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## THE LEGALITY CONDITION - EXERCISE 3 (1/1 point)

"Clara is pregnant, but has a medical condition that makes it dangerous for her to continue her pregnancy and give birth. She would like to seek an abortion. Where she resides, however, abortion is only authorized when the life of the mother is at risk. Clara is unable to obtain authoritative advice from the physicians she consults as to whether or not the continuation of her pregnancy might represent a threat to her life and thus, could be legally performed in her country of residence: the doctors disagree among themselves. She is thinking of traveling to another country to have the abortion performed there, but she regrets that the legal framework does not oblige the medical profession to settle such disagreements, thus allowing her to know, with certainty, whether she may or may not legally seek abortion".

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- ☐ Since there is no right to abortion in international human rights law, this is not a human rights issue;
- ☒ Clara's right to seek abortion is negated by the absence of a procedure to settle disagreements amongst doctors: the law should allow for her to obtain authoritative and timely medical advice; ✓
- ☐ Obliging Clara to face the risk of prosecution if she undergoes an abortion without knowing whether or not it is legal is not a disproportionate interference with her right to respect for private life.

### EXPLANATION

The situation described is analogous to that of the third applicant, C, in the case of *A, B and C v. Ireland* decided by the European Court of Human Rights in a judgment of 16 December 2010 (Appl. No. 25579/05). Based on Article 40(3)(3) of the Irish Constitution and on sections 58 and 59 of the Irish Offences Against the Person Act of 1861, the Irish courts consider that abortion is permissible only where there is 'a real and substantial risk to the life, *as distinct from the health*, of the mother, which can only be avoided by termination of her pregnancy' (*Attorney General v. X and Others* (1992) 1 IR 1 (emphasis added)). But C. could not obtain an authoritative determination of whether or not that condition was fulfilled in her case. The Court noted that, in the absence of any 'framework whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman or doctor, could be examined and resolved through a decision which would establish as a matter of law whether a particular case presented a qualifying risk to a woman's life such that a lawful abortion might be performed' (para. 253), the criminal provisions of the 1861 Act could have 'a significant chilling factor for both women and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act. Both the third applicant and any doctor ran a risk of a serious criminal conviction and imprisonment in the event that a decision taken in medical consultation, that the woman was entitled to an abortion in Ireland given the risk to her life, was later found not to accord with Article 40(3)(3) of the Constitution' (para. 254). Since the Irish courts, too, are not in a position to provide such certainty,

litigation 'would amount to requiring the constitutional courts to set down on a case by case basis the legal criteria by which the relevant risk to a woman's life would be measured and, further, to resolve through evidence, largely of a medical nature, whether a woman had established that qualifying risk' (para. 258) --, the European Court of Human Rights found 'a striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman's life and the reality of its practical implementation' (para. 264). It concluded that Ireland was in breach of Article 8 ECHR: 'the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40(3)(3) of the Constitution' (para. 268).

The case shows that the condition of legality may be just as important where positive obligations are involved, and where the State guarantees the provision of certain services or the delivery of certain goods.

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