

# Strategic Litigation at the European Roma Rights Centre

This paper summarises how the ERRC's legal department understands and practises strategic litigation to advance the cause of Roma emancipation.

## I. Definition of Strategic Litigation

The legal department defines strategic litigation, for the ERRC's purposes, as follows:

*Strategic litigation at the ERRC means supporting legal cases designed to expose and contribute to the elimination of discriminatory structures that prevent Roma from enjoying full equality.*

## II. Three-Part Analysis

In order to ensure that our litigation is strategic, the legal department approaches litigation by:

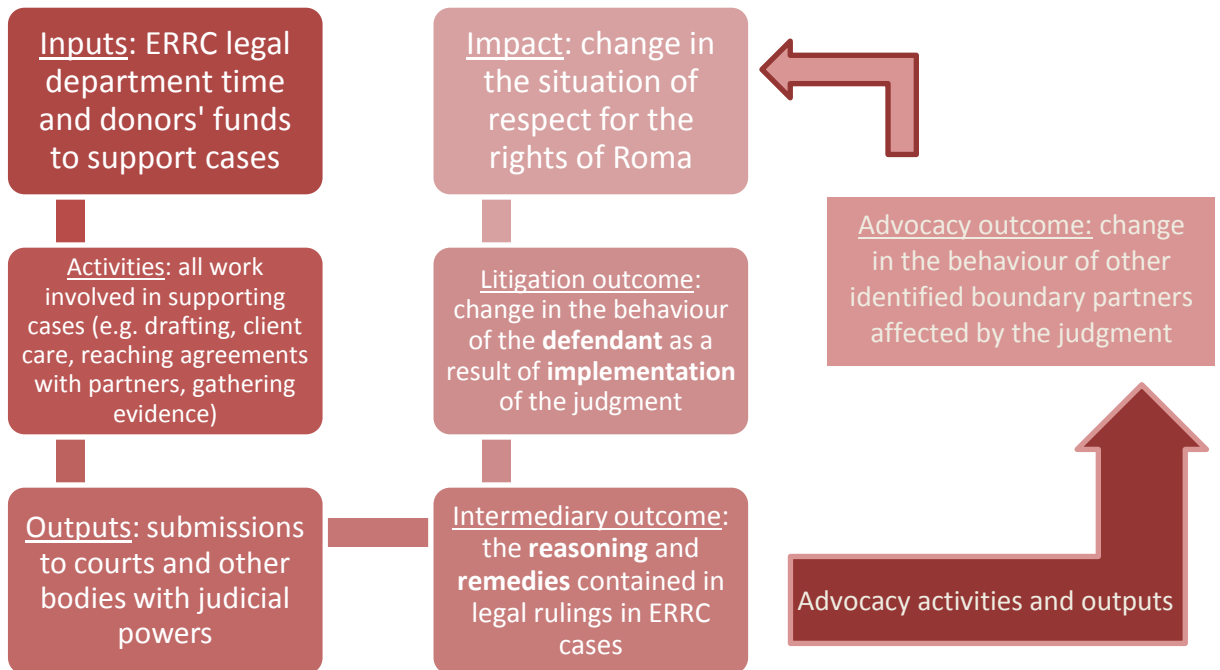
- a. identifying the discriminatory structure(s) the litigation targets;
- b. setting out the theory of change the litigation is designed to achieve; and
- c. defining the nature of the case by reference to two factors (legal argument and the litigants' position).

### a. Identifying the Discriminatory Structure

When considering undertaking litigation, the legal department always identifies the discriminatory structure(s) the litigation will target. In many cases this is straightforward (e.g. taking a case against an education authority for school segregation), but in some cases it is more complex: for example, police brutality cases may involve institutional discrimination in the police force but also in the body responsible for investigating police abuse. Discriminatory structures that prevent Roma from enjoying full equality can be obscured by or confused with problems of economic justice (as in cases about access to housing) or general rule-of-law problems (as in jurisdictions where there is generally poor respect for judgments of the European Court of Human Rights). The ERRC's strategic litigation may take on these other issues, directly or indirectly, but the focus of litigation is always the discriminatory structure affecting Roma. Usually, this means litigation will be based on legal provisions prohibiting race discrimination. It is possible, though, that the case will be based solely on other legal arguments, as part of a larger advocacy strategy designed at exposing and contributing to the elimination of discriminatory structures.

### b. Setting out the Theory of Change

The legal department has adapted theory-of-change language (introduced to the ERRC thanks to support from the Swedish International Development and Cooperation Agency) to our strategic litigation work. Starting from the definitions of theory-of-change terms agreed within the ERRC, the legal team has further refined those terms for the purposes of litigation, as depicted at the top of the next page. The legal department sets out in writing the theory-of-change narrative for a particular piece of litigation at the beginning of the litigation and revises it as necessary when the case develops.

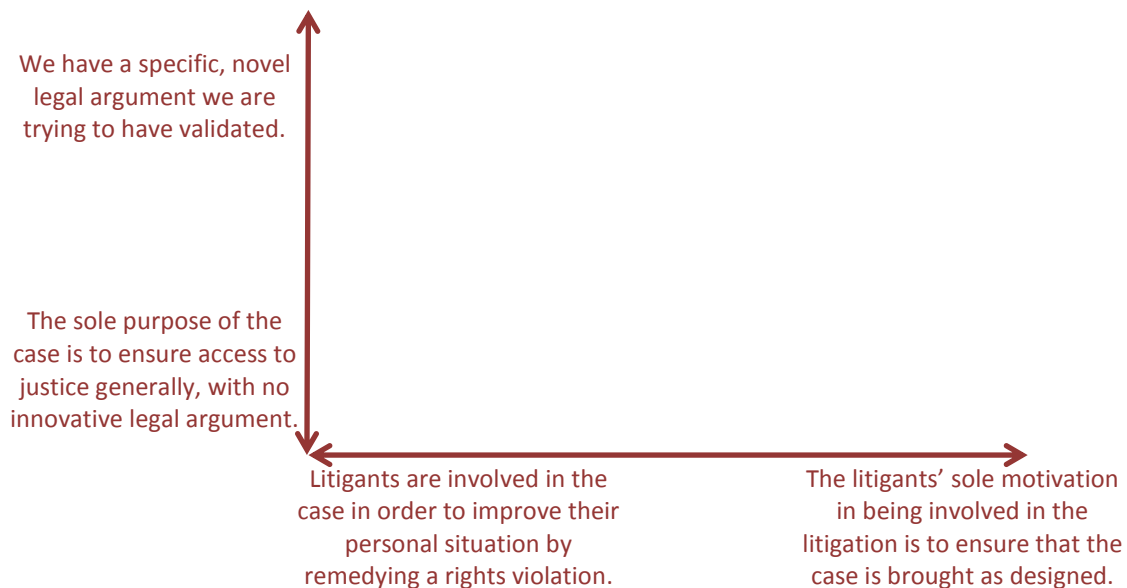


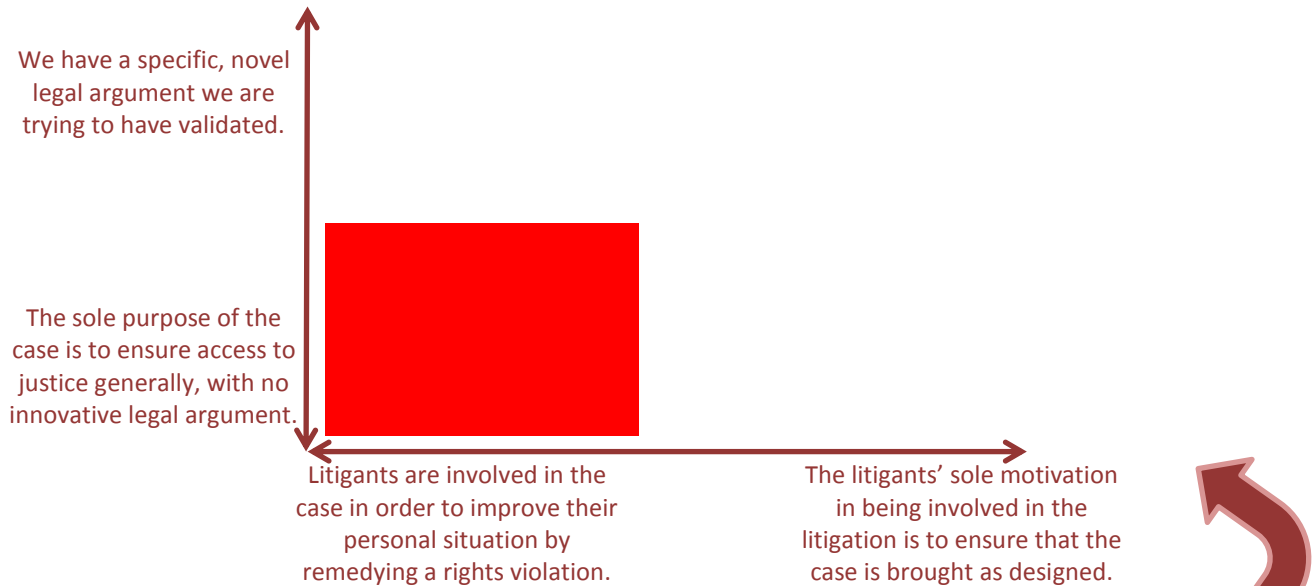
### c. Defining the Nature of the Case

The legal team identifies where its cases fall along two axes:

- **Legal argument:** At one end of the spectrum, the case raises no novel legal arguments and is solely designed to secure access to justice. At the other end, the case is solely designed to air and secure validation of a specific, innovative legal argument. The same case might appear at a different place along this spectrum depending on when it is brought: what once might have been a case seeking validation of a specific legal argument would, once that argument has been validated in other cases, be essentially about providing access to justice.
- **The nature of the clients' involvement:** At one end of the spectrum, the client is involved in the case solely to improve her/his individual situation by securing a remedy for a rights violation. At the other end, the client's sole motivation is to enable the case to be brought as designed.

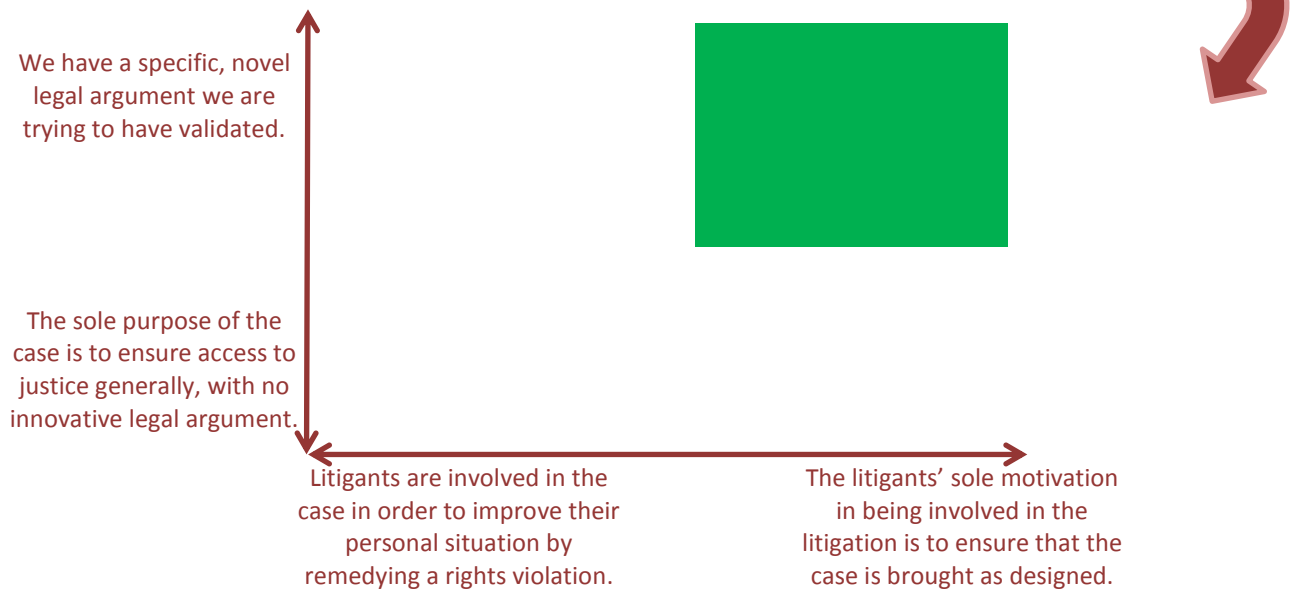
The chart below, with variations on the following pages, reflects where cases may fall. While the variations focus on the corners, these axes are spectra: cases will not always fall precisely in a corner.





**A. Free legal services:** This is the only quadrant where the legal team does not operate. Many Roma need free legal services in order to make complaints on issues that are the subject of well-established case law, but the ERRC, as a European organisation with limited resources, is poorly placed to do this work directly.

**B. “Set-piece battle” litigation:** These are cases designed to test innovative legal arguments in court in order to establish the progressive case law that will advance the cause of Roma emancipation. The clients might be situation testers, Roma who were victims of rights violations in the past and are determined to see that similar violations do not happen to others, or the ERRC itself and others NGOs (*actio popularis* litigation).



We have a specific, novel legal argument we are trying to have validated.



The sole purpose of the case is to ensure access to justice generally, with no innovative legal argument.

Litigants are involved in the case in order to improve their personal situation by remedying a rights violation

The litigants' sole motivation in being involved in the litigation is to ensure that the case is brought as designed.



**C. "Reactive-strategic" cases:** Some legal arguments designed to advance Roma rights are most appropriately put forward in the context of cases where the clients are seeking individual justice. These cases carry a high risk of conflict between the goals of the litigants and the strategic goals of the case. The legal department has two main tools to manage those risks:

1. **Incubators:** The legal team will provide arms-length support to lawyers and NGOs taking forward a critical mass of such cases and observe the cases to see if any develop in such a way as to make it strategic to invest more of our resources into them (such as through a high-level appeal or use of a regional or international mechanism).
2. **Third-party interventions:** The legal team may intervene as a third party in cases that have already been developed by other lawyers or NGOs in such a way that the ERRC's input as an intervener is likely to ensure that a specific legal argument is validated (this could also be seen as shifting the case into category B, as the ERRC is the third-party litigant).

**D. Awareness-raising litigation:** These cases are designed to raise awareness of a particular issue without there being much doubt as to the outcome of the case (i.e. the intermediary outcome). The theory of change in such cases relies on the assumption that a ruling or a number of rulings on a well-understood legal point will change the behaviour of defendants and those similarly situated to them.

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### III. Conclusions

The legal department's three tools for ensuring litigation is strategic are related, but serve separate functions. Identifying the discriminatory structure ensures that the case meets our definition of strategic litigation. Setting out the theory of change ensures that the case is designed to achieve agreed, effective results which can be easily communicated to others. The legal department's adaptation of theory-of-change language also provides a way of understanding and communicating the role of **remedies** and **implementation** in our work, and allows colleagues to map out where the work of litigators ends and that of colleagues engaged in other forms of advocacy begins. Defining the nature of the case allows our department to understand and explain the risks and limitations, on the one hand, and the strengths and opportunities, on the other, that the litigation presents; it also provides a framework for discussing how the department designs cases that reduce those risks and limitations (e.g. through an "incubator" approach or designing a case more to the "right" side than previously anticipated) and enhance the case's strengths and opportunities (e.g. by commissioning certain forms of research or fixing case- or client-selection criteria). Defining the nature of the case also provides a vocabulary through which the legal department can explain how we choose to use the ERRC's limited litigation resources.

The ERRC Legal Department  
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