



BOFAXE

#ManuelaJusticiay Esperanza? (Part 1)

SOME REFLECTIONS ON THE HEARINGS ON *MANUELA AND OTHERS V. EL SALVADOR*

On 10 and 11 March 2021, the public hearings on the historic case of *Manuela and others v. El Salvador* took place before the Inter-American Court of Human Rights (IACtHR). For the first time in the Court's history, judges will have the opportunity to rule on human rights implications of absolute abortion bans, potentially paving the path for major changes in the perception of women's reproductive rights in Latin America.

Latin America abounds in restrictive abortion regulations. While a few states have legalized abortions ([Cuba](#), [Mexico City](#), [Guyana](#), [Uruguay](#), and recently [Argentina](#)), most states allow access to abortions under exceptional circumstances, e.g. in cases of imminent danger to the life and health of the expecting mother, rape, and severe malformations of the fetus. In some states, including El Salvador, absolute abortion bans are still in place, often accompanied by severe sanctions for women and doctors performing abortions.

This Bofax draws attention to the case of *Manuela and others v. El Salvador* and highlights its implications for the future of abortion legislation in Latin America. To this end, it will firstly provide an overview of the facts and public hearings of the case. Subsequently, it will introduce the human rights implications of abortion bans and, lastly, it will comment on the possible outcome of the case and the impact of the upcoming judgement.

The Facts of the Case

The case concerns a series of alleged violations in the context of the criminalization and stigmatization of abortions in El Salvador. Manuela, a single analphabetic mother with few economic resources, experienced a sudden obstetric emergency during her third pregnancy (probably due to a later diagnosed cancer). On arriving at the hospital, instead of receiving emergency care, she was chained to her bed, interrogated, and detained by the police on the grounds of having been caught *in flagrante delicto* after self-inducing a miscarriage. During the subsequent proceedings, Manuela did not receive appropriate legal defense and was finally sentenced to 30 years in prison on the grounds of aggravated homicide. In prison, her health conditions worsened extremely but it took almost a year until her already advanced cancer was diagnosed. She died in prison a few months after the diagnosis.

In 2012, the [Centre for Reproductive Rights](#) brought the case (see their factsheet on the case [here](#)) before the Inter-American Commission on Human Rights (the Commission). The Commission accepted the petition and found a violation of, *inter alia*, the right to life, the right to health, the right to privacy, and the right to judicial protection (see full report [here](#)). On 19 July 2019, the Commission submitted the case to the IACtHR.

Summary of the Proceedings

On the first day of the hearings, focus was placed on the testimonies of two expert witnesses. The first expert, an El Salvadorian doctor, reported that the absolute abortion ban had a "chilling effect" on both women and medical staff: Doctors denied the treatment of women with obstetric emergencies in order to avoid the suspicion of performing abortions and women did not seek the necessary medical assistance in fear of criminal prosecution. He observed that Manuela received insufficient medical healthcare due to the police interference and noted that easing the abortion ban might be an appropriate measure to guarantee non repetition. As he further stressed, clear procedural guidelines and protocols for both medical professionals and law enforcement officials are essential.

The second expert, a human rights professor, repeatedly emphasized that the absolute abortion ban leads to severe intersectional and gender discrimination. The fact that Manuela was poor and uneducated combined with the harmful stereotypes that were applied to her as a woman ("immoral", "reproductive machine") led to discriminations during her hospitalization, interrogation, and trial. Lastly, the expert noted that a change in the states' abortion legislation could be an appropriate measure for the prevention of similar future human rights violations.

The second day of hearings made it clear that the key question of the case will be whether the absolute abortion ban was causative for the alleged human rights violations experienced by Manuela and whether a change of the abortion ban will be required for the prevention of repetition. This question of causality was addressed several times by the judges, since Manuela, as vehemently emphasized by the state, was not convicted of an illegal abortion (Art. 133 Penal Code), but of aggravated homicide (Art. 129 Penal Code). On request, the Commission clarified that it had not based its findings regarding the series of human rights violations directly on the normative abortion ban, but rather on how the Penal Code is interpreted and applied in a discriminatory manner, leading to severe deficiencies in procedural safeguards and legal certainty concerning the treatment of obstetric emergencies and medical confidentiality. However, Manuela's legal representatives took the argumentation further, directly basing the alleged violations on (*inter alia*) the absolute abortion ban as a form of gender-based discrimination and violence that has a disproportionate impact on vulnerable women and that facilitates the criminalization of their reproductive processes.

The state responded mainly on a factual level, arguing that, according to the evidence, Manuela committed an infanticide. It further justified the penal legislation as an essential step for the protection of human life. Further arguments will be submitted in written form by the parties until 12 April.



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Human Rights Dimension of Abortion Rights

In line with the aforementioned, the pressing question is whether the IACtHR will find absolute abortion bans to be compatible with the American Convention on Human Rights (ACHR).

Unlike other human rights treaties (see [here](#) and [here](#)), Art. 4(1) ACHR explicitly protects life from the moment of conception. However, the IACtHR underlined in *Murillo et al v. Costa Rica* that the formulation of Art. 4(1) ACHR (“in general”) suggests that the protection of prenatal life is not absolute “and exceptions to the general rule are admissible” (para. 264). Consequently, to assess whether such an exception exists in the context of abortion, the rights of the expectant mother and the prenatal life must be weighed against one another.

While one could argue that an unconditional right to a safe and legal abortion inheres in various human rights norms [e.g. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Art. 16 (1) (c), ACHR Art. 11 and 24], international fora have been hesitant to acknowledge the existence of such a right (see e.g. *L.C. v. Peru*, para. 8.15). Moreover, [strong divergences](#) in state practice seem to indicate a lack of consensus on the existence of at least an absolute right to abortion. However, relevant case-law highlights the human rights imperative to legalize abortions when the life or (mental or physical) health of the mother are at stake. For instance, in 2013 the IACtHR issued [provisional measures](#), ordering the State of El Salvador to allow the interruption of the applicants high risk pregnancy in order to protect her right to life and personal integrity. Similarly, in *L.C. v. Peru*, the CEDAW Committee called on the State of Peru to decriminalize abortions in cases of pregnancies resulting from rape (*inter alia* to protect the mental health of the pregnant women). Moreover, the Human Rights Committee [found](#) that the prohibition of the abortion of an anencephalic fetus was incompatible with expecting women’s rights under the International Covenant of Civil and Political Rights.

Against this background, the Commission [stated](#) in 2017 that absolute abortion bans “have a negative impact on women’s dignity and their rights to life, to personal integrity, and to health, as well as on their general right to live free from violence and discrimination.” Nevertheless, none of the states, which had absolute abortions bans in force, changed their legislation since. Conversely, in a seemingly retroactive move, Honduras even [changed its Constitution](#) this January and provided for absolute protection of prenatal life in an effort to prevent future changes in abortion legislation.

The Road ahead: Will the Court address the Elephant in the Room?

Although Manuela’s representatives and the expert witnesses have linked the case of Manuela directly to the absolute abortion ban, it remains to be seen to what extent the IACtHR will finally address the abortion ban in its judgement. The IACtHR may choose to assess the alleged human rights violations only on the basis of the absent procedural safeguards in the health care and justice system instead of addressing directly the link between these circumstances and the abortion ban in El Salvador. The existence of said link was repeatedly questioned by the judges and vehemently challenged by the respondent state.

Should the IACtHR identify this link, its own [Resolution](#) of 2013 and the Commission’s findings in 2017 give hope that the court will deem the absolute ban to be incompatible with the ACHR. The confirmation of the unlawfulness of absolute abortion bans is crucial for the prevention of loss of life in cases like Manuela’s and for the fight against the structural and intersectional discrimination against women. Under the fear of the absolute abortion ban in El Salvador, women facing any obstetric emergency ultimately only have the choice between risking their lives and facing criminal prosecution. The judgement on *Manuela y otros vs. El Salvador* could put an end to this dilemma and shape a safer landscape with regard to future abortion legislation in El Salvador and other Latin American states.