Part One: Formalism in Central and Eastern Europe (Related Work)

This section provides a quick introduction to formalism and a literature review of the debate on CEE formalism. After I introduce the theoretical debates on legal formalism as such, I examine key scholarly perspectives on judicial reasoning in the CEE region, focusing on three aspects of formalism: its alleged origins in the communist era, its alleged persistence during democratic transitions, and its ongoing influence in contemporary legal systems. By introducing these discussions, I reveal how the anti-formalist narrative shapes debates on institutional reforms, judicial appointments, and public trust in the judiciary. Crucially, this review highlights emerging critiques of the dominant anti-formalist narrative, particularly its lack of empirical evidence—a gap that this study aims to address.

1.1 Theoretical Debate on Formalism

Weber's Conception of Legal Formalism

Max Weber's analysis of *formal rational legal thought* provides an essential theoretical foundation for understanding legal formalism.[9] Weber developed this concept as the so-called ideal type – a heuristic tool

9 Weber has received impressive epithets such as "Aristotle of our age" (Sica et al., 2023, p. 63) or "Einstein of social sciences" (Raiser, 2008, p. 853).

intended to aid researchers in understanding and explaining different legal systems (Weber, 2013, p. 125).[10]

Weber identifies five key features of *formal rational legal thought* (Weber, 1978, pp. 657–658). In formalistic decision-making,

a) decisionmakers shall apply abstract legal rules to particular facts;
b) each decision must be logically derived from the legal rules;
c) the legal system must be treated as a complete, gapless set of rules;
d) anything that cannot be rationally interpreted in legal terms is irrelevant to the law; and
e) all human actions are viewed as either applying, executing, or violating legal rules.[11]

D. Kennedy adds sixth tenet of *formal rational legal thought* that appears throughout the Economy and Society:

f) decisionmaker is restricted by logical analysis of meaning derived from existing legal norms (Kennedy, 2004, p. 1040).

Weber's conception of formality in law can be further specified. Weber finds following aspects crucial when assessing the formalistic nature of adjudication:

10 Commentators frequently point out that Weber's ideal types should not be mistaken for precise descriptions of reality nor for normative standards (Weber, 2013, p. xxiv). As Guenther Roth explains in his introduction to Economy and Society, these types function as "trans-epochal and trans-cultural" frameworks for comparing legal systems. Weber emphasizes this methodological purpose explicitly (Weber, 2013, pp. 126, 331), although his treatment becomes more nuanced in Economy and Society itself.

11 Weber, 1978, pp. 657–658: "Present-day legal science… proceeds from the following five postulates: first, that every concrete legal decision be the 'application' of an abstract legal proposition to a concrete 'fact situation'; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a 'gapless' system of legal propositions…; fourth, that whatever cannot be 'construed' legally in rational terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an 'application' or 'execution' of legal propositions, or as an 'infringement' thereof."

a) whether decisions consider only general characteristics or include case particularities,[12]
b) whether decisions rely solely on legal rules or incorporate extra-legal standards.[13]

First dimension concerns the facts. According to Weber, a formalistic judge should only focus on the general characteristics of a case which are defined by the legal system. In other words, legal norms determine which facts are legally relevant (general characteristics) and which are irrelevant (particular characteristics); the more a judge incorporates legally irrelevant facts, the more non-formal her adjudication becomes. To illustrate, consider a legal system that stipulates only two requirements for a valid sale of goods contract: an offer and acceptance. Once these conditions are fulfilled, the contract is deemed valid with no other grounds for invalidation. A non-formalist judge, however, would look beyond, when establishing whether a valid contract was formed; she might investigate the relative value of goods exchanged, the nature of the contracting parties, or the circumstances surrounding the agreement.

The second dimension of formalism concerns the norms used for evaluation. Decision-making becomes more substantive (less formal) when extra-legal norms (political, ethical) and other bases (Weber mentions "emotional bases") influence the evaluation of facts. Continuing the previous example, a judge would decide in a non-formalistic fashion if she invalidated a contract not due to provisions in the legal code but based on external ethical or political principles. For instance, upon observing that the parties involved are a consumer and a corporation, and determining that the compensation is excessively high, she might invalidate the contract based on her policy conviction that only

12 Weber, 1978, pp. 656–657: "Law (…) is 'formal' to the extent that only unambiguous general characteristics of the facts of the case are taken into account."
13 Weber, 1978, p. 656: "Lawmaking and law finding are substantively irrational to the extent that decision is influenced by concrete factors of the particular case as evaluated upon ethical, emotional or political bases rather than general norms."

fair agreements between companies and consumers should be enforceable in a just society.

While Weber does not explicitly separate these two dimensions (general v. particular facts; legal v. non-legal norms), distinguishing between them provides valuable analytical clarity.[14] Thus, a formalistic judge, in Weber's framework, operates within two key constraints: considering only legally relevant facts (ignoring case particularities) and applying only those norms that can be logically derived from the legal system (excluding extra-legal bases like ethical and political norms or emotional considerations).

Contemporary Understanding of Legal Formalism

Contemporary debates about formalism align with Weber's framework.

Schauer's article on formalism from the late 1980s has been probably the most prominent piece written on the topic to date (Schauer, 1988). For Schauer, formalism boils down to the question whether wording of the norms can and shall limit decisionmakers' choices (Schauer, 1988, p. 531).[15] Schauer answers both questions affirmatively: rules can and shall constrain courts. His assertion that "rules get in the way" and constrain decisionmaker's choice of potential reasons echoes Weber's view that formalism is about restricting which aspects and norms judge can consider.[16]

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14 Though the concepts are connected and would usually appear together, a judge might maintain formality in fact-finding (i.e., focusing only on general characteristics) while incorporating non-legal bases in evaluation. For instance, a judge would only establish whether there was an offer and acceptance, but then, after establishing the facts, disregard this completely and decided in a way that she thinks is just.

15 Schauer, 1988, p. 531: "To put it simply, now that we have established that formalism-in the sense of following the literal mandate of the canonical formulation of a rule-is conceptually and psychologically possible, we must ask whether it is desirable.

16 Schauer, 1988, pp. 536–537: "(r)ules get in the way. They exclude from consideration factors that a decisionmaker unconstrained by those rules would take into account." and "What makes formalism formal is this very feature: the fact that taking rules

Many definitions of formalism align with the conceptions of Weber or Schauer (see Grove 2020, 267; Sunstein 1999, 3). Grove defines formalist textualism as "an approach that instructs interpreters to carefully parse the statutory language, focusing on semantic context and downplaying policy concerns or the practical (even monumental) consequences of the case." Sunstein understands formalist strategies to entail three commitments: "(commitment) to ensuring compliance with all applicable legal formalities (whether or not they make sense in the individual case), to rule-bound law (even if application of the rule, statutory or contractual, makes little sense in the individual case), and to constraining the discretion of judges in deciding cases."

Of course, definitions of formalism vary. Different authors come up with different aspects of formalism and the debates on formalism also vary across jurisdictions. For instance, in the United States, the discussion often focuses on the legal realists vs. the formalists debate. In Central and Eastern Europe (CEE), the discussion is often part of the debate on transitional reforms and post-communist legacies, as I describe below. Nonetheless, there is a "family resemblance" in how scholars conceive of formalism: formalism very often concerns the extent to which legal rules (their wording) constrain judicial decision-making and exclude extra-legal considerations.

1.2 CEE as Post-Communist Region with Flawed Judiciary and Formalistic Reasoning Practices

Existing scholarship has identified distinct patterns in communist-era judicial reasoning in Central and Eastern Europe (CEE). According to scholars like Kühn, Bobek, or Manko, the judiciary initially operated under heavy ideological influence during Stalinist times after 1948 and in the 1950s (Kühn, 2011; Manko, 2013; Bobek 2006; Cserne

seriously involves taking their mandates os reasons for decision independent of the reasons for decision lying behind the rule. If it were otherwise, the set of reasons considered by a decisionmaker would be congruent with the set of reasons behind the rule, and the rule would add nothing to the calculus."

2020).[17] Nonetheless, most of the cases allegedly shifted toward textual formalism in the 1970s and 1980s, once the communist regime was established. Kühn (2011) mentions that "in contrast to the Stalinist era, Socialist judges in subsequent decades seldom revealed the policies and principles underlying their decisions" (p. 125). The narrative suggests that judges relied on text as a protective mechanism during the late communism.; formalism allowed them to minimize ideological interference (and often more serious injustices) through strict adherence to the wording of the law.[18]

Formalism is widely recognized as the dominant judicial approach throughout Central and Eastern Europe (Bystranowski et al., 2022; Dixon, 2023; Bencze, 2021), with many scholars attributing it to the enduring influence of socialist-era legal culture (Cserne, 2020; Kosař, 2023; Manko, 2013; Suteu, 2023). This tendency has been variously referred to as "hyperpositivism" (Manko, 2013), "mechanical jurisprudence" (Kosař, 2023), or "vulgar formalism" (Suteu, 2023, pp. 524–525), and is considered especially pronounced in Poland (Rogatka, 2023; Manko, 2013), Czechia (Kühn 2011; Kosař et al., 2020; Jakab et al., 2017), Romania (Suteu, 2023), Serbia (Besirevic, 2014), and much of the post-Yugoslav region (Uzelac, 2010). This leads some theorists to endorse very strong claims suggesting that CEE legal systems might collectively form a distinct "third legal family" alongside common law

17 See, e.g., Sharlet (1999), who notes that under Stalinist Soviet law, the political and arbitrary often prevailed in politically sensitive cases "over the more predictable use of coercion based on an objective interpretation and application of general rules" (pp. 156–157). However, Sharlet clarifies that a large proportion of cases were not "political" and thus remained separated from politicization. See also Kühn (2011), who distinguishes between the first anti-formalist era of the late 1940s and 1950s and the second phase of socialist law in the 1970s and 1980s, which was allegedly formalist (p. 88).

18 Manko states (2013) that "hyperpositivism had (at least) three important advantages for the legal community. First of all, by conceptually separating law from politics and presenting legal interpretation as a technical, not socio-political exercise, it created a safe haven for academics and judges. By stating that they are merely performing their technical and neutral activity, they could avoid difficult political questions". Similarly, see Kühn (2011, p. 150) or Bystranowski et al. (2022, p. 1913).

and Western continental law traditions (Manko et al., 2016). All this because the CEE region is allegedly formalistic.

The concrete reasons for formalism's alleged persistence have been debated. Manko and Uzelac emphasize institutional and personnel continuity of the judiciary, noting that courts retained their pre-1989 structures and judges trained under the communist regime largely remained in office (Manko, 2013; Uzelac, 2010). Very interesting recent research on lustration laws supports this claim; Šipulová and Kosař found that lustration laws in Czechia (allegedly one of the strictest) were rather inefficient on a larger scale (Šipulová and Kosař, 2024). Uzelac further argues that judicial independence contributed to this continuity, as high-ranking judges from the former regime influenced subsequent appointments (Uzelac, 2010). Educational practices are also considered significant – scholars repeatedly highlight the missing courses on legal argumentation and interpretation in traditional legal education, that were not part of communist legal curriculum and remained absent during the transition (Manko, 2013; Kühn, 2011; Bystranowski et al., 2022). Generally, most of the alleged reasons for the formalism in CEE can be traced back the communist past.

1.3 The Anti-formalistic Narrative Matters

The anti-formalistic narrative resonates in the post-communist region. It fuels claims that judicial transitions in the region were weak and unsuccessful (Kühn, 2011, p. 189).[19] Critics also argue that the persistent communist-era formalism makes the judiciaries ill-suited to enforce EU law and its goals (Matczak et al., 2010; Kühn, 2004, p. 567).[20]

19 Kühn (2011) observes: "The ordinary courts in the Czech and Slovak republics—and in most other post-Communist countries—have never acted as one might expect transitional courts would act. With the exception of the constitutional courts, the majority of post-Communist courts continued in their formalist reading of the law. (…) In this way, the simplified version of textual positivism and the ideology of bound judicial decision-making were able to survive" (p. 189).

20 Matczak et al. (2010) argue that Central and Eastern European (CEE) formalism obstructs changes introduced by EU accession (p. 97). Similarly, Kühn (2004)

In Poland and Hungary, illiberal leaders have invoked prevailing "communist legacies" to justify court packing and judicial reforms contributing to democratic backsliding, which makes any alleged communist legacies particularly dangerous (Nalepa, 2021; Sipulová and Kosař, 2024).[21] The former Slovak president blames judicial formalism for public frustration and distrust towards judiciary in post-communist Slovakia and Czechia (ČT24, 2024).[22] The narrative drives conflicts between constitutional and ordinary courts (Kühn, 2011, pp. 200–207); the Czech Constitutional Court repeatedly declared excessive formalism a violation of fundamental rights (Constitutional Court, 2012*)*.[23]

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states, "(…) it is inevitable that new European judges coming from the post-communist realities would face a number of problems in the enforcement of European law and that the level of enforcement of European law might differ significantly from that in the old Member States" (p. 567). For a nuanced view, see Bobek (2008), who notes that while CEE judges sometimes use purposive reasoning, they often resist the teleological interpretation and *effet utile* applied by the Court of Justice of the European Union (CJEU). This resistance is allegedly influenced by historical distrust rooted in communist-era formalism, which served as a defense against Party-imposed judicial policies (pp. 14–17).

21 For Poland, see Nalepa (2021), who notes that "Jaroslaw Kaczyński has, on numerous occasions since his party became the dominant force in parliament, used the unfinished decommunization project as a pretext for weakening the judicial branch" (p. 282). For Hungary, Sipulová and Kosař (2024) observe that "Orbán initially advocated large-scale reforms and court-packing plans initiated in 2011 using de-communization rhetoric." This experience makes any alleged postcommunist legacies potentially dangerous.

22 See Čaputová's comments on formalism and judicial courage (ČT24, 2024) at https://ct24.ceskatelevize.cz/clanek/svet/prosazovani-pravdy-prekazi-formalismus-justice-a-nedostatek-odvahy-rika-caputova-57181 (timestamp 16:05–18:02, accessed November 22, 2024).

23 In its annual bulletin, the Constitutional Court notes that it repeatedly faces objections regarding ordinary courts applying excessive formalism. It highlights several cases where such formalism violates fundamental rights, particularly the right to a fair trial (*Ročenka Ústavního soudu* [Annual Bulletin of the Constitutional Court], 2012, pp. 60, 89–92). A simple search through the Constitutional Court's database reveals 183 decisions (out of 5,251) that overturned previous rulings due to formalism. The search was filtered for decisions on the merits (*nálezy*) overturning prior rulings (*výrok vyhověno*) where the term "formalismus" appeared only in the "legal sentence" or "abstract." A random check of 15 such decisions confirmed that 100 % of them overturned prior rulings due to formalism (database search conducted November 22, 2024). For more details, see Ročenka Ústavního soudu [Annual Bulletin of the Constitutional Court], available at: https://www.usoud.cz/fileadmin

The narrative also influences judicial appointments to most important institutions (Czech Senate, 2002).[24] As such, the claim that CEE courts are formalistic has had an impact on judicial reforms, EU expansion, fundamental rights adjudication, and judicial appointments. Despite its importance, the narrative lacks sufficient evidence, as discussed in the next subchapter.

1.4 Critique of the Anti-formalistic Narrative and Empirical Evidence

Two major critiques challenge the dominant narrative about CEE legal formalism: a normative and empirical critique.

First, Bobek (2015) argues normatively that text-based reasoning serves as valuable judicial restraint, warning that purpose and value-based interpretation risks politicizing courts – similar to experiences in fascist Italy and Stalinist CEE. As I discuss below, our empirical findings show that such calls for more text-based reasoning are substantiated, as the Czech apex courts use text-based reasoning surprisingly scarcely, very scarcely in fact.

Second, scholars question the narrative's empirical foundations. Komárek (2015), Cserne (2024), and Mańko (2013) note that claims about CEE formalism rely primarily on anecdotal evidence. As Manko mentions, the main source of evidence is often the experience of a few

/user_upload/ustavni_soud_www/prilohy/ROCENKA_2012_FINAL_na_web.pdf (accessed November 22, 2024).

24 For instance, former President Václav Havel noted that he nominated Justice Eliška Wágnerová to the Czech Constitutional Court because she embodies a non-formalistic approach to judicial decision-making. During the 3rd session of the Czech Senate on March 14, 2002, he stated, "The law must never again serve crime or shield it simply because there is too little courage to confront its malicious intent, flawed wording, or harmful consequences. Cowardice or resignation must never again be clothed in the noble guise of blind adherence to the law. Routine, mechanical application, and automatic execution of justice should be replaced by human judgment—one that understands the law as an imperfect tool for safeguarding human dignity and fostering decent social coexistence" (Czech Senate, 2002). Retrieved from https://www.senat.cz/xqw/xervlet/pssenat/htmlhled?action=doc&value=11921 (accessed November 20, 2024).

influential insiders, like elite judges, rather than systematic research. Similarly, Cserne (2020) adds that "(m)uch of the literature is 'theoretical' in the sense of non-empirical or quasi-empirical, relying on intuitions and anecdotes, rather than solid data". This empirical weakness, combined with a tendency to mix descriptive and normative claims, undermines reliable conclusions about judicial reasoning patterns in the region. Thus, Cserne (2024) concludes that "empirical analysis is in its early stages" and highlights that one could advance the debates about CEE by "operationalizing formalism properly".

Two major empirical studies have examined formalistic reasoning in post-communist Poland, Hungary, and Czechia. These studies analyzed administrative court decisions (1999–2013) using Galligan and Matczak's annotation scheme, which categorized interpretative standards as internal, external, constitutional, or EU-based. The first study (1999–2004) confirmed predominantly formalistic reasoning across all countries, with Czech courts showing slightly more discursive tendencies, but still considered formalistic. The second study (2005–2013) revealed some shift toward discursive reasoning, particularly in the Czech Supreme Administrative Court, marked by increased use of purposive arguments and EU-conforming interpretations. Notably, while these studies focused exclusively on administrative courts, their authors criticized Czech Supreme Court as formalistic despite not including it in their empirical analysis.

While these studies represent a great pioneering effort and a valuable contribution, they also have several shortcomings. First, they focus solely on administrative courts, which account for a smaller proportion of judicial decisions—particularly in countries like Czechia, where civil and criminal courts generate far more rulings (more than fifty times more).[25] Second, the authors extrapolate their findings to non-admin-

25 For instance, in 2023, Czech administrative courts collectively issued around 10,000 decisions, with roughly 4,200 of these coming from the Supreme Administrative Court. By contrast, civil and criminal courts produced about 500,000 decisions (nearly 900,000 if payment orders and related instruments are included), while the Supreme Court alone issued approximately 6,500 decisions. For detailed data, see the official databases of the Supreme Court (https://www.nsoud.cz/Judikatura/ns_

istrative courts, even though they did not examine them. Third, they do not document the annotation process in detail, leaving key issues—such as the precise coding scheme for different types of arguments and the level of intercoder agreement—unaddressed; it cannot be verified whether the findings hold. Fourth, the studies only focused on argument types, which may be insufficient for fully capturing formalism, as I discuss below. And lastly, the two studies appeared ten (or more) years ago and thus covered decisions only till 2013; more recent developments remain unknown.

Other studies on CEE formalism relied on unrepresentative datasets, e.g. 300 decisions from one single year from criminal law (Bystranowski et al., 2022; Malolepszy and Gluchowski 2023) or basically lack any empirical evidence.

1.5 A Tale of Two Supreme Courts: Reasoning Practices in Czechia

The anti-formalistic narrative has been very strong particularly in Czechia. There, it has the shape of what I called the Tale of Two Supreme Courts, i.e., the tale of formalistic Supreme Court and discursive Supreme Administrative Court.

For more than two decades, the "formalistic Supreme Court", often seen as an example of "unreformed communist judiciaries", has been juxtaposed to the Supreme Administrative Court, a modern institution established in 2003 unburdened by a communist legacy. The most recent studies still highlight the different reasoning practices and genealogy of the two institutions. The story usually unfolds as follows:

The Velvet Revolution and the fall of communism brought about the creation of entirely new judicial institutions in the Czech Republic: namely, the Constitutional Court (1993) and the Supreme Administrative Court (2003). Former dissidents and emigrants were appointed to the Constitutional Court, not career judges connected to the previous

web.nsf/WebSpreadSearch) and the Supreme Administrative Court (https://vyhledavac.nssoud.cz/), as well as the Czech Ministry of Justice's statistics (https://msp.gov.cz/web/msp/statisticke-udaje-z-oblasti-justice).

regime. Neither the Supreme Administrative Court did recruit the career judges of the previous regime but focused mainly on the younger judges and scholars who often had foreign education or various professional experience (Kosař et al., 2020).

In contrast, both institutional and personnel continuity characterize the Supreme Court. As mentioned by Kosař, the Supreme Court "was inherited from the communist era and remained untouched by any substantive personnel change" (Kosař et al., 2020). The authors highlight this as a lack of transition of the Supreme Court since the court "entered the democratic regime with judges who had served under the communist regime and who were strongly influenced by a culture of socialist formalism" (Kosař et al., 2020). According to Šipulová and Kosař, the missing transition persisted, and the communist era judges "did not lose their influence". In 2019, almost 40 % of the Supreme Court's justices were former members of the communist party, the highest percentage in the Czech judiciary (Šipulová and Kosař, 2024).

The notion of institutional and personnel continuity has often been taken to imply a consistent pattern of legal reasoning, suggesting that the Supreme Court—an older institution composed largely of the same judges—continues to adjudicate in much the same formalistic style that allegedly prevailed in the 1970s and 1980s (Kühn, 2004, 2005, 2011, 2018; Matczak et al., 2010, 2015; Kosař et al., 2020; Šipulová & Kosař, 2024; Kadlec, 2016; Stehlík, 2014). This narrative has persisted for over two decades and remains visible in contemporary scholarship. For instance, Z. Kühn—a former Supreme Administrative Court judge—argues that the Supreme Court maintains a traditional, formalistic method of legal argumentation, relying on its hierarchical authority rather than clarity or persuasive reasoning. According to this perspective, the Supreme Court allegedly aligns more closely with a "strictly formalistic ideal that dominated Czech legal academia and practice until the early 1990s."

Recently, a few studies have slightly softened the earlier assertion that the Supreme Court is overwhelmingly formalistic. For instance, Wintr and Koželuha (2015) argue that the Supreme Court occasionally

employs teleological interpretations, and Kosař et al. (2020) highlight the Court's references to the European Convention on Human Rights (ECHR)—a practice that might be deemed non-formalistic in this study's framework. Even Kühn (2018) acknowledges that judicial decisions overall have become lengthier, not only at the Supreme Administrative Court, suggesting a gradual shift away from rigid formalism. However, Kühn's more recent observations do not focus specifically on the Supreme Court, and neither Wintr's nor Kühn's conclusions rest on systematic empirical data. Likewise, Kosař et al. (2020) address the Court's approach to ECHR standards rather than its reasoning in the far greater volume of cases that do not involve ECHR issues. Consequently, despite these slight revisions to the original claim, the prevailing view in the literature continues to regard the Supreme Court as adhering to a primarily formalistic style of adjudication.

To conclude, much of the current discourse continues to contrast the "formalistic" Supreme Court—reportedly shaped by communist-era legacies—with the more discursive and modern Supreme Administrative Court. Yet, systematic evidence on the Supreme Court's actual reasoning has been lacking. Consequently, three key questions remain unanswered: how best to measure formalism, how Czech apex courts differ, and what types of arguments have SC and SAC been using over the last 20 years.

This monograph draws on prior scholarship but seeks to remedy certain methodological shortcomings. It makes five main contributions: (1) it sets forth an explicit methodology, including detailed annotation guidelines and intercoder agreement measures, (2) it grounds its annotation scheme more firmly in legal argumentation theory and the core tenets of formalism (see Part Two), (3) it introduces a mixed approach that quantifies formalistic arguments and provides a holistic assessment of each decision (see Part Two), (4) it employs a more representative sampling strategy, allowing broader conclusions, and (5) it enables large-scale analysis by enabling argument-mining study (with argument mining models currently being developed based on a dataset annotated for this monograph). These advances aim to provide

more reliable evidence about judicial reasoning patterns in Czechia and the region.