Lessons of a Landmark Lost

The Judgment of the Hague Court of Appeal in Shell v Milieudefensie

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12.11.2024 doi: 10.59704/dd77504c9eae2abd

On 12 November 2024, the Hague Court of Appeal in *Shell v Milieudefensie* set aside the preceding 2021 judgment which held Shell responsible for its contribution to climate change. The 2021 judgment was widely heralded (though also critiqued) as groundbreaking and a precedent that could be followed elsewhere. While the Appeal judgment is unlikely to receive similar praise from climate activists, it contains important lessons regarding the responsibility of multinational companies for their contributions to climate change.

Not the wisest strategy?

Even though *Milieudefensie* lost the case, and the Appeal Court set aside the 2021 judgment, the new judgment should not be read as an authoritative determination that companies have no obligations to reduce greenhouse gas emissions or cannot be held responsible for failure to do so. *Milieudefensie*'s loss can largely be attributed to its litigation strategy, which focussed exclusively on the claim that Shell would act in violation of what is generally accepted under unwritten law (as a matter of Dutch tort law) because it would not reduce its CO2 emissions by 45% by 2030 relative to 2019 levels. In retrospect, this may not have been the wisest strategy.

The 45% reduction target originated from the IPCC. It was in 2020 adopted by COP 26, which recognized that "limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid-century as well as deep reductions in other greenhouse gases." In its 2021 judgment, the District Court used the 45% reduction target in its interpretation of the unwritten standard of care and, on that basis, concluded that Shell was responsible for failing to meet that target (para. 4.4.38). While the Court of Appeal agreed that there is broad consensus on the need to achieve a 45% reduction to limit global warming to 1.5°C (para. 7.73), it rejected the direct application of this target to Shell. It considered, rightly, the 45% target "an average for all sectors and for all places in the world" (para. 7.74) and held that Shell could not "be bound by a 45% reduction standard (or any other percentage) agreed by climate science because this percentage does not apply to every country and every business sector individually" (para. 7.111).

Two openings

The exclusive focus on the 45% reduction target as a basis for the claim of responsibility precluded possible findings of responsibility on two other points. The Court of Appeal critically assessed Shell's planned investments in new oil and gas fields. It noted that it was reasonable to expect oil and gas companies to take into account the negative consequences of further expanding the supply of fossil fuels for the energy transition also when investing in the production of fossil fuels, and that Shell's planned investments in new oil and gas fields may be at odds with this. However, since the plaintiffs had not formulated their claim in terms of the wrongfulness of investment in new oil and gas fields, the Court did not answer whether Shell's planned investments in new oil and gas fields violated its social standard of care (para. 7.61).

Likewise, the formulation of the claim precluded a determination on the contents and possible breach of obligations in relation to scope 3 emissions (that is: indirect emissions, generated in Shell's value chain, including emissions generated from the use or

consumption of products Shell supplies to other companies or consumers, or other third parties). The Court acknowledged that Shell may have obligations to reduce its scope 3 emissions. However, it could not use this as a basis for a conclusion that Shell acted wrongfully since the claim was based on the 45% reduction standard, which did not apply to Shell individually. Moreover, the Court held that it could not be established that downsizing the resale activities of Shell would lead to a reduction in CO2 emissions. Thus, it may be that Shell did not do enough to reduce scope 3 emissions. But because it could not be determined that that made a difference in terms of actual emissions, and since the latter is what plaintiffs sought to achieve with the reduction order they claimed, the Court found that *Milieudefensie* had no interest in their claim and did not rule on a possible breach of Shell's obligation.

The rejection of the claim that Shell acted wrongfully by contributing to climate change is not only negative news for companies' possible responsibility for climate change. Apart from the two openings noted above (possible wrongfulness of investment in new oil and gas fields and obligations in relation to scope 3 emissions), the judgment contains four important takeaways.

Lesson 1: shared responsibilities

First, the Court emphasized the shared responsibilities of states and private actors in relation to climate change. Everyone has a responsibility – not only states – to combat the danger posed by climate change. The Court noted that especially companies whose products have contributed to the creation of the climate problem and have it in their power to contribute to combating it are obliged to do so vis-à-vis other inhabitants of the earth, even when (public law) rules do not necessarily compel them to do so. The Court referred in this context to the OECD guidelines and the UN Guiding Principles on Business and Human Rights (UNGP), to which Shell has subscribed. Those instruments also place responsibility for protection against dangerous climate change on (large) companies and call on them to take appropriate measures to counter dangerous climate change (para. 7.26). Though non-binding, they are legally relevant as a means of interpretation.

Lesson 2: horizontal effect of human rights on corporations

Second, the Court affirmed in unequivocal terms that "protection from dangerous climate change is a human right" and that while human rights obligations are primarily directed at the government, "they can have an impact on private law relationships by giving substance to open standards, such as the social standard of care" (para. 7.17). Climate change damages the rights protected by Articles 2 and 8 ECHR, both in the Netherlands and abroad, and those rights are also decisive for the interpretation of the social standard of care and for answering the question of what can be required of Shell, as a large and international company, under that standard (para. 7.25). This horizontal effect is eventually based on Dutch (tort) law, so this holding cannot automatically be transposed to other jurisdictions. However, it will be an important example for those jurisdictions where national law may provide a basis for such horizontal effect.

Lesson 3: differentiated responsibilities

Third, based on the previous two points, the content and scope of obligations of companies may vary from one company to another. Shared responsibility does not mean that all actors have the same obligation or must undertake the same actions. What is needed depends on a company's contribution to climate change and its capacity to counter it. The Court states that more can be expected of Shell than of most other companies, as Shell has been a major player in the fossil fuel market for over 100 years and continues to occupy a prominent position in that market today. Based on the previous points, the Court of Appeal concluded that

> *"companies like Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO2 emissions to counter dangerous climate change, even if this obligation is not explicitly laid down in (public law) regulations*

of the countries in which the company operates" (para. 7.27).

Lesson 4: the decisive importance of EU law

Fourth, almost in passing, the Court referred to what, in legal terms, is perhaps the most important ground for companies' obligations and responsibilities: the obligations under EU law. While the 2021 District Court judgment was revolutionary, its concrete impact was taken over by the EU's adoption of the Corporate Sustainability Due Diligence Directive of 13 June 2024, obliging Shell to adopt and implement a climate transition plan that ensures the company's business model and strategy are compatible with the goal of limiting global warming to 1.5°C, in line with the Paris Agreement. This is the legal framework that, in the coming years, will determine what Shell is legally required to do to cut its greenhouse gas emissions. This is not altered by what the Court of Appeal concluded in yesterday's judgment – even though the Court did note that the due diligence directive does not impose on Shell a reduction obligation of 45% (para. 7.46).

Conclusion

Perhaps the most important lesson of the judgment is that plaintiffs should carefully consider their litigation strategy. A different formulation of the claim might well have led to a judgment that now would be heralded as a major precedent for responsibilities of companies for climate change. Be that as it may, the Judgment contains important takeaways, notably the findings in relation to shared responsibility of companies, horizontal application of human rights to companies, the openings offered on the possible illegality of investment in new oil and gas fields and the obligations for scope 3 emissions, and the recognition that the EU due diligence directive now is the decisive legal framework for the obligations and responsibilities of companies like Shell. These takeaways will offer important grounds for both future litigation and, perhaps more importantly, serve as a legal incentive for speeding up corporate policies for reducing their greenhouse gas emissions.

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SUGGESTED CITATION

Nollkaemper, André: Lessons of a Landmark Lost: The Judgment of the Hague Court of Appeal in Shell v Milieudefensie, Verfassungsblog, 12.11.2024, doi: 10.59704/dd77504c9eae2abd.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20241113-000218-0.