I feel honoured to have been asked to give the opening address at this Congress, where the topic is “Gender, Human Rights and Activisms”.

Introduction

My main connection with the topic is that, as a practising lawyer, I have spent much of the last 11 years representing a transgender woman who was seeking official recognition in her female gender in Ireland, where there was no legal provision of any kind for recognising transgender persons in the gender in which they actually live. Happily that situation has changed as a direct result of this case and we now have one of the most liberal and inclusive gender recognition laws in Europe.

I would like to say a little about that case and about some wider lessons about campaigning for social change that I think can be drawn from it. But first I should probably say something about my own background and how I came to be involved in this sort of work.

I was born and grew up in a very small town in the middle of a rural area of Northern Ireland in the mid-1940s and early 1950s. There was nothing to distinguish this town except perhaps that Seamus Heaney, who went on to become one of the best known and best loved poets in the English language, grew up on a farm a few miles away and a lot of his poems are rooted in the local landscape. I was later privileged to be taught English literature by Seamus Heaney at Queens University in Belfast in the early 1960s.

I did not come from a political or radical background but this was a time when significant events were happening in other parts of the world and were brought home to us by cinema newsreels which were played at the local cinema between the main films, and later by black and white television when it finally reached our area.

In 1960, when I was still at secondary school, sixty nine people were shot dead and 176 wounded at Sharpeville in South Africa when police fired into a crowd protesting peacefully against the apartheid race laws in that country. The British newsreels carried dramatic images of the carnage because South Africa was a former British colony. The following year young white and black students tried to challenge the rigid racial segregation in the Southern states of the United States of America and were brutally attacked and beaten by racist police.
And in October 1962, when I began my first year at university in Belfast, another student called James Meredith enrolled in the University of Mississippi at the same time. But James Meredith was black and no black student had ever been allowed to enrol in the University of Mississippi before. A violent mob surrounded the university trying to keep Meredith out and President Kennedy had to send in the US army to keep them back. For the next year James Meredith had to have US federal marshals protecting him wherever he went on the campus.

I had never met a black person before I went to university but I and other students at the time were shocked at the unfairness of what we had seen on the television screens and the behaviour of the police, and hugely impressed by the courage of the young people fighting racism in South Africa and the United States. It made a deep impression on me and left me with a lifelong desire to oppose racism and discrimination.

My university career ran parallel with the US Civil Rights movement and the growing protests against the war in Vietnam, which culminated with the murder of Martin Luther King in April 1968. And that, of course, was also the year of student revolution, with the Prague Spring uprising in Czechoslovakia and the student revolt in Paris.

Northern Ireland was a very unequal society at that time with electoral restrictions and discrimination in employment and housing allocation against the Catholic minority there, most of whom favoured unification with the Republic of Ireland. This was not at all on the scale of the treatment of black people in the United States or South Africa but in that year of upheaval it was not surprising that a Civil Rights movement inspired by the US model sprang up in Northern Ireland and that students, including myself, played an active part in it.

Sadly the Civil Rights movement in Northern Ireland was met with increasing violence and repression that boiled over into a long-running armed conflict which resulted in the loss of very many lives. Some of us who had been involved in the Civil Rights movement worked in the succeeding years opposing emergency laws, detention without trial, and ill-treatment of prisoners, though without a great deal of success.

In 1981 I moved to Dublin and became an investigative journalist and worked for a number of years on a series of cases where a group of Irish people had been wrongly convicted of IRA bombings in Britain that had killed a large number of civilians. Eventually all these convictions were overturned, the prisoners were released and there was a major reform of the British judicial system.

I had played just a small part in these cases but I had worked closely with the British lawyers involved and had been impressed with their courage, thoroughness and determination and the fact that they had been able to achieve such a significant outcome. As a result, I decided to become a lawyer just over 25 years ago.
At first I did mostly criminal defence work but I also became chairperson of the Irish Council for Civil Liberties and subsequently a member of the national Human Rights Commission and I became interested in using the law in a more positive and proactive way as well – using the law to assert and extend peoples’ rights, not just to defend them against abuse of their rights by the state.

Eleven years ago, I became the senior lawyer with an NGO called Free Legal Advice Centres (FLAC) with the aim of doing strategic litigation to try to enable disadvantaged groups to obtain their rights.

Much of my work was with asylum seekers and immigrants, helping them to access social security payments in the face of opposition from officials who seemed determined to make things as difficult as possible for them. But one case was rather different. It was the case of a transgender woman called **Lydia Foy** who was seeking legal recognition in her female gender.

FLAC had already started the *Foy* case several years earlier but it had been rejected by the Irish High Court. It was under appeal to the Supreme Court when I joined the organisation. I knew very little about transgender issues but I was going to have to learn quite fast as the case was due for hearing in the Supreme Court in three months’ time.

Lydia Foy had been registered at birth as male. She had been unhappy with her gender role when growing up but she did her best to conform to the expectations of a very conservative society. She married and she and her wife had two children but she became more and more unhappy and distressed and in 1992 she had gender re-assignment surgery in the UK – it was not available in Ireland at the time.

Lydia’s contract as a public health dentist was not renewed. Her marriage broke up and, in a very cruel decision, the courts prevented her from seeing her children. She never got another job and was dependent upon social security for many years. Her health deteriorated and she was very isolated and depressed. There were no transgender groups at the time to which she could turn for help. Even lesbian and gay organisations were small and weak at a time when homosexual conduct was still a criminal offence.

Lydia lived as a woman in a small country town, sometimes suffering verbal abuse or having stones thrown at her house but helped as well by a few kindly neighbours. She wanted legal recognition as a validation of her identity and to avoid continual embarrassment whenever she had dealings with officialdom. In 1993 she applied to the Registrar of Births for a new birth certificate showing her female name and gender. In Ireland there is no system of national identity cards and birth certificates are regularly used as proof of identity.

The application was refused and Lydia wanted to take a legal challenge to the decision but she had no money to employ a lawyer and she was refused legal aid. Eventually in 2006 she
approached FLAC, which had been set up to provide advice, and sometimes representation, to people who could not get legal aid under the very restrictive state scheme.

**The Foy No. 1 case**

My predecessor in FLAC had had the foresight and courage to take on the case, seeing it as a denial of Lydia’s right to be accepted as who she was, not as who society expected her to be. It was also a test case as the outcome would affect other transgender persons as well and it was an access to justice issue as Lydia was unable to challenge the Registrar’s decision because she had no money.

The FLAC legal team had done a good job in Lydia’s case so far. They had brought in one of the world’s leading gender identity experts from the Netherlands to give evidence to the High Court that gender should not be determined by physical attributes alone but by taking account of mental and psychological factors as well.

The case was heard over 14 days in the High Court in 2000 involving some very intrusive questioning about Lydia’s personal life and it was accompanied by hurtful and demeaning reporting in some sections of the media.

It was two years before the judge gave his decision in July 2002 and when it came it was deeply disappointing. He said that there was nothing in the law or the Irish Constitution that would allow Lydia Foy to be issued with a new birth certificate in the gender in which she had been living for the previous ten years.

The judge had shown some sympathy towards Lydia’s case. He had expressed his shock at the “mocking, derision and downright abuse” that transgender persons had to endure and he called on the government to take urgent steps protect them and improve their position. That part of his judgment was somewhat overlooked, given the disappointment at the time, which was already nine years after Lydia had first applied for a new birth certificate, but it was to prove important later on.

During the hearing the legal team had tried to rely upon the European Convention on Human Rights ECHR) but although the European Court of Human Rights in Strasbourg had considered six transgender cases by then, it had only once found in favour of the transgender applicant and that had been in a case that was not really comparable to Lydia’s position. In all the other case, while expressing concern about the position of transgender persons, the Court had found that a failure to recognise transgender persons was not in breach of the ECHR.

Two days after the judgment in Lydia Foy’s case in the Irish High Court in July 2002, the Strasbourg Court unanimously held that the United Kingdom, whose law on this issue was identical to that in Ireland, had breached the rights of two transgender women by failing to make any provision for recognising them in their preferred female gender. It seemed that the Court,
which had already expressed concern several times about the non-recognition of transgender persons in the UK, had finally lost patience with the London government and was not prepared to give them any more leeway.

Would it have changed things if the judge in Lydia Foy’s case had known about the Strasbourg Court’s decision? The answer is probably no, because at that time Ireland had not yet incorporated the ECHR into its domestic law. However, the Strasbourg decision did provide a glimmer of hope for Lydia after the major disappointment of the decision in the High Court.

Lydia appealed the High Court decision but delays in the courts meant that the appeal was not set for hearing until October 2005, shortly after I joined FLAC. By that time Ireland had passed a law incorporating the ECHR after lobbying and campaigning by the Irish Council for Civil Liberties and the Irish Human Rights Commission, in both of which I had been involved. As a result I was familiar with the new legislation and anxious to test it in practice.

The No. 2 case and the Declaration of Incompatibility

We quickly applied for leave to rely on the new Act even though we had to go back to the High Court to do so in what I will call the Foy No.2 case. And luckily there was another favourable decision by the Court of Human Rights in a transgender case before Lydia’s case was heard in April 2007. In the meantime too we used all our human rights connections in other countries, including Australia, New Zealand and the US to build up a collection of positive decisions in transgender cases across a spectrum of other countries, which we put before the Irish court.

The case was heard by the same judge who had dealt with the first hearing and in his decision, given in October 2007, he repeated that there was nothing in Irish domestic law or the Constitution that would require the issue of a new birth certificate, but he went on to say that the failure to recognise Lydia Foy in her female gender was in breach of the Article 8 of the ECHR, which protects private and family life. He was clearly frustrated at the lack of any action by the Irish government despite the urgent appeal in his judgment given five years earlier. He said:

“[I]t is very difficult to see how this court ... could now exercise further restraint, grant even more indulgence and afford yet more tolerance to the State, some five years after both the decision in Goodwin [the Strasbourg Court’s decision] and the July 2002 judgment [in the Foy case].”

Unfortunately, however, under the Irish legislation incorporating the ECHR into domestic law, the Convention cannot override domestic legislation. All the court could do was issue a Declaration that the Irish law on the registration of births was incompatible with the ECHR and then it was left to the government to decide what to do about it. The judge duly issued the Declaration, the first Declaration to be made under the ECHR Act.
Lydia Foy was delighted with the result. It was the first real success she had achieved since making her application 14 years earlier, but her delight did not last very long. The government appealed the making of the Declaration, despite the fact that the Strasbourg Court had given another decision in favour of a transgender applicant not long beforehand.

On enquiring from the Supreme Court office, we were informed that it could be another four years before the appeal would be heard.

Lydia was deeply depressed by the appeal after thinking that her long struggle was almost over. It is easy for lawyers, academics and even campaigners, when discussing legal cases, to forget that they are about real, and often quite fragile, people with real emotions and who have already suffered considerable trauma before the case even began. Lydia had experienced a roller coaster ride of emotions throughout this case and it was beginning to take its toll of her.

**Campaigning for support**

We decided that we would have to try to exert pressure on the government to drop their appeal, which they were almost certain to lose anyway. We adopted a twin-track strategy. We would try to get international human rights organisations and officials to press the government to change the law and we would also try to mobilise public opinion at home in support of change.

We contacted the Council of Europe’s Human Rights Commissioner, the UN Human Rights Committee and the European Union’s Fundamental Rights Agency asking them to express their concern at the lack of recognition of transgender persons in Ireland. It was a lot easier to persuade these agencies to intervene now that we could point to a decision by the High Court that Ireland was in breach of the European Convention on Human Rights and all three criticised the Irish position quite strongly.

International pressure is very important but it can only do so much. Governments tend to be more concerned about their own electorates and in this case the transgender community was very small and had no electoral clout. It would be necessary to win over much larger numbers of people to call for change.

We had already issued briefing notes to the media before and during the hearing of the second Foy case to try to avoid the negative reporting that had marked the first case and now we stepped this up pointing out that Ireland, Andorra and Albania were the only remaining European countries that did not provide any form of recognition for transgender persons and Ireland was the only country in the EU not to have any such provision.

The Irish Human Rights Commission and the Equality Authority were also supporting gender recognition but the public needed to hear the voices of transgender people themselves. Lydia Foy had done some interviews herself but she is quite a private person and was not a natural
campaigner. However, one of the effects of the second Foy case and the more sympathetic media coverage around it was to begin to mobilise and empower the transgender community.

A new and increasingly effective organisation called Transgender Equality Network (TENI) was established and it received support and encouragement from the by now well organised and influential lesbian and gay movement.

Things were changing in Ireland. From a country where homosexual conduct had been a criminal offence until 1993, the gay and lesbian community were now firmly out of the closet and were increasingly accepted in Irish society. They had become a powerful lobbying group and succeeded in securing the introduction of civil partnership for lesbian and gay couples with hardly any opposition in 2010.

FLAC had worked hard at publicising the case for gender recognition but the argument was greatly strengthened by the human interest factor of transgender persons telling their own, often very moving, stories of the prejudice, hostility and abuse they had suffered. In 2010 the government withdrew their appeal against the Declaration of Incompatibility in the Foy case and announced that they would introduce legislation to recognise transgender persons in their preferred gender. They also set up a committee to make recommendations about the content of the legislation but unfortunately the committee did not contain any transgender persons or even anyone who worked with the ‘trans’ community.

Lydia Foy’s emotional roller coaster continued. She was once again delighted that her struggle seemed near its end. Sadly, however, it would be another five years before it finally ended.

A year later, in 2011, the government committee recommended a very restrictive gender recognition scheme which was largely rejected by the transgender community. After that, arguments went on in the Oireachtas (the Irish parliament) and the media with no sense of urgency being shown by the government. We had to turn again to the international human rights organisations to seek their support for another attempt to get the government to bring in acceptable legislation.

Nils Muiznieks, the Council of Europe’s Human Rights Commissioner wrote a sharp letter to the Irish Minister responsible in November 2012 saying that a delay of five years in implementing the High Court decision in the Foy case “sends a very negative message to society at large”.

**Going back to court and how the legislation was passed**

Two months later, in January 2013, Lydia Foy’s patience ran out and she began a new legal action (the Foy No.3 case) against the Registrar and the Irish government.

By now the media were strongly on her side but the case dragged on until October 2014, very shortly before it was due for hearing, when the government agreed to settle her claim, undertaking to publish its Gender Recognition Bill before Christmas and introduce it in
Parliament in January 2015. The Bill would ensure that she could obtain a new birth certificate and they also agreed to pay her compensation for the long period during which they had refused to provide her with the certificate - although nothing could really compensate for the years of isolation, misunderstanding and abuse which she had suffered as well as the uncertainty and emotional trauma of an 18-year long legal case.

The Bill was duly published in December 2014 but it still contained some serious flaws. It required applicants for gender recognition to produce medical certificates; married transgender persons would have to divorce before they could get recognition so as not to create a category of same-sex marriages. And there was no provision for transgender young persons.

At this stage the transgender organisation TENI carried out a very effective campaign of getting legislators to meet with ‘trans’ persons and their family members. Several Parliamentary Deputies said in the subsequent debates that they had been opposed to the legislation until they met transgender individuals and their families and heard their stories.

The government appear to have been taken by surprise when calls for a more liberal scheme came from their own supporters as well as the Opposition and the debate on the Gender Recognition Bill was adjourned until after a referendum on same-sex marriage which was due to take place on 22nd May 2015. When the referendum was carried by a comfortable majority of 62% to 38%, the government seem to have been encouraged to take a less cautious approach.

To the surprise and delight of the transgender community they dropped the requirement for medical certificates, allowing transgender persons to self-certify in their chosen gender. The ‘compulsory divorce’ requirement lapsed because same-sex marriage was now legal and the minimum age for applying for a Gender Recognition Certificate was lowered to 16 (though under very strict conditions). The government also promised they would talk to transgender groups about helping, protecting and respecting younger transgender children.

The result was one of the most progressive gender recognition regimes in Europe. It was passed in July 2015 and almost exactly one year ago, in September 2015, Lydia Foy was issued with the first Gender Recognition Certificate to be issued under the new Gender Recognition Act, 2015 and a new birth certificate showing her gender as female. She was delighted and said: “With this piece of paper and after 22 years of struggle my country has finally recognised me for who I really am, not for what other people think I should be”. A couple of weeks later she was awarded the European Parliament’s Human Rights Prize for Ireland to honour her long drawn-out campaign for transgender rights.
The Irish Gender Recognition Act is not perfect. It needs to be amended in some respects, particularly around provision for transgender children and intersex persons but it has made life a great deal better for a substantial number of ‘trans’ persons and their families and it means that future generations of ‘trans’ persons will not have to suffer the hardship, humiliation and isolation that Lydia Foy and her contemporaries had to endure. For that the whole transgender community owes a great debt of gratitude to Lydia Foy for her courage and determination in carrying on her often lonely struggle for 22 years and never giving up.

**Learning lessons**

What lessons can we learn from the *Foy* case about campaigning for social change in other areas as well? And in particular what can we learn about the respective roles of litigation, international human rights institutions, media work and advocacy, and the role of the community itself on behalf of, or by whom, the campaign is being conducted?

In some ways the Foy case was taken out of sequence. Logically one might expect that a campaign to assert the rights of a disadvantaged minority would begin with the formation of a lobby group which would seek to raise awareness of the injustice at issue and then campaign for it to be remedied. As part of that campaign, or if the authorities were unresponsive or the campaign was stalled, the campaign group might take a legal action to increase the pressure for change.

In the *Lydia Foy* case there was no transgender lobby group at the beginning. The transgender community was so small and isolated that they had no organisation and could scarcely be called a community. Lydia Foy was on her own and saw legal action as her only option for seeking official recognition in her female gender.

It was her original case and the media coverage that it generated, however painful it was at the time, that brought the transgender issue to public attention and won some sympathy, including from the judge, even though the case itself was initially unsuccessful. And the second *Foy* case with its media briefings from the beginning and in the build-up to the hearing and decision in 2007 led to the establishment of TENI as a voice for the 'trans' community and an effective campaigning organisation.
The Declaration of Incompatibility arising from the second case gave TENI and FLAC a solid base from which to campaign for gender recognition legislation.

Without the legal case there would have been no campaign and no Gender Recognition Act, or at least not for several years later. But the legal case would not have succeeded without the European Convention on Human Rights and its incorporation into Irish domestic law. The judge made clear in the *Foy No. 2* case that if he had been confined to domestic law, he would have been compelled to find against Lydia yet again. As in many countries, the Irish Constitution and laws and the judges who implement them had and have certain blind spots that can only be remedied by recourse to European or international Human Rights law interpreted by judges from a wider range of legal backgrounds.

In the long and frustrating period between the Declaration of Incompatibility in 2007 and the publication of the Gender Recognition Bill in December 2014, nothing might have happened had it not been for the pressure from the European and international Human Rights bodies and the continued publicity and campaigning of FLAC and TENI with the support of the LGBT community and bodies like the Irish Human Rights Commission and the Equality Authority. And even then it required another application to the courts to get the government to finally put the Gender Recognition Bill before Parliament.

At that stage it took TENI’s very effective programme of getting the legislators to meet individual ‘trans’ persons and their families to secure significant changes in the Bill, in particular dropping the requirement for medical certification.

**Conclusion**

Looking back on this long drawn-out case and drawing on the experience of other campaigns over the years, I would suggest that litigation can play an important role in campaigns for social change. And that role is not confined to successful outcomes from the courts. The *Foy* case demonstrated that sometimes the actual hearing of an unsuccessful case and the publicity surrounding it can be almost as effective as a legal victory by raising awareness and creating sympathy for the applicant.
But litigation by itself, however successful – and to succeed it may need to rely on international human rights decisions and jurisprudence from other jurisdictions - may not be enough to bring about substantial change, as we have seen in the period after the Declaration of Incompatibility in the *Foy No. 2* case. Governments may feel that the issue is not important enough or does not command sufficient support for them to include it in an already overcrowded agenda, or that it may antagonise their more conservative supporters. And that is where international pressure, advocacy and campaigning come in, together with, where possible, the direct and moving testimony of the persons who are directly affected.

The lesson is that all these methods have their place in a campaign for change but that the role they play will vary from case to case, as will the sequence in which they are used. And the voice of the community whose rights are at issue must always be heard not only by the legislators whom the campaign seeks to influence, but by the campaigners as well.

In the *Lydia Foy case* we started at what might have been expected to be the middle of a campaign, i.e. using litigation, and much of what we did was in reaction to other developments rather than part of a careful strategic plan. But we can learn from that experience and try to act more strategically in other cases. And while ideally it would be better to begin at the logical starting point: the setting up of a lobbying group and a campaign of awareness raising, things do not always work out as neatly as we might wish.

I should mention in passing that the struggle to decriminalise homosexual conduct in Ireland also began with a legal case, commenced in 1981 by gay Senator David Norris. His case was lost in both the High Court and the Supreme Court in 1984 and he complained to the European Court of Human Rights which held in his favour in 1988. This series of high profile legal cases very successfully mobilised support for decriminalisation, but it still required a further five years of campaigning before the offending legislation was repealed in 1993.

The campaign for same-sex marriage in Ireland also involved a legal case at an early stage. It was taken by a lesbian couple, Katherine Zappone and Ann Louise Gilligan, who applied for legal recognition of their marriage in Canada some years earlier. The case was lost in the High Court in 2006 but it mobilised the lesbian and gay movement and sparked off a campaign which led to the introduction of civil partnerships in 2010 and the referendum that approved same-sex
civil marriage last year. Katherine Zappone is now the Minister for Children in the current Irish government.

Finally, I imagine that some of you may be wondering how it has come about that Ireland, which had been regarded until relatively recently as an intensely conservative country, at least on issues of sex and gender, has suddenly become the first country in the world to introduce same-sex marriage by popular vote and has also brought in a remarkably liberal Gender Recognition regime.

The Republic of Ireland was, of course, an overwhelming Catholic country, where the Catholic church exercised a stifling influence on “moral” and social issues. However, a series of child sexual abuse scandals by clergy and in church-run institutions, and the cover-up of these events by the Church hierarchy have drastically undermined the Church’s authority to lay down the law on such matters. The Catholic church still opposed same-sex marriage in last year’s referendum but they made only the most half-hearted statements during the campaign as if they knew that very few people would be listening to them.

Culture wars are not yet over in Ireland and there is likely to be another battle fairly soon over calls to liberalise the extremely strict law on abortion, but at least on LBGT issues Ireland has become a much more tolerant and inclusive society in recent years. I hope we will also prove to be as tolerant and welcoming on the other greatest issue of our generation – the refugee and migrant crisis.

In conclusion, after a long career in the human rights field, sparked off by those black and white cinema newsreels about the struggle against apartheid and the Civil Rights movement in the United States all those years ago, I will leave you with the thought that working for human rights can be one of the most frustrating things that you can do. It is frustrating because the struggle for human rights is never-ending. But it is also hugely fulfilling if you can look back upon your work and feel able to say that you think you helped to make a difference.

Michael Farrell, Solicitor, member of the European Commission Against Racism and Intolerance and member of the Council of State of Ireland. September 2016