

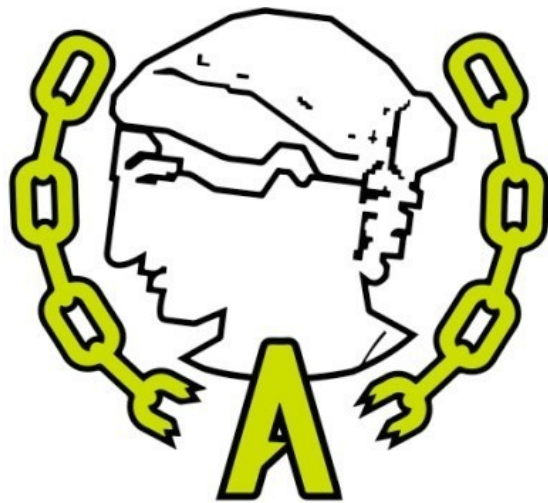
# ANTIGONE

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N. 1

**Have prisons learnt from Covid-19?  
How the world has reacted to the pandemic  
behind bars**



ANTIGONE



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## N. 1/2020 HAVE PRISONS LEARNT FROM COVID-19? HOW THE WORLD HAS REACTED TO THE PANDEMIC BEHIND BARS

edited by Susanna Marietti and Alessio Scandurra

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# The Covid-19 pandemic highlights the urgent need to decriminalise petty offences in Sierra Leone and beyond

*Isabella Cordua<sup>1</sup>, Joseph Bangura<sup>2</sup>*

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## 1. Introduction

At the height of the Covid-19 pandemic, several Un agencies released a joint statement urging governments around the world to protect people in detention and all those deprived of liberty from their increased vulnerability to the virus by taking appropriate public health measures, including reducing overcrowding (Unodc, Who, Unaid, Ohchr, 2020). This was echoed by regional bodies, including the African commission on human and peoples' rights (African commission on human and peoples' rights, 2020). Despite this, some African countries continue to use custodial measures to detain people for petty offences (AdvocAid, 2020a). In some cases, these countries have even created – through restrictions put in place to combat Covid-19 – new petty offences for which people are being arrested and imprisoned (L. Muntingh, 2020).

Following the outbreak, imposing custodial measures on those who commit petty

offences is not only disproportionate and against the recommendations of the African commission on human and peoples' rights to decriminalise and declassify petty offences (African commission on human and peoples' rights, 2018) – it is counterproductive and puts their health at risk. This is without considering the devastating consequences that prison already had on people who were incarcerated before this public health emergency (Open society justice initiative, 2011). This essay will discuss the criminalisation of petty offences in Sierra Leone before and during the Covid-19 outbreak – with specific attention to women. It will subsequently show the urgency to decriminalise and declassify petty offences in the country and beyond. The essay will draw from the authors' first-hand observations while working on access to justice for women and girls in Sierra Leone.

## 2. Towards a definition of *petty offences*

Petty offences were imposed on African countries during the Colonial era and are



based on a policing model that, as Lukas Muntingh argues, “protected the ruling white colonial elite and aimed at social control, the vestiges of which are still visible in many jurisdictions” (L. Muntingh, 2015, p. 40). Yet, while most petty offences have now been repealed from the statutes of the main colonising countries, they are still criminalised in almost all African countries. These offences are defined by the African commission on human and peoples’ rights (the Commission) as: “Minor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment, often for failure to pay the fine (...). Petty offences are entrenched in national legislation and, in most countries, fall within the broader category of minor offences, misdemeanours, summary offences or regulatory offences” (African commission on human and peoples’ rights, 2017, p. 9).

In 2018, the Commission recommended that State parties to the African Charter on human and peoples’ rights (the African charter) take steps to decriminalise and declassify petty offences as they violate a number of rights guaranteed by the Charter – namely the right to equality and non-discrimination<sup>3</sup>, the right to dignity and freedom from torture, cruel, inhuman or degrading punishment and treatment<sup>4</sup> and the right to liberty and security of the person and freedom from arbitrary arrest and detention<sup>5</sup>. The petty offences identified by the Commission as being ripe for repeal across the African continent include offences such as loitering, begging, failure to pay debts, being a common nuisance and disobedience to parents, urinating in public and washing clothes in

public, hawking, vending, being a rogue and vagabond, being an idle or disorderly person and being a vagrant (African commission on human and peoples’ rights, 2018).

These offences disproportionately impact those who are already marginalised and poor, arbitrarily targeting vulnerable groups such as the homeless, the beggars, the sex workers and the street vendors, but also people with psychosocial and intellectual disabilities (L. Muntingh, K. Petersen, 2015)<sup>6</sup>. When a State chooses to pursue prosecutions for petty offences, it is essentially punishing poverty (S. Mahtani, 2013).

These offences are enforced under often wrongly applied, outdated and vague laws which give the police wide discretion for enforcement (M. Kozah, 2017). This leaves ample liberty for the police to extort bribes and conduct arbitrary arrests of the poor and other marginalised groups (Carl, AdvocAid, 2019). In some cases, the vague character of these laws means that they are used by the police to arrest those against whom a substantive charge could not be imposed (L. Muntingh, K. Petersen, 2015). This is contrary, *inter alia*, to the Commission’s *Guidelines on the use and conditions of arrest, police custody and pre-trial detention in Africa* (the Luanda Guidelines), which provide that people can be arrested and incarcerated only on the basis of laws that are clear, accessible and precise, consistent with international standards and respect the rights of the individual<sup>7</sup>. Arrests for petty offences also arguably do little to promote public safety and are disproportionate to the offence they set out to remedy (Commonwealth human rights initiative, 2018).



### 3. Petty offences in Sierra Leone: the impact on women and marginalised groups

In Sierra Leone, petty offences are still criminalised both in law and in practice and make up a substantial share of the cases entering the criminal justice system. A study conducted by AdvocAid and the Centre for accountability and rule of law (Carl) in 2019 indicates that 33% of all offences for which people were in prison in the country – either in pre-trial or convicted – were petty (Carl, AdvocAid, 2019). Among the most common petty offences are loitering, the non-payment of debt (including fraudulent conversion and obtaining goods or money by false pretences), insulting conduct, and minor traffic offences. While those are the petty offences specifically criminalised in Sierra Leone, similar charges exist in the statutes of most African countries.

Tougher criminal justice policies have resulted globally in an increase in the number of women who are imprisoned for petty offences (Unodc, 2015). While both men and women are arrested and charged for petty offences in Sierra Leone, women generally experience higher rates of poverty due to limited access to capital, education, and job opportunities. These disadvantages place women at greater risk for arrest for petty offences. The vast majority of women in prison in Sierra Leone are marginalised, illiterate, petty traders and the sole caretakers of young children (Cyrus R. Vance Center for international justice, AdvocAid, 2020). Petty offences are often the survival crimes of women who commit them to support themselves and their families (AdvocAid, 2018a).

### 3.1 The criminalisation of debt: fraudulent conversion and obtaining money or goods by false pretence

Both these offences relate to the non-repayment of debt and require in law a deliberate and fraudulent intention to maliciously defraud a person<sup>8</sup>. Based on the authors' observations, these offences are now generally misinterpreted and have been overextended to criminalise almost any instance of debt, regardless of intent. Following advice from the police, some women plead guilty to owing money to their accuser without really understanding that they are admitting to intentionally defrauding them or the implications of their plea. A recent study in fact revealed that low levels of education, combined with the fact that most women do not receive appropriate legal advice at the police stations, means that many women in the country do not understand the criminal justice process and plead guilty to charges they do not comprehend (Cyrus R. Vance Center for international justice, AdvocAid, 2020).

The enforcement of charges of both fraudulent conversion and obtaining money by false pretences creates opportunity for corruption and bribery. The authors have met many women who said they have been held at the police station as the police levied money from both them and their lender. Some of these women are then charged to court and spend such extended periods of time in pre-trial detention that by the time their case is heard in court, they have already served their time (S. Mahtani, 2013). Once an individual is convicted and goes to prison, the lender does not recover the money owed and the State incurs expenses in detaining someone who could have

instead worked to repay the lender. This further shows the need to develop alternatives to incarceration and community-based non-custodial measures in Sierra Leone and beyond, to reduce the devastating consequences of imprisonment, while also offering a more cost-effective approach for the State (Unodc, 2020).

A number of women in prison in Sierra Leone, who are already marginalised and often the breadwinners of their households, are therefore in prison for borrowing small amounts of money for business purposes and using it to provide for their children and families instead. Civil society organisations in the country say that the number of such cases among women has increased during the Covid-19 pandemic (AdvocAid, 2020a). As already mentioned, most women in Sierra Leone work as small-scale traders and, following the establishment of a curfew to limit the spread of the virus, they have had their trade hours – and thus their profits – reduced. This can mean that women are unable to repay their loans and are arrested under charges of fraudulent conversion and obtaining money by false pretences (AdvocAid, 2020a).

### **3.2 Marginalised and criminalised under loitering laws: sex workers**

The United Nations Committee on the Elimination of Racial Discrimination has stated that laws which ban loitering essentially criminalise homelessness and have a disproportionate effect on vulnerable groups (Committee on the Elimination of Racial Discrimination, 2014, para.12). Loitering in Sierra Leone is defined by the Public Order Act 1965 (section 7) as idling in the street “not

having any visible means of subsistence, and not giving a good account of himself”. This definition is vague and highly discretionary; it can lead to abuse of power on the part of the police and places vulnerable groups, and especially sex workers, at an increased risk of arrest.

Sex workers are globally harassed by the police and often face discrimination when they come in contact with the criminal justice system (C. Mgbako, 2011). In Sierra Leone, police officers sometimes extort money or sex from sex workers in return for their release (Justice studio, *et al.*, 2011; AdvocAid, 2018b). While sex work is otherwise legal in Sierra Leone<sup>2</sup>, sex workers are the target of arbitrary arrests by law enforcement under these vague loitering laws<sup>10</sup>.

This already vulnerable group has been severely affected by the pandemic across Africa, as measures such as lockdowns, curfews and travel bans have left many without income (The Global Fund, 2020). In Sierra Leone, sex workers are reportedly often arrested for violating curfew regulations and are sometimes forced to spend the night with a client to avoid breaching the limitation, frequently without being appropriately remunerated (AdvocAid, 2020a). Some of these women are then reported to the police for having stolen items from clients after not having been paid or having been physically abused by them.

### **3.3 Covid-19 and the creation of new petty offences**

Recently, many African countries have created new petty offences, often under community by-laws, to punish the violation of restrictions put in place to contain the spread of Covid-19 (L.

Muntingh, 2020). However, the criminalisation of petty offences relating to Covid-19 is not an appropriate public health response and disproportionately targets marginalised groups. While this public health emergency may require governments to limit and derogate from certain human rights, these restrictions must be based on legality, evidence-based necessity, *proportionality*, and gradualism<sup>11</sup>.

In Sierra Leone, measures such as restrictions on inter-district travels, curfew, and the compulsory use of masks have led to individuals being arrested and sometimes even detained. According to civil society organisations, women have been distinctly impacted by some of these measures (AdvocAid, 2020a). The authors have witnessed AdvocAid paralegals and duty counsels having to step in, in cases where women had been arrested for leaving their houses after the curfew or during a lockdown to go and fetch food or water for their families. The organisation also reportedly provided legal representation to 25 students and petty traders who were arrested in a market for not wearing a mask (AdvocAid, 2020d).

“I am so grateful to AdvocAid for intervening in my case and that I did not have to go to prison for failing to pay a fine for not wearing a mask. I fear being in a cell with strangers, who might have been exposed to the virus. I do not have money to buy a mask, but I will try to find one”.Kadiatu, one of the many women who have been arrested for failure to wear face masks<sup>12</sup>.

#### 4. Overcrowding, petty offences and Covid-19

According to the latest report by Penal reform international and the Thailand

institute of justice (2020), prisons in 124 countries exceed their maximum capacity. As of September 2020, more than 214,246 people in detention have tested positive for Covid-19 in 106 countries<sup>13</sup>. This comprises many sub-Saharan African States, including South Africa, Namibia, Botswana, Zimbabwe, Madagascar, Malawi, the Democratic Republic of the Congo, Rwanda, Uganda, Kenya, Ethiopia, Sudan, Nigeria, Togo, Ghana, Guinea, Senegal and Sierra Leone. According to internal data obtained by the authors, correctional centres in Sierra Leone are on average holding double their capacity, with some prisons even exceeding the maximum occupancy rate by more than four times<sup>14</sup>. It is worth mentioning that another factor in the congestion of prisons in Sierra Leone is the continuous and excessive use of pre-trial detention the country makes for both women and men (Timap for justice, Prison watch Sierra Leone, Open society justice initiative, 2013)<sup>15</sup>.

Reducing overcrowding was already a priority under regional and international standards such as the Luanda guidelines and the Mandela rules, the Bangkok rules, and the Tokyo rules. Yet, the Covid-19 pandemic presents unprecedented challenges and thus requires extraordinary efforts to reduce prison overcrowding, which makes the social distancing rules recommended to prevent the transmission of the virus virtually impossible. Incarcerated people also commonly have poorer health than the general population, and often suffer from underlying conditions (L. Roy, 2020). These circumstances, combined with the substandard hygiene routines and infrastructures found in many correctional

centres around the world, puts the health of both those detained and prison staff at significant risk (Penal reform international, 2020).

Currently, most countries have attempted to reduce the spread of the virus in prison by limiting visitation from the outside world and placing infected individuals in isolation (Penal reform international, Thailand institute of justice, 2020). However, restrictions on visits from family, lawyers and independent monitoring bodies, combined with the fear of being infected with the virus, have exacerbated anxiety and tensions among people in detention, which in some cases have culminated in suicides, escapes and riots (H. Summers, 2020). In April 2020, the Sierra Leonean government confirmed the first Covid-19 case in a correctional facility. The man who contracted it had been charged with larceny, which is a minor offence (AdvocAid, 2020b). Following this, a riot broke out in the male prison in the capital and 31 people were killed – one officer and 30 men in detention. The Sierra Leone Correctional service released a report into the riot, finding that 400% overcrowding, staff shortages, and the severe Covid-19 restrictions imposed on those imprisoned were key causes of the riot (A. R. Thomas, 2020).

Yet, in spite of civil society organisations' repeated calls to release pre-trial and vulnerable detainees as part of Covid-19 prevention measures (AdvocAid, 2020c), the only people in detention who were released in the country since the outbreak were the 150 men and three women<sup>16</sup> who were granted *unrelated* presidential pardons on Sierra Leone's Independence day (A. K. Sesay, 2020). When comparing

the response of the Sierra Leone government to that of other countries in Africa<sup>17</sup>, Sierra Leone's efforts to decongest prisons to reduce the spread of the virus are insufficient. Not only has the Sierra Leone government not released people in detention to reduce prison overcrowding in response to Covid-19, it also continues to arrest people for minor, economic and petty offences, jeopardising the lives of those detained, prison staff and the general public.

The *Ouagadougou declaration and plan of action on accelerating prisons and penal reforms in Africa* had already identified in 2002 the decriminalisation of minor offences as an important measure towards reducing prison overcrowding in Africa<sup>18</sup>. This was reiterated in 2018 by the African commission on human and peoples' rights (African commission on human and people's rights, 2018). The recent Covid-19 outbreak demonstrates that the decriminalisation and declassification of petty offences in Africa can no longer wait.

## 5. Conclusion

Following the outbreak of Covid-19, prisons have become "ticking time bombs" (Penal reform international, 2020). It is clear, now more than ever, that there is an urgent need for governments around the world to decongest all places of detention.

Unnecessary arrests greatly contribute to the overcrowding of prisons in Africa. Petty offences target those who are already poor and marginalised – often women and vulnerable groups – without doing much to promote and guarantee public safety. The creation of new petty offences to punish violations of Covid-19 restrictions are increasingly impacting marginalised

groups and criminalising actions that fall under public health concerns rather than criminal justice. Custodial sentences for all petty offences are disproportionate and counterproductive and place those who are already struggling in a position of increased vulnerability. Their enforcement, combined with the overuse of pre-trial detention, contributes to prison overcrowding, which facilitates the spread of diseases.

Following the outbreak of the novel coronavirus, there is an obvious need for a moratorium on new arrests and prosecutions of petty offences in Sierra Leone and beyond. This global health crisis has further indicated that there is a pressing need to decriminalise and declassify petty offences across Africa and develop alternatives to incarceration as well as non-custodial measures such as diversion, cautions and warnings where necessary. This, combined with an effort to truly use (pre-trial) detention as a measure of last resort, might go a long way in curbing the spread of the virus in the already often underfunded and vulnerable African prisons.

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## Notes

<sup>1</sup> **Isabella Cordua**: is a human rights researcher and consultant at the Cyrus R. Vance Center for International Justice. As part of the Vance Center's *Women in prison project*, she has led the first comprehensive study on the causes and consequences of women's imprisonment in Sierra Leone, jointly with AdvocAid.

<sup>2</sup> **Joseph Bangura**: is the monitoring and evaluation officer at AdvocAid, the only organization in West Africa providing holistic access to justice to women and girls caught up in Sierra Leone's often unjust legal system.

<sup>3</sup> Articles 2, 3 and 18 of the African Charter.

<sup>4</sup>Article 5.

<sup>5</sup>Article 6.

<sup>6</sup>This is contrary to several human rights treaties, such as, for example, the International covenant on civil and political rights and the African charter.

<sup>7</sup>Article 2(a).

<sup>8</sup>Under the Larceny act 1916, a person is guilty of committing "fraudulent conversion" if: "...being entrusted (...) with any property in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; (...) *fraudulently converts* to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof" (emphasis added). Fraudulent conversion carries a sentence of up to seven years in prison. Similarly, a person is liable to up to five years in prison if "by any false pretence — (1) *with intent to defraud*, obtains from any other person

any "chattel, money, or valuable security (...)" (emphasis added).

<sup>9</sup>While solicitation is illegal under s.17 of the Sexual offences act 2012, prostitution itself is legal in Sierra Leone.

<sup>10</sup> International standards place positive obligations on States to protect sex workers, who are particularly exposed to abuse (Cedaw, 1992, paras. 15–16).

<sup>11</sup> The Siracusa Principles: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>

<sup>12</sup> Case study provided by AdvocAid. Name has been changed to protect the identity of the woman.

<sup>13</sup> To track the spread of the virus in prisons across the world: <https://www.jpp.org.pk/covid19-prisoners/>

<sup>14</sup> The prison population in Sierra Leone has doubled in the last ten year: <https://www.prisonstudies.org/country/sierra-leone>

<sup>15</sup> According to official data seen by the authors approximately 60% of all incarcerated people in Sierra Leone are held in pre-trial detention.

<sup>16</sup> This is approximately 3% of the total prison population.

<sup>17</sup> See, for example, Ghana: <https://allafrica.com/stories/202007060575.html>, Kenya: <https://www.aa.com.tr/en/africa/covid-19-kenya-frees-nearly-4-000-prisoners/1789969> and Zambia: <https://www.lusakatimes.com/2020/05/22/president-lungu-pardon-2-984-inmates-to-commemorate-african-freedom-day/>

<sup>18</sup> Download [here](#).



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