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

By [Laura Burgers](#), 2 June 2021

On the 26th of May 2021, the Hague District Court rendered a ground-breaking [judgment](#) against oil giant *Royal Dutch Shell* (RDS). The Court ruled that RDS has an independent obligation to do its share against climate change. The legal basis is international human rights law, which applies indirectly to a private entity like RDS through an open norm of Dutch private law. 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, implying all must do their share against climate change.



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## Climate change is a human rights matter

The same district court (albeit with different judges) already rendered the [landmark Urgenda ruling](#) in 2015, ordering the Dutch State to articulate more ambitious climate policy. Both the [Court of Appeal](#) and the [Supreme Court](#) upheld this order, reasoning that climate change will heavily impact Dutch citizens' rights to life and private life enshrined in Articles 2 and 8 of the European Convention on Human Rights. Thus, it was already a matter of Dutch law that the *State* has a [human rights based duty](#) to act against climate change. The question in the RDS case was whether this equally applied to *private entities*.

Yes, said the Court, basing itself on Article 6:162 of the Dutch Civil Code. This provision stipulates that tortious behaviour can amongst other things be that which 'according to unwritten law is contrary to what is required in societal interrelations'. The Court uses fourteen elements to fill in this open norm. One of these is precisely that human rights will be heavily impacted if global warming exceeds 1.5-2 degrees Celsius, as recognized in *Urgenda*. Another element consists of the [United Nations Guiding Principles on Business and Human Rights](#), which emphasize that corporations have the obligation to *respect* human rights (where States must *respect, protect and fulfil* human rights). Thus, RDS must refrain from behaviour that will likely negatively impact 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 requested by the claimants, ordering RDS to reduce the entire Shell Group's emissions with net 45% by 2030, compared to the year 2019. This number corresponds to States' obligations derived from reports of the [IPCC](#). Net 45% means that the target is not absolute, i.e. that compensatory measures are allowed, notably carbon capture and storage.

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

Other elements to fill in the open norm include: that RDS can exercise control over its subsidiaries in the Shell Group; and that RDS can influence emissions of its business relations. They lead to Court to say that RDS has an 'obligation of result' to reduce [so-called](#) 'Scope 1' emissions – i.e. the emissions resulting from activities on Shell premises. The Court says RDS has an 'obligation of best efforts' (i.e., RDS must do its best) to reduce its Scope 2 and 3 emissions. Scope 2 and 3 refer respectively to the emissions resulting from the production of the energy used by the Shell group, and the emissions resulting from Shell consumers using its products. It is doubtful whether this distinction between the two types of obligations will be upheld by the Court of Appeal, once the case will be brought there, as the meaning of 'best efforts' is perhaps not clear enough to be executed qua judicial order.

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. That consideration is echoing (not explicitly citing) the argumentation used by the [Court of Appeal](#) in the Norwegian climate case. At stake was whether the Courts could strike down a governmental authorization for exploration of more petroleum fields, based on Section 112 of the Norwegian Constitution. This provision enshrines a healthy environment for current and future generations as a human right. Norwegian petroleum was likely to be exported, hence the question whether Norway was responsible for the emissions resulting from burning the petroleum abroad. The Court answered affirmative, reasoning that for future generations of Norwegians it is immaterial where greenhouse gasses are released, as *global* warming will also impact Norway. However, in the end, all three instances of Norwegian courts [including the Supreme Court](#) ruled that the authorization was not unconstitutional.

## Proportionality & future generations

The Hague Court acknowledges that its order has far-reaching implications for RDS. Yet RDS' sacrifices are proportional, says the Court, when weighing them against the consequences of dangerous climate change. Indeed, the Court allowed six of the claimant environmental organizations standing to represent future generations of Dutch people. Knowing that half of the Netherlands faces the risk of being flooded already in 2050, it is hard to see how the Court could assess this proportionality differently. Put bluntly, climate change poses an existential threat to the Netherlands. Indeed, the Court remarks that in this balancing exercise, also the interests of only the *current* generation of Dutch inhabitants would weigh heavier than the sacrifices of RDS, so even when not counting in the suffering of the unborn.

## The level playing field: all companies obliged

The Court emphasizes that RDS' obligation is *self-standing*, i.e. independent from actions by States and the rest of society. RDS argued that the injunction would significantly impact its level playing field – as soon as RDS retreats from oil and gas, other companies would fill the resulting gap. The Court was not convinced by the argument, referring to studies showing that restricting production actually reduces emissions, and to the likelihood that the decarbonisation trend will continue thanks to inter alia pressure by shareholders. The Court emphasized that 'also other companies must respect human rights'. Thus, it implies that *all other companies in the world* also have self-standing obligations to do their share against climate change, though this does not necessarily mean that each of those obligations is enforceable in court.

## Democratic legitimacy, enforcement & looking ahead

The scope of these private law proceedings thus extending to all other companies globally, makes the judgment an undeniable instance of judicial law-making. Unsurprisingly therefore, some voices in the Dutch public already expressed worries about the judgment's democratic legitimacy – is regulating business' climate policies for Courts to decide, or should this have been left to politics?

In my view, this judgment further consolidates a movement of environmental constitutionalism, which increasingly recognizes the environment as a fundamental, constitutional or human right. Human rights are designed to counter-balance majoritarian decision-making in constitutional democracies. Thus, as I argue elsewhere, it becomes increasingly legitimate for the judiciary to rule on climate change matters.

RDS has said to consider an appeal. Even so, the judgment is legally binding, meaning RDS is required to start executing the reduction order immediately. There are no penalties imposed yet to enforce this obligation. Making predictions about the expected appeals is tricky for lawyers, but I would be surprised if Dutch higher courts would overturn the essence of this judgment. I expect the trend of ongoing environmental constitutionalisation to continue. Obligations of private companies to do their share against climate change is now a matter of (fundamental rights) law.

Tags: [social justice and sustainability](#), [Sustainability](#), [Business and global value chains](#)