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STRATEGIC APPROACH TO THE JUDICIAL REFORM IN MONTENEGRO: THE CURRENT STATE OF PLAY AND A WAY FORWARD¹

Summary

More than two decades have passed since Montenegro introduced the strategic approach to judicial reform. The quality of policy documents, but also the intensity of reform processes varied over the time, being intensified mostly when the strong political support to Montenegro EU accession processes existed. Considering the importance of the present reform momentum, as for the future of Montenegro judiciary as for its EU accession processes, in this paper, the authors address the main findings on the current state of play judicial reform in Montenegro. The paper also provides the recommendations on the necessary steps to be taken in order to foster those processes towards a full fulfilment of the Interim Benchmarks (IBMs) in Chapter 23 and receiving the Interim Benchmark Assessment Report (IBAR), since this is the precondition to obtain the closing benchmarks and to enter the final stage of negotiations in Chapter 23.

Key words: judicial reform, judiciary, justice reform, Chapter 23, EU integrations.

1. INTRODUCTION

Aimed at ensuring reform continuity based on long-term public policy planning that begun through the Judicial System Reform Project from 2000, continued through the

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Judicial Reform Strategy 2007-2012 and following the expiration of the Judicial Reform Strategy 2014-2018 (JRS 2014-2018), the Government of Montenegro adopted the Judicial Reform Strategy 2019-2022 (hereinafter referred to as the Strategy, JRS 2019-2022) at the session held on 12 September 2019. Reform activities in this four-year term have been focused on achieving five strategic objectives as follows:

- Strengthening the independence, impartiality and accountability of the judiciary
- Strengthening the efficiency of the judiciary
- Montenegrin judiciary as part of the European judiciary
- Strengthening the accessibility, transparency and public trust in the judiciary
- Development of the Ministry of Justice, Judicial Training Centre, professions of lawyers, notaries, bailiffs and court expert witnesses.

Priorities defined as such are an illustration of the need to ensure the implementation of the most significant reform priorities determined in the negotiating process for Chapter 23 (hereinafter referred to as: CH 23).

In order to define, in more detail, the manner and dynamics of implementation (activities, result and performance indicators, deadlines, competent authorities and funds planned for the implementation of operational goals defined in the Strategy), along with the adoption of the Strategy, the Action Plan for the Implementation of the Judicial Reform Strategy 2019-2020 has been adopted (hereinafter referred to as: AP 2019-2020), after the expiration of which the Government adopted a new Action Plan for the Implementation of the Judicial Reform Strategy 2021-2022 on 9 December 2021 (hereinafter referred to as: AP 2021-2022).

JRS 2019-2022 also envisaged the establishment of the monitoring mechanism, and the monitoring of the Strategy implementation has been entrusted to the Council for Monitoring the Implementation of JRS 2019-2022, formed by the Government of Montenegro (hereinafter referred to as: JRS Council 2019-2022) has, so far, prepared three annual reports on the implementation of the Strategy and AP 2019, 2020 and 2021, adopted by the Government of Montenegro.

Simultaneously, progress in area of judicial reform has been monitored through mechanisms established in the context of Montenegro's negotiations with the European Union (hereinafter referred to as: EU) which involves reporting within the monitoring of the Stabilization and Association Agreement implementation (hereinafter referred to as: SAA) as well the implementation of Action Plan for Chapter 23. Indirectly, certain aspects of judicial reform have been monitored by universal and regional treaty bodies and the special procedures of the United Nations (hereinafter referred to as: the UN) and the Council of Europe (hereinafter referred to as: CoE), and all the reports created within these mechanisms in the period of JRS 2019-2022 implementation can be considered a relevant information source, along with the findings of civil society organizations and academic community.

Since the period of the JRS implementation has been marked by a turbulent situation on Montenegro political scene, and blockade of work of the most important judicial institutions, the Ministry of Justice decided in 2023 to make an important step forward by conducting a comprehensive evaluation of the reform progress made through the JRS implementation, but also to develop a new package of policy documents (the Strategy, the Action Plan and the Monitoring and Evaluation Methodology) to frame the reform processes in 2024-2027 period.²

2. NO REFORM PLANNING WITHOUT OBJECTIVE EVALUATION

There is not any doubt that *ex-post* analyses aimed at assessing the impact of implementation of policy documents, as well as *ex-ante* analyses as tool to comprehensively scan the current state of play before designing future reform steps play a paramount role in the reform success.

In Montenegro, conducting such analysis is not just a matter of a good will or methodological approach, but also a standard part of the procedure of developing and monitoring policy documents. Decree on methodology and process of drafting, aligning and monitoring of implementation of strategic documents as well as Methodology for policy development, drafting and monitoring of strategic planning documents (GSG: 2018) established a legal basis for the evaluation of strategies and programs in the Montenegrin planning system.

Accordingly, purpose of the JRS 2019-2022 evaluation conducted in 2023 to precede developing the Judicial Reform Strategy 2024-2027 (JRS 2024-2027) is twofold:

- On one hand, to assess the results and impact of the Strategy implementation objectively and systematically at the end of the period this public policy document refers to (*ex post* analysis), whereby the relevance and meeting of objectives, as well as the efficiency of development, effectiveness, impact and sustainability of the strategic document are determined.
- Simultaneously, there is a requirement to ensure quality inputs in the process of developing new strategic documents (strategy and its action plan) which would be used to plan directly and in detail the reform processes in judiciary following the year 2023, whereby the results of this evaluation will become an important part of the *ex-ante* analysis necessary for the development of the new strategy.

Evaluation was carried out during May and June 2023, through the combination of quantitative and qualitative methods, including the documentation analysis and in-depth

² The authors of this paper have been actively engaged in this process in the capacities of the Working Group President (M. Jauković) and the international expert in charge of conducting External Evaluation and supporting the Working group in developing JRS 2024-2025 and accompanied Action Plan (M. Kolaković-Bojović).

interviews, aimed at assessing relevance, coherence, effectiveness, effectiveness, impact and sustainability.

3. THE MOST IMPORTANT FINDINGS AND CONCLUSIONS OF THE EVALUATION

3.1. JRC 2019-2022 relevance, coherence and effectiveness

Started from the above-mentioned importance of ex-post and ex-ante analyses, in the course of the JRS 2014-2018 impact assessment that became an integral part of the Strategy, the Evaluation showed that an opportunity was missed to analyze, in essence, the results of its implementation and therefore, clearly connect the existing state and the challenges at the time with the objectives, measures and activities contained in the JRS 2019-2022 and its action plans.

The Evaluation also showed that the objectives and activities from this strategic document are still **relevant**, not only because only three and a half years passed from the adoption of the JRC 2019-2022 until the Evaluation, but also due to limited Strategy implementation effects where many reform activities have remained unimplemented.

In terms of **coherence**, it is important to note that the adoption of the JRC 2019-2022, as well as the assessment of its implementation results are envisaged in key public policy documents of the Government i.e. in the Government Work Program and the Program of Accession of Montenegro to the EU. The foundations of the Strategy include in principle the key international standards concerning the organization and functioning of the judiciary. JRS 2019-2022 addresses the need for further improvement of criminal legislation. The fact that the Secretariat-General of the Government was not directly included in the development of the Strategy affected the above-mentioned.

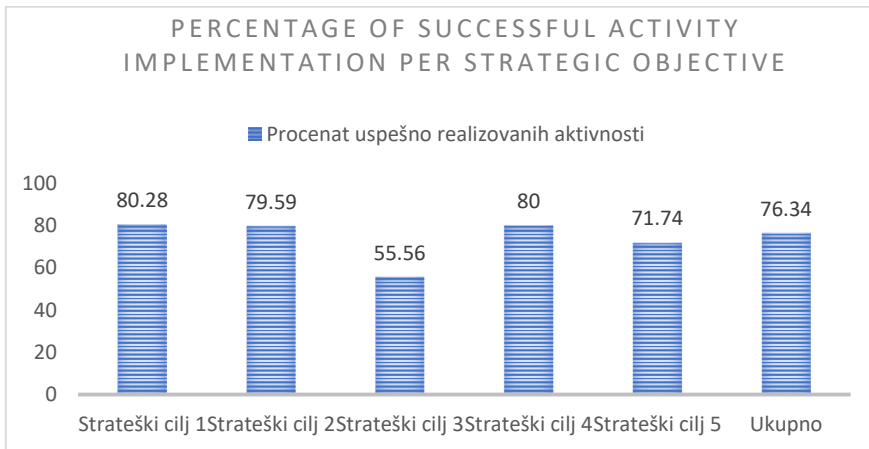
JRS 2019-2022 was not aligned with relevant international gender equality standards. Namely, as stated above, the Strategy and its action plans did not recognize nor address the lack of existing normative and institutional framework in Montenegro which currently does not ensure gender equality of judges and state prosecutors. (Janashia & Elezović: 2022)

In terms of **effectiveness**, following the summary of statistical parameters on Strategy implementation, it can be concluded that, except for 2019 bringing the first implementation year, the implementation percentage in the period 2020-2022 is unsatisfactory.

In terms of the degree of activity implementation per strategic objectives, the difference in terms of achieved results is noticeable, considering that the degree of full activity implementation ranges from minimum 55,56% in case of Strategic Objective 4 up

to approximately 80% which is the implementation percentage of strategic objectives 1, 2 and 4.

Chart 1: Degree of activity implementation per strategic objective



The main reasons of insufficient degree of Strategy implementation can be found in methodological shortcomings in defining operational goals, activities and deadlines for their implementation, as well as low indicator quality which prevent effective reform implementation monitoring. In addition, the lack of monitoring mechanism efficiency had a significant impact, focused on the lack of appropriate organizational structure and lack of early warning mechanisms. Long-term blockade of the work of the Judicial Council and Prosecutorial Council, lack of human resources and necessary expertise in institutions, pandemic caused by COVID 19, strike of lawyers as well as the general political instability in the country, significantly slowed down the implementation of the Strategy.

3.2. Independence, impartiality and accountability of the judiciary

In terms of strengthening judicial independence and impartiality, the main obstacle in achieving better results and more effectiveness of reforms were caused by the delay in amending the judicial and organizational legislation³ to align them with the Venice

³ For more information on the relevant international standards on judicial independence and their transposition in the national legislation, see: Jauković, M. (2020) *Pravo na nezavisan i nepristrasan sud: međunarodno-pravni standardi i njihova uključenost u crnogorsko zakonodavstvo*: master rad, Podgorica; Kolaković-Bojović, M. and Turanjanin, V. (2017) *Autonomy of Public Prosecution Service - The Impact of the "Checks and Balances" Principle and International Standards*. Journal of Eastern-European Criminal Law (2). pp. 26-41; Kolaković-Bojović, M. (2016) *Constitutional Provisions on Judicial Independence and EU Standards*. Annals of the Faculty of Law in Belgrade: Journal of Legal and Social Sciences, LXIV (3). pp. 192-204; Kolaković-Bojović, M. (2017) *Stavovi Venecijanske komisije kao okvir ustavnih promena u oblasti pravosuđa*. Zbornik Instituta za

Commission opinions.⁴ The process of developing the draft amendments have started during the JRS 2019-2022 implementation period and the work process itself on developing the draft was deemed transparent and inclusive, in principle (HRA, 2022) it hasn't been finished even in early 2024.

Following the suspension during the blockade of the work of both councils, sufficient dynamics of evaluation of judges and public prosecutors was achieved in the final year of Strategy implementation.

Budget of courts and prosecution offices has been increased but it is still below the values targeted by the Strategy (1% of the Annual State Budget). Courts and prosecution offices were awarded the status of autonomous budget users, but the establishment of an effective budget control system and introduction of necessary software solutions are delayed.

Infrastructure capacities of both councils are still inadequate and, apart from analyses and plans, further steps towards relocating the judicial authorities to a new building have not been taken, while in terms of administrative capacities, the largest problems are still strategic and project planning, monitoring, evaluation and reporting. (Tmušić, Abadić, Bogosavljević: 2019)

Random case allocation system is still not functioning in misdemeanor courts, but the delegation of cases has been practiced to a lesser extent.

Commission for determining ethical and disciplinary accountability of judges and public prosecutors has not resolved all the initiated proceedings but only 50%, while the inspection supervision mechanism of the Ministry of Justice is still facing two issues: lack of extraordinary inspection supervisions and lack of human resources. Situation in terms of accountability of judicial professionals is unbalanced and there is a need to significantly improve the work of disciplinary authorities.

kriminološka i sociološka istraživanja, 36 (3). pp. 21-37; Kolaković-Bojović, M. (2018) *Nezavisnost pravosuđa i efikasnost sudske zaštite kao međunarodni pravni standard i uslov članstva u EU*. In: Organizacija pravosuđa i efikasnost sudske zaštite (Evropski standardi i stanje u Srbiji): krivičnopravni aspekti; LVIII savetovanje Srpskog udruženja za krivičnopravnu teoriju i praksu. Srpsko udruženje za krivičnopravnu teoriju i praksu; Intermex, Beograd, pp. 95-116; Kolaković-Bojović, M. (2018) *The Rule of Law Principle: the EU Concept vs. National Legal Identity*. In: Naučni skup sa međunarodnim učešćem Univerzalno i osobeno u pravu. Univerzitet u Kosovskoj Mitrovici, Pravni fakultet, Kosovska Mitrovica, pp. 137-159. ISBN 978-86-6083-053-3; Kolaković-Bojović, M. (2018) *The Rule of Law and Constitutional Changes in Serbia*. In: Međunarodna naučno-stručna konferencija "Krivično zakonodavstvo i funkcionisanje pravne države" 20-21. april 2018, Trebinje. Srpsko udruženje za krivičnopravnu teoriju i praksu; Grad Trebinje; Ministarstvo pravde Republike Srpske, Trebinje, pp. 277-292.

⁴ For better understanding of the legislative reform background, consult the following: CDL-AD(2023)011, CDL-REF(2023)016, CDL-AD(2022)050, CDL-AD(2021)030, CDL-PI(2021)008, CDL-REF(2021)040, CDL-AD(2021)012, CDL(2021)016, CDL-REF(2021)028, CDL-REF(2018)047, CDL-AD(2018)015.

3.3. Efficiency of judiciary

The overall efficiency of Montenegro judiciary at the end of JRS 2019-2022 was assessed as limited, considering a worrying situation in various aspects of efficiency.

This starts with the disproportional values describing efficiency of the court network assessed by CEPEJ (CEPEJ: 2022), but also considering that the judicial network rationalization process is still in an analytical stage (Stawa, G: 2022).

In parallel at the time of conducting evaluation, the reform of criminal and civil legislation was significantly delayed, and drafts have still not been submitted for adoption. Desired results in terms of reducing the number of unresolved number of cases have not been achieved but progress can be noted in terms of efficiency of enforcing court decisions (87,10% of enforced court decisions out of the total number of enforceable cases in 2022).

Serious problem is still the state of the judicial infrastructure and safety of judges and public prosecutors and citizens that have business before the courts and state prosecution offices. Apart from analyses carried out and partially implemented planning process, there was no significant progress in terms of judicial infrastructure improvement. (Tmušić, Abadić, Bogosavljević: 2019)

The lack of progress in terms of ICT system improvement is still a large problem. The existing JIS, apart from not being used by the misdemeanor courts, is outdated and does not support the needs for effective case management and increasingly complex and detailed reporting. Working group tasked with the development of the new ICT system, following the recent termination of contract with the company that should have implemented the system, decided to continue the work on the improvement of JIS as a transitional solution until a new system is developed.

Considering the significance of efficient collecting and processing of statistical data for improving the efficiency of judiciary, it is important to note that this process still presents a large challenge for Montenegrin judiciary.

3.4. Accessibility, transparency and public trust in the judiciary

Limited progress has been also made in terms of Montenegrin courts making references to the ECHR case law. Systematization and availability of ECHR case law has been partially limited due to staffing changes in the Supreme Court Division for Case Law, but this is a temporary obstacle.

The system of free legal aid is functioning without major difficulties but its further improvement through amendments to the Law on Free Legal Aid and increase of the circle of users is delayed due to the delayed response of the European Commission to provide an opinion on the draft Law. Even though there are numerous activities toward the transparency of the judiciary, overall research that would result in objective quantifiable parameters of the real state of play in this area is lacking.

3.5. Strengthening capacities of the Ministry of Justice, Judicial Training Centre, professions of lawyers, notaries, bailiffs, and court expert witnesses

There is no any doubt that the reform progress is highly dependent from strengthening institutional and administrative capacities of the main stakeholders in charge of reform implementation. However, the goals in this area defined in JRS 2019-2022 has been just partially met. Serious shortcomings have been noted in terms of the need to ensure appropriate capacities of the Ministry of Justice which, despite numerous trainings, have been significantly weakened due to a high employee turnover. The situation is slightly better in terms of the improvement of work of the Judicial Training Centre, the budget of which has been perceived as satisfactory and working conditions (although the premises are rented) as very good, including the required IT equipment. E-learning platform has been established and the development of courses in upcoming.

In terms of the further improvement of the work of notaries and bailiffs, the continuation of interconnecting their information system with other institutions and organizations remains a priority which further improves legal security and work efficiency. Proactive relation of chambers in terms of supervision over the work of bailiffs and notaries is lacking for the purpose of strengthening the accountability mechanisms.

Delays in adopting the Code of Ethics for lawyers and the lack of efficiency of work of disciplinary bodies of the Chamber of Lawyers are still concerning.

Organization and work of court expert witnesses require additional legislator's attention, which would impact the quality and impartiality of court expert witnesses as well establishing sustainable training mechanisms, ethics and integrity.

3.6. Monitoring, evaluation and financial resources for the reform implementation

The weaknesses of the JRS 2019-2022 identified in this regard explain a great portion of the implementation/results weaknesses. Namely, the funds planned for the implementation of the Strategy and action plans have generally been sufficient and financing planned activities has been significantly supported by donors.

However, the monitoring mechanism didn't provide for the possibility of an overview of the efficiency of planned and spent funds concerning the results achieved. The problem of lacking human resources in certain institutions, significantly strengthening by employee turnover during the implementation of the Strategy affected the lack of implementation of certain activities and alternative solutions have not been envisaged. The lack of initial basis has been recognized as one of the limiting factors that affected the aimed goals, planning of the scope of activities, implementation dynamics and assessment of required funds.

The existing monitoring mechanism has only partially achieved its purpose aimed at ensuring the efficient implementation of the Strategy. This was caused by the lack of the

early warning mechanism, low (annual) reporting frequency and multiplication of monitoring mechanisms in the area of reform of judiciary and overload of administrative capacities by reporting activities.

In addition to the above-mentioned reasons indicating the necessary continuous strategic planning in the area of reform of judiciary, the suspicion that cancelling this practice would negatively impact sustainability of already implemented reforms is justified.

Implementation of the Strategy provided a limited impact on judges and state prosecutors and the judicial system in its entirety, as well as citizens, NGOs, the economy and the EU integration process.

In terms of the impact on judges and public prosecutors, although the Strategy provided for the strengthening of their professional capacities through numerous training programs and international cooperation, the long-term blockade of both councils, delays in legislative reform in almost all areas, the lack of capital investments in judicial infrastructure and ICT system, pandemic caused by COVID 19, the strike of lawyers and general political instability in the country have significantly decreased the potential impact of the implementation of the Strategy and even caused stagnation and regressive processes in certain areas.

When it comes to the impact on citizens and the economy, it can be noted that the impact of the Strategy is very limited, whereas the effects are most visible in the part relating to the judicial professions, primarily notaries and bailiffs, the work of which has significantly contributed to a facilitated access to justice and the increase of legal security through more efficient enforcement of court decisions and unburdening of the courts. The low level of citizens' trust in judiciary, including lawyers as well, explained by a lack of integrity due to political influence and corruption additionally speaks to the limited effects of the implementation of the Strategy, particularly in terms of establishing effective accountability mechanisms.

In addition to the general assessment that the inclusion and transparency practices of creating and implementing public policies gave been improved in recent years, representatives of NGOs still have remarks in terms of the scope and quality of their inclusion into these processes.

Although it is one of the fundamental reform pillars within Chapters 23 and 24 i.e. the entire Cluster 1 (*Fundamentals*), due to the limited impact achieved in the implementation period, Strategy has not significantly contributed to Montenegro's accession process to the EU. On the contrary, its non-efficient implementation negatively impacted this process.

In terms of the sustainability of the Strategy implementation results, the lack of effective budget and HR management as well as the lack of HR, particularly the capacities in the field of analytics, strategic and project planning is of special concern in this context. All of the above, along with a high level of financial, expert and logistic dependence of a

large reform segment on project support, challenges the sustainability of already achieved and expected benefits of implemented reforms.

4. A NEW JUDICIAL REFORM STRATEGY 2024-2027

As previously said, such a limited progress achieved through the JRS 2019-2022 implementation, as well as a strong political commitment to Montenegro EU path resulted in the ten-months long journey (June 2023- March 2024) of, in parallel, developing a new JRS 2024-2027 and accompanying Action Plan for 2024-2025 period and intensive implementation of reform activities (mostly legislative reform).

Overall Objective of the Strategy is further strengthening of the Rule of Law by strengthening independence, accountability, professionalism, and efficiency of judiciary as well as the improved access to justice and legal security in the process of exercising the protection of rights and freedoms of citizens and increasing trust in the judicial system.

Furthermore, the Strategy is based on three specific strategic objectives that rely on the vision and the overall objective of the Strategy and are clearly related to the JRS 2019-2022 strategic objectives.

These strategic objectives will be implemented through 22 operational goals, considering progress achieved in the implementation period of the previous strategic document, as well as current challenges.

1. Strengthening independence, impartiality and accountability of the judiciary
2. Improving professionalism and efficiency of judiciary
3. Improving access to justice, transparency and trust in the judiciary

For each of the hierarchical degree of objectives, appropriate successful indicators have been defined with initial and target values at the half of the Strategy implementation period, as well as in the final year. Specifically, impact indicators are defined for strategic objectives and outcome indicators for operational goals. Additionally, for specific Strategy implementation activities, result indicators have been defined within the Action Plan.

Each strategic objective relates to the list of IBMs that are relevant for that objective and should be fulfilled by achieving the objective. At the same time this means establishing the direct connection between the indicators defined for each strategic objective and the IBMs that shall ensure a more accurate monitoring of the IBM fulfilment using the indicators defined in the JRS 2024-2027. This also contributes better organization of reporting, monitoring and evaluation processes.⁵

⁵ For more information on the relationship between effective monitoring and evaluation of national policy documents and those developed in the context of EU accession processes, see: Kolaković-Bojović, M. (2018) *Organizacija pravosuđa u Republici Srbiji- reformski okvir i EU standardi*, Institut za kriminološka i sociološka istraživanja, Beograd; Kolaković-Bojović, M. and Petković, B. (2020) *Položaj pravosuđa u Srbiji - između vladavine prava i samovlašća*. Institut za kriminološka i sociološka istraživanja, Beograd; Kolaković-Bojović, Milica and Simonovski, Ivica (2023) *The*

The Action Plan covers 2024-2025 period and mostly focuses on finishing legislative reform and overall system stabilization after the crisis experience in the previous period, as well as on the policy and infrastructure planning while it is expected that the next Action Plan for 2026-2027 period will be focused on achieving track record. Furthermore, the second AP will correspond in time with fulfilling closing benchmarks in Chapter 23.

5. NEXT STEP OR HOW TO ENSURE REFORM CONTINUITY AND STABILITY?

Since the JRS 2024-2026 adoption is expected at the moment of developing this paper, it is also the right moment to respond this “simple” question: What can make implementation of this new Strategy more efficient and more effective comparing with the previous one?

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СТРАТЕШКИ ПРИСТУП РЕФОРМИ ПРАВОСУЂА У ЦРНОЈ ГОРИ: ТРЕНУТНО СТАЊЕ И БУДУЋИ ПРАВЦИ

Апстракт

Прошло је више од две деценије од када је Црна Гора увела стратешки приступ реформи правосуђа. Квалитет докумената јавних, али и интензитет реформских процеса варирао је током времена, интензивирајући се углавном када је постојала снажна политичка подршка процесима придруживања Црне Горе ЕУ. С обзиром на значај тренутног реформског замаха, како за будућност црногорског правосуђа, тако и за процесе приступања ЕУ, аутори се у овом раду осврћу на главне налазе о тренутном стању реформе правосуђа у Црној Гори. Рад такође даје препоруке о неопходним корацима које треба предузети како би се ти процеси подстакли ка пуном испуњавању привремених мерила у Поглављу 23 и добијању Извештаја о процени испуњености привремених мерила (IBAR), будући да ово представља предуслов за добијање мерила за затварање, чиме се улази у завршну фазу преговора у Поглављу 23

Кључне речи: реформа правосуђа, правосуђе, Поглавље 23, ЕУ интеграције.

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