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Commentary

The Importance of Soft Law in Fulfilling the Duty of Care: *Shell v. Milieudefensie et al.*

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Introduction

This lawsuit, set against the current backdrop of major environmental and climate issues, focuses on whether companies are responsible for reducing environmental damage. The plaintiffs at first instance are an alliance of interest groups and more than 17,000 individual plaintiffs led by Milieudefensie. The defendant is Shell, a public limited company incorporated under the laws of England and Wales and based in the United Kingdom.

Mankind has been using energy, primarily obtained by burning fossil fuels (coal, oil, and gas), on a massive scale since the beginning of the Industrial Revolution. Carbon dioxide (CO_2) is released in this process. CO_2 is the main greenhouse gas. Together with others, it captures heat emitted by the earth in the atmosphere. This is known as the greenhouse effect, which intensifies as more greenhouse gases end up in the atmosphere. This in turn increasingly warms the earth. The link between human-caused greenhouse gas emissions, in part caused by the burning of fossil fuels, and global warming is direct and linear.[1] By far the majority of energy products sold by Shell consist of oil and gas. Shell is the ultimate shareholder of more than 1,100 companies around the

1 Court of Appeal, paragraph of law (r.o.) 3.3, 3.4.

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world. As the top holding company, Shell determines the general policy of the Shell group, including the climate policy. The companies in the Shell group are responsible for implementing and executing the general policies.[2]

Shell reports its greenhouse gas emissions in accordance with the Greenhouse Gas Protocol (GHG Protocol) methodology.[3] This protocol is a global standard for the accounting and reporting of greenhouse gas emissions by companies, governments, and other organizations. The GHG Protocol categorizes a company's emissions in scope 1, 2, and 3 emissions:

- scope 1: direct emissions from installations that are owned or controlled in full or in part by the company
- scope 2: indirect emissions from third-party installations from which the company purchases electricity, steam, or heat for its business activities
- scope 3: other indirect emissions not included in scope 2 generated in the company's value chain, including emissions generated from the use or consumption of products the company supplies to third parties, such as other organisations or consumers.

Analysis

On the basis of a number of authoritative reports on climate change originating from the Intergovernmental Panel on Climate Change (IPCC), the United Nations Environment Programme (UNEP) and the International Energy Agency (IEA), the understanding has emerged that a safe temperature rise should not exceed 1.5 degrees Celsius, with a corresponding concentration level of greenhouse gases of no more than 430 ppm. The IPCC has also described in its reports that in scenarios where warming is limited to 1.5 Celsius, the use of coal, oil, and gas will have to decrease.

Globally, the negative impacts of dangerous climate change are recognized, including in the United Nations Framework Convention on Climate Change (UNFCCC) concluded on 9 May 1992 and its Kyoto Protocol (1997) and the 2016 Paris Agreement.[4] The Dutch State has entered into a (nonbinding) "Expression of Principles" with Shell, which includes a commitment by Shell in the Netherlands to reduce CO2 emissions from activities under its operational control by 3.9 megatons.[5]

2 Court of Appeal, r.o. 3.21–3.24.
3 Court of Appeal, r.o. 3.5.
4 Court of Appeal, r.o. 3.6, 3.7–3.11.
5 Court of Appeal, r.o. 3.20.

In first instance, the District Court ordered Shell to limit or cause to be limited its scope 1, 2, and 3 $CO2$ emissions in such a way that by the end of 2030 the volume will be reduced by a net 45% over the 2019 level. The legal basis for this is the unwritten standard of care laid down in Article 6:162 of the Dutch Civil Code (tort), which is fleshed out by a number of human rights treaties (hard law) and the United Nations Guiding Principles on Business and Human Rights (UNGPs), which stipulate that a company must make efforts to prevent or mitigate negative impacts on human rights directly related to its activities, products, or services through its business relations, even if it has not contributed to them itself (soft law).[6]

Shell appealed to the Court of Appeal (the Court) of The Hague requesting to set aside the District Court's judgment. The question to be answered is whether on the basis of a general social standard of care, an obligation on Shell can be assumed that requires it to reduce its $CO2$ emissions by a certain percentage.[7] First, the Court stipulates that protection from dangerous climate change is without question a human right.[8] For the indirect horizontal effect of human rights, the Court refers to UN Guiding Principles on Business and Human Rights, the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct, and a number of other soft law instruments. Although provisions regarding human rights are primarily directed at the government, they can nonetheless affect private law relationships by giving substance to open standards, such as the social standard of care. The Court is of the opinion that companies like Shell have their own responsibility in achieving the targets of the Paris Agreement.[9]

Yet this does not lead to the opinion that the district court's judgment can stand. In regard to scope 1 and 2, the Court decides that an impending violation of a legal obligation has not been established. Shell has put forward, among other things, that it has set specific reduction targets of 50 percent for scope 1 and 2 in 2030 relative to 2016. There is no threat that Shell will not comply with the (alleged) reduction obligation. To that extent, the claim of Milieudefensie et al. cannot be granted.[10]

In regard to scope 3, to comply with the social standard of care, Shell is required to make an appropriate contribution to the climate goals of the Paris Agreement, but existing climate legislation does not provide for a concrete

6 Court of Appeal, r.o. 4.2–4.3.
7 Court of Appeal, r.o. 7.3.
8 Court of Appeal, r.o. 7.17.
9 Court of Appeal, r.o. 7.24–7.27.
10 Court of Appeal, r.o. 7.63–7.66.

reduction rate for individual companies or industries. Therefore, however much Shell may be required to do its part in combating dangerous climate change, the available figures do not provide the Court with enough support to oblige Shell to reduce its CO_2 emissions by a certain percentage in 2030, as Milieudefensie et al. assert.[11] This claim is also denied.

Conclusions

In this landmark case, the court's first instance ruling did not stand. Nevertheless, the ruling is still of great importance where companies' obligations to people and the environment are concerned.

The first that stands out is the way in which the Court of Appeal points out the UNGPs, the OECD Guidelines, and other soft law frameworks and the way in which these frameworks (partly) flesh out unwritten standards of care. The question whether soft law obligations in respect of fundamental labor rights and—as here—environmental rights can play a role in determining whether tort exists is answered in the affirmative by the Court of Appeal as follows: "Protection from dangerous climate change is a human right and it is globally recognised that a state has an obligation to do its part to protect its citizens from the adverse effects of dangerous climate change. In private law relationships, human rights including protection from dangerous climate change can have an effect through open standards, such as the social standard of care. The social standard of care in relation to climate can be further defined through soft law such as the UNGP and the OECD guidelines."[12]

The extent to which companies are accountable for their impact on society depends on the extent to which they are responsible for it. In the terminology of this ruling, the terminology used in due diligence regulatory frameworks shines through: "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 as it continues to occupy a prominent position in that market today."[13]

The bouncer, although legally not decisive, is at the end of the ruling: Is a scope 3 reduction obligation effective?[14] Here, one of the main problems in the area of corporate responsibility for human rights, labor rights, and the environment surfaces: As long as alternatives are available, an individual

11 Court of Appeal, r.o. 7.96.
12 Court of Appeal, r.o. 7.55.
13 Court of Appeal, r.o. 7.55.
14 Court of Appeal, r.o. 7.97–7.110.

company cannot achieve any direct effect by taking responsibility in its own value chain. It is like a waterbed. Pressure on one side produces a displacement of water to the other, but the total amount of water does not change: It is simply distributed differently. When Shell stops selling, others will take over. The only difference would be that Shell would no longer be part of the value chain, but this would not lead to a reduction in total CO_2 emissions. It is precisely this problem, which can only be solved with universally applicable and clear standards. Global action is therefore desirable.