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Guinea-Bissau: Pursue the construction of an independent justice system that is of use to the population

Summary

During the past four decades, the country has experienced time and again the settling of scores among political and military elites. Justice has rarely, if ever, been rendered to victims, promoting revenge and feeding the cycle of violence. In everyday life, the absence of formal justice mechanisms favours individual settlements or even conflict resolution methods implemented by traditional authorities that have remained highly influential and respected. An ambitious new Justice Reform Programme (2015–2019) has been prepared but has been blocked by the political crisis and differences between the government (Ministry of Justice) and the judicial power (Supreme Court of Justice). It is crucial to create consensus on the implementation of this essential reform.

Key recommendations

- Re-launch discussions on the implementation of the Justice Reform Programme (2015–2019) to help rebuild the justice system.
- Provide the justice sector with the means to fill the gap between reforms and observable changes on the ground.
- Strengthen public administration to make justice system reform effective.
- Provide the Attorney General and the President of the Court of Auditors with a mandate that strengthens their autonomy in carrying out their mission.
- Consider the creation of a Constitutional Court to ensure the letter and spirit of the Constitution prevail, with a moral and practical authority superior to that of the Supreme Court.

This note recalls the various reforms of the justice sector since the democratic transition of 1991, before listing the priorities for increasing the independence and improving the functioning of justice in Guinea-Bissau.

Successive efforts to build the rule of law and an independent justice system

The promises of democratisation of the 1990s

The political history of Guinea-Bissau, marked by a war of independence that had lasting consequences for state and nation building, has also been one where individuals and communities have experienced little change in the political, economic and social injustices encountered under different regimes. Justice has rarely, if ever, been rendered in addressing grievances and the violence that has so affected political life. Impunity has thus been the rule in a significant number of extremely serious crimes, such as assassinations of political actors, including in the state's top echelons, and military leaders.

On an everyday basis, the absence of formal justice favours individual settlements or even the resolution of conflicts by highly influential and respected traditional authorities. In rural areas, the virtual absence of the state, including courts and symbolic representations of state authority, contributes to the perception that local cultural norms carry more weight than the principles incorporated in the Constitution.

Since 1991, institutional reforms establishing political pluralism have affirmed the independence of the justice system. The Constitution of the Republic of Guinea-Bissau states that the organs of state are the President of the Republic, the National People's Assembly, the government and the courts (Article 59). Political power is based on the separation and interdependence of the organs of state and the subordination of all to the Constitution. It thus enshrines the independence of the courts and judges and their submission to the law.

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Judicial power is exercised by many courts, the highest of which is the Supreme Court of Justice (*O Supremo Tribunal de Justiça*). Its president, who also chairs the Higher Judicial Council, and vice-president are elected by their peers for a term of four years, renewable once.

The courts, through the Supreme Court, manage their own funds, either obtained through justice service delivery or directly allocated to them in the general state budget. The desire for an independent judicial sector is also visible in the way in which staff are managed and disciplined, through the higher councils of the two arms of the judiciary, in accordance with the statutes of the Bench and the Public Prosecutor's Office.

While the law recognises the independence and impartiality of judges as being fundamental principles of the rule of law, this independence is frequently compromised by the inadequacy or even absence of a budget allocated to the running of the courts. This facilitates direct interference by the executive, and allows the military to put pressure on the courts when one of its members faces legal action.

The failure to fully implement statutory provisions relating to the judicial branch, including financial autonomy, as well as the poor state of court infrastructure and facilities, also affect the independence of judges. This promotes laxity and corruption, which enables the political and economic elites to interfere in the judicial system.

Major reforms in the justice sector since the 1990s

Five major reforms were carried out in the 1990s. The 1993–1994 reform dealt with the renewal of the Penal Code and the Criminal Procedure Code. It allowed the justice system to adapt to and confirm with the new principles and constitutional order enshrined in the Constitution of 16 May 1984. In particular, it established the separation of competencies of the Public Prosecutor from those of the Bench in the conduct of criminal proceedings, assigning to the Public Prosecutor's Office the investigation phase and to the Bench the judgement phase.

> This independence is frequently compromised by the inadequacy or even absence of a budget allocated to the running of the courts

The 1995–1996 reform created sectoral courts (or 'small claims courts'), where judgements are based on the principle of equity and local custom, without resorting to the procedural formalities normally required by law (in conflicts related to land or theft of livestock in villages, for example). This reform has increased people's access to justice.

The 1996–1997 reform introduced major changes to the relationship between the judicial system and other organs of state. It enshrined the independence and autonomy of the judicial sector by subjecting the two arms of the judiciary (public prosecutors and sitting judges) to the administrative and disciplinary authority of their respective higher councils, and not political power. It also established career tracks in the two arms of the judiciary, with criteria for promotion based on experience and merit.

The 1999 reform introduced the principle of peers electing the President and Vice-President of the Supreme Court of Justice for a four-year term, renewable once. It completes the 1996–1997 reform, which had the same objective of strengthening the independence of the judiciary.

Finally, the reform adopted in 2010–2011 with the support of the United Nations Development Programme (UNDP) introduced legal and judicial

Major reforms in the justice sector since the 1990s

- **1993 – 1994:** Renewal of the Penal Code and Criminal Procedure Code
- **1995 – 1996:** Creation of the so-called 'small claims courts', or sectoral courts
- **1996 – 1997:** Introduction of changes to relations between the judiciary and other organs of state
- **1999:** Introduction of the Principle of Election of the President and Vice-President of the Supreme Court of Justice
- **2010 – 2011:** Creation of the Office of Information and Legal Advice of the Ministry of Justice (GICJU)

assistance to the most vulnerable people in terms of access to justice, as well as public service assistance, known as the Information and Legal Advice Office of the Ministry of Justice (*Gabinete de Informação e Consulta Jurídica do Ministério da Justiça, GICJU*). This service coordinates the Access to Justice Centres (*Centros de Accesso à Justiça, CAJ*). Intended for all nine regions of the country, in February 2018, only seven CAJ were operationnal. Two CAJ in Bissau and five in the regions.[1]

Various programmes have been launched, with international funding, to implement these reforms. The Programme of Support to State Organs and the Strengthening of the Rule of Law was funded by the European Union with a budget of €6 million for the period 2006–2010. An important component of the programme supported justice sector reform with the specific objectives of reorganising the justice system; building capacity; constructing and rehabilitating infrastructure and equipment; modernising the legislative framework; and promoting civil society's access to justice.[2]

Its implementation was difficult, in particular because of insufficient coordination with other institutions and a lack of national ownership;[3] probably also linked to the instability of the government and the lack of capacity of the state apparatus. Despite significant constraints, the programme ran for 11 months, during which 50 training activities were organised for 690 staff members. In addition, the programme also ensured that the buildings housing the national headquarters of the Bar Association and the Faculty of Law of Bissau were rehabilitated.

> The figure of the judge counsellor, who is familiar with local customs, has practically disappeared while lawyers are increasingly required

The very concrete nature of these latest achievements shows the magnitude of what needs to be done, which goes well beyond legislative changes. Without strengthening the institutions responsible for training the country's lawyers and magistrates, the independence of the judicial system and its usefulness to citizens will remain illusory.

Reforms such as the establishment of district courts to rule on 'small claims' have produced tangible results, facilitating access to understandable local justice for people not accustomed to formal proceedings. However, as the magistrates assigned to these courts received more training, the recourse to customary law and the principle of equity decreased. The figure of the judge counsellor, who is familiar with local customs, has practically disappeared while lawyers are increasingly required.

STRENGTHEN LEGAL TRAINING INSTITUTIONS

The crucial question of means explains the gap between reforms and changes on the ground. Of the 42 district courts originally planned for the entire country, only 22 were created. Of these, only 11 were actually operational in March 2018. This is owing to the precarious conditions in

which they have to function, with little funds to pay rent and low staffing levels. Some courts do not have magistrates.

All the administrations linked to the judicial system remain handicapped by their lack of workable budgets, and thus their legitimacy among citizens is undermined. Despite its national jurisdiction, the judicial police force (the body of the criminal police responsible for assisting judicial authorities in criminal investigations) is present only in the capital, Bissau, where it has its headquarters, with a single unit for the entire country.

The judicial police, which is under the administrative supervision of the Ministry of Justice and under the functional supervision of the Ministry of Public Security, does not have a forensic laboratory or a forensic institute, both of which are key mechanisms for conducting serious criminal investigations.[4]

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The penal system illustrates both the good intentions and efforts of recent years and the challenges that remain. The country has three detention centres: Mansôa Prison, Bafatá Prison and the Judicial Police Detention Centre of Bissau/Bandim. Progress has been made in the penal sector in terms of infrastructure and legislative review, and a sentencing court, for example, has been established.[5] Nevertheless, prisons and detention cells at police stations are still overcrowded and unsafe, while living conditions remain deplorable.[6]

Restart justice reform on the basis of the existing programme for 2015–2019

An ambitious but blocked reform agenda

For two decades, justice sector reforms have taken place in the context of a state that was destabilised by the 1998–1999 civil war and affected by political and military tensions that resulted in government instability and military coups. Certain activities have been carried out, but without any real political leadership or real desire to strengthen public administration, including those bodies forming part of the justice sector. As a result there were no concrete improvements in the judicial system's operations.

Considered slow, ineffective, unfair and inaccessible, the justice sector still has a bad reputation. It is perceived as being instrumentalised by political power. Impunity remains the rule, with those holding political, economic or traditional power considered immune from prosecution, regardless of the illegality of their actions.

The latest attempt to actualise stated ambitions to fundamentally reform the justice sector is based on the Justice Reform Programme (2015–2019), an initiative of the Ministry of Justice with support from the UNDP. The

THREE DETENTION CENTRES

- MANSÔA PRISON
- BAFATÁ PRISON
- BISSAU/BANDIM DETENTION CENTRE

presentation document on reform is detailed and covers all the dimensions of the sector, with specific action plans. The programme aims to:

- Strengthen the independence of the courts through the election of the President of the Higher Judicial Council and the appointment by the President of the Republic of the Attorney General for a fixed and renewable term, without the possibility of dismissal at any time by the President;
- Strengthen the independence of the courts by improving the status and remuneration of judicial officials;
- Strengthen transparency in the management of the courts through the creation of an independent inspection service located outside the Higher Judicial Council;
- Increase courts' productivity through regular inspections, conducted by the government, the Judicial Council and the Bar Association, in order to measure productivity, identify delays in proceedings, examine working conditions, etc.;
- Create a Constitutional Court to replace the Supreme Court of Justice in its role of constitutional control;
- Improve access to justice, including by expanding access to justice centres;
- Build and rehabilitate judicial infrastructure and equipment;
- Ensure gender equity in the courts;
- Strengthen the capacity of role players by reviving judicial training centres;
- Improve and update the legal framework in criminal, civil, administrative and procedural matters.

> A consultative process should involve political actors, courts (magistrates, court officials, lawyers, judicial unions) and civil society

This programme, supported by the government elected in the 2014 general elections, has not yet been adopted and its implementation has therefore not started, mainly because of the political crisis in the country since 2015. Governmental instability has prevented further discussions among justice sector stakeholders.

The development of this programme is based on thorough analysis and extensive consultations, which took place before the country and its institutions entered the current period of instability and uncertainty, which has not spared the highest court, the Supreme Court of Justice, from being called upon to decide in favour of one or other of the political camps.

It is crucial to bring an end to the political and institutional crisis in order to endow the country with a government with the necessary legitimacy to restart discussions on the implementation of this reform.

LACK OF FINANCIAL AUTONOMY AN OBSTACLE TO THE INDEPENDENCE OF THE JUDICIARY

Relaunch the dialogue and ensure coherence with constitutional reform

The resolution of the political crisis would make it possible to organise the national dialogue roundtable, an ideal framework for fostering broad consensus on the 2015–2019 reform programme, which is already three years overdue. A consultative process should involve political actors, courts (magistrates, court officials, lawyers, judicial unions) and civil society in order to iron out possible differences between the government and the judicial power.

> Building a stable and democratic state implies a long-term commitment

In view of the relaunch of the reform process, the drafting of a new Constitution should, in its chapter on the judiciary, include provisions aimed at:

- Strengthening the independence of the Attorney General of the Republic by setting a term of office during which he/she is irremovable, except in exceptional circumstances specified in the Constitution;
- Strengthening the Court of Auditors by determining a fixed term of office for the president of this institution, who must be empowered to play a major role in the fight against corruption and mismanagement of public resources. The court should also have financial autonomy, with direct access to its allocation in the state's annual budget;
- Creating a Constitutional Court that would ensure that the letter and spirit of the Constitution prevail and with a moral and technical authority superior to that of the Supreme Court, whose powers are of a different nature.

Conclusion

The overview of the justice sector and the summary of the various reforms undertaken since the beginning of the 1990s illustrate the serious effects recurrent political crises have had on the consolidation of the state and its capacity to provide essential public services, such as justice. The diagnoses are long established and the list of actions to be carried out is known, as is the extent of the shortfall in human and material resources.

There is considerable fatigue among Guinea-Bissau's regional and international partners, based on a perception of reformational failure due to governmental instability and military crises.

Building a stable and democratic state implies a long-term commitment. Despite the paucity of judicial institutions in the country, the level of violence and insecurity is relatively low. At first, civilian and military elites settled various scores. However, without support for further reforms, the peace and security of the people of Guinea-Bissau and the entire West African region would be under threat.

Notes

1 These are the regions of Bafatá, Oio, Cacheu, Quínara, Gabú and Tombali.
2 DCAF-ISSAT, Mission Report: Identification of Potential Areas of Support for the European Union to the Justice Sector in Guinea Bissau, ii.
3 Idem, DCAT-ISSAT, ii.
4 Ibid., 16–17.
5 2015-2019 Justice Reform Programme, 60.
6 UN Security Council, Report of the Secretary-General on developments in Guinea-Bissau and the activities of the United Nations Integrated Office, 7 February 2017, 5.

Methodological note

This note is part of a series of six analytical notes on the reforms that Guinea-Bissau needs in order to return to stability, and which are also proposed in the October 2016 Conakry Agreement. The first notes are respectively about the reform of the Constitution, the reform of the electoral law, the reform of the Framework Law on Political Parties, the reform of the defence and security sector and the reform of the judiciary. The sixth and final note summarises the main recommendations presented in the notes as a whole. These publications are the result of field research and analysis conducted from March 2017 to January 2018 by a team of researchers from the Dakar office of the Institute for Security Studies, with the support of experts from Guinea-Bissau, the region and internationally. They were developed at the request of the United Nations Integrated Peacebuilding Office in Guinea-Bissau (UNIOGBIS) to facilitate discussions on these reforms among the forces of political and civil society in Guinea-Bissau.

About UNIOGBIS

The United Nations Integrated Peacebuilding Office in Guinea-Bissau (UNIOGBIS) was established in 2009 by Security Council resolution 1876, of 26 June 2009. The current mandate of UNOGBIS, as specified in resolution 2404 of 28 February 2018, focus on the following priorities: i) supporting the implementation of the Conakry Agreement and facilitating an inclusive political dialogue and national reconciliation process; ii) supporting, through good offices, the electoral process to ensure inclusive, free and credible legislative elections in 2018; and iii) supporting national authorities in expediting and complementing the review of the Constitution. The Mission is also mandated to assist, coordinate and lead international efforts to strengthen democratic institutions and enhance the capacity of state organs, promote and protect human rights, support the combat against drug trafficking and transnational organized crime, mainstream gender in peacebuilding efforts, and mobilize, harmonize and coordinate international assistance with view to upcoming elections.

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