Introduction

Judges rely on various sources to justify their decisions, such as the legal text, legislative intent, or constitutional values. Scholars often criticize Central and Eastern European (CEE) courts for relying heavily on statutes' wording while neglecting other types of argument. For over three decades, this critique has framed CEE courts' reasoning practices as a product of "communist-era formalism"—a tendency to avoid complex argumentation, such as purposive, moral or political reasoning, by adhering blindly to legal texts.[3] This so-called anti-formalistic narrative often contends that courts in the region have not undergone significant institutional, personnel, nor ideological transformation and continue to

3 The debate is described in more detail in Part I. Bystranowski et al. (2022) argue that judicial reasoning in Poland and other Central and Eastern European (CEE) countries remains influenced by communist history, calling the region "the last bastion of formalism" (p. 1912). They emphasize that formalism sets CEE apart from other Continental legal systems. Similarly, Dixon (2023) highlights that legal culture in Bulgaria, Czechia, Romania, and Slovenia is predominantly formalist rather than functionalist (p. 393). Bencze (2021) notes that Western European courts have moved toward non-formalistic decision-making that incorporates constitutional and European Union (EU) law principles, while formalism remains the dominant approach in CEE (p. 1291). Kosař (2023) critiques formalism in the region, describing it as having reached "excessive levels" and often resulting in "mechanical jurisprudence." Suteu (2023) describes the phenomenon in CEE courts as "vulgar formalism," emphasizing its simplistic and rigid nature (pp. 524–525). Manko (2013) uses the term "hyperpositivism" to describe the persistence of formalism in CEE, attributing it to the continuity of socialist-era organizational structures, personnel, and academia. For example, in Poland, formalism allegedly remains prevalent in both academia and judicial practice (Bystranowski et al., 2022, p. 1912; Manko, 2013). Romania also allegedly continues to exhibit formalist reasoning (Suteu, 2023, p. 525), as do Serbia (Besirevic, 2014) and other former Yugoslav states (Uzelac, 2010). In a recent meta-discussion, Cserne (2020) frames the so-called anti-formalistic narrative around formalism as a "symptom of an inferiority complex" in the region (p. 880).

adjudicate in the same formalistic manner—just as they allegedly did during the late communist era.

The anti-formalistic narrative resonates strongly in post-communist countries, where critics argue that weak judicial transitions and communist-era formalism undermine the courts' ability to enforce EU law and protect fundamental rights (Kühn 2011, Matczak et al., 2010). In states like Czechia, the anti-formalistic narrative has heightened tensions between constitutional and ordinary courts, fueled public distrust towards the judiciary, and influenced the appointment of judges to key institutions like the Czech Constitutional Court (ČT24 2024, Czech Senate 2002). As discussed further in Part 1, these concerns highlight the broad impact of claims that formalistic adjudication remains entrenched in Central and Eastern Europe.

But is the CEE judiciary truly formalistic? We know little about how CEE courts in fact decide cases. The anti-formalistic narrative lacks systematic empirical evidence.[4]

This study addresses the gap by focusing on a case study from Czechia, where the anti-formalistic narrative has the shape what I term *A Tale of Two Supreme Courts*. The tale contrasts the allegedly formalistic Supreme Court (SC) with the "discursive" Supreme Administrative Court (SAC).[5] Scholars claim that the SC is the formalistic court "inherited from communist era". Allegedly, it has retained a traditional, formalistic approach characterized by textualist reasoning that lacks persuasiveness and transparency – just a typical CEE court, one might say. By contrast, the SAC, established during the transition and staffed with a new generation of judges, is applauded for its discursive and more open reasoning (Kosař et al., 2020; Kadlec, 2016). Critics contend

4 Many authors recognize that the anti-formalistic narrative lacks proper empirical evidence. For instance, Komárek (2015) notes that anti-formalistic narrative holds extremely strong claims despite lacking solid empirical grounds (pp. 285, 290), and Bobek (2015) states that the claims about CEE region are not empirically based (besides being normative) and would need to be verified (p. 400).

5 Following authors contrast the two courts: Kühn, 2004, 2005, 2011, 2018; Matczak et al., 2010, 2015; Kosař et al., 2020; Šipulová & Kosař, 2024; Kadlec, 2016; Stehlík, 2014.

that the SC relies on its hierarchical authority rather than engaging in substantive reasoning, mirroring the allegedly formalistic legal culture from the 1980s (Kühn, 2018; Matczak et al., 2015). Simply put, the prevailing narrative holds that the Supreme Court's reasoning has not substantially changed since the communist era and remained deficient, just as its CEE counterparts.

However, just as the general anti-formalistic narrative, this strong condemnation of the SC's reasoning lacks systematic empirical evidence. No systematic study has empirically examined how the SC actually reasons or how its reasoning compares to the SAC's. While some empirical work suggests that the SAC moved away from formalism between 2003 and 2013 (Matczak et al., 2010, 2015), the SC remains understudied. Yet, with no support in proper empirical data, the Supreme Court is portrayed as the formalistic court.

This study fills the gap by addressing three key research questions:

RQ1: How to empirically measure formalism?
RQ2: Has the SC's decision-making been more formalistic than that of the SAC?
RQ3: What types of arguments do the SAC and SC use, and how have their reasoning practices evolved over the last 20 years?

This study adopts an empirical perspective. To address the research questions, our team annotated a representative dataset comprising 272 decisions from the Supreme Court and Supreme Administrative Court issued mainly between 2003 and 2023. This annotated dataset will also serve as the foundation for training an argument mining model using natural language processing. The model aims to analyze the full corpus of approximately 230,000 published decisions from both courts.[6]

I avoid taking sides, refraining from evaluating whether any style of reasoning is inherently good or bad. The anti-formalistic narrative is highly normative and there is a lot of criticisms of the CEE judi-

6 The development and usage of the argument mining model is described in a separate article (Koref et al., Forthcoming) currently under review and on request by the author.

ciary out there.[7] My approach is empirical and analytical. Drawing on Robert Alexy's distinction between empirical, analytical, and normative theories of argumentation (Alexy, 2010; Klatt 2020), the study situates itself within the first two. Empirical theory investigates the use and perception of arguments, while analytical theory examines their logical structure. This study is empirical as it explores the types of arguments employed by the courts and analytical in its development of detailed taxonomy to annotate judicial reasoning. However, it is not normative; it does not evaluate whether certain argument types should be preferred or why.[8]

This study presents four key findings. First, formalism of Czech courts can be analyzed using a dual method of argument quantification and holistic decision assessment. Second, the "Tale of Two Courts", portraying the Supreme Administrative Court (SAC) as less formalistic than the Supreme Court (SC), is significantly inaccurate for the SAC's first decade (2003–2013). During this period, the SAC matched or exceeded the SC's formalism across key metrics: it had similar rates of formalistic decisions, more decisions lacking non-formalistic arguments, and a notably higher proportion of formalistic arguments (60 % vs 51 %). Third, the Tale of Two Courts came to life in the second period (2014–2024), much like Pygmalion's beloved sculpture. SAC issued

7 For rather atypical positive accounts of formalism, see Scalia (2018): "Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, of course it's formalistic! The rule of law is about form. (…) Long live formalism. It is what makes a government a government of laws and not of men" (p. 25). A minority of Central and Eastern European scholars welcome formalism. For instance, Bobek (2015) finds non-formalistic reasoning suspicious, noting that calls for courts to apply broad principles, values, or policies while ignoring the text of the law have appeared repeatedly after revolutions, such as in fascist Italy, Nazi Germany, and Stalinist Central Europe. He argues that the situation in CEE after 1989 is similar in terms of methods, not substance. Bobek suggests that formalistic reasoning serves as judicial self-restraint, leaving value decisions to the legislature while preserving legal certainty. He further argues that formalist courts might be more resistant to judicial capture in backsliding member states. On terminological side, Bobek prefers the term "textualism" over "formalism", as formalism has allegedly lost its meaning.

8 For a recent enlightening meta-perspective on interpretation fights in the US, see (Watson, Forthcoming).

much more non-formalistic decisions (increase by 56 %), used much more non-formalistic arguments (increase by 130 %), and reduced the proportion of formalistic arguments, while the SC's practices remained relatively stable. Finally, both courts surprisingly rarely use text-based arguments or legislative intent; they mostly rely on case law, teleological interpretation, and general principles instead.

This study delivers the first comprehensive empirical analysis of the Czech Supreme Courts' decision-making. It directly challenges long-established critical claims about their reasoning practices. Additionally, it opens the door to a more nuanced understanding of judicial reasoning in the region. It takes Czechia as case study and empirically tests the widely accepted narrative of formalism of CEE courts—a narrative that questions post-communist reforms, influences judicial nominations, and shapes criticism of the judiciary. The findings also reveal a lot about argumentation practices of both courts, i.e., that both Czech apex courts rely mainly on case law, teleological interpretation, and principles, while textualist and originalist arguments are rare, distinguishing Czech courts from how both the CEE and US scholarship define formalism. By comparing courts with varying levels of continuity with the previous regime, this study also questions the assumption that communist past leads to greater formalism, offering fresh insights into transitional justice and judicial reforms. Methodologically, it introduces a dual approach combining argument quantification with holistic assessments, supported by a novel taxonomy, guidelines and annotation charts. This enables large-scale research using argument mining that we prepare in a separate study. The study also assesses how judicial reasoning of Czech apex court aligns with normative theories of legal argumentation taught at Czech law schools.

This monograph proceeds as follows: Part One reviews the anti-formalistic narrative. Part Two outlines the new methodology to measure formalism in Czechia (and potentially beyond), including a new taxonomy and annotation scheme with guidelines. Part Three presents the findings; there, I revisit the Tale of Two Courts, and clarify what arguments Czech apex courts use. Part Four discusses implications for

legal theory and practice, concluding with recommendations for future research.