



## TESTED IN COURT: THE RIGHT TO BREASTFEED

**George Kent**  
**University of Hawai'i**

The human right to food and nutrition recently faced a hard test in Eugene, Oregon, in the United States. On September 17, 1998, Kathleen Tyson of Eugene, then six months pregnant, was told that her blood tests indicated that she was HIV-positive. Her son, Felix, was born on December 7, 1998. He appeared to be healthy in every way. Less than 24 hours after his birth, Kathleen was pressed by a pediatrician to treat Felix with AZT, an antiretroviral drug, and to not breastfeed him.

Having studied the issue along with her husband, David, she declined to accept that advice. Within hours, a petitioner from Juvenile Court came to her room, and issued a summons for her to appear in court two days later. She and her husband were initially charged with "intent to harm" the baby, but the petition, dated December 10, 1998, said that the child "has been subjected to threat of harm." When the Tysons appeared in court, they were ordered to begin administering AZT to Felix every six hours for six weeks, and to stop breastfeeding completely. The court took legal custody of the infant, but allowed the Tysons to retain physical custody as long as they obeyed the court's orders.

A trial was held in Eugene, Oregon from April 16 to April 20, 1999. There were three main lines of argument for the Tysons. First, the Tysons' advocates questioned the validity of the blood tests used as the basis for diagnosing Kathleen Tyson as HIV-positive. This was supported by expert witness Roberto Giraldo, who has published extensively on the uncertainties surrounding the tests. Second, they raised questions as to whether it has really been clearly demonstrated that HIV causes AIDS. This was the view advanced by expert witness David Rasnick, a leading challenger of conventional thinking about the causes of AIDS. Third, I was to be the expert witness regarding the human rights dimensions of the case.

I wanted to argue that the basic principle underlying health care decision-making normally is that patients themselves make the final decisions regarding their care, on the basis of informed consent. The function of health care workers is to provide the information needed, and to give advice, but not to make the final decisions. While there are exceptional cases in which the state may override this principle, and the patient may be treated coercively, the conditions required to justify such an exception were not met in this case. The published scientific evidence was not adequate to justify the State's presumption that breastfeeding by a woman

diagnosed as HIV-positive (but otherwise asymptomatic) would be subjecting that child to excessive risk by breastfeeding. Moreover, I wanted to show that United Nations agencies and the United States government had repeatedly reaffirmed the principle that HIV-positive women should not be coerced. Their official policy is that the treatment of HIV-positive women should be based on their informed consent.

After I was sworn in, and the Tysons' lawyer explained that he was going to ask me about the human rights dimensions of the case, the judge intervened and said these matters were irrelevant. I then had to step down. Just hours later, the judge gave his decision: the Tysons lost. The State of Oregon retained legal custody of Felix. The Tysons retained physical custody on the condition that, as ordered, Felix would not be breastfed.

The physicians who took the State's side in the case against the Tysons sincerely believed that the Tysons were endangering Felix. The scientific community, however, has failed to meet its obligations to produce the strong and clear scientific knowledge that is needed to guide individuals in situations like the one faced by the Tysons. I believe that if the Tysons had been presented with clear, hard evidence that breastfeeding Felix would be likely to harm him, they would have decided accordingly. We have clear indications of the physicians' strong beliefs, but we do not have scientifically sound studies of the sort they themselves claim to require. If there is a failure of informed consent, there is an obligation on the part of government and health care workers to provide better information. Resort to coercion is not the appropriate remedy.

Both the Tysons and the cause for realization of the human right to food and nutrition lost in this case. Nevertheless, this setback might be turned to advantage if it helps us to appreciate the importance of clarifying and strengthening those rights. It is as important for health care workers and policy makers to understand the importance of human rights as it is for them to understand the technical and scientific dimensions of health care.

### References

Kent G (1998) Women's Right to Breastfeed vs. Infants' Rights to Be Breastfed *SCN News* No. 17 (December) pp18-19. (The entire issue focussed on Nutrition and HIV/AIDS can be accessed through the SCN's website at <http://www.unsystem.org/acscn>)

under *SCN News No. 17*. This piece can be found in the PDF file at pages 20-21.)  
Kent G (1999) HIV and Breastfeeding *Mothering* No. 9 (May/June) pp 65-67, 70-71.

For further information contact: Dr Kent, Professor & Chair, Department of Political Science, University of Hawai'i, Honolulu, Hawai'i 96822-2281 USA; tel: 1 808 956 7536; fax: 1 808 956-6877; Internet: <http://www2.hawaii.edu/~kent>; email: [kent@hawaii.edu](mailto:kent@hawaii.edu)

## Recasting WID – A Human Rights Approach Daniel Whelan – ICRW

This International Center for Research on Women (ICRW) working paper No. 6 is intended to stimulate discussion and suggestions for improvement in the area of human rights. Its focus is on Women in Development (WID) in the light of the fact that 556 million women and girls are illiterate – is this not a violation of their right to education? That 600,000 women die annually as a result of complications of pregnancy and an additional 18 million women suffer from pregnancy-related morbidities that go untreated – is this not a failure of protect and fulfil women's rights to the most basic feminization of poverty be viewed as anything less than a living, equal access to employment, credit, property, and foundation of the literature on WID and are generally time has come to call these realities what they truly are:



That 600,000 women die annually as a result of complications of pregnancy and an additional 18 million women suffer from pregnancy-related morbidities that go untreated – is this not a failure of governments to meet their obligations to respect, attainable standard of health? How can the violation of women's rights to an adequate standard of training? These alarming statistics constitute the referred to as "the state of the world's women". The human rights violations.

This powerful 16 page paper begins with the premise that all human rights. In order to explore this premise as it recent developments in human rights scholarship and practice that are leading to a greater understanding of a human rights approach to development. It proposes strategies for the re-characterization of women's economic and social development and explores the interrelationships between WID and human rights. For development researchers, practitioners, and policymakers, this analysis will represent a significant shift in thinking about the goals and objectives of WID by placing the substance of their work within an internationally recognized and legally-binding normative framework – a significant foundation that is currently absent from prevailing development approaches and activities.

economic and social development is the realization of relates to women and gender, this paper describes

In bringing a human rights approach to ensuring women's access to productive resources and improving their economic, social and political status, the field of WID will have come full-circle from its initial foundation of equity and non-discrimination. Bridging the gap between these two approaches is manifest in the declarations and platforms of the major international conferences which took place during the 1990s.

For further information contact: ICRW, 1717 Massachusetts Ave NW, #302, Washington DC 20036 USA; tel: 202 797 0007; fax: 202 797 0020; Internet: <http://www.icrw.org>; email: [icrw@igc.apc.org](mailto:icrw@igc.apc.org)

## HUNGRY For What Is Right FIAN Magazine – For the Human Right to Feed Oneself

FoodFirst Information Action Network (FIAN) is an NGO which publishes the magazine *HUNGRY for what is right*. The major focus of each magazine is the human right to feed oneself; specific issues, such as Progress of the right to food (No. 14/February 1999) and Human rights and sustainability (No. 15/June 1999) are addressed in FIAN's most recent publications. *HUNGRY* No. 14 discusses the increasing awareness regarding the fragile character of our environment and consequences of mismanagement of natural "Sustainability as non-discrimination – a human rights described as a human rights principle in international development and for non-discrimination of future small farmers in the Philippines which saw their speculation; and "Agrarian reform for sustainability" development for future generations. *HUNGRY* No. 15 food by reprinting Asbjørn Eide's contribution to the Practice", followed by the role of international food by Michael Windfuhr, Executive Director of FIAN. explained in detail as a practical tool on how governments can fulfil their obligations for the right to food. This issue also reports on violations of the right to feed oneself, and includes FIAN interventions and strategies to move the human right to food forward.



survival in dignity of future generations confronted with resources. The magazine's articles included approach to ecological concerns" where sustainability is human rights law; "A victory for sustainable generations" focuses on the experience of a group of traditional farming area destroyed through industrial demonstrates how to pave the way for sustainable examined progress made toward the right to adequate FAO brochure "The Right to Food in Theory and institutions for the realization of the right to adequate The NGO driven initiative, The Code of Conduct, is

For more information about FIAN or to subscribe to *HUNGRY* contact: FIAN International Secretariat, PO Box 102243, D-69012 Heidelberg, Germany; tel: 49 6221 830620; fax: 49 6221 830545; email: [fiان@fiان.org](mailto:fiان@fiان.org)