

IS JUSTICE POSSIBLE IN RUSSIAN COURTS? A CASE STUDY OF HOUSING DISPUTES

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ABSTRACT

How do Russian judges go about achieving justice? This question is explored through a case study of disputes initiated by vulnerable (often elderly) actors who seek to invalidate contracts for the sale of their residences on the grounds that they were tricked or duped. The analysis is grounded in a set of ninety recent judicial opinions from courts across Russia. It reveals that, despite a longstanding distaste for witnesses, judges are open to hearing testimony in these cases. But they rarely rely on such evidence in making their decisions, preferring instead to prioritize documentary evidence. Doing so revealed that Russian judges' understanding of justice is primarily procedural. Their preference for documentary evidence allowed them to meet the quick turnaround times mandated by the procedural codes. This, in turn, served judges' career interests by allowing them to compile a track record that makes them strong candidates for promotion.

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I. INTRODUCTION

Judges everywhere are faced with a myriad of goals when resolving civil disputes, not all of which are consistent. They must balance their designated task of achieving justice in individual cases with their more prosaic need to manage their docket effectively. Depending on the political system in which the courts are embedded, judges may need to be cognizant of the interests of powerful actors both in government and in the private sector.¹ How they understand and prioritize among these goals varies. Much depends on their openness to different types of evidence. In the United States, for example, judges regularly take account of both documentary and testimonial evidence. They view assessing the credibility of witnesses as part of their job and do not fret about the time required to gather such evidence.² In countries with a civil law (as opposed to a common law) tradition, judges are less comfortable doing so. They are expected to resolve cases within fixed deadlines, leaving them with less patience for often garrulous witnesses. They value certainty, which they believe is best reflected in documentary evidence and are uncomfortable with making judgments calls about the credibility of competing witnesses.³ Some disputes lend themselves to this approach, but when disputes arise from disagreements over who did what to whom, there are rarely any contemporaneous written records. When there are written records, the parties seldom see eye to eye on their interpretation. Eyewitnesses can elucidate. When their testimony is disallowed or discounted, the results tend to preference those whose narratives are reflected in the available documents. Such outcomes may or may not be just.

In this article, I explore what happens when judges consistently give short shrift to witness testimony in favor of documentary evidence. I do this through a case study of housing disputes in contemporary Russia in which one party seeks to invalidate a contract for the sale of residential real estate to someone close to them.⁴ This is particularly fertile ground for study. The conflicts in question are classic “he said, she said” situations, where each side puts forward its own narrative. Those seeking relief tend to be sympathetic individuals, often elderly or disabled, who believe they were taken advantage of by savvier parties, often family members or friends.

1. In Russia, the practice of elites, either political or economic, being able to dictate the outcomes of cases has become known as “telephone law.” See generally BRIAN D. TAYLOR, *THE CODE OF PUTINISM* 116-27 (2018); Alena V. Ledeneva, *Telephone Justice in Russia*, 24 *POST-SOVIET AFFS.* 324 (2008).

2. E.g., LADORRIS HAZZARD CORDELL, *HER HONOR: MY LIFE ON THE BENCH... WHAT WORKS, WHAT'S BROKEN, AND HOW TO CHANGE IT* (2021).

3. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 48-55 (2d ed. 1985).

4. My study does not include fraudulent schemes in which vulnerable Russians are tricked out of their homes by professional criminals. Those who engage in these scams are subject to criminal liability. Nataliia Gustova, *Moshennichestvo s nedvizhimost'iu: kak rossiian ostavliaiut bez deneg i zhil'ia*, RBC (Dec. 9, 2020), <https://realty.rbc.ru/news/5fcfcc8a9a7947019d5464b1> [<https://perma.cc/U342-F8NH>]; *Ostorozhno, moshenniki: kak sokhranit' i vernut' svoiu kvartiru*, PRAVO (July 1, 2016), <https://pravo.ru/review/view/129751/> [<https://perma.cc/U576-HB25>].

Russian law grants judges the right, but not the obligation, to hear witnesses. An ambivalence toward witnesses is a theme that emerged from my many conversations with Russian judges conducted during observational research in the courts over the past 30 years. Exploring a subset of cases in which witnesses would seem to be essential to getting to the truth allows me to determine the extent to which these attitudes are reflected in contemporary Russian judicial behavior.

In the wake of Russia's invasion of Ukraine in February 2022, focusing on mundane disputes might seem frivolous. Indeed, the consistent drumbeat of convictions of regime opponents for protesting or criticizing the war⁵ confirms Russian judges' willingness to interpret purposely vague laws so as to serve the interests of political elites.⁶ Many scholars are engaged in studying these politicized cases and their implication for the Russian legal system.⁷ Yet, such cases constitute a small portion of the overall docket of the Russian courts. Existing in parallel are many more ordinary disputes which judges resolve with scrupulous, perhaps even obsessive, attention to the letter of the law.⁸ This combination of extra-legal and positivistic approaches, known as legal dualism,

5. E.g., Robyn Dixon, *Russia Sentences Kara-Murza, Putin Critic and Post Contributor, to 25 Years*, WASH. POST (Apr. 17, 2023), <https://www.washingtonpost.com/world/2023/04/17/vladimir-kara-murza-treason-sentence/> [<https://perma.cc/V7HV-HB7N>]; Anton Troianovski, *A Life in Opposition: Navalny's Path from Gadfly to Heroic Symbol*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/world/europe/navalny-russia-putin.html> [<https://perma.cc/8KZM-XG7Z>]; MASHA GESSEN, *WORDS WILL BREAK CEMENT: THE PASSION OF PUSSY RIOT* (2014); Richard Sawka, *The Quality of Freedom: Khodorkovsky, Putin and The Yukos Affair*, 9 PERSPS. ON POL. 207 (2009).

6. Politicized cases are not a Putin-era phenomenon but have persisted since the nineteenth century. In the late 1870s, creative defense lawyers were able to free their clients by convincing juries that the Tsarist regime was more at fault than their clients. E.g., ANA SILJAK, *ANGEL OF VENGEANCE: THE 'GIRL ASSASSIN,' THE GOVERNOR OF ST. PETERSBURG, AND RUSSIA'S REVOLUTIONARY WORLD* (2008). Juries were absent from the institutional landscape during the Soviet era. Under Stalin, judges who were hand-picked by the Communist Party, railroaded bewildered citizens into the GULAGs by convicting them of anti-Soviet activities under a vaguely worded section of the criminal code. E.g., ROBERT CONQUEST, *THE GREAT TERROR: STALIN'S PURGE OF THE THIRTIES* (1968). From Stalin's death in 1953 through the end of the Soviet Union in 1991, politically inspired arrests and trials decreased but did not disappear. The post-Stalinist version of the criminal code retained the crime of anti-Soviet activities and judges interpreted it loosely to convict those who came before them. DINA KAMINSKAY, *FINAL JUDGMENT: MY LIFE AS A SOVIET DEFENSE ATTORNEY* (1982).

7. E.g., Lauren A. McCarthy, Douglas Rice & Aleks Lokhmutov, *Four Months of 'Discrediting the Military': Repressive Law in Wartime Russia*, 31 DEMOKRATIZATSIYA, no. 2, 2023, at 125; Freek van der Vet, *When They Come for You: Legal Mobilization in New Authoritarian Russia*, 52 LAW & SOC. REV. 301 (2018).

8. Some scholars have argued that formalism is a vestige of state socialism. E.g., James E. Moliterno, Lucia Berdisová, Peter Čuroš & Ján Mazúr, *Independence without Accountability: The Harmful Consequences of EU Policy toward Central and East European Entrants*, 42 FORD. INT'L. L.J. 481 (2018). Memoirs detailing experiences with courts in post-Communist countries provide vivid examples. E.g., MENACHEM KAISER, *PLUNDER: A MEMOIR OF FAMILY PROPERTY AND NAZI TREASURE* 103-10 (2021).

is not unique to Russia,⁹ but has also been documented in Nazi Germany,¹⁰ the U.S.S.R. under Stalin,¹¹ Ukraine,¹² China,¹³ and other authoritarian countries.¹⁴ A small but growing literature focused on how ordinary disputes in authoritarian settings are handled has emerged.¹⁵ To date, however, the question of how judges approach evidence has been neglected. This article is an effort to fill this gap in the literature.

The potential for taking advantage of the vulnerable in urban housing markets is a sad reality almost everywhere. Russia presents an especially compelling case. Lacking a housing market under the Soviet planned economy, living space was allocated by the state. Those who held high-ranking positions in the bureaucracy of the state, or the Communist Party, received desirable apartments, as did workers at high-value factories.¹⁶ Much as in a game of musical chairs, when the music stopped with the collapse of the Soviet Union in 1991, those who were then living in these appealing apartments got to keep them by privatizing them at a pittance.¹⁷ If we fast forward to the present day, many elderly Russians are ensconced in highly desirable apartments worth a great deal of money on the open market. The high cost of urban housing makes owning one's own home beyond the reach of ordinary Russians.¹⁸ In order to jump start the acquisition process, relatives may sidle up to their elders in order to obtain their apartments at little or no cost.¹⁹ Outside the family setting, wily individuals may target the elderly or those with limited capacity to understand complicated financial transactions and convince or trick them to sign contracts to sell their apartments under terms that are highly disadvantageous to the seller. Only later do these vulnerable individuals realize they have been duped.

9. *E.g.*, HÅVARD BÆKKEN, *LAW AND POWER IN RUSSIA: MAKING SENSE OF QUASI-LEGAL PRACTICES* (2020); KATHRYN HENDLEY, *EVERYDAY LAW IN RUSSIA* (2017).

10. ERNST FRAENKL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1969).

11. Robert S. Sharlet, *Stalinism and Soviet Legal Culture*, in *STALINISM: ESSAYS IN HISTORICAL INTERPRETATION* 155 (Robert C. Tucker ed., 1977).

12. *E.g.*, Tatiana Kyselova, *Dualism of Ukrainian Commercial Courts: Exploratory Study*, 6 *HAGUE J. ON RULE L.* 178 (2014).

13. Hualing Fu & Michael Dowdle, *The Concept of Authoritarian Legality: The Chinese Case*, in *AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT, AND TRANSITION* 63 (Weitseng Chen & Hualing Fu, eds., 2020).

14. Kathryn Hendley, *Legal Dualism as a Framework for Analyzing the Role of Law under Authoritarianism*, 18 *ANN. REV. L. & SOC. SCI.* 211 (2022).

15. *E.g.*, ETHAN MICHELSON, *DECOUPLING: GENDER INJUSTICE IN CHINA'S DIVORCE COURTS* (2021); Benjamin L. Liebman, *Ordinary Tort Litigation in China: Law versus Practical Justice?*, 13 *J. TORT L.* 197 (2020), HENDLEY, *supra* note 9; KWAI HANG NG & XIN HE, *EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA* (2017).

16. JANE R. ZAVISCA, *HOUSING THE NEW RUSSIA* 26-27 (2012).

17. *Id.* at 51.

18. *Id.* at 127. This is not a problem specific to Russia. See Lilah Raptopoulos, *Millennials Discuss Why They Cannot Afford to Buy Homes*, *FIN. TIMES*, (July 10, 2018), <https://www.ft.com/content/69996664-8432-11e8-a29d-73e3d454535d> [<https://perma.cc/S5U4-9MDZ>].

19. Even under normal circumstances, acquiring an apartment requires help from families. ZAVISCA, *supra* note 16, at 138-39.

Although not unique to Russia,²⁰ such scenarios are especially pernicious in Russia. Elderly Russians were socialized into the Soviet system in which market incentives were not present and the sorts of scams that have grown increasingly commonplace were beyond the pale. As a result, they lack the wariness of their contemporaries who came of age under capitalism.²¹ Despite being fairly commonplace, this type of dispute has not previously attracted scholarly attention.²²

Post-Soviet Russian contract law opens the door to voiding scam-generated contracts. Agreements can be invalidated when they are the product of undue influence or duress or when one of the parties is incapable of understanding the significance of what they are signing.²³ The letter of the law does not offer any explicit advantage to elderly or other vulnerable individuals. Yet, their status may make it easier to satisfy the requirements of the law. Understanding how these laws actually operate and the extent to which they actually protect the vulnerable requires a deep dive into the day-to-day reality of Russian courts. The article is grounded in a mixed-methods analysis of ninety cases in which contracts involving vulnerable actors were sought to be invalidated.

The analysis of these cases provides a welcome window into Russian judicial behavior. Invalidating contracts on the basis of undue influence, duress, or similar arguments requires judges to explore and determine the intent and contractual capacity of the parties. This is rarely clear from the terms of the contract or other documentary evidence. Listening to the parties (and those close to them) explain the circumstances of formation can fill in the gaps. But testimony is likely to be inconsistent, requiring judges to determine who is telling the truth. In this article, I investigate the extent to which Russian judges are open to considering testimonial evidence and, when they allow it, the weight they give it in their decisions.

The methodology employed represents a departure from recent studies in which social scientists have scraped thousands of cases from court websites and used advanced statistical tools to tease out trends.²⁴ Others have dug into

20. The elderly, who have accumulated significant equity in their homes, are also commonly targeted in the U.S. See Anuta Sharma, *Pricey Real Estate Prompts Scammers to Target Senior Homeowners*, KPBS (Nov. 27, 2018), <https://www.kpbs.org/news/midday-edition/2018/11/27/pricey-real-estate-prompts-scammers-target-senior> [<https://perma.cc/8796-TXXX>].

21. This scenario has become fodder for popular literature set in Russia. See ANDREW D. MILLER, *SNOWDROPS* (2010).

22. A monograph on housing disputes concludes with drafts of judicial decisions in fourteen different types of housing disputes. None of these fourteen captures the sort of dispute I am studying. IU. F. BESPALOV, *ZHILISHCHNYE SPORY: PUTEVODITEL' PO ZAKONODATEL'STVU I SUDEBNYE PARTIKE* 295-362 (2021).

23. GRAZHDANSKIĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GK RF] [Civil Code] arts. 170, 177-79 (Russ.) [hereinafter GK RF]. For a translation of the civil code, see PETER B. MAGGS & ALEXEI N. ZHILTSOV, *CIVIL CODE OF THE RUSSIAN FEDERATION AS IN EFFECT JUNE 1, 2018* (2018).

24. DMITRY SKUGAREVSKY, DENIS SAVELYEV & TIMUR BOCHAROV, *ARBITRAZHNYE SPORY PO VIDAM EKONOMICHESKOĬ DEIATEL'NOSTI STORON: INSTITUT PROBLEM PRAVOPRIMENENIIA* (2022);

published caseload statistics with the same goal.²⁵ Another stream of scholarship is grounded in qualitative field work in the Russian courts, allowing for the voices of judges and litigants to be heard.²⁶ This study fits in-between these qualitative and quantitative approaches.

The article begins with an introduction to the Russian judicial system, debunking some of the most popular myths surrounding these courts. It then traces the evolution of the right to housing in Russia which, despite having been retained in the current constitution,²⁷ has undergone remarkable changes with the advent of the market. This is followed by an explanation of how the cases under review were selected and what marks them as unusual. The remainder of the article is devoted to an analysis of these cases.

The case decisions confirm the consolidation of private property rights. The issue that consistently plagued transfers of real estate in the Soviet Union, namely whether the person living in the apartment had title, is never raised. The battle lines have shifted. Now, Russians who are disgruntled with their real estate transactions attack the validity of the underlying contracts, often on the grounds of misunderstanding. Many who do so are elderly or otherwise socially vulnerable. The cases show that claiming befuddlement is no guarantee of success.

Indeed, on their own, such assertions rarely convinced judges to invalidate sales contracts, even when buttressed by compelling first-hand testimony from neighbors or relatives. This sort of testimony was invariably challenged by a bevy of witnesses from the other side who said just the opposite. Typically judges broke the impasse by ordering a psychiatric exam of the vulnerable party. The outcome hinged on the resulting report. Taken as a whole, the cases strongly suggest that Russian judges are hesitant to weigh the credibility of witnesses and, more importantly, are reluctant to invalidate contracts that have no obvious legal flaws. To do so, petitioners must present compelling documentary evidence that, through no fault of their own, they were incapable of understanding the significance of the contract they signed.

Vadim Volkov, Dmitriy Skougarevskiy & Ruslan Kuchakov, *Whither Repeat Players? Litigation Experience and Success in Court: Evidence from Russian Commercial Courts*, 112 SOC. SCI. RSCH. (2023); Vadim Volkov, *Legal and Extralegal Origins of Sentencing Disparities: Evidence from Russian Criminal Courts*, 13 J. EMPIRICAL LEGAL STUD. 637 (2016).

25. E.g., Kathryn Hendley, *Too Much of a Good Thing? Assessing Access to Civil Justice in Russia*, 72 SLAVIC REV. 802 (2013); Alexei Trochev, *Suing Russia at Home*, 59 PROBS. POST-COMMUNISM 18 (2012).

26. E.g., Ekaterina Khodzhaeva, *When Juries Come to Russian District Courts: Lay Participation Expansion and Court System Noncompliance*, 31 DEMOKRATIZATSIYA, no. 2, 2023, at 217 (2023); Agnieszka Kubal, IMMIGRATION AND REFUGEE LAW IN RUSSIA: SOCIO-LEGAL PERSPECTIVES (2019); HENDLEY, *supra* note 9; Varvara Andrianova, *The Everyday Experiences of Citizens in Justice of Peace Courts*, in A SOCIOLOGY OF JUSTICE IN RUSSIA (Marina Kurkchian & Agnieszka Kubal eds., 2018).

27. KONSTITUTSIYA ROSSIĬSKOĬ FEDERATSII [KONST. RF] [CONSTITUTION] art. 40 (Russ.) [hereinafter KONST. RF].

II. BACKGROUND ON THE RUSSIAN COURTS

Russian courts present this article with a conundrum. Public opinion polls consistently document Russians' low levels of trust in their courts. In 2021, only a quarter of those surveyed expressed complete trust in their courts.²⁸ Though this represents an increase from the 13% and 17% who trusted the courts in 2001 and 2007, respectively, it pales in comparison to the more robust level of trust vested in the president, which routinely exceeds 50%.²⁹ From this, it would seem to follow that Russians would shy away from using the courts. Yet, the published caseload data tell a different story. In terms of sheer numbers, the number of civil disputes resolved by the courts has risen eightfold over the past two decades, growing from 2.8 million in 1995 to 22.6 million in 2021.³⁰ This apparent contradiction begins to make sense when we realize that, for Russians, the link between trust and use is tenuous.³¹ In a series of focus groups, I queried ordinary Russians about their motivations for using or not using the courts of general jurisdiction. The upshot is that any skittishness about using the courts is grounded more in their apprehension about the time and emotional energy needed to pursue a case than in any fear that their case will be subject to political manipulation.³² Their use is driven primarily by need, and they turn to the courts as a last resort.

Also relevant is the muddiness of the trust data. Pollsters routinely ask whether Russians trust courts (*sudy*). Confusion can arise among respondents because Russia has several different types of courts. Most disputes between individuals are heard by the courts of general jurisdiction, while disputes between companies go to the *arbitrazh* courts.³³ Claims raising constitutional issues go to the constitutional court.³⁴ The lack of specificity in the phrasing of

28. *Doveria obshchestvennyimi institutam*, LEVADA CTR. (2021), www.levada.ru/2021/10/06/doverie-obshchestvennym-institutam/ [<https://perma.cc/77TP-G7WD>]

29. *Id.*; *Doverie institutam vlasti*, LEVADA CTR. (2007), <https://www.levada.ru/2007/04/08/doverie-institutam-vlasti-4/> [<https://perma.cc/NJ8N-P328>].

30. The caseload data about the Russian courts used throughout this article is drawn from the statistical information collected by the Judicial Department which is attached to the Russian Supreme Court. The author downloaded the spreadsheets containing these data from the Judicial Department's website (cdep.ru). This website has become inaccessible in the U.S. following Russia's invasion of Ukraine. The spreadsheets are on file with the author. The document with these data is on file with the journal. To request the data, please send an email to iichriul@iu.edu with the subject line "Hendley 2024."

31. Kathryn Hendley, *The Puzzling Non-Consequences of Societal Distrust of Courts: Explaining the Use of Russian Courts*, 56 CORNELL INT'L L.J. 517 (2012).

32. Kathryn Hendley, *To Go to Court or Not? The Evolution of Disputes in Russia*, in A SOCIOLOGY OF JUSTICE IN RUSSIA (Marina Kurkchyan & Agnieszka Kubal eds., 2018).

33. See KATHRYN HENDLEY & PETER H. SOLOMON, JR., *THE JUDICIAL SYSTEM OF RUSSIA* (2023); PETER B. MAGGS, OLGA SCHWARTZ & WILLIAM BURNHAM, *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* (7th ed. 2020).

34. ALEXEI TROCHEV, *JUDGING RUSSIA: CONSTITUTIONAL COURT IN RUSSIAN POLITICS 1990-2006* (2008).

the pollster's question makes it impossible to know what respondents have in mind when answering.

The civil dockets of Russian courts of general jurisdiction are dominated by straightforward cases in which the outcome is obvious, not due to the political influence of those involved, but because the facts present an entirely one-sided story.³⁵ A procedural mechanism, known as a judicial order (*sudebnyi prikaz*), has been developed to handle such cases.³⁶ It allows judges to resolve cases without a hearing on the merits, based solely on the pleadings to which the critical documents are attached.³⁷ In 2021, 84% of all civil cases were resolved through *sudebnye prikazy*.³⁸

Housing disputes, which constituted 46.5% of the civil docket in 2021, reflect this reality. Over 95% were resolved through *sudebnye prikazy*. This makes sense, given that almost all (97.4%) revolve around unpaid rent and/or arrears on utilities. They present no meaningful dispute. As part of the complaint, the landlord and/or utility company attaches evidence of the amount owed, which the homeowner rarely challenges. Having a full-fledged hearing on the merits would be a waste of time. Given the deluge of cases facing Russian judges, allowing such claims to be handled expeditiously serves the interests of everyone involved as well as the judicial system at large.³⁹

Not all housing disputes lend themselves to summary resolution. In this article, I home in on such a category, namely contentious cases challenging the validity of sales contracts for residential real estate. Typically, the allegations center on charges of a lack of contractual capacity, mistake, undue influence, and/or duress. Such claims are inherently contextual. Though documentary

35. Those schooled in the U.S. legal system, where cases in which the outcome is clear are typically settled, are surprised to learn that judicial opinions are rendered in such cases in Russia. A full analysis of the reasons for this difference is beyond the scope of this article. I have elsewhere argued that it is linked to the lower costs associated with Russian litigation, measured in terms of financial outlays and time spent. HENDLEY, *supra* note 9 (2017). On the phenomenon of the disappearing trial in the United States, see Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7 (2006).

36. GRAZHDANSKIĬ PROTSESSUAL'NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GPK RF] [Civil Procedural Code] arts. 121-30 (Russ.) [hereinafter GPK RF].

37. Hendley, *supra* note 25.

38. The Judicial Department of the Supreme Court of the Russian Federation publishes detailed data on the operation of lower courts on its website (<http://www.cdep.ru/?id=79>). Since the invasion of Ukraine in February 2022, this website has been persistently inaccessible outside Russia. The data used for this Article are on file with the Law Review. *See*, note 30 *supra*.

39. The number of civil cases decided by the Russian courts has risen dramatically in the post-Soviet period. They numbered 2.8 million in 1995 and now exceed 22 million. Anzhela Arstanova, *Statistika Sudebnogo departamenta pri VC RF za 2022 god*, ADVOKATSKAIA GAZETA (July 28, 2023), <https://www.advgazeta.ru/diskussii/statistika-sudebnogo-departamenta-pri-vs-rf-za-2022-god/> [https://perma.cc/SM39-5HDU]. Tools like *sudebnye prikazy* allow these large numbers of cases to be processed efficiently. The procedural codes set out clear deadlines for resolving cases. Most civil cases must be decided within two months of being filed. GPK RF, *supra* note 36 art. 145 (Russ.). Judges' track records in meeting deadlines color their chances for promotion and/or salary increases and, consequently, they do their best to avoid violations.

evidence can be helpful in corroborating or disproving them, getting to the bottom of what happened often requires testimonial evidence that sheds light on the parties' motivations and understanding of the contracts.

Although Russia has embraced adversarialism,⁴⁰ the civil procedure code constrains the ability of litigants to present their case. They are free to include any and all relevant documents when submitting (or amending) their pleadings. But, bringing in witnesses requires them to submit a petition to the court explaining why the witnesses are necessary.⁴¹ Whether to allow a witness is entirely within the discretion of the judge.⁴² As already noted, the distaste of Russian judges for witnesses has been a consistent theme in my conversations with these judges.⁴³ Their antipathy for testimonial evidence is likely a carryover from state socialism that is not unique to Russia.

On the eve of the shutdown of the East German courts, one judge told a researcher that he became a judge because he “never liked arguments.”⁴⁴

III. THE RIGHT TO HOUSING: THE LAW ON THE BOOKS VERSUS THE LAW IN ACTION

A right to housing has long been a central plank in the informal social contract between state and society that dates back to the Soviet era in Russia.⁴⁵ When the political leadership renounced mass repression as a way to ensure social stability in the decades following Stalin's death in 1953, the state provided a broad array of economic rights in exchange for societal passivity. These included a right to affordable housing, free education and medical care, and guaranteed employment. In Zavisca's monograph on Russian housing, one of her respondents explains, “By promising every family a separate apartment, the party-state signaled that it cared for all its citizens.”⁴⁶

The right to housing was formalized by its inclusion in the 1977 Soviet constitution.⁴⁷ This built on a previous promise. In 1959, Khrushchev assured

40. KONST. RF, *supra* note 27, art. 123; GPK RF, *supra* note 36, arts. 12, 56.

41. GPK RF, *supra* note 36, art. 57.

42. *Id.* arts. 56, 59, 69.

43. HENDLEY, *supra* note 9; Kathryn Hendley, *Are Russian Judges Still Soviet? An Analysis of the Effort to Introduce Adversarialism to the Russian Arbitrazh Courts*, 23 POST-SOVIET AFFS. 240 (2007).

44. Inga Markovits, *Last Days*, 80 CAL. L. REV. 55, 80 (1992). U.S. judges, by contrast, delight in being put in the middle of highly contentious situations and see assessing credibility as a routine part of their job. *E.g.*, CORDELL, *supra* note 2.

45. LINDA J. COOK, *THE SOVIET SOCIAL CONTRACT AND WHY IT FAILED: WELFARE POLICY AND WORKERS' POLITICS FROM BREZHNEV TO YELTSIN* (1993).

46. ZAVISCA, *supra* note 16.

47. KONSTITUTSIYA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION] art. 44 [hereinafter USSR CONSTITUTION].

citizens that they would have their own apartments by the end of the 1960s.⁴⁸ Such promises became a standard part of the rhetoric of the radiant future that kept Soviet citizens pliant, at least superficially. Decades later, Gorbachev proclaimed it to be a feasible goal by 2000.⁴⁹ Like so much else in the Soviet Union, where shortages were endemic, housing was perennially out of reach for the average citizen.⁵⁰ In the absence of a market, the state allocated housing. Though the constitution stated that the distribution would be done “fairly” (*spravidlivyi*),⁵¹ people waited decades while living with their families in one room dormitories or communal apartments as those with better connections received apartments before them. Soviet citizens learned to game the system through sham marriages and obtaining jobs with state agencies or industrial enterprises with better access to housing.⁵² It was estimated that, when the Soviet Union collapsed in 1991, approximately 22% of Soviet households were still on waiting lists for housing.⁵³ Although the dream of having their own apartment eluded many Soviet citizens, one element of the constitutional guarantee was realized, namely the low payment (*nevysokaia plata*) for rent and utilities.⁵⁴ Soviet officials regularly boasted that these charges remained unchanged since 1928.⁵⁵ They amounted to a trivial portion of household budgets.⁵⁶ Reflecting on this, Andrusz commented, “Rent became a purely

48. LYNNE ATTWOOD, GENDER AND HOUSING IN SOVIET RUSSIA: PRIVATE LIFE IN A PUBLIC SPACE, 170-72 (2013); ZAVISCA, *supra* note 16, at 4; Gregory D. Andrusz, *A Note on the Financing of Housing in the Soviet Union*, 42 SOVIET STUD. 555 (1991).

49. KATERIYNA MALAIA, TAKING THE SOVIET UNION APART ROOM BY ROOM: DOMESTIC ARCHITECTURE BEFORE AND AFTER 1991, at 1 (2023).

50. Following the rise of the Communist Party to power after the 1917 October Revolution, the housing stock was nationalized. Timothy Sosnovy, *The Soviet Housing Situation Today*, 11 SOV. STUD. 1 (1959); ZAVISCA, *supra* note 16, at 23-24; Donald D. Barry, *Soviet Housing Law: The Norms and Their Application*, in SOVIET LAW AFTER STALIN, PART I, THE CITIZEN AND THE STATE IN CONTEMPORARY SOVIET LAW 1, 8-11 (Donald D. Barry, George Ginsburgs & Peter B. Maggs eds., 1977).

51. USSR CONSTITUTION, *supra* note 47, art. 44.

52. MERVYN MATTHEWS, THE PASSPORT SOCIETY: CONTROLLING MOVEMENT IN RUSSIA AND THE USSR 51 (1993); Andrusz, *supra* note 48, at 557.

53. MATTHEWS, *supra* note 52, at 51; Andrusz, *supra* note 48, at 555.

54. Sheila O'Leary, *The Constitutional Right to Housing in the Russian Federation: Rethinking the Guarantee in Light of Economic and Political Reform*, 9 AM. U. INT'L L. REV. 1015, 1038 (1994); USSR CONSTITUTION art. 44, *supra* note 47. The constitution of the Russian republic when it was a constituent part of the USSR also included a right to housing. Art. 58 of the RSFSR Constitution obligated the state to develop and maintain housing at a low cost. KONSTITUTSIYA RSFSR (1978) [KONST. RSFSR] [RSFSR CONSTITUTION] art. 58. In return, citizens were responsible for taking care of their assigned housing.

55. O'Leary, *supra* note 54, at 1048; Andrusz, *supra* note 48, at 561; Barry, *supra* note 50, at 14.

56. O'Leary, *supra* note 54, at 1048, estimated that in 1992, when Russia was emerging from its Soviet shell, rent and utilities accounted for 1-3% of household income. Writing several decades earlier, Barry, *supra* note 50, at 14, estimated it at 4-5% of the average family budget.

symbolic and nominal value, thus creating the illusion that housing can be free

...⁵⁷

Having possession but not legal title to their dwellings made moving complicated. As Soviet families expanded and contracted over time, their housing needs changed. For example, when an adult child married and wanted to start a family, their parents might seek to trade their existing one-bedroom apartment for two studio apartments. Telephone poles and other public spaces were littered with handwritten notices of such offers with tear-off tabs listing offerors' phone numbers. Doing this without jumping through the hoops established by state regulations, was risky because one side could always unravel it by reporting it to the state.⁵⁸ Yet many people took this risk, believing that permission from the state would not be forthcoming in a timely fashion.⁵⁹

The dissolution of the Soviet Union in 1991 not only created the newly independent Russian Federation, but also marked the end of state socialism. The advent of the market replaced plan fulfillment with profit as the key indicator of success and led to the privatization of both industrial enterprises and housing stock. In this new environment, the social and economic guarantees that were the centerpiece of state socialism would seem to have no place. Yet, the informal social contract between state and society remained intact.⁶⁰ As a result, these rights were included in the 1993 constitution that reconstituted Russia as a market democracy built on the principles of the rule of law.⁶¹ To be sure, the language was not as expansive. Rather than a blanket right to housing, citizens were guaranteed that they could not be arbitrarily (*proizvol'no*) deprived of their housing. The role of the state was also downplayed. It was charged with creating the conditions to allow citizens to exercise their right to housing and with providing grants to help low-income individuals secure housing.⁶²

57. Andrusz, *supra* note 48, at 561.

58. The RSFSR Supreme Court invalidated a transfer that lacked official approval in 1975. The decision was published in its monthly bulletin. Given that relatively few decisions were published, it is fair to conclude that the inclusion of this case was designed to send a signal to lower courts. *Nikitina v. Vikulov*, BIULLETEN' VERKHOVNOGO SUDA RSFSR, No. 1, at 12, reprinted in JOHN HAZARD, WILLIAM E. BUTLER & PETER B. MAGGS, *THE SOVIET LEGAL SYSTEM* 141-42 (3d ed. 1977).

59. This process became grist for authors, giving rise to satirical novellas, e.g., YURI TRIFONOV, *THE EXCHANGE AND OTHER STORIES* (1991); VLADIMIR VOINOVICH, *THE IVANKIAD* (1977).

60. Jørn Holm-Hansen, Mikkel Berg-Nordlie, Aadne Aasland & Linda Cook, *Welfare Reform, Protest and Stability in the Light of Reforms of Old-Age Pensions, Housing and Primary Education*, 4 *RUSS. POL.* 354, 358 (2019).

61. KONST. RF, *supra* note 27, art 40.

62. The hundreds of amendments made to the 1993 constitution in 2020 did not affect Article 40. This article is part of the chapter on citizens' rights that can be amended only through a constitutional convention. Some of the 2020 amendments constituted an end-run around this hard constraint by placing rights-related articles in other chapters but housing was not addressed. William E. Pomeranz, *Putin's 2020 Constitutional Amendments: What Changed? What Remained the Same?*, 6 *RUSS. POL.* 6 (2021).

In the post-Soviet era, Russians are expected to take responsibility for obtaining and maintaining their own housing. Citizens, especially young people, recognized the sea change at work. “When we were growing up, we always knew we would have a place to live. If our parents couldn’t help us then the government would. Our children are the first generation born without a right to free housing. It’s hard to imagine how this could be possible!”⁶³ The rights laid out in the constitution were seen as “empty promises.”⁶⁴ Indeed, public opinion surveys fielded in 2018 and 2019 found that, among respondents who claimed that their rights have been violated, housing was the most common arena for such violations.⁶⁵

The shadow of the state has never entirely receded when it comes to housing. The state-mandated residence permits (*propiski*) that impeded the ability of Soviet citizens to relocate continue to exist. While the Soviet constitutions were silent as to freedom of movement, the post-Soviet Russian constitution guarantees citizens the right to choose their place of residence.⁶⁶ Yet local officials (especially in major population centers, such as Moscow and St. Petersburg) continue to require *propiski*. Even today, those without *propiski* cannot work legally, nor can they obtain social benefits.⁶⁷ The constitutionality of these regulations has been repeatedly challenged at the Russian Constitutional Court (RCC). The RCC has consistently found them to violate the constitution, but officials have refused to enforce these decisions.⁶⁸ As the former deputy chairman of the Constitutional Court, Tamara Morshchakova, has noted with regard to this issue, “The bureaucrat does all he can to delay implementation”⁶⁹

On the other hand, the embrace of private property has allowed apartment residents, at long last, to gain title to their homes. This transition from tenant to owner was facilitated by the housing privatization program of the 1990s, which allowed most to become owners of the apartments where they had been living

63. ZAVISCA, *supra* note 16, at 6.

64. *Id.* at 52.

65. Twenty-two percent of the Russians surveyed contended that their rights had been violated. Of that group, 31% situated the violation in the housing sphere, compared to 22 and 20%, respectively, for violations in relation to medical services and the workplace. NAFI ANALITICHESKII TSENTR, ROSSHIANE OKHOTNEE OTSTAIVAIUT SVOI PRAVA V TEORII, CHEM NA PRAKTIKE (2020).

66. KONST. RF, *supra* note 27, art. 27.

67. ZAVISCA, *supra* note 16, at 132-38; TOVA HÖJDESTRAND, NEEDED BY NOBODY: HOMELESSNESS AND HUMANNES IN POST-SOCIALIST RUSSIA (2009); see also Noah Rubins, *The Demise and Resurrection of the Propiska: Freedom of Movement in the Russian Federation*, 39 HARV. INT’L L.J. 545, 547 (1998).

68. MAGGS ET AL., *supra* note 33, at 404-08.

69. Rubins, *supra* note 67, at 564.

at a nominal cost.⁷⁰ By 2019, 87% of Russian homes had been privatized.⁷¹ In theory, these new owners could sell their apartments and use the capital to buy another apartment or for whatever they desired. In reality, however, few Russians had the resources necessary to pay for new residences and the mortgage market was slow to develop.⁷² Over time, the idea that their apartments truly belonged to them and could not be taken back by the state took hold among Russians. In a 2018 poll, 98% of Russians viewed their apartments as their personal property as opposed to only 59% who expressed similar confidence in their right to hold onto their business.⁷³

The “mosaic of property rights regimes”⁷⁴ inherited by present-day Russia made buying and selling residential apartments difficult in the early 1990s. Privatization sorted out questions of title, though the rights of family members who were currently or had once been registered in an apartment sometimes clouded legal title. In the Soviet era, former wives and estranged children sometimes reappeared at inconvenient moments to squelch apartment exchanges. Post-Soviet legislation introduced the concept of the bona fide purchaser⁷⁵ but courts did not consistently uphold the underlying principle that such buyers should be protected from claims from family members who had been unknown to buyers.⁷⁶ In 2021, the RCC⁷⁷ reinforced the rights of bona fide purchasers in a case brought by a man who had purchased an apartment after confirming that the state property registry listed no outside claims. This purchaser later learned that the ex-wife of the person who had sold the apartment to the person from which he purchased the property remained registered in the apartment. Following longstanding tradition, the lower courts found in favor of the ex-wife and voided the later sales transaction. Noting that such results tend

70. Linda J. Cook, *The Russian Welfare State: Obstacles to Restructuring*, 16 POST-SOVIET AFFS. 355, 363-64 (2000); Alexander Puzanov & Tatiana Koutakova, *Privatizing Housing and Creating Homeowners' Associations*, in RESTRUCTURING RUSSIA'S HOUSING SECTOR 1991-97, at 155 (Raymond J. Struyk ed., 1997); see also O'Leary, *supra* note 54.

71. Holm-Hansen, *supra* note 60, at 364.

72. ZAVISCA, *supra* note 16, at 49-68; See Louis Skyner, *Rehousing and Refinancing Russia: Creating Access to Affordable Mortgaging*, 57 EUR.-ASIA STUD. 561 (2005).

73. Andrei Kolesnikov & Denis Volkov, *Pragmatic Paternalism: The Russian Public and the Private Sector*, CARNEGIE MOSCOW CTR. (Jan. 18, 2019), <https://carnegiemoscow.org/commentary/78155> [<https://perma.cc/HA39-MD35>]. By contrast, in 2007, one of the most well-known and well-connected oligarchs, Oleg Deripaska, said that he was prepared to give the Rusal aluminum company back to the state whenever asked. “If the state says we need to give it up, we'll give it up. I don't separate myself from the state. I was lucky. Just consider that everything fell from the sky.” Catherine Belton, *I Don't Need to Defend Myself*, FIN. TIMES (London), July 13, 2007, at 9.

74. Regina Smyth & Sarah Wilson Sokhey, *Constitutional Reform and the Value of Social Citizenship*, 6 RUSS. POL. 91, 108 (2021).

75. GK RF, *supra* note 23, art. 302.

76. Skyner, *supra* note 72, at 567.

77. For background on the Russian Constitutional Court, which is a post-Soviet innovation, see TROCHEV, *supra* note 34.

to undermine the reliability of the housing market, the RCC reversed and found in favor of the bona fide purchaser-petitioner.⁷⁸

There is more consistency between the Soviet and post-Soviet eras in dealing with evictions. Put bluntly, although the housing codes always contemplated eviction,⁷⁹ actual evictions were and remain unusual. This was hardly surprising under Communism, when rents were trivial and homelessness was anathema. According to the law on the books, evictions were possible if a tenant abandoned the apartment or failed to pay their rent for six months or more. This rarely happened and, even if it did, before eviction, the state had to provide alternative accommodations, diminishing any incentive to evict.⁸⁰ As a result, once ensconced, dislodging a Soviet citizen from their apartment involuntarily was extremely difficult, giving rise to an informal entitlement to housing that arguably compensated for the lack of political freedoms.⁸¹

The informal norms that discouraged evictions in the Soviet period continue to hold sway today.⁸² Although it is impossible to know how common evictions are, the available evidence suggests they remain the exception rather than the rule. In any event, they rarely get to court. In 2021, eviction cases amounted to less than 1% of all housing cases and less than 0.1% of all civil cases. This should not be taken to mean that Russians are reluctant to bring housing-related disputes to court. As I noted earlier, these cases constitute the largest single block of cases on the civil docket. But almost all of them (97.4%) are seeking to recover arrears for rent and/or utilities. Around 90% of these cases are seeking less than 50,000 rubles (less than \$800 at the May 2022 exchange rate), suggesting that landlords and utility companies prefer to return to court time and time again to recover debts rather than evicting tenants. As I have argued elsewhere, this practice of using the courts as a mechanism for debt collection makes sense in Russia where going to court is relatively cheap and quick.⁸³

In the cases under review, the decisions often mention eviction but rise or fall on humbler rules. At the heart of all of these cases is a contract for the sale

78. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 13 avgusta 2021 g. [Ruling of the Russian Federation Constitutional Court of Aug. 13, 2021], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF]* [Russian Federation Collection of Legislation] 2021, No. 35-P; Mariia Golubkova, *KS RF zashchitil pokupatelei dedvizhimosti*, *ROSSIISKAIA GAZETA* (July 13, 2021), <https://rg.ru/2021/07/13/reg-szfo/ks-rf-zashchitil-pokupatelej-vedvizhimosti.html> [<https://perma.cc/36A8-VYSU>].

79. *ZHILISHCHNYĬ KODEKS ROSSIISKOĬ FEDERATSII [ZHK RF]* [Residential Code] art. 35 (Russ.).

80. HÖJDESTRAND, *supra* note 67, at 25-26; MATTHEWS, *supra* note 52, at 47-48; Barry, *supra* note 50, at 13.

81. O'Leary, *supra* note 54, at 1029; *cf.* Barry, *supra* note 50, at 15. Barry argues that "[e]viction is a considerable problem in Soviet law." He notes that a significant percentage of cases published in the official journal of the RSFSR Supreme Court focused on eviction. Because judicial opinions were not published, the relatively few cases published in this official journal were viewed as signaling trends in the overall judicial system. It is impossible to know whether that was true or not.

82. Cook, *supra* note 70.

83. Hendley, *supra* note 31.

of a piece of residential property. Later, however, one side recants, claiming that the transaction is a fiction or that they are a victim of duress, undue influence or that they lacked the necessary capacity to enter into the original transaction. These are claims that are familiar to contracts scholars elsewhere. They are relatively new in the Russian context.

The provisions governing contractual relations in the civil code in the Soviet era can best be described as rudimentary. The capacity to enter into contracts was presumed for all adult Soviet citizens. Only those with documented mental illnesses could have their transactions voided on the grounds of incapacity.⁸⁴ The familiar defenses to contract formation, e.g., duress, undue influence, lack of good faith, were absent.

Unsurprisingly, the civil code underwent dramatic revisions in the 1990s. The bare-bones approach that sufficed for the planned economy proved inadequate to the complexities of a modern market economy. Like its predecessor, the present-day civil code recognizes all citizens' capacity to enter into contracts.⁸⁵ In addition to recognizing mental illness as a basis for invalidating a transaction, the current civil code also acknowledges various addictions (alcohol, narcotics, gambling) as grounds for voiding transactions.⁸⁶ More interesting is the treatment of threats and misunderstandings under this code. These issues were left unaddressed by the Soviet civil code.

From the outset, the updated code provided that contracts made as a result of threats or deception could be invalidated.⁸⁷ How to deal with misunderstandings has evolved over time. Initially, the letter of the law allowed contracts to be voided on the basis of misunderstandings, though the lack of specificity in the statutory language made the section difficult to use.⁸⁸ The section was amended in 2013 to include a list of the sorts of misunderstandings that could serve as the basis for invalidating contracts.⁸⁹ These include mistakes as to the nature of the transaction or the person with whom they are negotiating.⁹⁰ A December 2013 summary of judicial practice issued by the Higher *Arbitrazh* Court (*Vysshiĭ Arbitrazhnyi Sud* or VAS)⁹¹ emphasized that misconceptions that could have been cleared up through an exercise of due

84. CIVIL CODE OF THE RSFSR arts. 9-11, 15, 160. During the Soviet era, each constituent part of the Soviet Union had its own codes, which duplicated one another. An English translation of the Russian version of the civil code is available in *THE SOVIET CODES OF LAW 387* (William Simons, ed., 1980).

85. GK RF, *supra* note 23, arts. 17, 18.

86. *Id.* at arts. 29, 30.

87. *Id.* at art. 179.

88. GRAZHDANSKIĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GK RF] [Civil Code] art. 178 (2013) (Russ.).

89. *VAS RF speshit, ne toropias', v vyrobke rekomendatsii po primeneniui st. 178 I 179 GK RF, EKONOMIKA I ZHIZN'* (Oct. 21, 2013), <https://www.eg-online.ru/article/227935/> [<https://perma.cc/7349-XXA8>].

90. GK RF, *supra* note 23, art. 178.

91. The VAS no longer exists. In 2014, it was merged into the Russian Supreme Court. For more on this process, see MAGGS ET AL., *supra* note 33, at 109-14.

diligence could not serve as the basis for invalidating contracts using this section.⁹² From that, it follows that misunderstandings about the motives of a transaction do not constitute grounds for unraveling it. A theme running through both the statutory language and the VAS commentary is the expectation that all parties act in good faith.⁹³

Reflecting on these changes, a consultant to the VAS expressed the hope that the greater detail embedded in the amended law would provide the means for victims of contractual machinations to protect themselves. He noted that, prior to the changes, these sections of the civil code were used only in “rare cases.”⁹⁴ He was, however, skeptical, arguing that prior practice evidenced a propensity for “tacit non-intervention” and a tendency to dismiss allegations of dishonesty as the sort of tough bargaining aimed at maximizing the parties’ interests that is routine in market-driven transactions. He noted that “[j]udges in the context of the flow of cases that exists in the judicial system are not always ready to take into account the complexity of situations that go beyond the usual. Such formalism must sooner or later be overcome.”⁹⁵

IV. METHODOLOGY AND DATA

Formalism characterizes most judicial decisions in housing disputes in Russian courts. The simplicity of petitioners’ demands in most cases and the lack of resistance by defendants reinforces this approach. Almost all (97.6% in 2021) such disputes arise from a failure to live up to the obligation to pay rent or utilities. Relatively few involved hearings on the merits. The vast majority were resolved through cookie-cutter *sudebnye prikazy* in which the plaintiff-creditors invariably prevailed.⁹⁶ The predictability of these results is not the product of political influence but of the lack of a viable defense to non-payment. As I noted earlier, most petitions involve less than the equivalent of \$1000, and the small stakes involved may also contribute to the passivity of defendants.

The expansion of the reasons for voiding a seemingly binding contract in the current civil code facilitates challenges to contracts to sell residential real estate. Such cases constitute a drop in the bucket, amounting to less than 0.03% of all housing disputes in 2021. In contrast to the prototypical case involving a

92. The then-Chairman of the VAS, Anton Ivanov, gave an example with a humorous twist. In it, the buyer acquired an apartment in an elite building during the summer. In the fall, when the nearby circus returned from a tour, the buyer learned to his horror that his windows overlooked an elephant den and emitted the stench of elephants which permeated the entire apartment. Ivanov had no sympathy for this buyer, arguing that the proximity of the elephants could have been discerned with minimal effort. The court did not invalidate the transaction. *VAS reshil ostavit' o sebe bol'she pamiati*, PRAVO (Oct. 14, 2013), https://pravo.ru/court_report/view/89475/ [<https://perma.cc/325D-HG56>].

93. GK RF, *supra* note 23, art. 1(4), art. 10(5), art. 307(3).

94. *Ekonomika I Zhizn'*, *supra* note 89.

95. *Id.*

96. In 2021, the plaintiff prevailed in 99.8% of all claims for overdue rental or utilities payments.

straightforward failure to pay rent or utilities, the circumstances in cases involving allegations of, for example, duress, mistake or undue influence vary, requiring courts to delve into the facts. Only a few (less than 2%) sought monetary damages; most aimed at establishing fundamental property rights. Unsurprisingly, *sudebnye prikazy* were not used; all of these cases required hearings on the merits. Claimants' success is not a foregone conclusion. They prevailed in around 70% of such cases in 2021.

These caseload statistics gathered and published by the judicial department of the Russian Supreme Court alert us to the basic differences between the two categories of housing disputes but tell us little about how judges managed the more complicated cases. In an effort to learn more, I used a publicly available database of judicial decisions to gather a set of 90 cases in which residential sales contracts were being challenged.⁹⁷ Using the search engine built into the database, I narrowed my search to trial-level decisions from 2019 and 2020 involving elderly litigants and limited myself to the sections of the civil code listed in Table 1.⁹⁸ I focused primarily on the elderly due to my interest in the extent to which law is capable of protecting vulnerable populations. As noted above, the vulnerability of the elderly population is heightened in Russia due to the elderly's lack of life experience with scam artists and the desirability (in terms of location and assessed value) of the apartments allocated to them during the Soviet era and privatized at minimal cost during the 1990s. This search produced several hundred cases, which were then culled to a more manageable number.⁹⁹ With the help of a graduate student at the University of Wisconsin Law School who had recently received her undergraduate degree in law from a Moscow-based law school, these cases were coded to allow for a more systematic analysis. We not only coded for such basic issues as which side prevailed, the location of the court, and the section of the civil code at issue, but also for more subtle issues, such as the gender of the parties and the judge, whether the parties were represented, and the type of evidence presented. Tables 1 and 2 provide an overview of the sample, with the former focusing on the cases and the latter focusing on the parties.

V. AN OVERVIEW OF THE CASES UNDER REVIEW

Creating a representative sample was not feasible. Even so, no single region dominates.¹⁰⁰ Each of the 90 cases comes from a different court and, consequently, had a different judge. The gender breakdown among the judges

97. SUDEBNYE I NORMATIVNYE AKTY RF, <https://sudact.ru/> [<https://perma.cc/9N8G-XTR3>] (judicial and normative acts of the Russian Federation).

98. See Table 1, *infra*.

99. The database produced a list of cases that met the requisites. I included every fourth case in my sample.

100. See Table 1, *infra*.

reflects the longstanding trend for women to dominate the ranks of trial judges in Russia.¹⁰¹

Women likewise dominated the ranks of both plaintiffs and defendants, accounting for 77% of the former and 67% of the latter.¹⁰² This is consistent with my earlier survey-based work which showed that women are significantly more likely to bring their problems to court than are men.¹⁰³

As Table 1 documents, over 80% of the cases in the sample center on contracts to transfer ownership of apartments. This is not surprising, given that most Russians live in apartments.¹⁰⁴ The causes of action, which are aligned with the section of the civil code under which the claim is made, all stem from flaws at the moment of making the contract that arguably were not apparent at that time. In all cases, the underlying contracts appear to be valid at first glance. At some later point, one of the parties reconsiders and contends that they were somehow duped into signing the contract. They then petition the court to invalidate the contract. Under the most common scenario, the vulnerable party contends that they were unable to understand the significance of what they were doing by signing the contract.¹⁰⁵ Cases brought under this section were more likely to be accompanied by a claim that they lacked the requisite intent to enter into a contract. The other three rationales for invalidating contracts allege affirmative trickery, either by misrepresenting key facts,¹⁰⁶ threatening harm if the contract is not signed,¹⁰⁷ or labeling the deal as a sham transaction.¹⁰⁸ None of these claims lend themselves to a one-size-fits-all approach. Resolving them requires judges to abandon their usual predilection for relying solely on documents and to confront the unavoidably conflicting stories of the parties.

In the typical housing case, an experienced litigant such as a landlord or a public utility seeks overdue payments from a beleaguered resident who is new to the courts. The simplicity of the dispute or, more accurately, the lack of any

101. See Vadim Volkov & Aryna Dzmitryieva, *Recruitment patterns, gender, and professional subcultures of the judiciary in Russia*, 22 INT'L J. LEGAL PRO. 166, 170 (2015).

102. See Table 2, *infra*.

103. HENDLEY, *supra* note 9.

104. In 2020, the All-Russian Center for the Study of Public Opinion (VTsIOM) found that 65% of Russians live in apartments, while 31% live in private homes and 4% live in dormitories. *Moy dom - i kak ya im upravlyayu* [*My home - and how I manage it*], VTSIOM NOVOSTI (Jan. 20, 2020), <https://wciom.ru/analytical-reviews/analiticheskii-obzor/moj-dom-i-kak-ya-im-upravlyayu> [<https://perma.cc/NXZ3-797P>].

105. GK RF, *supra* note 23, art. 177. This article allows a court to recognize a deal as invalid upon a showing that one party, otherwise legally capable, did not understand the meaning of his actions or was unable to control his actions at the moment the deal was made.

106. *Id.* art 178. Claims made pursuant to article 178 were more likely to be accompanied by an allegation that the claimant never received a copy of the contract and, therefore, never had an opportunity to read it than were claims made under the other sections of the civil code.

107. *Id.* art. 179.

108. *Id.* art. 170.

meaningful dispute ensures the petitioner's victory.¹⁰⁹ My cases are qualitatively different. Neither party comes to the court with much experience; they depend on their lawyers to guide them through the process. More importantly, the plaintiffs in the cases under review could not be sure of prevailing.¹¹⁰ Rather than a quick victory based on the pleadings, they had to show up for hearings on the merits and best their opponents. The parties were actively engaged, and each had their own version of what happened. Plaintiffs carried the day in around 43% of these cases.¹¹¹

As to the tactics employed, some patterns are evident. Table 3 shows that documentary evidence was routinely submitted but, in contrast to the typical housing cases, it was rarely relied upon exclusively. Testimony was sought from witnesses in almost three-fourths of these cases. This may seem unremarkable to those unfamiliar with the norms in Russian civil trials and even to those familiar only with the law on the books. Although the Russian civil procedure code allows for witnesses,¹¹² as noted earlier, parties who want to call witnesses must submit petitions justifying their purpose.¹¹³ The civil procedure code requires the court to accept "only that evidence which has significance for the consideration and resolution of the case," thereby clearing the way for judges to refuse to hear witnesses deemed superfluous or irrelevant.¹¹⁴ Indeed, the chapter of the code dealing with evidence is dominated by instructions on how to deal with written evidence; testimonial evidence appears to be an afterthought. It provides no guidance as to how to evaluate witness testimony.

This attitude is reflected in practice. My interviews with dozens of Russian judges over the past three decades led me to expect that judges would be reluctant to accede to these requests. Their hesitancy (perhaps even trepidation) is grounded in practical concerns. Coordinating the availability of witnesses with that of the parties has the potential to slow down the resolution of cases. The code mandates that most cases be decided within two months, leaving little wiggle room.¹¹⁵ Judges' track records on satisfying these deadlines influence their prospects for raises and promotions, giving them a strong incentive to comply. According to the caseload data collected by the courts, the two-month deadline for resolving civil cases was exceeded in 0.8% of all civil cases and in 0.26% of all housing cases. The rate dropped to 0.1% of cases for cases brought to recover overdue rent and utilities payments. For more complicated cases (like those analyzed here) involving ownership challenges, the rate increased

109. This pattern confirms the hypotheses of Galanter's seminal 1974 article in which he argued that litigants with experience, so-called "repeat players," have a tremendous advantage over neophyte litigants, known as "one-shotters." Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

110. *Id.*

111. Table 1, *infra*.

112. GK RF, *supra* note 23, art. 55.

113. *Id.* art. 57.

114. *Id.* art. 59.

115. *Id.* art. 154.

dramatically to 5.4%, reminding us that they are unusual. The other criterion coloring judges' professional potential is their reversal rate.¹¹⁶ Judges seek to minimize reversals, making them cautious. Determining which witnesses to believe is a judgment call which Russian judges fear makes their decisions vulnerable to reversal. Appellate judges can evaluate documentary evidence for themselves but, in the absence of transcripts, cannot know precisely what witnesses said or how they said it.

They have only the trial judges' characterization of the testimony, which can be attacked by the losing side. During my field work, I repeatedly heard this explanation as a justification for avoiding testimonial evidence. When I asked individual judges if they had ever been reversed on these grounds, they consistently said no, but were nonetheless confident that it could and would happen if they were not sufficiently vigilant.

Thus, the fact that witnesses appeared in three-fourths of my cases was surprising. The use of witnesses was not spread evenly across all the cases. They were more common when the dispute centered on the parties' behavior. Witnesses were called in almost 80% of the cases in which the contractual capacity of one of the parties to the contract was questioned. Along similar lines, witnesses were called in 78% of cases in which allegations of duress arose. Both groups of cases involve allegations that can best be proven or disproved through the testimony of those who knew the parties or who observed their behavior at key moments.

Another unusual characteristic of the cases analyzed in this Article lies in the involvement of lawyers. In the Soviet period, most of those involved in civil disputes did not bother with lawyers. Shelley estimated that they were involved in only about 10% of cases.¹¹⁷ Their use has increased in the post-Soviet era, though they are still not ubiquitous. As I have argued elsewhere, the civil procedure code's straightforward explanation of the requirements for initiating a civil case and the willingness of judges and their staff to assist lay people along the way lowers the barriers for parties to represent themselves.¹¹⁸ Court websites post downloadable templates of complaints that require petitioners merely to fill in the blanks. But these form documents are not subtle enough to handle the claims made in the cases here. These are not simple cases. Nor were the plaintiffs necessarily capable of handling their own cases. After all, a significant percentage (41%) sought to invalidate their contracts because they lacked contractual capacity, suggesting that they were unlikely to be able to represent

116. Aryna Dzmitryieva, *Becoming a Judge in Russia: An Analysis of Judicial Biographies*, 73 EUR.-ASIA STUD. 131 (2021); HENDLEY & SOLOMON, *supra* note 33.

117. Louise Shelley, *The Structure and Function of Soviet Courts*, in *THE DISTINCTIVENESS OF SOVIET LAW* 199, 200 (F.J.M. Feldbrugge ed., 1987).

118. HENDLEY, *supra* note 9.

themselves. Most were elderly; some were in their 90s.¹¹⁹ A subset of these claims was also grounded in broader mental challenges. Another group (24%) were the heirs of now-deceased individuals who were elderly when they initially signed their contracts, and their heirs were now contesting their capacity at the moment of formation. As Table 2 shows, almost 80% of plaintiffs had retained counsel. Defending against claims of incapacity is no less difficult and 70% of defendants had hired lawyers.

For both sides, lawyers were surely helpful (perhaps essential) in ensuring that their pleadings met the legal requirements. Once in court, lawyers were better positioned than their clients to ask appropriately targeted questions of witnesses. In my prior research, I found that Russians who were eager to economize sometimes hired lawyers to write their pleadings but stopped short of paying for them to appear in court.¹²⁰ By contrast, almost all of the lawyers hired in the cases analyzed here showed up for the hearings.¹²¹ Indeed, there were only fourteen cases (15.6%) in which neither party was represented.

The propensity to retain counsel varied depending on the specifics of the case. Once again, those who were involved in cases focused on whether the parties truly understood the significance of their actions by signing the contract were the most likely to have hired lawyers. This applied both to plaintiffs, 90% of whom had counsel, and defendants, 85% of whom had counsel. The convoluted language of the relevant section of the civil code¹²² would make most lay people's heads spin. Interestingly, plaintiffs asserting duress¹²³ were the least likely to retain counsel.¹²⁴ Perhaps they thought that the inclusion of the threats made to them in their complaints would be sufficient. Their opponents were less sanguine; two-thirds of defendants in duress cases had hired lawyers.

One last feature of the subset of cases under review is worth noting. About half of the cases include a citation to a ruling of the Russian Supreme Court. As a country with a civil law heritage, judicial precedent has not traditionally been a source of law.¹²⁵ In the post-Soviet era, this has begun to change. Decisions of the RCC, which have the power to negate laws that run counter to the constitution, are recognized as binding on other courts.¹²⁶ This right of judicial

119. The elderly character of the litigants sheds light on why women dominated their ranks, accounting for 77% of plaintiffs and 67% of defendants. As of 2019, the life expectancy for Russian women was 78 years, compared to 68 years for men. *Russia: Life expectancy at birth from 2001 to 2021, by gender*, STATISTA, <https://www.statista.com/statistics/971100/life-expectancy-at-birth-in-russia-by-gender> [<https://perma.cc/8YSR-YGW6>] (last visited September 21, 2023).

120. HENDLEY, *supra* note 9.

121. *See* Table 2, *infra*.

122. GK RF, *supra* note 23, art. 177.

123. *Id.* art. 179.

124. Around half of the plaintiffs pursuing a duress claim had lawyers, while only a third of the defendants in such cases had retained counsel.

125. MERRYMAN, *supra* note 3.

126. TROCHEV, *supra* note 34.

review was absent in the Soviet era. The Supreme Court lacks this power; its decisions are binding on the participants. Judges in the cases under review cited not to case decisions but to decrees (*postanovleniia*) or explanations (*raz'iasneniia*) issued periodically by the Supreme Court that instruct lower courts and lawyers about how troublesome legal issues should be handled. Such pronouncements are binding and have been used as a gap-filling mechanism for decades.¹²⁷ Due to the lack of empirical research on Russian courts, the frequency with which trial court judges include citations to these documents is unknown. My study sets a benchmark against which future research can be measured. No predictors emerge—citations are not driven by the presence of lawyers, the location of the court, or the type of claim being made. It should be noted that in no case does the Supreme Court document drive the outcome. The citations tend to provide substantiation for procedural rulings on the admissibility of expert testimony and or the impact of the statute of limitations.

VI. EXPLAINING THE OUTCOMES OF THE CASES UNDER REVIEW

Empirical research grounded in judicial decisions is in its infancy in Russia. Unlike in the United States, where this approach is well-developed, there are few studies that explore the impact of the outcome of cases of the gender of the parties or the judge, having a lawyer, the type of evidence offered, or other factors that have elsewhere been identified as influential.¹²⁸ The Russia-based studies that do exist are grounded in a big data approach that involves scraping court websites for thousands of cases. The sort of fine-grained analysis undertaken in this Article is not possible with such data.¹²⁹ Some patterns do emerge from the ninety cases examined, though the relatively small size of the sample means that they rarely enjoy statistical significance. Even so, the results provide a roadmap for future research.

127. MAGGS ET AL., *supra* note 33, at 23-26; Donald D. Barry & Carol Barner-Barry, *The USSR Supreme Court and Guiding Explanations of Civil Law, 1962-1971*, in CONTEMPORARY SOVIET LAW (Donald D. Barry, William E. Butler & George Ginsburgs eds., 1974).

128. A 2000 study found that, while the characteristics of litigants had no impact on outcomes, the gender of the judge does make a difference. Phyllis Coontz, *Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges*, 18 GENDER ISSUES 59, (2000). In addition, a series of U.S.-based studies has presented compelling evidence that having counsel in housing cases has a positive effect. Emily Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 900-10 (2016); *cf.* Emily Taylor Poppe, *Homeowner Representation in the Foreclosure Crisis*, 13 J. EMPIRICAL LEGAL STUD. 809 (2016).

129. *E.g.*, DENIS SAVEL'EV, INSTITUTE PROBLEM PRAVOVPREMENENIIA, "ANALOGICHNAIA PRAVOVAIA POZITSIIA": OTSYLKI K DRUGIM DELAM V TEKSTAKH SUDEBNYKH AKTOV ARBITRAZHNYKH SUDOV, ANALITICHESKIE ZAPISKI PO PROBLEMAM PRAVOPRIMENENIIA (2021), <https://enforce.spb.ru/en/products/policy-memo/7577-analiticheskaya-zapiska-analogichnaya-pravovaya-pozitsiya-otsylki-k-drugim-delam-v-tekstakh-sudebnykh-aktov-arbitrazhnykh-sudov-d-savelev-2> [<https://perma.cc/QU4C-S7PF>]; Volkov, *supra* note 24.

A. Where Are the Cases Brought?

Table 1 indicates that cases brought outside the areas surrounding Moscow and St. Petersburg (the Central and Northwest Okrugs) are more likely to succeed.¹³⁰ The courts in big cities tend to be busier than those in the hinterlands, which may mean that big-city judges are less willing to devote the necessary time to ferret out what actually happened. Although women judges are more likely than their male counterparts to rule in favor of plaintiffs, this cannot be linked to the geographic distribution of cases. In both the Central and Northwest Okrugs, all of the cases in my database were heard by female judges.

B. Who Are the Parties?

Women dominate the ranks of litigants, accounting for over three-fourths of all plaintiffs and around two-thirds of all defendants.¹³¹ Given my focus on older Russians, this imbalance is the result of simple demographic realities. The life expectancy for Russian women has long outpaced that for Russian men. As of 2020, it was 76.4 for women and only 66.5 for men.¹³² Table 2 also suggests that women fare better. The effect is marginal for plaintiffs but is stronger and statistically significant for defendants.

C. What Sorts of Claims Are Brought?

The legal theory of the case matters. According to Table 1, allegations of a mock (*mnimaia*) or sham (*prtvornaia*) transaction¹³³ enjoy little chance of success. The former is an agreement only for show, lacking the intent to create legal consequences. The latter is a contract made with the purpose of concealing another transaction. Both hinge on the parties' intent. Judges set a high bar for proof. In a 2019 case decided by the Levoberezhnyi district court in Lipetsk (located in the Central okrug), the judge found the plaintiff had failed to demonstrate the requisite "viciousness of the will of the parties" (*porochnost' voli storon*).¹³⁴ Those who prevailed in these cases typically laid out tragic scenarios involving fictitious marriages and/or property transfers designed to avoid foreclosure in which the elderly person has been emotionally manhandled. In one of the most egregious examples (heard by the Motynginskii district court in Krasnoyarsk krai in 2019), an elderly plaintiff was left homeless as a result

130. The results for the Urals and Far East Okrugs belie this pattern, though drawing conclusions based on the small number of cases (6 and 1, respectively) is risky.

131. Table 2, *infra*.

132. Aaron O'Neill, *Russia: Life Expectancy at birth from 2011 to 2021, by gender*, STATISTA (Jul. 21, 2023), <https://www.statista.com/statistics/971100/life-expectancy-at-birth-in-russia-by-gender/> [<https://perma.cc/T8WM-EZY9>].

133. GK RF, *supra* note 23, art. 170.

134. Decision No. 2-1178/2019 M-1225/2019, Case No. 2-1178/2019 (Dec. 25, 2019), <https://sudact.ru/regular/doc/tsHXjPYgPQgC/> [<https://perma.cc/WLN9-89CJ>].

of the machinations of her relatives.¹³⁵ This brief summary provides a taste of the soap opera character of many of the cases I reviewed. After the plaintiff's niece gave birth to a son in 2009, she moved in with the plaintiff. They initially got along well together. They mutually agreed to sell the plaintiff's apartment and use the proceeds to buy a better place. The plaintiff transferred the proceeds of that sale to her niece. Before they found a new place, relations between the two broke down. The niece refused to return her aunt's money, using it to buy a new apartment. This left her aunt destitute. The aunt successfully sued her niece on grounds of unjust enrichment. In order to avoid having her apartment seized to secure that judgment, the niece entered into a contract with her minor son to give it to him. This contract was registered through a notary. Both parties testified. They agreed on the basic facts, though the niece claimed the transfer to her son was a legitimate contract. When asked why she had failed to repay her aunt, her underwhelming response was that she had no money. Based on the timing of events, the judge was able to see through the apparent legality of this contract and found it to be a sham transaction. In doing so, she implicitly gave greater credence to the plaintiff's (aunt) testimony than to the defendant's (niece). Though the motives underlying the parties' behavior were relevant, the judge relied on documentary evidence relating to the transaction itself.

By contrast, plaintiffs who alleged that they had somehow been duped into signing their contracts enjoyed greater success. Yet absent definitive medical evidence of their inability to understand the import of the contract at the time it was signed, judges were rarely willing to invalidate contracts, even though the law gives them that power. Even seemingly compelling sob stories fell on deaf ears. An elderly woman who was housebound because she had lost the use of her legs argued that the contract she signed fifteen years previously should be invalidated because she had not understood the legal consequences of the contract. On its face, the contract passed title to her apartment to her niece, who was now trying to evict her. This petitioner claimed that this had never been explained to her and that she understood that the contract allowed her niece to live in the apartment rent-free in exchange for taking care of her. While acknowledging the plaintiff's physical disabilities, a Serdobsk court in the Penza oblast' found that she had failed to present any evidence that her thinking had been muddled when she entered into the contract.

Instead, it dismissed her claim as sour grapes, noting that “[a] change of opinion after a transaction is concluded is not a basis for recognizing the contract as invalid.”¹³⁶ On its own, the testimony of neighbors or others close to plaintiffs as to their absentmindedness rarely swayed judges. Perhaps this is because such testimony was inevitably countered by defendants' witnesses, who claimed that the allegedly ailing plaintiffs were able to handle their affairs with aplomb. This

135. Decision No. 2-21/2019 2-669/2018 M-612/2018, Case No. 2-21/2019 (Jan. 23, 2019), <https://sudact.ru/regular/doc/BIfIutK1T2WP/> [<https://perma.cc/J8WZ-T32N>].

136. Decision No. 2-294/2020 M-260/2020, Case No. 2-294/2020 (July 10, 2020), <https://sudact.ru/regular/doc/1onXqhsnScx5/> [<https://perma.cc/32JF-W2LY>].

preference for expert testimony (discussed in greater detail below) is consistent with Russian judges' desire for what they regard as objective evidence.

The Serdobsk case reflects a trend on the part of courts to be less sympathetic when claims of having misunderstood what they were signing were grounded in physical disabilities rather than mental challenges. A 2019 case decided by the Industrial'nyi district court in Khabarovsk (located in the Far East) is illustrative.¹³⁷ The petitioner was the daughter of an epileptic man who surprised her by leaving his apartment to his grandson rather than to her. The medical evidence, along with testimony by his neighbor, supported her position that her father was often delusional. Yet he held down a job as an electrician and had a valid driver's license. The court treated the driver's license as compelling evidence of his mental competency in the eyes of the state. Here again, the strong preference for documentary evidence shines through.

When plaintiffs filed compelling documentary evidence to support their claims, countervailing witness testimony faded in significance. In a 2020 case resolved by a Kuibesheskii district court in Irkutsk (located in Eastern Siberia), the plaintiff claimed that, after their grandmother's death, his cousin (the defendant) had raced to register their grandmother's apartment in her name. Allegations that the defendant had taken advantage of their grandmother in her final years played no role in the court's decision in favor of the plaintiff. Instead, the key was that the grandmother had a written will that left the apartment to the plaintiff.¹³⁸ In Russia, as elsewhere, legal squabbles over inheritance that threaten to devolve into name-calling can be resolved when the decedent takes the time to make her wishes known through a binding will.

Judges were not always able to rely solely on written evidence in cases questioning the contractual capacity of elderly litigants.¹³⁹ Oddly enough, plaintiffs were more successful in such cases, assuming it was the right sort of testimonial evidence. In a fairly straightforward case decided in 2019 in the Sovetskii district court in the Siberian city of Krasnoyarsk, the judge relied on the testimony of a forensic psychiatric expert who found that the elderly plaintiff was incapable of understanding the real estate transaction in question. Buttressing this testimony was the plaintiff's claim that he was tricked into signing the contract. The judge did not believe the defendant's argument that the plaintiff affirmatively chose to sign the contract and was fully cognizant of its consequences.¹⁴⁰

137. Decision No. 2-12/2019 2-2667/2018 M-2306/2018, Case No. 2-12/2019 (Feb. 27, 2019), <https://sudact.ru/regular/doc/FjrXdmWacebN/> [<https://perma.cc/HN6F-Y5H5>].

138. Decision No. 2-122/2020 2-2669/2019, Case No. 2-1366/2019 M-671/2019 (Feb. 27, 2020), <https://sudact.ru/regular/doc/XTccUMavxCrI/> [<https://perma.cc/U47S-UZAZ>].

139. GK RF, *supra* note 23, arts. 177-78.

140. Decision No. 2-663/2019 2-9897/2018 M-6187/2018, Case No. 2-663/2019 (Mar. 22, 2019), <https://sudact.ru/regular/doc/idbusvKRZiJs/> [<https://perma.cc/C8YF-R6DF>].

D. Who Was Present at the Hearing(s)?

Justice would seem to require that both sides be present. However, Russian law provides that, as long as all interested parties have received notice of the time and place of the hearing, the hearing can go forward in their absence.¹⁴¹ In my previous research, when I have been able to observe court proceedings, moving forward without one or both parties was not uncommon. Table 2 reveals that having both parties present was the exception rather than the rule. Here again, the elderly status of many of these litigants likely explains their absence. When both parties were present, plaintiffs did better than average. Oddly enough, their poorest results occur when defendants fail to show up. It might seem that plaintiffs would automatically win when their opponents fail to appear, but they still need to convince the court of the merits of their underlying claim. When plaintiffs' petitions are weak, defendants may reason that they need not waste their time.

E. Were the Parties Represented?

As I have earlier emphasized, my cases are unusual in that most of the parties were represented.¹⁴² These lawyers almost always came to court in support of their clients.¹⁴³ But in an unexpected twist, their impact is underwhelming.¹⁴⁴ Hiring lawyers appears to have no effect on the likelihood of winning or losing. Once again, looking at the bigger picture is helpful. We see that when no lawyers are present, plaintiffs suffer. Their chance of prevailing drops from 43 to 36%.¹⁴⁵ The playing field evens out when both sides are represented, as was the situation in almost two-thirds of my cases. As to cases in which only one side had a lawyer, the admittedly limited numbers suggest that plaintiffs are more likely to win if defendants are the only ones represented than if plaintiffs hold that advantage. The explanation may lie in the underlying

141. GPK RF, *supra* note 36, art. 167.

142. *See* Table 2, *infra*.

143. Of the 71 cases in which plaintiffs hired lawyers, 61 of the lawyers came to the hearing. As to defendants, lawyers were also hired in 63 of the cases. These lawyers showed up in 56 instances.

144. Like many European countries, Russia has a divided bar; to represent a client in a civil claim like the housing disputes here, a person must have university-level degree in law. GPK RF, *supra* note 36, art. 49. They need not be an *advokat* or a member of the bar. Traditionally, *advokaty* have specialized in criminal cases, though they have branched out into business and other civil cases in the post-Soviet era. My data shows that the 30% of plaintiffs who hired *advokaty* were more likely to win, prevailing in 52% of cases as compared to 43% for the overall sample. For a discussion of the differences between *advokaty* and other types of Russian lawyers, see Kathryn Hendley, *Mapping the Career Preferences of Russian Law Graduates*, 25 INT'L J. LEGAL PRO. 261 (2018); PAMELA A. JORDAN, *DEFENDING RIGHTS IN RUSSIA: LAWYERS, THE STATE, AND LEGAL REFORMS IN THE POST-SOVIET ERA* (2005).

145. *See* Table 2, *infra*.

merits of the plaintiffs' claims. Perhaps those in strong legal positions do not feel the need to retain counsel. The results would seem to confirm their instincts.

F. What Sort of Evidence Was Presented?

The cases were coded for the type of evidence used. All parties relied on documentary evidence.¹⁴⁶ This should not be seen as an affirmative choice but as an artifact of the requirements for initiating a case. Petitioners are required to attach any relevant documents.¹⁴⁷ In these cases, the failure to include the underlying contract would have resulted in the complaint being returned in order to remedy this defect. If a defendant opts to respond in writing, their answer (*otzyv*), must substantiate any claims with documentary evidence.¹⁴⁸

The decisions confirm that judges always scrutinized the text of the contracts, consistently noting whether they met the legal requirements for enforcement. Convincing them to invalidate a lawful contract was not easy. Having registered the contract militated in favor of enforcement because it was seen as evidence of the parties' intent. On the other hand, including a clause affirming the sound mental status of the parties was not definitive; it could be overcome by evidence to the contrary.

Bringing in witnesses neither helped nor hurt.¹⁴⁹ In cases relying on their testimony, plaintiffs were only slightly less likely to prevail. Calling more witnesses only made things worse. The average number of witnesses was 3.2. In cases with one to three witnesses, plaintiffs won 47.4% of the time, whereas their win rate decreased to 34.5% when they called four or more witnesses.¹⁵⁰

As already noted, witnesses were most often called to shed light on contractual capacity. Because these cases frequently involved disputes over elderly people allegedly deeding over their property to a younger family member, witnesses tended to be family members who lined up on opposite sides. Those siding with an elderly petitioner would paint a picture of them as doddering and incapable of understanding the contract. Occasionally, they would even accuse the younger person of isolating the elderly person from other family members to ensure they ended up with the property. Also called upon were neighbors and even postal workers who had the opportunity to regularly observe the elderly person. In the final analysis, these witnesses—family members and others—were rarely the deciding factor in a case. Judges would mention them to bolster their rulings, which tended to be grounded in documentary evidence. No doubt the “he said-she said” nature of the evidence ended up neutralizing the impact of witnesses' testimony.

146. Table 3, *infra*.

147. GPK RF, *supra* note 36, arts. 131-32.

148. Defendants have the right, but not the obligation to respond in writing. *Id.* art. 149.

149. Table 3, *infra*.

150. Among cases with witnesses, they were fairly evenly divided between those with one to three witnesses (49.3%) and those with four or more witnesses (50.7%).

Judges found evidence provided by medical experts more persuasive. In Russian courts, when mental capabilities are challenged, judges order a forensic psychiatric examination (*sudebno-psikhiatricheskii ekspertiz*).¹⁵¹ The experts who provide these reports (and sometimes testify as to their substance) have no allegiance to either party; they work for a state institute. As a result, their conclusions are singular and carry more weight than in adversarial systems in which battling experts are commonplace. Judges direct medical experts to focus on the moment the contract is signed. For example, in a 2020 case decided by the Tsentral'nyi district court in Tver (located 110 miles northwest of Moscow), the medical evidence established that the plaintiff suffered from a brain disorder that lowered his intellectual capabilities. Yet based on a post-mortem court-ordered report on his mental status, the judge found that, at the moment of formation, the plaintiff was able to form the requisite intent and so enforced the contract.¹⁵² The medical evidence sometimes undermined what looked to be a compelling narrative of betrayal. The case of a plaintiff from the city of Alushta in Crimea who asserted that she was tricked into signing the contract by being given a blank sheet of paper to sign and that she signed it while sitting in the car outside a notary's office was derailed when the forensic psychiatric expert testified that the plaintiff could understand what she was signing. The notary's testimony that taking documents out to the car for elderly clients was not uncommon was the final nail in the coffin.¹⁵³ Along similar lines, in a 2020 case from Ufa (located in Bashkortostan, a republic bounded by the Volga River and the Ural Mountains), a diagnosis of schizophrenia by the seller's private psychiatrist, confirmed by the conclusions of a court-ordered psychiatric exam, that she was incapable of understanding the significance of the contract she signed to sell her residence was not enough to invalidate the contract.¹⁵⁴ The judge noted that the contract had no obvious flaws and, more importantly, the seller's mother (who actually brought the case) was actively involved in the sale and never informed the buyer of her daughter's mental challenges, even though she was well aware of them. The judge discounted the forensic psychiatric report because the experts had failed to respond to all the questions posed. Reading between the lines of the opinion, it seemed that the judge suspected that, with

151. GPK RF, *supra* note 36, arts. 79-80.

152. Decision No. 2-10/2020 2-1239/2019 M-1006/2019, Case No. 2-10/2020 (Feb. 28, 2020), <https://sudact.ru/regular/doc/8iW2bC4yOJUpl/> [<https://perma.cc/AGW2-FABE>].

153. Decision No. 2-1129/2019 2-121/2020 M-872/2019, Case No. 2-1129/2019 (May 27, 2020), <https://sudact.ru/regular/doc/jUZDGAAdwi31V/> [<https://perma.cc/929Y-TYMR>].

154. Each side introduced witnesses. The petitioner called friends who had known the seller for many years and characterized her as "clearly ill . . . with an unkept appearance." They recollected that she spoke of suicide. By contrast, the defendant called the realtor who handled the transaction who saw nothing untoward about the seller and remembered the seller and her family as being extremely motivated to sell due to financial worries. Unsurprisingly, none of these witnesses made a material difference in the court's decision.

the passage of time, this petitioner had come to regret the sales price and was now seeking a do-over. For this, the judge had no patience.¹⁵⁵

Without compelling factors to dull the significance of a well-documented schizophrenia diagnosis, it can serve as conclusive evidence that the seller lacked the necessary capacity to enter into a contract. Indeed, in 2020, a court in Samara (located in Southern Russia) described a buyer-defendant who bought an apartment from a schizophrenic as “unscrupulous” (*nedobrosovestnyi*) and chastised her for tricking a sick person out of his apartment onto the street.¹⁵⁶

G. Impact of Being a Bona Fide Purchaser?

As noted above, the ostensible protection for bona fide purchasers provided by the civil code has been enforced unevenly by courts. The cases here reflect this reality. A 2019 case from Perm krai in the Far East involved a messy situation in which the brother of a deceased, disabled alcoholic sought to have two contracts invalidated—both the contract transferring ownership of the apartment from the disabled brother to his caretaker and the subsequent sale of that apartment by the caretaker to a third party. As to the first contract, the forensic psychiatric evidence convinced the court that the disabled brother was incapable of understanding the meaning of his actions, thereby voiding that transaction. As to the second contract, the court conceded that the third party knew nothing of these shenanigans, which would seem to qualify him as a bona fide purchaser. But the court also invalidated this contract, citing to a 2010 interpretation of the civil code section by the Supreme Court defining this concept, which held that a petitioner can prevail and reclaim his property even against a bona fide purchaser if he proves that the property was originally transferred against the will of the owner.¹⁵⁷ The fact that the disabled brother was unable to appreciate the consequences of his actions satisfied this requirement and left the third part-bona fide purchase empty handed.¹⁵⁸ Such cases indicate that, when forced to prioritize between the rights of misled or scammed sellers and bona fide purchasers, the courts favor the former.

155. Decision No. 2-1016/2020, Case No. 2-25/2020 (July 21, 2020), <https://sudact.ru/regular/doc/5kfMX94uQU6K/> [<https://perma.cc/947V-DV6L>].

156. Decision No. 2-6317/2019 M-5737/2019, Case No. 2-6317/2019 (Aug. 21, 2019), <https://sudact.ru/regular/doc/XMS0oEpp5cZb/> [<https://perma.cc/8VKF-ZFSB>].

157. POSTANOVLENIYE “O NEKOTORYKH VOPROSAKH, VOZNIKAIUSHCHIKH V SUDEBNOI PRAKTIKI PRI RAZRESHENII SPOROV, SVIAZANNYKH S ZASHCHITOI PRAVA SOBSTVENNOSTI I DRUGIKH VESHCHNYKH PRAV” [Resolution “On some issues arising in judicial practice when resolving disputes related to the protection of property rights and other property rights”], ROS GAZ, May 20, 2010, p. 39.

158. Decision No. 2-497/2019 M-448/2019, Case No. 2-497/2019 (July 15, 2019), <https://sudact.ru/regular/doc/c1VfueUiphLW/> [<https://perma.cc/65UD-7LZ8>].

VII. CONCLUSIONS

What can we learn about Russian judicial behavior from the analysis of these cases? It demonstrates that, when pressed to choose between the competing goals of fairness and efficiency, Russian judges continue to opt for efficiency. Their predilection for documentary evidence allows cases to be processed quickly, thereby ensuring that they do not violate the statutory deadlines for resolving cases. Doing so benefits their career prospects. In the short run it also serves the interest of the legal system generally by avoiding the endless delays that plague courts in many other countries. Yet the obsession of Russian judges with building a strong track record for promotion can be corrosive to the legal system in the long run. It makes them reluctant not only to take the time necessary to sort through the multiple narratives of key events to determine the truth but also to go out on the proverbial limb. The safer course is to ground decisions in documentary evidence that can be confirmed by appellate judges. This sort of thinking explains why Russian judges are willing to go with the flow in politicized cases and why a majority of Russians question their independence.¹⁵⁹

Given these powerful institutional incentives, the appearance of witnesses in three- fourths of the analyzed cases was a surprise. Judges' willingness to allow witnesses may be a reflection of the post-Soviet changes to the civil code. The introduction of mechanisms to invalidate contracts due to undue influence, duress, and other indicia of a lack of contractual capacity required new strategies on the part of petitioners. Proving that apparently valid contracts are built on a house of cards is almost impossible based solely on documents.

Instead, petitioners must share their side of how the contract was concluded and muster witnesses who can substantiate that they did not grasp the import of the document. The analyzed cases show that litigants—both plaintiffs and defendants—have adopted this more activist stance. They likewise indicate a grudging receptivity to it among judges, suggesting that they are not turning a blind eye to fairness. Yet when making their decisions, Russian judges remain resistant to relying on testimonial evidence. As a rule, when they have a choice between relying on testimony or on documents, they opt for the latter. All too often, testimony offered by the petitioners is disputed by defendants' testimony, putting judges in the unfamiliar position of having to decide who is telling the truth. By pivoting to relying on documentary evidence, judges avoid this disagreeable task. As judges become more accustomed to sifting through testimony, their diffidence is likely to dissipate, though their deep-seated tradition of formalism and risk-averse culture will push them to stick with documentary evidence.

159. In national polls fielded in 2008 and 2018, 58 and 58%, respectively, of surveyed Russians said that they believed judges in Russia to be basically dependent on representatives of local and federal power. Kathryn Hendley, *A Bottom-Up Analysis of Societal Belief in Judicial Independence in Russia*, COMMUNIST & POST-COMMUNIST STUD. (forthcoming).

In addition to documenting an important shift in judicial behavior, the analyzed cases also cause us to question several key tenets of the prevailing common wisdom about Russian courts. First, contrary to the impression conveyed by mainstream sources that Russian courts are hopelessly politicized,¹⁶⁰ the disputes were mundane, not political. Neither President Putin nor anyone at any level of political power had a stake in their outcomes. Rather, they represent the sorts of disputes among family members and acquaintances that arise in many countries and are of interest only to the litigants. This confirms the existence of dualism within the Russian legal system.¹⁶¹ Second, unlike the vast majority of housing cases, in which the courts serve as a glorified debt collector, the disputes animating the analyzed cases were not straightforward. The claims were deeply contextual, with each side putting forward remarkably different versions of what happened. To their credit, the judges recognized their complexity and scheduled them for full-fledged hearings. In this sense, judges prioritized the goal of coming to a fair result over their need for speed in resolving cases even though doing so potentially jeopardized their prospects for career advancement. The image of “judge” that emanates from the cases is a legal technician driven by the letter of the law as applied to the specific facts of each case, not a policy maker working to change the law or a puppet of political masters. For them, the positivism inherent in their approach is a sine qua non for justice. This does not mean that, when faced with politically charged cases, these same judges might answer the siren call of political or economic elites. It simply reminds us of the dualism of the Russian judicial system under which how judges respond depends on the context. Obtaining justice in the Russian courts is possible but cannot be guaranteed.

160. In 2010, the New York Times won a Pulitzer Prize for a series of articles detailing the inadequacies of Russian justice. *E.g.*, Ellen Barry, *Russia Turns a Deaf Ear as Killing Cries for Justice*, N.Y. TIMES (June 3, 2010), <https://www.nytimes.com/2010/06/04/world/europe/04impunity.html> [<https://perma.cc/K6U7-7CMG>]; *see also* BILL BROWDER, RED NOTICE: A TRUE STORY OF HIGH FINANCE, MURDER, AND ONE MAN’S FIGHT FOR JUSTICE (2015); ANNA POLITKOVSKAYA, PUTIN’S RUSSIA 145-92 (2004).

161. *See* BÆKKEN, *supra* note 9; Hendley, *supra* note 14.

Table 1: Overview of Analyzed Judicial Decisions

		Full sample	Plaintiff wins	Plaintiff loses
Full Sample			43%	57%
Okrug (region)				
	Central	19%	29.4%	70.6%
	Northwest	3%	33.3%	66.7%
	Southern	17%	46.7%	53.3%
	Siberian	12%	54.6%	45.4%
	Volga	30%	51.9%	48.2%
	Urals	7%	0%	100%
	North Caucuses	11%	60%	40%
	Far East	1%	0%	100%
Cause of Action (civil code section)				
	Sham transaction (art. 170 GK)	16.7%	20%	80%
	Allegedly invalid transaction because one party cannot understand the significance of their actions (art. 177 GK)	43.3%	46.2%	53.8%
	Allegedly invalid transaction because contract made under influence of essential misapprehension (art. 178 GK)	30%	52.9%	48.1%
	Allegedly invalid transaction because contract made due to duress (art. 179 GK)	10%	44.4%	55.6%
Year of Decision				
	2019	67%	45.6%	54.4%
	2020	33%	39.3%	60.7%
Gender of the Judge				
	Female	80%	47.2%	52.3%
	Male	20%	27.8%	72.2%
Subject-matter of sales contract				
	Apartment	82.2%	40.5%	59.5%
	Stand-alone house or piece of property	17.8%	56.3%	43.8%

Table 2: Information About the Parties to the Cases

		Full sample	Win	Lose
Plaintiff:				
	Gender			
	Male	27.9%	41.7%	58.3%
	Female	77.1%	45.2%	54.8%
	Hired Representative	78.9%	43.7%	56.3%
Defendant:				
	Gender			
	Male	32.9%	28.6%	71.4%
	Female	67.1%	50.9%	49.1%
	Hired Representative	70%	46%	54%
Presence of parties at hearing:				
	Plaintiff and defendant present	28.9%	50%	50%
	Plaintiff present but not defendant	17.8%	25%	75%
	Defendant present but not plaintiff	18.9%	47.1%	52.9%
	Neither party present	34.4%	41.9%	58.1%
Presence of lawyers at hearing				
	Both parties are represented	64.4%	44.8%	55.2%
	Plaintiff is represented but not defendant	14.4%	38.5%	61.5%
	Defendant is represented but not plaintiff	5.6%	40%	60%
	Neither party is represented	15.6%	35.7%	64.3%

Table 3: The Type of Evidence Presented in the Cases:

	Full sample	Win	Lose
Presented documentary evidence	100%	43.3%	56.7%
Presented witnesses	74.4%	41.8%	58.2%