like it is usual in private law proceedings, but instead it stresses numerous times in the judgment that a similar obligation applies to other companies.

This has already raised some concerns in the public debate in the Netherlands about the democratic legitimacy of the judgment. Is it for the court to make such a decision or should it have been left to politics? The Hague Court itself says that the question whether Shell has an obligation to reduce its emissions is 'par excellence' a question to be dealt with by courts.[22] I would like to submit myself that this is a democratically legitimate judgment – perhaps I will write more extensively about this issue later – most importantly because the Court is simply right that a global warming exceeding 1.5-2 degrees will have catastrophic consequences for our human rights, which in turn would shake the foundations of our constitutional democracies, which justifies judicial interference.[23]

### **Proportionality & future generations**

The Court does acknowledge that its order has far-reaching implications for RDS, and that it is likely that RDS has to make certain 'financial sacrifices'.[24] Yet these implications are proportional, says the Court, when weighing them against the consequences of dangerous climate change. In this regard, it is of importance that the Court had allowed six of the claimant environmental organizations standing to represent the interests of future generations of Dutch people.[25] The balancing exercise of the Court thus includes the rights and interests of future Dutch people. As we know that sooner or later, half of the Netherlands will sink below rising sea levels due to anthropogenic global warming, it is hard to see how the Court could make another judgment on this proportionality. Pointedly, though, the Court remarks that also the interests of only the currently alive Dutch inhabitants would weigh so heavy that the sacrifices of RDS are proportional.[26]

### **Enforcement & future developments**

Even if Shell appeals, the judgment is legally binding, the Court stressed. This

means Shell has a legal obligation to start executing the reduction order immediately. There are no penalties imposed as of yet to enforce this obligation. Making predictions about the appeals to this case (yes, appeals in plural, as it is likely that not only the Court of Appeal but also the Dutch Supreme Court will have to rule on this case in the future) is a tricky thing to do for lawyers. That being said, I would be surprised if Dutch higher courts would overturn the essence of this judgment. The duty of care of companies like Shell to act against climate change is now a matter of law.

Being based on the human rights implications of climate change, this case further consolidates the development of environmental constitutionalism, signaling an increasing realization that a stable climate and a healthy environment are existential for us and our societies.[27]

(Photo: [Appolinary Kalashnikova](#))

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[2] District Court of The Hague 26 May 2021 *Milieudefensie e.a. v Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5337. English translation of the judgment available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>

[3] Article 6:162(2). Whereas in the *Urgenda* case (see note 6), the District Court used the doctrine of *hazardous negligence* as an interpretative tool of this open norm, in this case, it rather fills the open norm with all relevant sources, some of which to be discussed below in this blogpost.

[4] Hague District Court, §4.4.16.

[5] Other blogposts on the judgment have already been written, for instance by Aurer on the [Columbia University climate change litigation blog](#), by professor Lambooy on the [Nyenrode business university blog](#), and by professor Nollkaemper on the [Verfassungsblog](#).

[6] English translations of all three judgements are available through <https://www.rechtspraak.nl/Bekende-rechtszaken/klimaatzaak-urgenda>

[7] Translation LB.

[8] See Hague District Court, §4.4.2.

[9] This in contrast with States that are generally thought to have an obligation to *respect, protect and fulfill* human rights.

[10] Hague District Court, §4.4.30.

[11] Hague District Court, §4.4.5.

[12] Hague District Court, §4.4.22.

[13] Hague District Court, §4.4.26.

[14] See <https://ghgprotocol.org/>

[15] Hague District Court, §4.4.37.

[16] Cf. Oslo Court of Appeal (*Borgarting Lagmannsrett*) 23 January 2020, *Natur og Ungdom & Greenpeace Norge v Staten* ('Artic Oil'), case number 18-060499ASD-BORG/03

[17] A book chapter of my hand is forthcoming with Hart Publishing in a volume edited by prof. dr. C. Mak & dr. B. Kas; this chapter addresses the theoretical implications of representing future generations and rather critical reviews the reasoning of the Supreme Court in this Norwegian case.

[18] Hague District Court, §4.4.46.

[19] Hague District Court, §4.4.50.

[20] *Idem*. Interestingly, on the same day the District Court rendered its decision, shareholders of other oil majors indeed influenced considerable green pressure; cf

[21] *Idem*.

[22] Hague District Court, §4.1.3.

[23] For a more extensive explanation of this argument, see my article '*Should Judges Make Climate Change Law?*' *Transnational Environmental Law* 2020, available in open access form at <https://www.cambridge.org/core/journals/transnational-environmental-law/article/should-judges-make-climate-change-law/D9B088113959571B24E97F5E976CA107>

[24] Hague District Court, 4.4.53-54.

[25] The District Court did not allow standing to represent people worldwide, though, cf Hague District Court §4.2.5. I am curious whether the Court of Appeal will decide the same, when the time is there. The District Court's argument for not allowing standing on behalf of people abroad was that the Dutch Civil Code requires interests to be 'similar' enough to be compiled in a collective action. To my mind, *for the purpose of the reduction order of 45%*, the interests of people globally are similar enough.

[26] Hague District Court, 4.4.54.

[27] See also <https://www.cambridge.org/core/journals/transnational-environmental-law/article/should-judges-make-climate-change-law/D9B088113959571B24E97F5E976CA107> and my PhD Thesis *Justitia, the People's Power and Mother Earth – Democratic Legitimacy of Judicial Law-making in European private law cases on climate change*.

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