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The right to housing and the restrictions to the housing market

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Introduction

The question this paper tries to answer is: “What kinds of ethical limitation of the market are entailed by the affirmation of a right to housing?”. Housings are not goods which seem to be corrupted if they are sold and bought, if they are exchanged against money (or rented against money), and the point is not whether they should be excluded or not from the market sphere. At first glance, indeed, the right to housing does not imply a limitation of the market, insofar as it does not seem to justify restrictions of the housing market. The right to housing is considered as a typical “positive right”, that is to say a right that guarantees the providing of something to people (having a positive right means “having the right that Y does A for me”) – contrary to “negative rights” (such as the right to physical security), that simply protect people from harms caused by other people (“having the right that nobody does A to me”). The right to housing is seen as a positive right because its content is supposed to be essentially the following: guaranteeing access to housing to everyone (or simply to the poorest), just as other positive rights may guarantee access to health care or to education. The right to housing would thus essentially consist of a complement to the market: it would consist of adding to the housing market some kind of publicly subsidised system that creates a guarantee. Of course, this system should be financed by taxes, and in addition it would harm the principle of free competition on the housing market ; but it would not directly prohibit some kinds of transactions (whereas this is the usual consequence of the recognition that a market should be limited for ethical reasons).

However, one can contend that the right to housing is not a “positive right” in this sense. Here, I would like to refer to the general critic of this distinction between “positive” and “negative rights” proposed by Henry Shue in his book *Basic Rights*¹ (in the chapter II). Shue contends that the proper distinction is between the positive and the negative *duties* implied by a right, and that both kinds of duties are correlative to the so-called positive rights as to the so-called negative rights: first, a

¹ *Basic Rights. Subsistence, Affluence, and US Foreign Policy*, Princeton University Press, Princeton, New Jersey, 1980.

“negative right” like the right to physical security assigns to the state the positive duty to protect the security of the people (by means of appropriate public institutions, which are expensive) ; second, a “positive right” like the right to housing assigns to everyone the general negative duty to respect the right to housing of the others. These negative duties correlative to the right to housing (that is *duties* not to harm others in respect to their housing situation, not duties to help them) are what I want to consider in this paper: I will examine to which extent the right to housing implies substantial negative obligations, and to which extent the state has the duty to limit the housing market in order to enforce these obligations. I will consider two kinds of such negative obligations:

- I) not to rent non-decent housings
- II) not to take out of the market a housing, by keeping it empty and non-rented.

I) Prohibition to rent non-decent housings ?

The first kind of ethical limits of the housing market that I want to examine relates to some specific transactions: namely those that consist in renting a housing that does not comply to the criteria of a decent housing, that is the transactions between the owner of a non-decent housing and a household eager to rent this housing. The notion of a decent housing, or of an adequate housing (here, these two expressions can be taken as equivalent) is for example defined in the comments made to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) by the *Committee on ESCR* (which task is to monitor the implementation of the covenant by the States parties)²:

“Adequate housing means adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost.”

It is an important and difficult question to specify the precise conditions that make a housing adequate (or decent) or not ; but it is easy to find in our societies housings that do not at all respect some of these criteria, and that therefore are unanimously considered non-decent ; and this type of situation is sufficient for us to examine the ethical problem of prohibiting the rental of non-decent housings.

The problem is the following: if someone owns a housing that is obviously non-decent, but wants to rent it, and finds someone else who wants to rent it in order to live there, is it morally justified that the state prohibits this transaction? This particular problem has the same general structure as many problems of ethical limitation of market transactions: if the two parties are really free in this

2 General comment n° 4, 1991, on the right to adequate housing ; cf. <http://www2.ohchr.org/english/bodies/cescr/comments.htm>, or rather <http://www1.umn.edu/humanrts/gencomm/epcomm4.htm>

transaction, if they really give a free consent to it because both think that this transaction will make them better off, then what would authorize the state to interfere in their agreement and to forbid it?

To analyse this problem and to make it more concrete, it is useful to consider two different cases: 1° the case of unhealthy housings, and 2° the case of extremely small housings.

1° in our societies, many housings are unhealthy, for example because they are extremely humid, or because they have a very bad ventilation, or very bad lighting: that is to say that the very fact to live in such housings has (very) bad consequences on the health of their dwellers. The legislator often deals with this problem: in Wallonia, for example, the housing code³ prescribes minimal criteria of salubrity ; this means that it is legally forbidden to rent such housings, although this interdiction may be implemented in different ways, and with more or less success⁴.

Which kind of limitation of the market is the prohibition to rent unhealthy housings? At first glance, it could seem that this prohibition is not at all specific to the housing market: indeed, it is also forbidden to sell unhealthy food for example, or in general dangerous goods (the normal consumption of which threatens consumers' health). So it could seem that the prohibition to rent unhealthy housings simply corresponds to the basic legal regulation of any market and to the normal protection of consumers, not to what we refer to with the phrase “ethical limits of the market”. But this kind of basic regulation typically aims at avoiding fraud on the part of the seller, and transactions based on a false presentation of the product ; and this indicates that the case of unhealthy housings is in fact very specific: indeed, the most interesting situation for moral philosophy is the situation where there is no fraud, and in which the tenant had true information about the housing and perfectly knew that it was an unhealthy housing. Surely there are situations in which the tenant was not fully aware of the insalubrity of the housing ; but there surely are also situations in which he was, and nevertheless wanted to pay in order to have the right to live in this housing, and still wants to. Yet similar situations appear to be exceptional on the market for food: if people know that an aliment is unhealthy (and not simply of bad quality), they normally do not buy it. So in the situation of someone renting an unhealthy housing with correct information about that point, there is really a specific problem of justifying the interdiction of this market transaction.

2° in the definition of unhealthy housings given by the Walloon housing code, there is also a criteria of minimal *size* of the housing ; nevertheless, it seems that the size of a housing is a characteristic that is conceptually different from its salubrity (since a housing or a room may at the

3 Article 3

4 On these different possible implementations, see Nicolas Bernard, *Repenser le droit au logement en fonction des plus démunis*, éditions Emile Bruylant, 2006 (chapter on the belgian « permis de location »)

same time have a very small surface and be healthy) ; so it is worth distinguishing the problem of prohibiting the rental of too small housings. And this second case has some interesting peculiarities: first it seems very specific to housings, since there are no such quantitative minimal limits for normal economic goods (this is simply due to some economic properties of the housings, and of the way the housing service is consumed) ; then in this situation, it is particularly difficult that the information about this aspect of the housing is false ; and in addition, living in a very small room has not the same direct physical effects as living in a very humid room (this is why there is no moral problem in renting a small room for another use than to live in it: the moral problem is specifically when someone wants to live in such a room).

Taking these two kinds of situations as illustrations, we can now examine the main possible reasons why it should be forbidden to rent non decent housings.

1° first, one can easily underline the strong **negative externalities** of such a contract. Granted, the two parties freely agree to the transaction and find themselves better off due to this market exchange, but it also have expectable bad effects on third parties, and these effects are not taken in account in another contract with these other persons. In the case of an unhealthy housing, one direct consequence of living in it is that the tenants will get various illnesses ; then this is a case of negative externality insofar as it has social bad consequences, which is the case in particular in societies where there are public health care systems that mutualise the costs: all those who contribute to this system would be in a way *harmed* by these externalities. This justifies that the state tries to limit the causes of illnesses, and in this case tries to avoid that people live in unhealthy housings: here the negative externality seems to be strong enough to justify an interference in the free and mutually advantageous contract between the owner and the tenant.⁵

This argument is a strong and frequent *economic* justification of the limitation of market transaction, that can be properly used here. However, we can wonder if this line of argumentation is the strongest and the most appropriate in this case. In particular, it should be noticed that this argument does not entails the prohibition of the transaction: it could simply justify the creation of a tax on the rental of non-decent housings ; this tax (that should certainly be paid by the owners) would internalize the negative externalities, but would nevertheless let owners and tenants free to make such kinds of transactions (although the tax would of course deter them to do it). If the level of this tax is high enough to cover the main social externalities of the contract, then the fact that people live in non-decent housings would no more seem problematic (according to this argument) ;

5 Another (and much more obvious) kind of strong externalities justifying to prohibit the relation is the **danger** that an unhealthy housing may represent: if a flat is in such a bad state that a possible accident threatens the neighbours, then the preferences of the owner and the tenant do not matter.

yet according to our common moral intuitions, such a solution would not remove the main moral problem that this situation displays.

2° a second, and maybe stronger justification resorts to the existence of an important **inequality of powers** between the two parties to the market transaction: there is a strong presumption that in any rental of a non-decent housing, the difference of power between the owner and the tenant is very important, and that this will prevent this market relation to be fair. The presumption of inequality of power comes from different characteristics of the housing market: housing belongs to a category of goods corresponding to the most vital needs (as do food or clothes), and on the contemporary housing markets, there is often a real shortage of housings ; given that a non-decent housing is in itself non desirable, if someone decides to rent such a housing, it is highly probable that he has an urgent need of housing, that he could not find one of decent quality compatible with his income, and that he had thus to accept a non-decent one. As a consequence, the transaction is likely to be unfair: for example the rent per m² is excessively high (without any possibility for the tenant to negotiate it), or some conditions of the contract will not be respected, and the tenant will not really have the possibility to protest. In addition, the costs of leaving a housing and searching a new one (that is to say some kinds of costs of transaction) are likely to be particularly high, which allows the unfair situation to last long. The rationale for prohibiting such an exchange, then, is that the choice to rent a non-decent housing is typically a desperate choice, which is the background for some sort of exploitation of the tenant by the owner. That is to say that although this transaction occurs between consenting adults, it is unlikely to meet the conditions that allow free contracts to have a moral value, and that therefore, it is better to simply forbid this kind of contracts.

3° The previous argument seems to provide a rather convincing reason to prohibit the rental of non-decent housings, but this reason is probably not the main, and not the best one: the argument remains prudential and probabilist, while we would tend to think that it is the very fact that people live in a non-decent housing that justifies the public intervention, and that the situation would be morally bad even without any exploitation in the owner-tenant relation. This intuition corresponds to the idea that living in a non-decent housing is contrary to human dignity: that it to say that as a person (or as a reasonable agent, in opposition to an animal) the tenant should be protected against some situations, among which the lack of the basic goods (including a decent housing). Of course the specification of the exact limit between what is contrary to human dignity and what is not may be difficult to draw, but there are obviously housings of extremely bad quality for which the argument is morally valid. The important point here is that the argument grounds on the notion of

fundamental right, and implies that the guarantee of fundamental rights should have priority over the respect of some preferences of the bearers of these rights (even without strong negative externalities on others): even if people want to abandon one fundamental right, they will not be allowed to. So here, the fact that people living in unhealthy housings get illnesses would be reinterpreted: it is an argument to close unhealthy housings because of the consequences on the dwellers themselves, not because of the consequences on third parties external to the contract.

So here, the thesis that everyone has a right to a decent housing is needed to justify the prohibition of the transaction. And this kind of justification appears to be the strongest, not only because it does not rely on some circumstances of the transaction and of the situation (as do 1° et 2°), but also because it allows to respond to the main criticism such a prohibition faces: the simple observation that if people eager to rent non-decent housings do not have the right to do so, then they will not have any housing at all, and will indeed be in a worse situation⁶. Affirming a right to a decent housing does not imply only the interdiction to rent non-decent housings:

A) if there is already someone in the non-decent housing (situation where the interdiction is enforced a posteriori), a complementary implication of the RH is that the owner who is compelled to close the housing is also compelled to guarantee a decent rehousing solution to his tenant⁷.

B) if the interdiction is enforced a priori, a complementary implication of the RH is the obligation for the state to implement policies avoiding that the poorest people lack of (decent) housings at reasonable cost⁸.

But then, it seems that the interdiction of the rental of non-decent housings is justified only if that the state ensures some additional guarantee, that is to say only if the negative duty of the state is accompanied by a positive duty, which would actually be the most important one. However, this is not exact, since the general duty of the state to avoid the lack of (decent) housings may necessitate only some other negative actions (cf. part II).

To conclude on the interdiction to rent non-decent housings, it is interesting to compare it to other kinds of ethical limitation of the market, in order to characterize this kind of limitation.

6 To this criticism, we could also add that one: the market for non-decent housings is typically the kind of markets that, if banned, will reappear as black market, and will then probably be worse ; if we prohibit the rental of non-decent housings, they will still be rented, but illegally, and in worse conditions.

7 Such a kind of sanction (for not having respected the interdiction) is established by the French Law « Solidarité et renouvellement urbain » (passed in 2000): the owner must guarantee a correct rehousing ; if he does not, the state do, and the owner has to pay the cost of it.

8 The question of the cost of decent housings is of course very important: if non-decent housings are no more proposed to rental, then, all things being equal, the average cost of rented housings will increase (either because there are less housings rented, or because the non-decent ones have been renovated) ; then if the poorest are constrained to dedicate a bigger part of their income to their housing, it could seem as a typical negative side effect of the limitation of the market, and a typical case where this disadvantages in fact the poorest people.

First of all, it should be noticed that what is prohibited is solely the fact to *rent* the housing (to people wanting to live in it), and not the fact to sell it: indeed, the owner is fully entitled to sell it to someone else, who may want to renovate it, or to transform it, etc. So it is simply the service of renting such housings that is forbidden: the moral problem does not come from the sole introduction of the non-decent housing in the sphere of the market.

Secondly, if the interdiction relies on the argument 3°, one can wonder if in this situation, the problem really comes from the market. Indeed, if living in a non-decent housing is contrary to human dignity, then it should be justified as well to close a non-decent housing where the owner himself lives. But the case for this interdiction seems very difficult, since it would be a strong form of paternalism to deny to someone for his own sake the right to live in his own housing (while there is not this problem of paternalism in the case of a rented housing – or at least not to this degree) . Certainly, such a situation is rare, but it is conceptually possible. For example we can think of a wealthy person that would like to adopt a very low standard of living (out of frugality, or rather out of asceticism), and that would thus decide to live in a 5 m² room that he owns: he seems to have the right to do it (as he would have the right to reduce his food in the same proportions).

So the moral problem effectively comes from the fact that there is a relation between the person living in the housing and someone else (a rental relation). The problem is not simply that the situation of the tenant is not conform to minimal limits, but more precisely that the owner is somehow responsible for this situation, and that he harms the tenant and violates his fundamental right. Maybe this is partly similar to this other moral and juridical case: one has the right to kill oneself, but one has not the right to kill someone else that would have asked it (even by contract).

But is it really the fact that the relation is a *market* relation that is problematic ? If there was no money given by the tenant, would it still be objectionable ? A first alternative situation would be the following: the contract does not oblige the tenant to pay, but he still has to provide some non-monetary service, or the owner gets some other advantage in the fact that the tenant lives in his housing ; then there seems to be little moral difference with the situation of a market relation. Another possible situation would be that the owner is fully selfless and altruistic in proposing his (non-decent) housing to the people, but still does not transfer the property of the housing: yet this situation seems very improbable, or maybe analytically impossible (given the definition of charity, the owner acting so would not really act charitably). So it seems that indeed, the target of the interdiction to rent non-decent housings is the market (or at least the principle of contractual reciprocity) ; but contrary to the case of blood or body parts (the *gift* of which is morally authorized, and even praised, although the sale is forbidden), here the non-market relation is very improbable or

impossible, instead of being a moral substitute. So the market is responsible for the interdiction, but not as something that would degrade the relation (as in the many cases of commodification).

II) Prohibition to keep empty a housing ?

A remark to introduce this second part: if indeed it is morally prohibited to rent non-decent housings, then are the owners of such housings free to use them in any other way ? And for example, are they entitled to let them empty and unoccupied (which of course they are likely to do if they do not have the right to rent them) ? To reformulate this question: in the roman law, it is traditional to distinguish three elements in any property right, namely the *usus* (right to use and to enjoy the good: for example, right to live in a housing), the *fructus* (right to receive the products or the benefits coming from the good: for example, right to receive the rent of the housing) and the *abusus* (right to transform the good, or to transfer its property to someone else: for example, right to sell the good) ; then, we have examined a restriction on the fructus (interdiction to rent the non-decent housing), and seen also that there was no restriction on the main aspects of the abusus (right to sale or to give the non-decent housing), but is it justified to put also restrictions on the usus ? So the question I want to deal with in this second part is: “Does the affirmation of the right to housing justify to forbid the fact to let a housing unoccupied, and to sanction the owners doing so ? And if yes, in which conditions is it justified ?”

Before answering the question, it is useful to replace it in the general problematic of the ethical limits of the market: to take again the tripartition usus/fructus/abusus, such limits usually consist in restraining one aspect of the abusus (interdiction to sell), and one aspect of the fructus (interdiction to rent), that is the aspects of the property rights that involve monetary counterparts. As a consequence, restricting the usus would seem further from the problematic of the market restrictions. However, there is a strong link between the fact to let a housing empty and the housing market: one consequence of this action is that the total supply of housing on the market will decrease, thus increasing the price (all things being equal). To forbid this action is to limit (on the side of supply) the free play of supply and demand, which defines the market system. So the question here is no more the limitation of market transactions, but a kind of limitation of the market as a whole ; that is to say that there is a difference in the kind of object examined here: although the market transaction of renting a housing was not envisaged as something fully atomic and isolated from the rest of the market, here the action to prohibit (or not) is taken as a part of a market system,

and is evaluated only insofar as it has consequences on this system (so here the approach is necessarily holistic)⁹.

To answer the question, I would like now to present a line of argumentation inspired by Henry Shue (in the chapter 2 of *Basic Rights*), who develops it to show that the so-called “positive rights” imply essential negative duties on the part of the state. To introduce the argument, I will first give a hypothetical example proposed by Henry Shue, concerning the basic right to food: in a little and isolated peasant village in a poor country, where there is a main subsistence crop (for example black beans), there are poor peasants (who own only very small pieces of land), and one wealthier peasant who owns a larger piece of land ; then one day, this peasant decides to grow flowers instead of the traditional crop, in order to export them, which should ensure him a much better income ; as a consequence, the year after, the local production of black beans is much lower, and because of this sharp reduction of the local supply of black beans, their price becomes much higher: the poorest families can only buy half of their needs, and their children suffer malnutrition. So the choice of the wealthy peasant has harmed these families, and moreover it has violated their basic right to food. One main cause of this effect is that food (and the means to produce it) were very scarce goods in this village. The conclusion of Henry Shue is that the government of this country should have protected the subsistence right of these families, either by banning the cultivation of flowers, or by taxing it, or by another mean.

Let us now give a similar example in the field of housing. In France, there is today a significant lack of housings in the great cities, resulting in high and still increasing prices. Yet a substantial part of the existing housings in these cities remain empty for a particular reason: not because at a given moment, the owners do not find anybody to rent them, but because the owners do not propose them on the rental market (for example because their housings do not meet the legal criteria that would authorize them to rent them, and because they do not want to make the investment necessary to meet these criteria, but do not want either to sell these housings¹⁰). So it seems very probable that the decision of these owners not to put their housings on the rental market is partly responsible for the high level (and/or increase) of the prices (of course here, it is only the aggregation of these individual decisions that has such an effect, because probably the proportion of empty housings due

9 It is possible to summarise this distinction with the distinction between the French adjective “marchand” and the French substantive “marché”: what is here at stake is no more a “relation marchande”, but one aspect of the functioning of the “marché”.

10 There are of course many kinds of disincentive to rent housings, including also some risks for the owner (for example the risk that he later wants to get back the housing for his own use, but do not manage to let the tenant leave).

to each of these owners is never big enough to have alone a measurable effect on the prices). As in the previous example, there is here a context of scarcity (which explains why the high prices do not produce a market adjustment and an increase of the supply, or only slowly): above all scarcity of constructible land, and of construction capacities of the firms. Then one can contend that the non-rental decisions of these owners harm those who suffer the most from the high prices of housings (not being able to live in a decent housing, or in any housing at all) ; and if there is a basic right to decent housing, then these decisions violate this right. And then again, the state should protect this right, either by an interdiction to keep owning a non-rented housing, or rather by a tax bearing on the owners in this situation.

But is it justified to treat as similar the right to a decent housing and the right to food ? And what does justify to give such a priority to these rights over the property rights of the land owners or housings owners ? The justification proposed by Henry Shue¹¹ is roughly the following. He defines the basic rights as those which must have the highest degree of priority, and gives as main characteristic of a basic right the fact that it is indispensable to the enjoyment of any other right ; then the justification is relative, but very strong: if we think that any kind of right has a moral justification and should be guaranteed by the state, then it is necessary that the state guarantees all the basic rights. This justification is most easily understandable in the case of the right to security: nobody could really enjoy a right (such as the right to vote, or the right to free speech) as a guaranteed right if he had not also the guarantee that he will not be prevented to enjoy this right by a physical aggression (or a serious threat to be physically assaulted). But, Shue says (and this is the main thesis of his book), this justification applies also to some social rights, that are also basic rights (just as security is one), and that Shue calls “subsistence rights”: the rights that one's basic needs are satisfied. Indeed, the fact of being deprived from basic food (for example), or the threat of being deprived of it, can prevent someone from exercising his rights as the lack of security can, because starvation or severe malnutrition is also one of the main possible harms to someone, and also badly affects the capacity to act. So if you have the right to vote or to practice your religion, but if at the same time anyone has the right to deprive you of food (for example by the mean of an market intervention that provokes a sharp increase of the prices), then in fact you do not enjoy this right as a right, that is as something guaranteed from the standard threats. This notion of “standard threats” is important in the definition of basic rights given by Shue: to enjoy a right, one need not to be guaranteed from any possible threat, but simply from those which are predictable, serious and remediable (among which are assault, and deprivation of the basic goods).

The enjoyment of a housing is one of the basic goods that everyone needs. Thus, it seems that the right to housing can be justified as a basic right. Lacking a housing is typically something that is

11 In the chapter 1 of *Basic Rights*.

likely to prevent someone to exercise his other rights (for many reasons, it is very difficult to exercise one's right to vote, or to political participation, if one has no housing) ; moreover, the serious threat to be deprived of housing is an easy way to prevent someone to exercise any right. This is one important argument of Shue: if it was morally and legally authorized to deprive someone from a housing (for example, by the mean of an intervention on the market), then it would be authorized and easy to attack the rights of some categories of people, by putting a threat on their housing opportunities, and accepting to stop this threat only if they renounce to exercise these rights ; or it would simply be possible to propose a housing to those who lack one, provided they renounce to some other right, and they would probably accept this contract if they have no right to housing (that is to say no other guarantee). It would be thus possible to threaten or to buy the rights of the people who are the most fragile on the housing market. Of course, other rights than the right to housing protect the enjoyment of a housing (for example the prohibition of discrimination in the access to housing), but they do not protect from the negative side effects of a price increase on a free market ; that is why a specific right to housing is needed to ensure that all other rights are guaranteed against standard threats, and has to be considered as a basic right.

It is important to notice that this justification does not exactly rely on the concepts of mean and end: the right to housing is not justified as a mean to the enjoyment of all the other rights, but more precisely as a part of them, that is to say as something that is part of their definition ; given what it is to enjoy a right, then enjoying a right requires to enjoy the right to housing. So the thesis held by Henry Shue is analytically true, provided his definition of enjoying a right is accepted and the notion of standard threats is precisely defined ; then the empirical aspect of the question relies on the delimitation of what is a standard threat. So here again, the exact content of what should compose the right to housing (justified as a basic right) may be discussed: the right to a minimal shelter seems as basic as the right not to starve (because lacking any shelter exposes to death or severe illnesses as well as lacking food does), but it does not seem to be a sufficient protection against the main threats related to housing, and some or all features of a decent housing could also be included in the basic right to shelter ; for example, the right to live in a healthy housing would be basic insofar as the risk to get the illnesses due to such a housing is a standard threat to all other right ; or the right to live in a secure and permanent housing would also be basic, since the risk to lose quickly one's shelter is also such a standard threat.

Then the interest of this justification of the right to housing as a basic right is that it clearly explains why the property rights of the owners of non-rented housings can legitimately be restrained: as a basic right, the right to housing has a priority over all the other rights that are non-basic, because enjoying a basic right is a necessary condition for enjoying one's other rights, while

enjoying a non-basic right is not. Yet the right of the owner of a housing not to live in it, and not to rent it at all, is not a basic right ; thus it may be harmed if it comes to contradict the right to housing of other people: under some conditions of scarcity of housings, the owners have a duty not to take out of the market their housings (to avoid harming a basic right of other), and the state has a (positive) duty to enforce these individual duties. So this kind of duty shows (as the one examined in the first part) that the right to housing does not imply only positive duties, but also substantial negative duties.