CARTER LEDYARD

our resources

Recognizing Right to Clean Water: The Time Has Come in the U.S.

September 14, 2016

New York Law Journal
September 14, 2016 by Stephen L. Kass

It's not just Flint, Mich., where the water is bad. It is also contaminated in Hoosick Falls, N.Y., and, almost certainly, in hundreds of school districts, institutions and communities around the United States, where "potable" water has, on inspection, turned out to be seriously polluted. In many places in our country, the availability of any water is also now an issue. Large parts of California have been under severe water restrictions for most of 2016 because of inadequate water quantity, just as portions of the Southeastern U.S. were in 2015.

For the first time in a generation, water rationing is becoming an important policy option in a growing number of U.S. communities and, as the Earth continues to warm, is likely to become a familiar part of life for many farmers and other high-volume water users, including hydroelectric power plants and others with "once through" cooling systems. The U.S. is beginning to recognize that the days of freely available water are numbered and that both water scarcity and water quality need to be addressed more vigorously and more fairly by local and national policymakers.

Much of the developing world already knows this, and the rest soon will. In 2015, the United Nations estimated that approximately 748 million people currently lack any reasonable access to drinking water (never mind the quality of that water) and that, by 2030, the world will face a 40 percent water shortfall, with many countries in Africa, the Middle East and elsewhere facing severe water scarcity (less than 1,000 cubic liters, approximately 265 gallons, per capita annually). In fact, this projection may prove too optimistic as farmers and industry continue to deplete subsurface aquifers and rising global temperatures reduce surface water supplies and accelerate salt water intrusion into coastal aquifers.

Severe water shortages are already transforming parts of Kenya, feeding unrest in Yemen, driving migration in Syria (even before the civil war), undermining public health in Haiti and Bangladesh, and threatening regional stability in India. While climate change is surely the largest long-term environmental threat facing the global community, water scarcity is now the most urgent threat for hundreds of millions (perhaps billions) of people in the developing world.

International Right to Water

The international community has therefore debated for more than a decade whether there is a fundamental human right to clean water. The issue is not as simple as it might appear. The Universal Declaration of Human Rights, the foundation of modern human rights law, does not mention a right to water. Nor does either the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR). Nor does any other global convention specifically address the right to water. The closest are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC), both of which address the rights of women and children to adequate standards of health and sanitation, and thus, by implication, to clean and sufficient water to meet those needs.

Proponents have also pointed to the right to life itself, which is enshrined in the Universal Declaration, the ICCPR and the ICESCR, as implicitly incorporating a right to water as an essential requirement for all human, and other, life. These arguments, bolstered by support within the United Nations and its constituent agencies, have led the right to water to be widely endorsed by the international community and to be seen by many observers as an accepted part of customary international law, despite its omission from any authoritative global convention.

But not so for the U.S. government, which has consistently argued (during both Democratic and Republican administrations) that, while clean and adequate water is an important "interest" and "goal" of the U.S. government, it is not an inherent "right" of individuals. This is consistent with the overall position of the U.S., which has ratified the Universal Declaration and the ICCPR but not the ICESCR, that economic, social and cultural "rights" are merely "aspirational" and not enforceable in the way that, for example, the rights to freedom of speech or religion are.

In the U.S. view, individual "rights" restrain overreaching governmental action but do not compel affirmative action by governments to meet even compelling social and economic needs. Such needs are to be addressed through the political process and are not judicially enforceable except to the extent set forth in specific legislation. Apart from its international significance, this U.S. position has important domestic implications, as the Flint water tragedy demonstrates.

Flint Litigation

Flint involved a massive failure by state and federal agencies to protect the citizens of that city (then under a State of Michigan manager) from the adverse health effects of lead contamination in their drinking water, which was supplied by state and local agencies under the supervision of the federal Environmental Protection Agency (EPA). This failure has sickened thousands of people, perhaps for many years, and frightened many thousands more. It has also spawned at least two dozen lawsuits, as well as state and federal hearings, investigations and criminal charges.

For our purposes, the most significant lawsuits are three class actions pending in federal district court in Eastern Michigan: *Concerned Pastors for Social Action v. Khouri*, brought jointly by the Natural Resources Defense Council (NRDC), the ACLU and the Concerned Pastors (Case No. 16-10277) under the federal Safe Drinking Water Act (SDWA); a second action reportedly brought by 514 Flint residents seeking damages of $220 million against EPA for negligence in supervising state officials (CNN, April 26, 2016, "Flint Water Crisis: Complaint Against EPA Seeks $220 Million In Damages"); and a third action, *Gilcrest v. Lockwood, Andrews & Newman*, brought by the NAACP seeking both damages and injunctive relief on behalf of Flint residents, a significant percentage of whom are black (Detroit Free Press, May 18, 2016, "NAACP Sues Michigan Officials Over Flint Water Crisis").

Because, contrary to the international consensus, neither the U.S. nor any of its states recognizes a "right to water" as a fundamental human right, the plaintiffs in these actions could not simply assert that the federal and state governments were legally obligated to provide such water to Flint residents and, despite having the resources, failed to do so. Rather, they were required to argue, as NRDC has, that state and local officials violated the SDWA in a number of specific ways, or that federal officials had been negligent in performing their oversight duties or that state officials had improperly ignored (or intended) the racially disparate impacts of their failed water policies. The SDWA protects public drinking water supplies. Under the act, the EPA sets standards for drinking water quality.

NRDC's SDWA claims appear strong in view of the clear failure of Michigan officials to treat their new preferred water source (the Detroit River) to prevent lead corrosion, as required by the act, and to accurately monitor and report on lead levels in residents' homes. However, the separate negligence claim against federal officials is likely to be difficult to prove, and, absent clear evidence of intent, the racially disparate impacts of the Flint crisis may not be enough to prevail in an environmental context where large numbers of white residents were also adversely affected.

A Broader Remedy

Even if, given the extraordinary facts of the Flint crisis, the plaintiffs succeed in securing the purely injunctive relief sought by NRDC, similar relief (and no damages) may not be available in the hundreds of other communities in the U.S. where limited budgets, agency inertia, short-sighted good-faith decisions, aging infrastructure or taxpayer resistance to new bond issues expose students, prisoners, hospital patients or the general public to lead and other contaminants above EPA levels. Instead of relying on technical or reporting violations of individual statutes, might it not be preferable to recognize, as most of the world has, a basic right of individuals to have access to clean and reliable water for their most basic needs?

There are several ways in which such a right to water could be realized in the United States. Congress could simply create such a right as part of an amendment to both the Clean Water Act and the Safe Drinking Water Act, specifying that affected consumers have standing to enforce their right to clean and reliable water against responsible federal, state and local agencies. Failing that, individual states could provide a similar right either through legislation or in their state constitutions (as New York has done for the right to a basic education). Finally, our federal (and state) courts might look more closely at the prevailing consensus in customary international law (the "law of nations") and consider whether, as the Constitutional Court in South Africa has held, the right to clean water should now be deemed incorporated in our own common law.

There is, in fact, already a statutory basis for considering such an incorporation of customary international law into our tort laws. The Alien Tort Statute (ATS), adopted by our first Congress in 1789, provides that non-citizens may maintain tort actions in the federal courts for violations of both treaties and "the law of nations." In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the U.S. Supreme Court held that at least some fundamental rights recognized by customary international law could provide a basis for an ATS claim against federal officials.

No environmental claims have yet been held to fall within the narrow Sosa definition of actionable international norms. However, the right to water is so fundamental to life, and now so broadly recognized by the international community, that an eligible alien might seek to maintain such a claim in circumstances (such as Flint) where governmental indifference has deprived the plaintiff of that fundamental human right. (Although *Sosa* has recently been narrowed by the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), such a clean water claim would arise entirely within the U.S. and involve U.S. defendants, thus satisfying the court's insistence that ATS claims be based on domestic rather than foreign actions.) Once a non-citizen plaintiff were held to have an actionable claim for clean water, it would, I suspect, be only a matter of time before U.S. citizens were found to have the same right.

related professionals

Stephen L. Kass / Retired Counsel
D 212-238-8801
kass@clm.com