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Inglaterra y Francia

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SPECIAL ISSUE:

URBAN DEVELOPMENT, HOUSING AND RIGHTS:
AN INTERNATIONAL AND INTERDISCIPLINARY APPROACH

Coordinated by Mr. JULI PONCE SOLÉ
Acrd. Law Professor
University of Barcelona

SECTIONS
I. RIGHT TO THE CITY AND SOCIAL ACTIVISM
II. AFFORDABLE HOUSING AND LAND USE LAW
III. BANK ACTIVITIES, HOUSING AND REAL ESTATE LAW

This special issue includes 21 papers from the international meeting Study Space VII, Barcelona, 2014.

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THE RIGHT TO HOUSING AND HOUSING RIGHTS: ENFORCEABILITY AND EFFECTIVENESS IN ENGLAND AND FRANCE

By JANE BALL

ABSTRACT
France and England are close and do extremely similar things, but their differences in the area of rights, particularly housing rights, are structural. These go back to the serious schisms of the French revolution and the Napoleonic Wars. These differences cannot be dismissed as functionally similar because they have an effect on the perception and effect of rights.

The English assumption has been historically that a right is something that is enforceable whilst in France this can be a range of things from an enforceable right to simply a policy. You can see this in the French right to housing which is enforceable for some classes of people who can apply for priority in access to social housing, as in England. However, the right to housing also covers urban planning policy and the extent of tenants’ rights, which means that this is a holistic framework for most things that have to do with housing.

This paper looks at the difference in approaches to the purpose of social housing. English traditional approaches are to house those in need, whilst the French approaches are wider, recently increasing the focus on disadvantaged people. The French right to housing has to battle opposing principles such as property, social mix and equality, in the sense that all should access housing. Both systems have run into practical difficulties.

Key words: France, England, right to housing, housing rights, DALO, social mix

INTRODUCTION

The right to housing is a global concept. Ideas implementing this are commonly borrowed across borders. Spain has a constitutional right to housing

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2 Below 2.
but this is less fully implemented in legislation than in France. Barcelona, a lively and thriving city still has housing problems. It is for this reason that I was asked to speak about the ‘right to housing’ in England and France. Within this chapter, England is described rather than the UK, since the law differs within that kingdom.

A double aim of this chapter is to explain the housing policy frameworks related to the right to housing both for the Spanish hosts and for US visitors to show just how different these can be. There is a longstanding ‘functional similarity’ in multiple strands of English and French housing policies, converging from the 19th century. However, functional similarity is not the same as structural similarity. There is a risk of misdirected moral opprobrium, based on misunderstanding of the presence or absence of this social right.

France has a ‘right to housing’ and England does not. There is campaigning for an English right to housing, but this tends to be confined to a traditional English legislative concern with housing need, missing two important things about the right to housing: The first is the wider dimension of the French right in urban planning, and the second its constitutional limitations, particularly limitations by opposing principles. Some versions of the right are not intended to be enforceable by individuals. In a different constitutional setting, England has laws that are functionally similar to the French but which do not rely on the right to housing at all. We may mean something different by the right to housing?

What is the right to housing and what is it used for? To consider this, the global and EU principles should be introduced, then this wider French right in its global context, to examine what French lawyers mean by the right to housing. The meaning of ‘rights’ and ‘enforceable’ are also relevant. This begins to allow assessment of the effectiveness or otherwise of the ‘rights’. This approach means a lop-sided approach, which is implicitly comparative in that it is intended for a non French audience. This means a broad explanation of the French approach under the ‘right to housing’ heading. Finally, similar English and French procedures to house the needy are comparable as housing ‘rights’. This

6 Padraic Kenna, Housing Rights and Human Rights (FEANTSA 2005).
chapter concerns the scope and implementation of the different kinds of principle rather than their moral justification.

I INTRODUCING THE RIGHT TO HOUSING

This section concerns the French approach, introducing its global context, and then how it works in France. This right to housing also has a role of coordination and emphasis of housing purposes, a focus for lobby groups and, on occasion, opportunities for individuals to complain. There is an account of its considerable institutional opposition and the difficulties in Part III, before the English-French comparison in Part IV.

1a The global right to housing

The ‘right to housing’ is a globally-recognized umbrella term for heterogeneous types of housing support. Thus, its content and effectiveness is likely to be highly variable. Housing is mentioned in the 1948 Universal Declaration of Human Rights along with other human needs, such as food, clothing, medical care and social services. The UN treaty still sponsors and encourages this nuts and bolts approach to the needs of a decent existence. 8

The European reach of the UN right to housing was extended by the European Social Charter (revised) 9 article 31, imposing responsibilities on signatory state ‘to take measures designed:

(i) to promote access to housing of an adequate standard;
(ii) to prevent and reduce homelessness with a view to its gradual elimination;
(iii) to make the price of housing accessible to those without adequate resources.’

In addition, the European Committee on Social Rights (ECSR) has a quasi-judicial role to hear collective complaints against states about failure to achieve these standards (which they also supervise and elaborate). The ECSR applies an obligation of result in their decisions. 10 The approach gets round the problem of different national approaches but can be difficult to achieve.

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7 Article 25(1), UN General Assembly, 10 December 1948.
8 Elaborated by committees and in subsequent covenants. See Kenna, n 5.
9 Strasbourg, 3 May 1996.
10 For this and a more general exposition of the law see Kenna n 5.
The commitment to such a normative right to housing by different nations is not globally even. Oren and Alterman\textsuperscript{11} surveyed 188 national constitutions in force in 1913 to see if they contained statements supporting a constitutional right to housing, or which support rights to housing indirectly through other rights. The incidence of the express right to housing has increased since 1970. Amongst other things, they found differences in the incidence of this explicit right between families of legal systems.

The common law and civil law families of legal systems are globally dominant. Allowing for mixed and other types of legal system, common law legal systems comprise roughly one third of global legal systems, with England as a founder member.\textsuperscript{12} Also roughly, civil law systems comprise around two thirds of global systems. The Napoleonic version of the civil law originated in France and is found extensively in Africa and Latin America (around one third of global legal systems).\textsuperscript{13}

Oren and Alterman found that the right to housing was particularly strongly present in the Spanish, Portuguese and Latin American group of Napoleonic systems, 19 out of 23 systems. This did not include England and France. France’s right to housing is only ‘of constitutional value,’ an administrative, not a full constitutional right.\textsuperscript{14} England has no constitutional document containing such a provision. For whatever reason, many civil law systems collectively felt the need to enact a right to housing when common law systems did not. This is a puzzle to which this chapter suggests some answers.\textsuperscript{15}

1b The French right to housing

The French right to housing encompasses principles which the English or US reader might not expect to belong together, with three declaratory formulations: in landlord and tenant law; urban planning and access to housing.


\textsuperscript{12} Philip R Wood, \textit{Maps of World Financial Law} (6th ed, Sweet & Maxwell 2008). This depends on the area of law looked at. Wood’s classification was based on 4 particularly typical private law devices, now rapidly Europeanizing.

\textsuperscript{13} The German Pandectist systems have a similar reach.

\textsuperscript{14} Below 3.

\textsuperscript{15} Particularly by opposition of rights, below 12.
This has a conceptual brilliance for pulling together legislation concerned with housing in different codes and statutes.

The right to housing for tenants first appeared in France in the 1982 *loi Quillot.*[^16] This followed protests and a rent strike about rental conditions. French rents had been systematically decontrolled after the 2nd World War[^17]. Next, there was loss of rental stock in the 1980s by landlords ceasing to let[^18]. A greater balance between the landlords and tenants was found in a 1989[^19] statute currently stating:

> The right to housing is a fundamental right; it is exercised in the framework of laws which regulate it... The reciprocal rights and obligations of landlords and tenants must be balanced in their individual relations as in their collective relations.'[^20]

The tenants’ right to housing is needed in France needed to achieve this perceived social balance between landlord and tenant, since tenants are not seen as having real property rights with which to oppose the powerful landlords’ right to property.[^21] This conflict settlement was sustained by a series of tax reliefs favoring landlords[^22].

The second version of the right to housing for urban planning heads up the Code de l’Urbanisme as part of a long introductory statement of principles. Publicly-elected bodies must work together:

> To manage the framework for life, to ensure, without discrimination, the conditions of habitat, employment, work, services and transport for present and

[^16]: Loi no° 82-256 du 5 mars 1982 (repealed).
[^19]: Loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986
[^20]: Ibid, article 1. This also includes a statement of equality in choice of housing, and action against discrimination.
[^21]: Below 13.
[^22]: This was originally the *Amortissement Périsso*, which gave capital allowances to landlords starting to let property unfurnished under the 1989 act for a period of 9 years.
future resident populations, in response to the diversity of their needs and their resources.

Here, the declaratory nature of the right to housing is evident as an objective for the future. Achieving all objectives all of the time is unlikely, and principles may conflict, explored in the next part. This right to housing also imposes a general duty to manage housing weighing on the public authorities. The closest English equivalent is generally planning policy guidance and a plethora of specific duties on local authorities. These English duties are not what is normally thought to be rights but are not necessarily less effective. The mismatch in the meaning of ‘right’ (discussed in section II) becomes apparent here.

The third version of the right to housing for ‘disadvantaged people’ first appeared in 1990. Its current form states:

Guaranteeing the right to housing constitutes a duty of solidarity for the whole of the nation.

Every person or family experiencing particular difficulties, notably due to the insufficiency of their resources or the unsuitability of their conditions of existence, has the right to an aid from the government, in conditions fixed by the present law, to access a decent home in conditions of independence or to maintain themselves there ...

After an incremental process of development, from 2007, the new French ‘opposable’ right to housing (‘DALO’) created an individual legal action leading theoretically to a hostel or social housing place: This is sometimes translated as ‘enforceable’ which may be true in a popular sense but it will be seen, perhaps not in a legal sense. This possibility of legal action to obtain accommodation means that this aspect of the right to housing can be compared to

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23 Code de l’Urbanisme, article L110 (the first article of the Code).
24 Such as the homelessness duties in Part IV of this chapter, but there are many more.
25 In Loi no° 90-449 du 31 mai 1990 visant à la mise en œuvre du droit au logement (known as the Loi Besson) as amended repeatedly, ultimately by the DALO statute. The Building and Housing Code article L300-1 incorporates article 1 the Lois Besson above and adds a State guarantee.
26 Droit au logement opposable in the Loi n° 2007-290 du 5 mars 2007 instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale.
27 See Part II for different meanings of the key words and Part IV for enforcement difficulties.
English legislation, because France borrowed the idea from the UK, in fact from Scotland.

This narrow version assisting groups known as ‘disadvantaged people’ is central to how the right would be popularly understood in England. The ‘the right to housing’ in this particular context can be well translated as ‘housing rights’. This plural English expression gives an idea of the variety of rights that are needed to create access to housing and to maintain people in decent conditions.

The wider French right to housing is not thus solely about housing difficulty. The public apparatus should work towards more and better housing alongside other objectives and regulate conditions of access, use and occupancy. The link to urban planning is clear. If production and planning of the housing of suitable quality is deficient, the apparatus for reception of those with access difficulties will struggle, whatever the processes for reception.

It should not be assumed that the broadness of French rights means they are ineffectual. There is an individual right, existing since 1873, for citizens or groups of citizens to litigate in the general French administrative courts, which have a much more extensive reach in French life than the English judicial review process does.28

II PROBLEMS UNDERSTANDING THE RIGHT TO HOUSING

The differences between England and France can be frustrating for the researcher in the face of longstanding and clear functional similarities.29 English and French housing policies, converged from about 1852. Both countries improved housing in the late 19th century, driven by public health considerations. Social landlords were a historically common idea.30 There were common movements towards garden cities, social concern for the working classes, state involvement in construction and the freezing of rents in the shadow of the

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29 Watson, and Zweigert and Kötz, both n 4.
30 Initially mainly directed at housing better-off workers in both countries. See Jane Ball, Housing Disadvantaged People (Routledge 2012), chapter 3.
Russian revolution. Even now, a new idea on one side of the channel tends to pop up almost immediately on the other.\textsuperscript{31}

Despite this, similarities can be misleading, particularly the ease of translation of French or Latinate law into English. The central words of ‘rights’ and ‘enforceability’ can cause misunderstandings about the extent of the nature and use of the expressions, and thus distort conclusions. The law of the other country might seem desirable but the major linguistic and institutional differences should be understood before borrowing ideas. This part interrogates the language of rights and enforceability, to show continuing misunderstandings. Housing law is particularly prone to such misunderstanding because of its interdisciplinary nature, its wide scope, and its connectedness to land law, which is very national, predating 19th century convergence.

\textbf{IIa Top-down and bottom-up principle}

The French right to housing is a general normative principle, a ‘top-down’ approach rather than the ‘bottom up’ traditional English approach. There is a need in France to base legal action on a principle which is not so pronounced in England. This is so even though France had a substantial and active housing policy well before the creation of the right to housing, using other powers and principles on which to base action.

Posner\textsuperscript{32} described top-down thinking as starting with a principle, such as egalitarianism and then interpreting law to favor these norms. For the bottom-up, he proposes:

In bottom up reasoning, which encompasses such familiar lawyers’ techniques as ‘plain’ meaning’ or ‘reasoning by analogy’ one works with the words of a statute or other enactment, or with a mass of cases, and moves from there – but doesn’t move far. .. The top-downer and the bottom-upper do not meet.

\textsuperscript{31} An example would be the ‘access to justice’ reform projects in England and France in 1998, the former run by Lord Wolf and the latter announced by Sarkozy. Both concerned the high cost and delays in the court system.

Rachlinski\textsuperscript{33} (2006) also suggested that the top-down approach represents the civil law family of legal systems, whilst the bottom-up approach represents the reasoning of the common law legal systems.

A number of general differences from England follow from this. The first is that a French normative principle of this type is often declaratory an objective for the future, and is present as a basis for public action, where public and legislative power to act may be limited in principle. The expressed right may never by fully achieved, particularly if strongly expressed. This is so even before it encounters opposition from other interests.

In contrast, English housing legislation is generally intended to have current effect, and thus to be very detailed and limited with mechanisms in place at the outset.\textsuperscript{34} Today this difference is less pronounced since English legislation and court judgments may reflect the balancing of European principle. This is particularly so in use of the European Convention on Human Rights (ECHR)\textsuperscript{35}, but the UK did not sign the revised version of a sister treaty on collective rights, the European Social Charter,\textsuperscript{36} due to disagreements over labor law, thus the new article 31 of that charter (above) is not specifically part of UK law.

French norms in this area such as the right to housing are frequently associated with opposing lobbies, such as the environmental lobby opposing construction, or the right to property opposing tenants’ rights (Part II below). Balancing these and the diverse needs of modern life inevitably causes an increased demand for new principles. Quite possibly you could argue that the more principles there are, the more room to maneuver exists for the administration to navigate between them. However, the French Constitution and the vetting of primary and secondary legislation by the Constitutional Council and the Council of State respectively limit this.

\textsuperscript{34} The term ‘policy’ does not mean the same in England and France. France has only one word for policy and politics. In England policy is a kind of soft law framework, particularly in planning law. Some areas of ‘public policy’ are not connected to the government or legislative process.
\textsuperscript{35} The European Convention on Human Rights and Fundamental Freedoms opened for signature in 1950 but entering into force on 3 September 1953. The UK was an original signatory, but this is directly applicable in the UK since the Human Rights Act 1998.
\textsuperscript{36} Above 2.
No English formulation or body of thought has the same sweeping normative effect as the French right to housing. This is so even though there is no lack of English legislation in these areas, or a shortage of theorizing about the moral basis for the right to housing.\textsuperscript{37} This is so, even though the English and French detailed law for homelessness is broadly similar. There is an English trend to greater freedom of action for local authorities,\textsuperscript{38} and companies\textsuperscript{39} by recent legislative changes. Thus an English principle is not necessary for public action, so long as there is no ‘breach’ of law or principle. The result can be similar in both countries.

\textbf{IIb The trouble with rights}

The French word ‘right’ is a hypernym, (meaning more than the English expression). The French word ‘droit’ is both the word for law and the word for rights, whilst in England these meanings are separate. In different contexts the French word covers both rights and law and things in between. England does not really have a word for the things in between, such as the generalized normative housing framework between law and rights. It is important to judge from the detailed content of the French legislative statement whether you are looking at a firm policy, a general law or at an individually enforceable right.

The in-between or policy version of droit au logement can be seen in French planning principles. The consideration of housing jostles with every other kind of consideration of the urban planner. It is harder to say when public planning authorities are not respecting their obligations in this situation.\textsuperscript{40} An English lawyer might say that, by themselves, the headline principles lack the certainty required to say that the public authorities are in breach. Nonetheless, the usefulness of this wider right to housing can be seen by insisting that the issue is permanently considered by successive administrations, and to join up thinking with the implementation for tenants, the less well-off. That is the ideal position even if not the practice.

\textsuperscript{37} N 5.
\textsuperscript{38} By the Localism Act 2011, s 1(1) ‘A local authority has power to do anything that individuals generally do’. There will be limitations in particular areas an in European treaty which might be ‘breached’.
\textsuperscript{39} The Companies Act 2006 says ‘Unless the company’s articles specifically restrict the objects of a company, its objects are unrestricted.’
\textsuperscript{40} It is however, the subject of extensive regulation and of broadly expressed ‘jurisprudence’, here meaning the broadly-expressed interpretation of principle by the law by the Court.
England has this kind of principle, when enacting European obligations41 or providing government policy guidance in different situations.42 ‘Rights’ have to be recognized as having different forms rather than failing in either county. It might be necessary to compare French rights with English policy or French rights with English laws (the other sense of droit) to produce broad comparability.

IIc The trouble with the language of enforceability

There is a dynamic tension in the language of the housing rights between England and civil law countries, since English became a very common language for exchange. This tends to ratchet up the force of the language of rights. French terminology, in the face of opposition, tends to apply strong or even rhetorical wording to a right, already seen above and obvious in the case of the right to property (section IIIb). However French terminology can be weak in procedural enforcement, speaking typically of ‘non-respect’ or of ‘recourse’.43

In contrast, the English language of principle is weakly expressed, not in the kind of ringing terms typical of French rights. The English rights sound limited, if expressed at all,44 yet the language of English court processes is strong, speaking of ‘breach’ and ‘enforcement’. The traditional English understanding of ‘right’ is associated with the old idea of a ‘remedy’: that is, something that will be successful, if your case is made out. Scruton said: ‘Rights do not come into existence because they are declared. They come into existence because they can be enforced.’45 This is somewhat at odds with weaker versions of French rights.

A French housing campaigner can see the strong language of ‘enforcement’ of housing rights for disadvantaged people as a desirable addition to the language of housing rights. This can be seen in the ‘droit au logement

43 Recours effectif is the term within the European Social Charter (revised).
44 There is a requirement of certainty in many areas as a precondition of enforcement.
opposable’ (opposable right to housing - DALO). However, *opposable* indicates that there is someone to sue, here for failure to provide accommodation in social housing or shelters under the ‘right to housing’, explored below. It does not have the English sense of an enforceable remedy.

Similarly, English campaigners could see that the broader French or other housing rights are more strongly expressed than their own, pushing to follow. In fact, such campaigning leaves out of account that French rights can be objectives for the future, and that these may be reduced by opposition by conflicting principles. Implementation may be more limited than first appears. There is a need for great care in vocabulary. The question of whether the stronger French DALO is enforceable is introduced next and dealt with more fully in Part IV.

**IIId The comparability of English and French rights of access to housing**

The French right to housing for the disadvantaged and the English homelessness legislation can relatively easily be compared for effectiveness. Probably neither is enforceable for reasons that will be seen, but both broadly mean individuals with housing difficulty can apply to the authorities for accommodation, and possibly appeal if not satisfied. Both relied to a major extent on the availability of social housing to satisfy housing need, but with other options coming to the fore now if access to social housing is difficult – hotels (or similar,) hostels, and contracted private renting.

This comparison is facilitated because of the UK or rather Scottish inspiration for the French DALO legislation. The idea was ‘diffused’ through national exchanges of every kind such as government, voluntary workers, and housing studies researchers. Since 1977, Scotland had implemented the UK-wide Housing (Homeless Persons) Act 1977 as a means to receive those in housing need. In 1999 substantial powers were devolved to the Scottish parliament. In 2000, Scotland committed to gradually widening the application of local authority duties towards the homeless so that simply being homeless would be enough to trigger the special access to housing accommodation in the legislation.

Reformers spoke of a Scottish ‘right to housing’, even if this was still...

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implemented there by duties on local authorities, working with others. The popular terminology of housing rights is common in the UK despite legal differences, even though the Scottish ‘right’ was in fact a duty imposed on local authorities as in England explored below.  

The French DALO legislation was a response, partly to campaigning and protest and partly to a 2007 decision against France by the European Committee on Social Rights under the European Social Charter. France was found to be in breach of its responsibilities for: substandard housing for those on a low income; long waiting times for social housing; insufficient protection from eviction, rehousing the evicted or assisting the homeless and insufficient recourse for those not allocated a social home. England has never been found in breach of this article, since it has never signed the revised Charter.  

A question to explore in the sections that follow is whether the ‘right to housing is ‘enforceable’. This question combines an essentially French civil law expression with an English expression (enforceable). They rarely sit comfortably together. In the area of housing need, ‘enforceability’ and scope of the right to housing is limited in both England and France. Effectiveness is a better way to assess the results in the face of these striking limitations.

III LIMITATIONS TO THE FRENCH RIGHT TO HOUSING FOR THE DISADVANTAGED

This section shows the limitations of the French right to housing for disadvantaged people and the next for English homelessness legislation. The different French forms of the right have been described in part IB. Despite its Scottish inspiration, the French right to housing has originality. Watson

Executive, 27 February 2002. All the 59 objectives of that report have not been implemented yet.  

48 In part IV.  


50 Above 2.  

51 Ibid.  

52 Nor the protocol which allows collective complaints. The UK was a signatory to the original 1961 European Social Charter, without a right to housing.  

53 From the Loi Besson, n 25.  

54 See part IV.  

55 Alan Watson, n 4.
suggested that this borrowing of ideas can be useful even when unsystematic and that the concerns of the country choosing the legal transplant to fit within their home system are predominant. Thus the French right is not the same as the English with important institutional differences. The French right promises more in its formulation, even when adjusted by its limitations, such as proposing a place in a social home, no longer present in the English formulation.

The limitations to the French right to housing are clear in the texts, with limitations by other principles and the limitations in procedure. Limitations by other principles affect the detailed formulation of the rules, a feature only weakly present in England. Much of the information in this section is based on my qualitative interviews\(^\text{56}\) with social housing allocation actors in three regions of France in 2005-6, updated for legislative change.

It is an attractive suggestion that anyone in housing difficulty will enjoy the assistance from the French acting collectively, generally through the State.\(^\text{57}\) Under the French DALO statute anyone in the categories listed in the statute can apply to a committee, the Departmental Mediation Commission\(^\text{58}\) to be housed in social housing or hostels. The commission comprises representatives of local interests, such as mayors, tenant representatives, social landlords union representatives and but drawn from a fairly wide area (the département) and with representation of voluntary bodies. Applicants must have specific priority in legislative categories of disadvantage\(^\text{59}\) or suffer ‘abnormal’ delay to a social housing application.\(^\text{60}\) The Commission must declare whether the applicant has priority and if this is urgent. Appeal is possible from this Commission to an administrative or private law judge.\(^\text{61}\) Damages\(^\text{62}\) may be awarded, not available in England.

If an applicant is successful initially or on appeal, their file is placed in the hands of the local prefect, the departmental representative of the central government, to action their housing. This last step is by no means easy as prefects may have difficulty persuading social landlords to assist a particular

\(^{56}\) In Ball (2012) n 30.

\(^{57}\) Its composition and the means of application are in article L441-2-3 of the Code de la Construction et de l’Habitation.

\(^{58}\) Ibid.

\(^{59}\) Ibid. art L441-1.

\(^{60}\) Ibid. L441-1-4 and L441-2-3, II. The local ‘abnormal delay’(délay anormal) is decreed by the local prefect, depending on local demand. It can be 10 years in Paris.

\(^{61}\) Ibid.

\(^{62}\) In as a fine, or astreinte, Code de la Construction et de l’Habitation, article L441-2-3-1.
applicant. Prefects may opt to put the successful litigant through a social landlord’s selection procedure again, a kind of circularity, rather than forcing the issue.63

IIIa Limitations in the texts

The right to housing for the disadvantaged in the *loi Besson* only promises ‘help’. This is exercised ‘in the conditions fixed by the present statute.’64 In this way, the broad objective cannot fail until more narrowly defined or where there are outside standards, such as those in the European Social Charter.65 Consequently, only people listed in relevant legislation66 can claim under the DALO procedure. The open-ended statutory definition of disadvantage could allow expansion of the categories, but Brouant recently found no sign this was happening in the Commissions.67

The categories of disadvantaged people acquiring priority by this route include: those in unfit housing; those under an eviction order; those in temporary housing for 6 or 18 months; the disabled or those responsible for a disabled person;68 those suffering domestic violence.69 It often is sufficient to have only one of these difficulties, putting the categories of disadvantaged in political competition.70 There is also a requirement for good faith by the applicant.71 Also, the Commission must judge the urgency of the application. Brouant found this last criterion was used to reduce the urgency for someone whose conduct had contributed to their position.72

There is another limitations not found in the English legislation. The Mediation Commission or court can order the individual’s parents or

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63 Jean-François Strillou, ‘L’interprétation par les commissions de médiation des conditions auxquelles est subordonnée la reconnaissance du DALO’ in Brouant, n 67, 39-72.
64 Article 1 of the *Loi Besson*, n 25.
65 Above section Ia.
66 Particularly the classes of individuals in Code de la Construction et de L’Habitation, articles L441-1 and L441-2-3.
68 These requirements are from Code de la Construction et de l’Habitation, article 441-14-1.
69 Code de la Construction et de l’Habitation, article L441 (a)-(c) and (e) elaborated in more detail by decree.
70 See Ball, n 30.
72 Brouant, n 67.
grandparents to house them to pay to house them even.\textsuperscript{73} The latter is part of traditional alimentary rights where individuals must maintain children, parents or grandparents.\textsuperscript{74} Even if sensitively, done, this can be used to refuse or reduce priority of applicants falling foul of this. There are other limitations in implementation of the procedure in IIIc.

The condition of abnormal delay does not depend on disadvantage, although it will pick up cases where someone is suffering any kind of discrimination. The abnormal delay is a time decreed by the local prefect for local market conditions, exceptionally 10 years in Paris, much longer than elsewhere.\textsuperscript{75} Decreeing local delay allows some control by availability of stock. It does, however, also suggest tendencies of legislators to be generous with this access point, even if burdened. In France, this may relate to the egalitarian idea of ‘housing for all’.\textsuperscript{76}

\textbf{IIIb Limitations by other principles}

The force of the broad French statement of the right to housing can be diminished by traditional political oppositions between the right to housing and other French constitutional and administrative principles. The right to property deserves special mention for its historic role, particularly in tenant representation and as a major reason why the right to housing is needed in countries with a Napoleonic legal system already described.\textsuperscript{77} This is thus dealt with in the first subsection before the others. In England a connection between the right to property and planning and property law is less obvious since the ‘right to develop’ was effectively nationalized in 1948.\textsuperscript{78}

\textbf{IIIb (i) The right to property}

The iconic French right to property is formulated in particularly absolute terms. Rather like the US constitutional right to property,\textsuperscript{79} French property-ownership cannot be removed without prior compensation, due process and clear
public necessity. However, the French right goes further to define property-ownership in 1789 as ‘inviolable and sacred’ and in the 1804 Civil Code as: ‘The right to use and dispose of assets in the most absolute way possible’ subject also to conditions of legality and public utility. These limitations are the foundation of social rights for non-owners who needs must also occupy land. In 1921, Duguit (a French lawyer) proposed that property rights had a social purpose but this idea has had greater constitutional expression outside France.

The right to housing allows tenants and disadvantaged people to oppose landlords, as without it they would have no substantial public right on which to base their rights. Such a French political opposition is connected to the old and bitter struggle between socialism and capitalism. This unites tenants, workers and trade unions, ever since the contracts for hiring labor and for hiring homes were placed adjacent to each other in the Napoleonic Civil Code of 1804, and, as already seen, because French short-term tenants have no real property rights. This illustrates the role of rights to support lobbying, particularly played out in tenancy law and for large lobby groups of landlords and tenants.

Every version of the right to housing might be seen as affecting the rights of property owners in some way, whether by limits in planning and building control, in the rights of tenants and in the imposition of poor and disadvantaged tenants or their funding from the public purse. For French private social landlords, the right to property can mean the right to reject candidates unable to pay rent, assisted by public rules of good administration, to balance the books. In interviews in three French regions from 2005-6 for my book social landlords thought it obvious that they should reject a candidate who could not pay the rent, not always covered by benefits.

80 The Declaration of the Rights of Man and the Citizen of 1789, Article 17, supplemented by articles 544 and 545 of the Civil Code. These are still in force. 81 Ibid. 82 Article 544, Civil Code 83 Ibid. 84 Article 545, Civil Code. 85 Léon Duguit, Les Transformations Générales du Droit Privé depuis le Code Napoléon (Paris, LeBon 2012). 86 For example in the German Constitution, arts 1-21, taken overall, with other limitations, particularly article 14 concerning property. 87 Alain Bénabent, Droit Civil, Les Contrats Spéciaux Civils et Commerciaux (6th ed, Domat 2004) para 312. 88 Ball, n 30. 89 Ibid.
French tenants have an ambiguous role in social housing allocation. Often tenants campaign for greater rights for disadvantaged people in a traditional alliance. However, tenants can participate locally in excluding disadvantaged people from their estates. Landlord and tenant representatives are nationally entrenched in a series of negotiating and locally in consultative committees. They also have minority representation on the social housing allocation Commission. This is useful way to consult and ensure consent and fair play. Exclusion is by no means mainly due to tenants but rather to local cultures. In my study, localism was a powerfully exclusionary force in many areas, particularly for non-locals or those unable to pay rent or feared to have behavioral problems. A social landlord said: ‘Everyone agrees we should house people with behavioral problems … but in the commune next door, not in my home.’

In Napoleonic systems, there is a pressing reason for a right to housing to empower both public action to support tenant security, or housing rights of any kind, to oppose powerful property rights with other opposing principles below. Without this ‘basis’ of the right to housing, many French groups and many activities would have less support.

IIIB (ii) Limitations from other French principles

Other principles might support patchy localism and oppose the right of access to housing for the disadvantaged. These include the right to local freedoms, equality and a new principle of social mix. There are local rights of independent decision making for social landlords and for local councils of any kind. French social housing construction was always geographically uneven, with little towards the south and west of France, a major practical difficult. Refusal of disadvantaged people in some areas increased the concentration of disadvantaged people in communes accepting them. Brouant confirmed continuing patchy acceptance in the DALO in 2012. All of this makes implementing a blanket right to be housed difficult.
Equality is the most traditional of French principles\(^{96}\) but this can limit access to housing, because a departure from strict equality of access for everyone to house the disadvantaged has to be justified. The French allocation system has never been wholly or even mainly directed to housing disadvantaged people.\(^{97}\) Partly as a consequence, the *opposable* right to housing for disadvantaged people is limited by statute to 25 percent of housing stock, not adequate to needs. Many social landlords harbor or accept more disadvantaged people, but this is a political issue, a departure from housing objectives for the population as a whole,\(^{98}\) effectively seen in the new principle of social mix.

Social mix is an obligation to pay attention to the social and other diversity of neighborhoods, which also causes problems of access to housing by the disadvantaged. The principle is intended to avoid stigmatized concentrations of poverty and disadvantage, often within those social housing estates prepared to accept disadvantaged people. This resulted in a national scheme to build social housing everywhere: intending to promote building housing for better-off in poor areas and housing for the worse off in better-off areas. Unfortunately, better-off communes tended to build social housing aimed at the better off, whilst disadvantaged communities could refuse their traditional disadvantaged candidates\(^ {99}\). This tended to increase housing difficulty for the disadvantaged, particularly since accompanying redevelopment increased rents. Another problem with social mix was that social landlords informally imposed quotas on the numbers of vulnerable women or ethnic minorities in individual developments.

In this way, a ‘right’ in the French sense of a normative principle might conflict in public law with other principles, when it comes to who should be housed. The decision-maker has room to maneuver in the weight to give to different norms in individual circumstances, which could favor localism.

### IIIc More problems in French implementation

The French implementation of the right to housing was inspired by the Scottish right but encountered difficulties already look at: insufficient and

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\(^{96}\) Found in the revolutionary Declaration of Rights of Man and the Citizen, above n 80.

\(^{97}\) Ball, n 51.

\(^{98}\) Lévy-Vroelant, n 76, 207.

uneven social housing provision; independent-minded local actors; and oppositions in principle. There were more limiting problems.

The French *opposable* right to housing (DALO) claims social housing spaces through the mechanism of the ‘prefectural contingent’. The prefect, as local State representative, was entitled to 30 percent of social housing vacancies (5 percent for civil servants). This ‘contingent’ had fallen into disuse in most areas during my study in 2005-6, taken over by local actors. It would not be simple to recover these local privileges. The French right to housing is now worded to include local councils in its duties, but there is still local difficulty. The Constitution provides the cost of central state duties carried out locally should be refunded, a potential bargaining chip.

For the DALO, the first problem was that people exercising their right to go to the departmental mediation commission were not housed during their application. Someone without a home is not the best litigator. Support from voluntary bodies was practically necessary and Zitouni found these were still not helping with applications sufficiently in 2011. French landlords often demand that disadvantaged candidates should have the support of a social worker in meeting their obligations. Zitouni found this support was patchy. The most applications were received in areas where access was already stretched, for example 59 percent of applicants were from the Paris area, where it would be the most difficult to find spaces.

As legal processes go, the DALO is quite a quick procedure. The case should be heard by the Departmental Mediation Commission in 3 to 6 months, and when successful this means another 3-6 months. It is still a difficult wait, when someone is homeless. A recent circular allows for expedited applications in case of need. The procedure includes applications to gain access to a hostel, partly because some French voluntary organizations provide coveted good quality accommodation, rehabilitation and training and because beds are state-funded. This must put pressure on voluntary organizations.

100 Ball, n 30.
101 In article 1 of the *Loi Besson*, n 25.
102 Article 72-2 of the current Constitution (1958) as amended.
104 Strillou n 57.
105 Short time periods are required by the regulations.
The DALO process is responsible for housing many more people than during my 2005-6 study. In 2013, there were 80,737 applications across France and 32,467 favorable decisions. However, only 15,318 were actually housed, about 19 percent.\textsuperscript{107} The process for access to hostels for the homeless is less successful, 10,354 applicants and 1,092 actually housed.\textsuperscript{108} This suggests that there are still local difficulties, for example, Cantal and Haut Loire had no hostel applications. Cantal had one application for a social home whilst Haut Loire had two, both refused. Without further enquiry, it is impossible to know whether this is a failure of good housing generally. This is not what you would call an enforceable right, but that does not mean it is not worth doing.

The ability of a central government to satisfy a ‘right to housing’ can be affected by a whole series of factors, not under its control. There have been strenuous efforts by many local actors to improve the situation, but this is not an ‘enforceable’ right in English terms- a limited right, for limited populations with room to maneuver over acceptances. Despite this, the DALO has come a very long way from its 1990 origins towards practical if not legal effectiveness on individual application, even if this is not enforcement in the normal English sense.

Brouant, in considering all French options, finds it utopian to propose that the right to housing can be as enforceable and ubiquitously successful as a right to schooling.\textsuperscript{109} He questioned whether court processes are the right way to go, when it might be easier for the government to insist that social landlords should house 100 percent disadvantaged people in their basic access rules. This would save the cost of the court process and the difficulty for those involved. However, he said this would also lead to residualization of social stock, concentrations of various kinds of disadvantaged and stigma associated with an address. This is traditional English problem. It might also be contrary to other principles.

Thus the issue of enforcement is just one strand of the right to housing. The need for court back-up can be reduced if the system is effective as a whole, using all the elements of the’ right’ to housing: rentals, urban planning and construction. In places this amounts to simply a policy concern for housing in all

\textsuperscript{108} Slightly more were offered and refused or no longer needed housing.
\textsuperscript{109} Jean-Phillippe Brouant, ‘Eléments de conclusion’ in Brouant, n 67, 145-162.
areas, including concern for disadvantaged people. There will still always be some need for an effective route for complaint if things are not done properly, but limited to the possible.

**IV LIMITATIONS TO ENGLISH HOMELESSNESS LEGISLATION**

The limitations to English legislation are on the face of the texts. The lack of a broad French-style ‘right to housing’ does not by itself mean that this is a mean and nasty country. The key test of effectiveness of the processes is whether the care of those in housing need (the English formulation) or disadvantaged people (the French formulation) are housed. This is very difficult to measure in both countries, although procedures can be compared.

**IVa The context in wider rights to housing**

In England, instead of a right to housing, either wide or narrow, there are a variety of duties imposed on local authorities, including housing duties. There are also national rules within the planning system that oblige local authorities to consider housing generally. Rules in land law, statute and consumer law provide enforceable rights for tenants over and above those of a normal contract. English law does not necessarily join these areas together conceptually in the law.

England has schisms between landlord and tenant in politics but this has not directly penetrated the structure of property law itself. In theory, English proprietary land rights are split between landlord and tenant; a kind of English equality before the courts. English landlords and tenants have the same kind of right, technically an ‘estate’, despite relative insecurity for recent English tenancies. No right to housing is required to support English tenants’ few proprietary rights, such as they are. Tenancies and employment contracts have never been seen as connected in private law theory, as in France, even if they might be politically connected.

In England, a right to housing might still actually ultimately be needed to support residence. Hohmann argued that housing rights were difficult to conceptualize without it. Nevertheless, English landlord and tenant

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organizations are relatively still small and without a tradition of consultation or bargaining rights. This may be why reduction in tenant security has been less well resisted in England to date. English tenants have no representation in the social housing allocation process, and thus no opportunity to exclude disadvantaged people, other than influencing the local council’s formulation of access rules politically. English exclusionary localism is more evident in the processes around the grant of planning permission for construction.

The reader will observe that this chapter has no section on English principles opposing homelessness legislation. This is because the right to housing does not formally exist, but then neither do the opposing principles. An exception is the right to property in the ECHR, but that does not generally explicitly intrude into homelessness legislation and its application.

**IVb The limits to English homelessness duties**

English duties towards the homeless are limited and very specific, but they have minimal consideration of countervailing principles as in France. English national legislation without a European element does not normally have a preamble or general introduction in which to place French-type rights. Part VII of the Housing Act 1996 provides a variety of assistance through English local authorities, including a duty to provide local advice to anyone on homelessness. There are special rights for those who are homeless or threatened with homelessness within 28 days, particularly those who are not homeless intentionally and in 'priority need'. A person is homeless if ‘he has no accommodation available for his occupation.’ This includes someone who has accommodation but it would not be ‘reasonable’ for them to continue to occupy it, for example if dangerous. There are also duties towards homeless children under the Children Act 1989.

The definition of homelessness in the 1996 Act is fairly broad, and interim accommodation must be provided but only for individuals who are in

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115 See Kate Barker, *The Barker Review of Land Use Planning, Interim Report – Analysis* (HMSO 2006) for criticisms of the limitations affecting the grant of planning permissions.
116 N 35, article 1 of Protocol 1.
117 Housing Act 1996, s 179.
118 Housing Act 1996, s 175, and 175(4) for the 28 day limit.
119 Infra
120 Ibid s 175(1).
121 Ibid s 175(3).
'priority need’, and who are not homeless intentionally. Unlike France, this duty applies even before enquiry, if it appears the applicant is in this position. Currently those in statutory priority need include: pregnant women, individuals with dependent children, a people who are vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or individuals with whom such a people or might reasonably be expected to reside. Later additions are young people leaving local authority care and discharged soldiers. The individual is accommodated along with family that normally resides with them, or indeed anyone that it is reasonable to expect should live with them.

Local oppositions may be played out in politics but the resultant law should be the fairly applied by impartial actors, here the local authority housing officer. They are professionals in the local council who make enquiries, assess and make decisions to place applicants. This is inherently cheaper than the French committees, but this is a question of who is trusted in different countries, and a belief that a committee is more impartial than an individual is not confined to France.

As with the French texts, there is English room to maneuver for the authorities in determining who should be housed. There is a ‘discretion’ (a power of appreciation in French terms) as to whether someone is considered to be vulnerable, and when it is reasonable for someone to remain in existing accommodation. This assessment is hedged about by detailed rules. Candidates are awarded ‘points’ for types of need, or a prescribed acceleration of their waiting time. This means cumulative need will result in higher priority on a points total or by reduced waiting.

There have been limitations to the rules for reception of the homeless since 1977. People from abroad are no longer assisted, with asylum seekers served by a government agency. Accommodation provided is no longer of permanent, whether in private or social housing, probably because most English

122 Ibid s. 189.
123 Ibid s 189.
124 Ibid s 188.
125 By ministerial order under Ibid, s 18(2).
126 See the discussion of the differences in Ball, n 30.
127 The National Asylum Seekers’ Agency. The treatment of asylum speakers was held to be contrary to human dignity in R(on the application of Limbuela) v Secretary of State for the Home Office [2004] EWCA CIV 540, [2004] All ER (D) 323 (May). Asylum seekers are not accepted into French social housing at all. (Ball, n 30).
non-homeless private tenants do not have permanent accommodation either.\textsuperscript{128} This deterioration contrasts with Scotland;\textsuperscript{129} and Wales, which recently acquired powers to re-cast its housing provisions.\textsuperscript{130} English homeless people accepted into ‘accommodation’ now join a separate queue for social housing, to avoid allegations of unfairness. Private rented property can be obtained by the local authority by private contracting, but the homeless can be placed in Bread and Breakfast accommodation, often unsuitable and expensive. These limitations reflect the pressures to which both the homelessness system and social housing access is subjected.

Unlike in France, the rules for normal allocation, not just for homelessness, require that the homeless priority need categories should have ‘reasonable preference’ in all allocation processes,\textsuperscript{131} definitely not the case in France. The scheme for local allocation is worked out by the local housing authority working with social landlords and voluntary bodies, but it must follow certain national rules\textsuperscript{132} and government guidance concerning the ‘reasonable preference’.\textsuperscript{133} This is different from France where there are different routes to access for different types of applicant. Also in France, some localized areas the disadvantaged will take all vacancies whilst in others an absolute minimum. Clearly the English system is better for disadvantaged people in some ways but not others.

\textbf{IVc Problems in implementation of English homelessness provision}

There are immense pressures on the homelessness access procedure in both England and France but England has suffered particular difficulties. Some difficulties are common to both countries: current austerity; the relative economic success of London and Paris causing impossible pressure there; then there is a process of Europeanisation, with England essentially brought into line with most European countries by the ‘privatization’ and transfer of social housing to not-for-profit social landlords, or subsidiary housing companies if the

\textsuperscript{128} An ‘assured shorthold’ tenancy for a principal residence has a minimum term of six months (from the Housing Act 1988).
\textsuperscript{129} Discussed above 8.
\textsuperscript{130} By the Housing (Wales) Act 2014.
\textsuperscript{131} Allocation rules are in Part VI of the Housing Act 1996, with the obligation for ‘reasonable preference’ at 166A.
\textsuperscript{132} Ibid, and now in detailed ‘Guidance’ from the minister under s.169.
\textsuperscript{133} Department for Communities and Local Government, \textit{Allocation of accommodation: Guidance for Local Housing Authorities in England} (Communities and Local Government 2012).
residents vote for this.\textsuperscript{134} English social housing now resembles France with a mix of public and private social landlords.

In England, there has been a double loss of housing stock directly controlled by local authorities in which to house people, first by compulsory sale of council housing to tenants at a discount and then by transfers of housing to independent social landlords. All such landlords now also have their solvency to think about like as in France. Will this cause reluctance to accept tenants unable to pay or tenants with social difficulties? There are no English statistics like the French, showing levels of people actually housed after acceptance of priority need.\textsuperscript{135} The English assumption has been that all candidates nominated will be accepted, or accepted after a court decision, and that benefit will pay the rent (not necessarily so now). These English placements are customary, but we may see reluctance arising from landlord independence, as in France.

There are a series of new problems. Hunter recently evidenced the new use of a private agency appointed by the national government to assess medical vulnerability of homelessness candidates, essentially by-passing housing officers. This produced rejections, not accepting patients own doctor’s view.\textsuperscript{136} Another problem is that now, newly constructed homes often have ‘affordable’ rents, which at 80 percent of market rents, are too high for those in difficulty in London in particular. There is also difficulty obtaining legal aid for housing, part of a general budgetary reduction in such provision. A particular problem is the heavy and varied duties on English local authorities, when they no longer have sufficient funding to meet these.

The English homelessness and social housing allocation acceptance processes is commonly criticized,\textsuperscript{137} but there are still a substantial number of acceptances by local authorities. In the UK in 2012 there were 88,494 people who were not intentionally homeless, with 10,494 homeless intentionally but still

\textsuperscript{134} Marja Elsinga, Mark Stephens and Thomas Knorr-Siedow, ‘the Privatisation of Social Housing: Three Different Pathways’ in Kathless Scanlon, Christine Whitehead and Melissa Fernández Arrigotia, Social Housing in Europe (Wiley Blackwell, 2014) 389, from 393.
\textsuperscript{135} Above 14.
\textsuperscript{136} Joanne Bretherton, Caroline Hunter and Sarah Johnsen, ‘‘You can judge them on how they look ...’’: Homelessness Officers, Medical Evidence and Decision-Making in England’(2013) European Journal of Homelessness, Vol. 7(1).
accepted: 53,450 and 8,700 respectively for England. The often assisted nature of the English process 138 may mean that those not eligible will be advised of this and not apply. This would not appear in the statistics.

IVd An enforceable English process?

If you ask whether the right kind of English homeless applicant has a right to housing, the short answer is no, definitely not. This is a duty, not a right, but with a right to limited appeals. Of course, Hohfeld139 might say that a right is a co-relative of a duty. The fulfillment of the one might require the other to be effective. Yet there is a structural preference for local authority powers in France and for duties in England. Duties are easier to censure in the court. In the past the re-opening of English allocation decisions would have been by judicial review, but this procedure was simplified to make this easier for homeless applicants. The applicant can ask for an internal review of any decision against them within the local authority and if this is unsuccessful they can appeal to their local court rather than the normal route to the High Court in London, but this is limited to a point of law. 140

Enforceability seems to be out of place as a term in this context. The fact that qualifying English homeless people are actually accommodated following a decision of the local authority or the court is a matter of custom, part of a history where benefits would have covered rent, and where there was publicly owned housing stock at the disposal of the local authority. Such a custom took a long time to develop within a national legislative straightjacket since 1936. 141 The effectiveness of the procedure must lie in the acceptance of those who qualify at the point of entry, still higher in England.

It is easy to say that people have a right to be housed but legislation in both countries enables gate-keepers to housing to match the people to the available housing stock, within the limitations of finance and the willingness of those controlling housing to admit those in need. The most ‘enforceable’ right to housing is one where the housing stock and living conditions and procedures to access housing are good enough to mean few such demands for recourse are necessary.

138 In terms of interim accommodation, advice and sometimes filling in the form with the local authority official, partly due to the duty to advise, n 117.
140 Housing Act 1996, from s 204.
141 Cowan and Marsh n 137.
Conclusion – whither the right to housing?

There is considerable divergence in what is meant by ‘right’, with the French conception being much wider than the English, encompassing the law of urban planning and tenancy terms, as well as the needs of disadvantaged people. Thus this is rights, law and things in between. The English term ‘right’ is distinct from ‘law’ and carries particular meanings of enforceability, which necessarily narrows its scope to what can be achieved. Thus the French use of ‘rights’ is not just a widening of the English term but exhibits extra meanings, often missed which make true comparability difficult. Thus the effectiveness of a right to housing depends on how it is defined and “enforceability” is rarely the appropriate term for either country.

This means that English-speaking researchers must look closely at the exact terms of the French texts and their limitations in law, procedure and in fact before drawing conclusions. The French term droit is likely to mean anything from soft-law guidance to binding law, and only sometimes something an individual can claim. The individual may not succeed. It is usually clear from the linguistic context whether a personal right or a simple law is intended.142 Also, the ‘opposable right to housing’ empowering individuals is only part of the functions of the wider right to housing. Housing law is immensely heterogeneous, so it must be asked what exactly is promised. Is it delivered effectively or indeed intended to be effective? How far is it rhetorical, empowering housing lobbies against opposing principles?

In turn, civil law researchers may search in vain for a broad directive English right to housing, despite English debate referring specifically to a rather narrower right to housing usually concerning those in difficulty143. The right to housing has no legislative force in England. To look at this, you could functionally group together all housing-related law in the French style, as evidence of its existence. Alternatively, in the narrow version the effectiveness of the homelessness legislation can be tested as to how close it is to ‘right’ for those applying, as in the recent Scottish discourse.144 Neither the English nor the French version houses all those in need, but the French wider French version can lead to long term approaches across all housing stock.

142 See the discussion in Ball n 30, chapter 4.
143 See Hohmann, n 5.
144 Above 8.
In the narrow English version of the right to housing, lack of enforceability may be due to wide and often necessary room to maneuver by gatekeepers. Both countries’ procedures house large numbers of people, but any effectiveness lays not so much in court procedures, but access afforded by preliminary assessment procedures. These difficulties mean intense difficulty is in choosing which categories of people should be housed where there is less housing than needed.

There are substantial differences between the two systems, but moral superiority of the one system over the other is not one of them. Measuring the rhetoric of the French approach against the narrow conditionality of the English approach always makes the English approach sound mean. You could not say easily that the predominant ‘duty’ approach in England was any more or any less effective than the French ‘rights’ approach. There are successes and failures on both sides of the channel, although the French approach is still dynamically changing and responding to the current situation whilst the English system seems to be declining in capacity. The French approach still gives direct access social housing, no longer necessarily so in England. However, a the English approach still has merits, such as immediate accommodation and the assumption that close to 100 percent of those accepted should be housed, whether in social housing allocation procedures or through homeless procedures, even though this presents substantial difficulties.

It would be easy to say that the right to housing made no difference, but this is not so. Such a principle has a structural role to play in France to support people against opposition by other lobbies. It does not follow that England cannot achieve such effects without the right to housing. However, Europeanization may mean in the future that England might need a right to housing. This would be an acknowledgement that there are serous housing problems, but it risks giving the appearance of action without changing much. More importantly it is a defense to oppositional approaches imported from Europe. Hohmann argued that is was difficult to conceptualize the right to housing within the ECHR. That is because the ECHR right to property could be interpreted in a French way, to resist housing purposes. Then a right to housing would be an essential defense if European property lobbies become overly enthusiastic about reducing tenants’ rights, or unite against effective housing policies.

145 Hohmann, n 5.
146 Article 1 of Protocol 1 of the ECHR.
There is much to learn and when the differences are known, England and France can walk together to exchange our experiences, including bad ones. On the one hand, it is sad to see the French enthusiasm for importing the opposable right to housing affected by English-type problems. Brouant observed the potential for increased segregation and stigma for tenants. This might be moving even more towards an English-type dualist or residual social housing market complained of by Kemeny. On the other hand, if England were to import a French holistic approach, with the wider right to housing as an effective permanent policy consideration, it would mean building a wider range of housing over a long period in a complex mesh of incentives. In planning, France is considerably more successful than England in producing housing construction, which has run at roughly double the rate of housing construction in England over the last thirty years, often with less and less funding. This too has problems but might be what is needed in England. The ‘right to housing’ could assist joined-up thinking, a way of looking at things because individual housing difficulty is often the result of difficulties in the housing market as a whole.

147 Above 10.
149 Ball, n 30.
150 See section IIIb on social mix and effectively gentrification.