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# Structural Silence in Relation to Article 5 ECHR: A Comparative Analysis of Pretrial Detention Practices in Azerbaijan and Turkey

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*This paper examines the discrepancy between formal legal guarantees and their practical implementation under Article 5 of the European Convention on Human Rights, which protects the right to liberty and security. Although the Convention provides detailed safeguards against arbitrary detention, the existence of these safeguards does not necessarily ensure their effective application at the domestic level. Persistent shortcomings in pre-trial detention may therefore represent not only separate violations, but also deeper structural constraints affecting the practical enforcement of human rights standards. This paper employs the idea of "structural silence" to analyse why formally recognised rights may remain visible in judicial decisions while losing part of their protective effect in practice. The comparison is based on detailed examination of Farhad Aliyev v Azerbaijan, Mammadli v Azerbaijan, and Rasul Jafarov v Azerbaijan, as well as Şahin Alpay v Turkey and Selahattin Demirtaş v Turkey (No 2). It also considers the Venice Commission's findings concerning Turkey's criminal peace judgeships. The analysis demonstrates recurring patterns of generalised reasoning, limited engagement with defence arguments, continued detention without renewed factual justification, and review mechanisms that sometimes confirm rather than reassess detention. At the same time, the paper does not treat Azerbaijan and Turkey as identical systems. It argues that structural silence may emerge through different institutional paths, while producing a similar weakening of Article 5 protection.*

## Introduction

The European Convention on Human Rights (ECHR), while widely viewed as one of the most comprehensive regional frameworks for the protection of fundamental freedoms, has developed a sophisticated system for safeguarding individual liberty, particularly under Article 5.[1]

Despite the extensive body of law developed under the Convention, a considerable gap may exist between the formal recognition of rights and their real-world implementation. This gap is particularly visible in the context of pre-trial detention, where a person may be deprived of liberty through a formally valid judicial procedure, yet without the detailed and individualised reasoning required by the Convention. The authority of international law is therefore dependent not only on the existence of a rule, but also on the form in which national institutions receive and apply that rule.[2]

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[1]European Convention on Human Rights (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 5.

[2]Başak Çalı, The Authority of International Law: Obedience, Respect, and Rebuttal (Oxford University Press 2015).

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This paper posits that such shortcomings cannot always be attributed solely to isolated instances of non-compliance. In some situations, they reflect recurring characteristics of national legal and institutional practice that shape how individual liberty is realised. Accordingly, the concept of "structural silence" is proposed as an analytical tool for understanding cases in which the law continues to speak through formal procedures, while the facts and arguments necessary for meaningful protection receive insufficient attention.

"Structural silence" refers to situations in which rights formally exist within a legal system, yet progressively lose their functional effectiveness because of routinised decision-making, standardised reasoning, limited judicial engagement, or review mechanisms that reproduce the original decision. As Koskenniemi has emphasised, the existence of legally recognised norms does not automatically ensure their realisation in practice.[3] Similarly, Merry has shown that human rights norms undergo processes of translation when applied within local institutions, and that their meaning may be narrowed during that process.[4]

Through the analysis of pre-trial detention in Azerbaijan and Turkey, this paper asks how formal Article 5 procedures can fail to provide substantive protection and through which institutional mechanisms such failure becomes recurring. The argument is developed through close examination of the factual basis for detention, the reasons used by domestic courts, the arguments raised by the defence, the quality of subsequent review, and the response of the European Court of Human Rights (ECtHR).

The comparison does not claim that every detention decision in either country follows the same pattern. Nor does it attempt to rank the two legal systems. Rather, the selected cases are used to identify specific mechanisms through which judicial review may become formal rather than protective. The central argument is that the effectiveness of Article 5 depends not only on legal recognition, but also on institutions capable of connecting legal standards to the facts of the individual case.

## Structural Silence as an Analytical Framework

The gap between law as formally recognised and its actual implementation has long been documented in legal and socio-legal scholarship. The familiar distinction between law in books and law in action is important because it demonstrates that a norm does not operate independently from the institutions applying it. Tamanaha similarly argues that the practical effect of law is determined by the broader social and institutional environment in which legal actors operate.[5]

The implementation-gap concept, however, generally focuses on whether a recognised legal rule is enforced. Structural silence places greater emphasis on the internal form of compliance. A court may cite the relevant legal provision, hold a

[3]Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Cambridge University Press 2005).

[4]Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (University of Chicago Press 2006).

[5]Brian Z Tamanaha, Law as a Means to an End: Threat to the Rule of Law (Cambridge University Press 2006).

hearing, issue a written order, and refer to accepted categories such as flight risk or interference with evidence. Nevertheless, the procedure may fail to protect liberty if those categories are not connected to the particular conduct, history, or circumstances of the detainee. In that situation, the failure is not external to the legal process. It is produced through the ordinary form in which the process operates.

Structural silence must also be distinguished from a normative gap. A normative gap exists when the applicable law does not regulate an important question or remains unclear. The problems examined in this paper occur despite the existence of developed standards. Article 5 already requires a factual basis for reasonable suspicion, relevant and sufficient reasons for continued detention, and effective review capable of ordering release. The issue is therefore not that the law is silent, but that its practical content may be reduced during institutional application.

This concept does not convert every Article 5 violation into a structural problem. A single incorrect decision may be corrected on appeal and may not indicate any broader institutional pattern. Structural silence becomes more relevant when several indicators appear together: the same abstract grounds are repeated at different stages; defence arguments capable of affecting the result are not answered; a reviewing court reproduces the reasoning under challenge; the passage of time does not lead to a stronger justification; or the institutional design reduces the possibility of independent correction.

These indicators are analytical rather than independent legal tests. The finding of a Convention violation remains governed by the requirements of Article 5. Structural silence is used only to explain how the protective purpose of those requirements may be weakened. The concept therefore operates between doctrinal and institutional analysis: the ECtHR judgment identifies the legal defect, while the broader comparison examines how similar defects are produced and repeated.

This approach also avoids the assumption that the mere use of legal language proves compliance. Legal frameworks may maintain an appearance of neutrality even when institutional routines and relationships of power shape how legal concepts are applied.[6] Recent discussion within the Athens Journal of Politics & International Affairs has also emphasised that the practical protection of human rights is connected to the institutional conditions in which rights are claimed and enforced, rather than to abstract recognition alone.[7]

For the purposes of this paper, structural silence is therefore defined as the recurring institutional production of formally reasoned decisions that acknowledge a right, but fail to engage with the facts, changing circumstances, and defence arguments necessary for that right to influence the outcome. In the context of pre-trial detention, the analysis focuses on three questions: what material supported the initial suspicion; what specific reasons justified continued detention; and whether judicial review functioned as a genuine reassessment or merely as confirmation of the prosecutorial position.

[6]David Kennedy, A World of Struggle: How Power, Law and Expertise Shape Global Political Economy (Princeton University Press 2016).

[7]Gregory T Papanikos, "Are Human Rights a Luxury or a Normal Good?" (2025) 1(1) Athens Journal of Politics & International Affairs 9-38.

## Methodology and Scope

This paper employs a qualitative comparative case-study method combined with doctrinal analysis. The primary materials are judgments of the ECtHR and official Council of Europe documents. The doctrinal part identifies the applicable standards under Article 5 §§ 1(c), 3, and 4, and, where relevant, Article 18 in conjunction with Article 5. The comparative part examines the facts described in the judgments, the grounds relied upon by domestic courts, the defence submissions, and the manner in which detention decisions were reviewed.

The cases were selected because they provide detailed information about different stages of detention. *Farhad Aliyev* concerns prolonged detention sustained by nearly identical grounds and proceedings that did not adequately address the applicant's submissions. *Mammadli* concerns the absence of a sufficiently concrete factual basis for suspicion and the automatic endorsement of detention requests. *Rasul Jafarov* is used as a corroborating case because it demonstrates that similar reasoning appeared in another prosecution connected with civil-society activity. *Şahin Alpay* illustrates a situation in which a final and binding Constitutional Court judgment did not immediately produce release. *Selahattin Demirtaş* concerns the use of political speech and parliamentary activity as the basis of terrorism-related suspicion, together with prolonged and formulaic detention review.

The analysis also relies on the Venice Commission's opinion on Turkey's criminal peace judgeships. This source is important because individual judgments alone cannot fully explain the institutional setting in which decisions are made. The opinion provides information concerning the judgeships' competence, workload, and the horizontal-appeal structure operating during the period examined. The later amendment to this appeal structure is addressed below.

The selected cases are not a statistically representative sample of all detention orders in Azerbaijan or Turkey. The paper therefore does not claim that every domestic court or judge applies Article 5 in the same manner. Its narrower claim is that the judgments reveal recurring mechanisms capable of transforming formal judicial control into weak protection. Where the paper uses the term "structural," it refers to documented recurrence across stages, cases, or institutional arrangements, rather than statistical universality.

The comparison further recognises that Azerbaijan and Turkey have different constitutional systems, political histories, procedural rules, and judicial structures. These differences are not treated as obstacles to comparison. They make it possible to examine how different institutional pathways can produce a comparable functional result: the continued existence of Article 5 procedures together with a reduction in their capacity to challenge detention.

## Legal Framework and Doctrinal Development under Article 5 ECHR

The doctrinal standards developed under Article 5 provide the benchmark against which the structural deficiencies identified in the case studies can be assessed. Article 5 guarantees the fundamental right to liberty and security while defining the limited

situations in which a person may lawfully be deprived of liberty. The purpose of the provision is to prevent arbitrary or unjustified detention.[8]

*Reasonable Suspicion under Article 5 § 1(c)*

Article 5 § 1(c) permits arrest or detention for the purpose of bringing a person before the competent legal authority on reasonable suspicion of having committed an offence. Reasonable suspicion requires facts or information capable of satisfying an objective observer that the person may have committed the alleged offence. The investigative stage does not require evidence sufficient for conviction, but a domestic criminal label or a general prosecutorial statement cannot replace the necessary factual connection.

The requirement must exist at the moment of detention and remain capable of justification while detention continues. The seriousness of the political or security context does not remove this condition. Even in terrorism-related investigations or during an emergency, the authorities must identify verifiable conduct connecting the individual to the alleged offence. Otherwise, the concept of suspicion risks being expanded to such an extent that it loses its protective function.

*Relevant and Sufficient Reasons under Article 5 § 3*

Reasonable suspicion may justify the initial deprivation of liberty, but it cannot by itself justify continued detention. In *Buzadji v the Republic of Moldova*, the Grand Chamber clarified that the authorities must provide additional relevant and sufficient reasons from the first judicial decision ordering detention, and that the burden of justification becomes increasingly demanding as time passes.[9]

The Court has accepted that risks such as absconding, interference with evidence, pressure on witnesses, reoffending, or disturbance of public order may justify detention. However, these risks must be supported by concrete and individual circumstances. In *Letellier v France*, the Court emphasised that the persistence of reasonable suspicion is not sufficient after a certain period and that the grounds relied upon must be linked to the particular case.[10] In *Idalov v Russia*, it criticised stereotyped reasoning capable of being applied to almost any accused person.[11]

Individualised reasoning also requires attention to change over time. A risk that may be credible at the beginning of an investigation may become weaker after documents have been seized, witnesses have been questioned, or the accused has demonstrated stable residence and cooperation. A court should therefore explain not only why detention was initially necessary, but also why the same reason remains sufficient at every later stage.

[8]European Court of Human Rights, Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security (updated 28 February 2026).
[9]Buzadji v the Republic of Moldova [GC], App no 23755/07 (ECtHR, 5 July 2016) paras 87-102.
[10]Letellier v France, App no 12369/86 (ECtHR, 26 June 1991) paras 35-51.
[11]Idalov v Russia [GC], App no 5826/03 (ECtHR, 22 May 2012) paras 139-48.

*Effective Judicial Review under Article 5 § 4*

Article 5 § 4 requires a procedure through which the lawfulness of detention can be decided speedily by a court and release can be ordered where detention is unlawful. The existence of a hearing or written decision is not sufficient by itself. Depending on the circumstances, the procedure must be adversarial, respect equality of arms, and allow the court to examine the factual and legal conditions essential to detention.

The review court is not required to respond to every sentence in a detainee's submissions. It must, however, address arguments that are specific, relevant, and capable of affecting the lawfulness or necessity of detention. Where a court simply repeats the prosecutor's position or uses the same formula as the initial order, review risks becoming confirmatory rather than corrective. Timeliness is also an essential element of protection, as demonstrated by the Court's early case law in *Brogan and Others v the United Kingdom*.[12]

*Article 18 in Conjunction with Article 5*

Some of the selected cases also concern Article 18, which prohibits restrictions imposed for purposes other than those prescribed by the Convention. Article 18 does not mean that every weak prosecution or incorrect detention order is politically motivated. Its application requires the Court to examine the purpose actually pursued, taking account of the chronology, the quality of the evidence, the wider context, and the conduct of the authorities. The Grand Chamber clarified this approach in *Merabishvili v Georgia*.[13]

Article 18 is relevant to structural silence because ineffective review may allow detention to serve a purpose that is not visible in the formal language of the order. A court may refer to criminal investigation, seriousness of the offence, or public security while failing to examine whether the facts support those grounds. In such circumstances, formal legality may conceal a different institutional or political function.

## Case Studies: Azerbaijan

The Azerbaijan case studies reveal related but distinct forms of weakened Article 5 protection. *Farhad Aliyev* demonstrates how detention may be sustained through repeated grounds without genuine temporal reassessment. *Mammadli* demonstrates a more fundamental problem: the facts relied upon did not provide a sufficient basis for reasonable suspicion, yet courts continued to authorise detention. *Rasul Jafarov* provides additional evidence that the latter pattern was not confined to one applicant.

[12]Brogan and Others v the United Kingdom, App nos 11209/84, 11234/84, 11266/84 and 11386/85 (ECtHR, 29 November 1988) paras 55-62.
[13]Merabishvili v Georgia [GC], App no 72508/13 (ECtHR, 28 November 2017) paras 287-317.

*Farhad Aliyev v Azerbaijan: Repetition over Time*

Farhad Aliyev was serving as Azerbaijan's Minister for Economic Development when he was taken from his office to the Ministry of National Security on 19 October 2005. He was suspected of participating with other senior officials in an alleged plan to overthrow the government. On 21 October 2005 he was charged with offences including large-scale embezzlement and attempting to usurp state power, and a judge ordered his detention. His detention was subsequently extended on several occasions until the criminal case was transferred for trial.[14]

The chronology contains two details that are sometimes overlooked when the case is discussed only as an example of prolonged detention. First, the ECtHR found that the applicant had remained in custody for a period beyond the forty-eight-hour limit permitted by domestic law before judicial authorisation was obtained. Secondly, from 19 April to 21 May 2007 he remained detained after the final investigation-stage order had expired and before the trial court provided a new legal basis. The existence of serious criminal allegations did not cure these gaps in lawful authorisation.[15]

The central Article 5 § 3 problem concerned the length and quality of the reasoning. The applicant's pre-trial detention lasted two years and six days. In the decisions extending detention, the domestic court repeatedly referred to the gravity of the charges and the risks that he might abscond or influence participants in the proceedings. The ECtHR observed that the reasoning in the extension decisions was the same as, or very similar to, the original wording. It did not identify facts showing that the applicant had prepared to leave the country, attempted to contact witnesses, or taken steps to interfere with evidence.[16]

The passage of time did not result in a more detailed analysis. The courts did not explain whether the risks had changed after evidence had been collected or after the investigation had advanced. Nor did they examine the applicant's individual circumstances in a manner capable of demonstrating why less restrictive measures would be insufficient. The reasoning therefore treated the initial decision as a continuing assumption instead of a conclusion requiring renewed justification.

The Article 5 § 4 findings show that the problem was not merely a matter of short drafting. Detention was extended on three occasions in the absence of the applicant and his lawyers. Although legal representatives were able to participate in some later proceedings, the courts did not adequately address the specific written arguments submitted in support of release. The proceedings formally existed, but they did not provide the level of adversarial and substantive control required by Article 5.[17]

This case illustrates structural silence in a direct form. Judicial orders, extension hearings, appeals, and recognised legal grounds were all present. Nevertheless, the facts necessary to connect the stated risks to the individual were missing, and the reasoning did not develop with time. The legal procedure continued to operate, but its capacity to protect liberty was progressively reduced through repetition.

[14]Farhad Aliyev v Azerbaijan, App no 37138/06 (ECtHR, 9 November 2010) paras 10-34.
[15]Farhad Aliyev v Azerbaijan (n 14) paras 154-69 and 172-79.
[16]Farhad Aliyev v Azerbaijan (n 14) paras 188-94.
[17]Farhad Aliyev v Azerbaijan (n 14) paras 199-213.

*Mammadli v Azerbaijan: Suspicion without a Sufficient Criminal Basis*

Anar Mammadli was a civil-society activist whose organisations specialised in election monitoring. Following the 2013 presidential election, the Election Monitoring and Democracy Studies Centre published a critical assessment of the electoral process. In December 2013 Mammadli was arrested and charged with offences including illegal entrepreneurship, tax evasion, and abuse of power. The prosecution's theory was closely connected to grants received for the work of an unregistered organisation through another registered organisation.[18]

The factual basis of the suspicion requires careful attention. Domestic law did not prohibit a non-governmental organisation from operating merely because state registration had not been obtained. The authorities also failed to identify a provision clearly prohibiting the receipt of grants through a registered partner organisation. The purpose of the grants, which included election-monitoring activity, was not itself alleged to be unlawful. The donors did not claim that funds had been misused, and the prosecution did not initially identify conduct demonstrating that Mammadli had personally appropriated money or obtained unlawful profit.

The ECtHR also noted an important chronological point. Additional allegations of embezzlement and forgery were introduced only after the last order extending the applicant's pre-trial detention. Those later charges could not retrospectively provide reasonable suspicion for an earlier period of detention. This distinction is important because a court must examine the evidence existing at the time when liberty is restricted, rather than rely on material developed at a later stage.

On this basis, the Court held that the material relied upon by the authorities was insufficient to satisfy Article 5 § 1(c). The detention orders did not merely contain weak explanations for an otherwise supported suspicion. They accepted a prosecutorial characterisation without identifying conduct that was sufficiently connected to the constituent elements of a criminal offence. The formal existence of charges therefore concealed an evidentiary absence.[19]

The domestic review did not correct that weakness. Mammadli relied on factors favouring release, including his permanent residence, the absence of a previous criminal record, family circumstances, and the availability of bail or house arrest. The courts continued to rely on the seriousness of the accusations and a risk of reoffending, but did not explain why those personal circumstances and alternatives were insufficient. The ECtHR concluded that the domestic courts had limited their role to the automatic endorsement of the prosecution's applications rather than conducting genuine and independent review.

The Court further found a violation of Article 18 in conjunction with Article 5. That conclusion was based not on the applicant's status alone, but on the relationship between the weak evidentiary basis, the timing following the election-monitoring report, and the broader treatment of civil-society actors. The Court found that the actual purpose of detention had been to silence and punish Mammadli for his election-monitoring work.[20]

[18]Mammadli v Azerbaijan, App no 47145/14 (ECtHR, 19 April 2018) paras 7-32.
[19]Mammadli v Azerbaijan (n 18) paras 72-74 and 87-91.
[20]Mammadli v Azerbaijan (n 18) paras 99-105.

For the present argument, this finding demonstrates the consequences of structural silence. When courts do not test whether the alleged conduct is criminal, the legal form of detention may be used for a purpose beyond ordinary criminal procedure. The written order remains formally recognisable, but it no longer performs its central function of requiring the state to justify the deprivation of liberty.

*Rasul Jafarov as Corroborating Evidence*

The case of *Rasul Jafarov v Azerbaijan* provides a further and less frequently examined point of comparison. Jafarov was a human-rights defender and the chair of the Human Rights Club, which had organised public campaigns including "Sing for Democracy" and "Art for Democracy." He was arrested in August 2014 and charged with offences connected to grants, registration, tax obligations, and alleged abuse of power. As in *Mammadli*, the authorities relied heavily on the legal status of an unregistered organisation and on the receipt of grant funding.[21]

The ECtHR found that the domestic courts did not verify the existence of reasonable suspicion despite repeated objections. The courts reproduced the prosecution's account and rejected the applicant's challenges through short and vague formulae. The Court stated that their role had been reduced to automatic endorsement of the prosecution's applications. It also found that the detention review did not meet the requirements of Article 5 § 4.[22]

The Court additionally found a violation of Article 18 in conjunction with Article 5, concluding that the restriction had pursued the purpose of silencing and punishing the applicant for his human-rights activities.[23] The significance of *Rasul Jafarov* is not that it proves that every prosecution of an NGO representative has the same purpose. Its significance is that a similar combination of weak criminalisation, automatic judicial endorsement, and an ulterior purpose appeared in another case involving different activities and a different applicant.

Later judgments have continued to refer to the abstract and formulaic use of detention grounds in Azerbaijan. In *Azizov and Novruzlu*, for example, the ECtHR again observed that domestic courts repeated grounds without explaining their relevance to the applicants or identifying case-specific facts.[24] This broader recurrence supports the conclusion that the deficiencies examined above cannot be treated only as drafting errors in two isolated decisions.

## Turkey

The Turkish materials reveal comparable risks of formulaic reasoning, but they arise within a different institutional environment. The role of criminal peace judgeships is central during the investigation stage, while the selected ECtHR cases developed

[21]Rasul Jafarov v Azerbaijan, App no 69981/14 (ECtHR, 17 March 2016) paras 8-28 and 119-33.
[22]Rasul Jafarov v Azerbaijan (n 21) paras 140-55.
[23]Rasul Jafarov v Azerbaijan (n 21) paras 156-63.
[24]Azizov and Novruzlu v Azerbaijan, Apps nos 65583/13 and 70106/13 (ECtHR, 18 February 2021) paras 76-80.

in the exceptional context following the attempted coup of July 2016. The analysis therefore focuses on the structure of review, the treatment of expressive and political activity as criminal evidence, and the ability of higher-court findings to produce an effective result.

*Criminal Peace Judgeships and Horizontal Review*

Criminal peace judgeships were established in 2014 and were given authority over investigative-stage measures affecting personal liberty and privacy, including arrest, pre-trial detention, search, seizure, and interception. According to the Venice Commission, their official purpose included specialisation and improvement of the reasoning used for protective measures.[25]

At the time examined by the Venice Commission in 2017, the appeal structure was unusual. A decision of one peace judgeship was reviewed by another peace judgeship at the same level. The judgeships were numbered, and an objection normally passed to the next numbered judge; the objection against the highest-numbered judge returned to the first. The number of judgeships within a province was limited, producing a circular form of horizontal review rather than review by a superior court.

The institutional details are relevant. At the time of the Venice Commission's visit, Turkey had 719 peace judges. In Ankara, nine peace judges served a population of more than 3.6 million. The Commission was informed that the Ankara judges dealt with approximately 7,700 decisions annually, including around 700 detention matters, approximately 1,500 objections against decisions of other peace judges, and a large number of unrelated matters. Their offices were situated close to one another in the same courthouse.[26]

The Venice Commission did not conclude that every peace judge lacked independence or that every order was defective. It nevertheless considered the horizontal appeal system among a small number of judges problematic, described it as a closed system, and noted numerous decisions with insufficient reasoning. It recommended that objections be examined by a different or higher court and observed that the heavy workload left insufficient time for individualised reasoning, particularly in detention cases. This description concerns the system examined in 2017. Article 268 § 3(b) of the Code of Criminal Procedure was amended in 2021, and appeals concerning detention and judicial control were transferred to a judge of the criminal court of first instance within the judicial district. Where that judge handles the matters of the peace judgeship, the appeal belongs to the president of the assize court. The earlier horizontal structure is therefore used here to explain the institutional setting of the cases and period examined, rather than as a complete description of the present appeal model.[27]

[25]European Commission for Democracy through Law (Venice Commission), Opinion on the Duties, Competences and Functioning of the Criminal Peace Judgeships in Turkey, CDL-AD(2017)004, paras 16-26.

[26]Venice Commission (n 25) paras 22-24 and 104-05.

[27]Venice Commission (n 25) paras 72-76 and 101-06; European Commission for Democracy through Law (Venice Commission), Amendments to the Turkish Code on Criminal Procedure Related to Criminal Judgeships of Peace, CDL-REF(2025)017 (31 March 2025), art 268 § 3(b), reproducing the amendment adopted on 8 July 2021.

These historical points do not by themselves prove a violation in any individual case. They identify institutional conditions that were capable of reducing corrective distance during the period examined. Where the reviewing judge worked within the same small circle, applied the same procedural routines, and handled a substantial workload, the review process could reproduce the assumptions of the original decision. The formal right to challenge detention remained, but the institutional possibility of correction could be weakened.

*Şahin Alpay v Turkey: A Binding Judgment without Immediate Effect*

Şahin Alpay was a journalist and columnist for the newspaper *Zaman*. He was taken into police custody on 27 July 2016 on suspicion of belonging to an armed terrorist organisation and was subsequently placed in pre-trial detention. The authorities relied largely on his journalistic work and his association with a newspaper considered to be linked to the Gülen movement. The case therefore raised not only the existence of judicial review, but also the question whether published political analysis could provide a sufficiently concrete link to the alleged criminal activity.[28]

The Turkish Constitutional Court examined the material and found that the articles relied upon did not demonstrate a strong indication that Alpay had acted in accordance with the aims of a terrorist organisation. It noted that the expressions used in his writings formed part of public and political debate and that at least one article had warned against a military intervention. The Constitutional Court concluded on 11 January 2018 that his detention had violated the constitutional right to liberty and security, as well as freedom of expression and of the press.

The rare and legally significant feature of the case arose after that judgment. The Istanbul 13th Assize Court refused to release Alpay and questioned whether the Constitutional Court had acted within its competence when assessing the evidence. An objection was also unsuccessful. No new factual material or newly identified detention risk replaced the basis rejected by the Constitutional Court. Alpay therefore remained detained despite a final and binding finding by the highest domestic court that the measure had violated his rights.[29]

The ECtHR held that continued detention following the Constitutional Court judgment could not be regarded as lawful and in accordance with a procedure prescribed by law. It emphasised that allowing another court to call into question the powers of a constitutional court to issue final and binding judgments would undermine legal certainty and the rule of law. Alpay was eventually released from pre-trial detention on 16 March 2018, shortly before the ECtHR delivered its judgment.[30]

This case adds a distinct dimension to structural silence. The domestic constitutional remedy did not fail at the stage of legal analysis: the Constitutional Court identified the violation and required its consequences to be removed. The failure appeared in the transmission of that judgment to the court controlling detention. The right was fully expressed at the constitutional level, but its practical effect was temporarily neutralised by institutional resistance below.

[28]Şahin Alpay v Turkey, App no 16538/17 (ECtHR, 20 March 2018) paras 7-58.
[29]Şahin Alpay v Turkey (n 28) paras 75-89 and 114-21.
[30]Şahin Alpay v Turkey (n 28) paras 127-39.

The legal limits of the case should also be stated. The ECtHR did not find a violation of Article 5 § 4 concerning the speed of the Constitutional Court proceedings in the exceptional circumstances, and it did not separately determine the Article 5 § 3 complaint after finding a violation of Article 5 § 1. The case should therefore not be presented as a finding that every stage of Turkish review was ineffective. Its narrower importance concerns the inability of a final and binding judgment to produce immediate protection.

*Selahattin Demirtaş v Turkey (No 2): Political Activity as Suspicion*

Selahattin Demirtaş was a co-chair of the Peoples' Democratic Party (HDP) and a member of the Turkish Grand National Assembly. In May 2016 a constitutional amendment lifted parliamentary immunity in respect of pending investigation files affecting a large group of members of parliament. Demirtaş was arrested on 4 November 2016 together with other HDP parliamentarians and was placed in pre-trial detention on terrorism-related accusations. The evidence relied upon included political speeches, participation in public meetings, and statements made in the course of his political activity.[31]

The Grand Chamber examined whether the domestic decisions identified facts capable of connecting those activities to the specific offences alleged. It accepted that states may investigate genuine terrorism-related conduct and that the relevant national context was serious. However, it found that none of the decisions on initial or continued detention had established a clear factual link between the applicant's speeches or participation in lawful political meetings and the criminal offences attributed to him.

A particularly important issue concerned parliamentary non-liability. The domestic courts did not adequately examine whether some of the statements relied upon were protected because they formed part of parliamentary political activity. The omission was not a minor procedural point. It affected whether the very conduct used as evidence could lawfully serve as the basis for suspicion. The Court concluded that no specific facts or information capable of establishing reasonable suspicion had been put forward for the relevant detention.[32]

The Article 5 § 3 analysis reached a related conclusion. Domestic courts repeatedly referred to the nature and seriousness of the alleged offences, the existence of strong suspicion, and statutory grounds for detention. The wording remained abstract and formulaic. It did not explain how the risks applied to Demirtaş personally or how they changed as proceedings continued. The Turkish Constitutional Court later found that the extension decisions had not contained relevant and sufficient reasons, but that later recognition did not undo the long period already spent in detention.[33]

The political timing formed part of the Article 18 assessment. Demirtaş remained detained during the 2017 constitutional referendum and the 2018 presidential election, in which he was a candidate. The Grand Chamber did not rely on timing alone. It considered the absence of reasonable suspicion, the sequence of political events,

[31]Selahattin Demirtaş v Turkey (No 2) [GC], App no 14305/17 (ECtHR, 22 December 2020) paras 10-70.
[32]Selahattin Demirtaş v Turkey (No 2) (n 31) paras 323-39.
[33]Selahattin Demirtaş v Turkey (No 2) (n 31) paras 350-60.

statements by senior political figures, the effect on parliamentary activity, and the broader interference with pluralism. It concluded that the predominant purpose of the detention had been to stifle pluralism and limit freedom of political debate.[34]

Under Article 46, the Court held that Turkey had to take all necessary measures to secure the applicant's immediate release.[35] This remedy demonstrates the seriousness of the structural concern. The problem was not confined to the wording of a particular detention order; the continuation of detention had become incompatible with the Convention in a manner requiring a direct operational response.

At the same time, the case should not be overstated. It does not establish that political speech can never be evidence in a criminal investigation, nor that national-security considerations are irrelevant. It establishes that speech and lawful political activity cannot be transformed into reasonable suspicion through general labels alone. A concrete connection to the alleged offence remains necessary, and emergency conditions do not remove that requirement.

## Comparative Analysis of Azerbaijan and Turkey

### *Judicial Reasoning and the Formalisation of Compliance*

The case studies demonstrate that the central problem is not the total absence of judicial reasoning. Domestic courts in both jurisdictions used recognisable legal categories and issued written decisions. The problem lies in the transformation of reasoning into a formula that satisfies the outward appearance of legality without performing a sufficiently individualised assessment.

In *Farhad Aliyev*, the same or similar reasons continued for more than two years. In *Mammadli* and *Rasul Jafarov*, the courts accepted the prosecution's characterisation of NGO-related conduct without adequately testing whether the conduct provided a criminal factual basis. In *Demirtaş*, general references to terrorism-related offences and strong suspicion did not explain how the applicant's speeches were connected to those offences. The categories used by the courts were legally familiar, but the factual bridge between the category and the individual was missing.

This distinction is important. Flight risk, interference with evidence, seriousness of charges, and risk of reoffending are not illegitimate grounds in themselves. They become problematic when they operate as conclusions rather than questions. A reference to flight risk should require identification of conduct, resources, foreign connections, or other circumstances making flight a real possibility. A reference to interference with evidence should identify the evidence remaining to be collected and the detainee's capacity to affect it. Without that connection, judicial reasoning becomes descriptive rather than evaluative.

[34]Selahattin Demirtaş v Turkey (No 2) (n 31) paras 421-38.
[35]Selahattin Demirtaş v Turkey (No 2) (n 31) paras 439-42.

*The Temporal Reversal of Article 5 Protection*

Article 5 requires the justification for detention to become more demanding as time passes. The selected cases reveal the opposite movement. Once detention was ordered, the original decision acquired institutional momentum. Prosecutors repeated the same risks, courts referred to earlier grounds, and review focused on whether circumstances had changed sufficiently to justify release rather than whether the state had proved the continuing necessity of detention.

This dynamic is particularly visible in *Farhad Aliyev* and *Demirtaş*. In both cases, numerous decisions did not result in a progressively stronger factual analysis. The quantity of review therefore did not ensure its quality. Repeated hearings can coexist with structural silence where each hearing begins from the assumption that the existing detention is correct.

The practical burden may consequently be reversed. Article 5 places the burden on the authorities to justify detention, yet routinised review may require the detainee to demonstrate why an existing order should change. This implicit shift is difficult to detect because the written decision still refers to accepted legal grounds. Structural silence is located in the analytical step that is missing between those grounds and the person's changing circumstances.

*Review without Effective Correction*

A second common feature concerns the corrective capacity of review. In the Azerbaijani cases, domestic courts repeatedly endorsed the prosecution's requests and did not adequately answer specific arguments. In Turkey, the institutional problem takes a different form. The horizontal appeal structure examined by the Venice Commission in 2017 could reduce distance from the original decision during the relevant period, while Şahin Alpay demonstrates that even a successful constitutional complaint may not protect liberty if the judgment is not implemented by the court controlling detention.

These examples show that access to a court and the effectiveness of a court are separate questions. A review mechanism may exist and may even operate rapidly, but it cannot protect liberty if it lacks the authority, independence, factual material, or institutional acceptance necessary to correct the decision under challenge.

*Different Institutional Pathways*

The comparison must not obscure the differences between Azerbaijan and Turkey. In the Azerbaijani cases, the dominant mechanism is routinised affirmation: prosecution requests are accepted through recurring formulae, while defence arguments and alternatives receive limited attention. The Article 18 cases further demonstrate how this weak scrutiny may permit criminal procedure to be used against civil-society activity.

In Turkey, formulaic reasoning appears together with institutional design, emergency context, terrorism legislation, parliamentary politics, and conflicts within the judicial hierarchy. The peace-judgeship system raises concerns about horizontal review and workload. *Şahin Alpay* concerns resistance to the binding authority of the Constitutional

Court. *Demirtaş* concerns the treatment of political activity and the continuation of detention during major electoral periods.

Structural silence is therefore not used to claim that the two systems are identical. Its purpose is to identify a common functional outcome produced through different institutional mechanisms: legal safeguards remain formally present, but their capacity to require evidence, reassess necessity, and order effective release is diminished.

*Limits of the Structural Claim*

The structural conclusion is based on repeated patterns documented in selected judgments and official institutional material. It is not based on a complete quantitative study of all detention orders. The concept should therefore remain open to correction and disconfirmation. Evidence that domestic appellate courts consistently reject formulaic reasoning, that alternatives are increasingly used, or that the same deficiencies no longer recur would weaken the structural claim.

Nevertheless, the recurrence identified by the ECtHR extends beyond the principal cases analysed here. The Committee of Ministers continues to supervise the *Mammadli* group of judgments concerning the misuse of criminal law and detention against government critics, civil-society activists, and human-rights defenders, most recently at its 1545th meeting in December 2025.[36] That continuing supervision supports the view that individual compensation alone has not resolved the institutional concerns.

## Normalization and Systemic Consequences

A direct consequence of formulaic and confirmatory review is the risk that pre-trial detention will lose its exceptional character. This conclusion should be expressed carefully. The selected cases do not provide statistical proof that detention is the default measure in every proceeding. They demonstrate, however, mechanisms that may contribute to normalisation: abstract risks are accepted without evidence, earlier decisions are repeated, and alternatives receive limited consideration.

The presumption of innocence remains formally applicable to every accused person. Nevertheless, prolonged detention without individualised justification may create a practical condition in which the accused bears consequences similar to punishment before conviction. Recent scholarship in the Athens Journal of Law has also emphasised that preventive detention must not be used as a means of achieving punishment in advance and that criminal-procedure decisions must remain grounded in concrete evidence.[37]

The normalisation process also affects alternatives. Bail, reporting obligations, travel restrictions, guarantees, or house arrest cannot be treated as formal options that are mentioned and rejected without analysis. Where a court does not explain why a

[36]Council of Europe, Committee of Ministers, Decision CM/Del/Dec(2024)1492/H46-04, Mammadli group v Azerbaijan, 1492nd meeting (12-14 March 2024); Decision CM/Del/Dec(2025)1545/H46-04, Mammadli group v Azerbaijan, 1545th meeting (2-4 December 2025).

[37]Oana Elena Iacob, "Brief Analysis of the Importance Given to the Presumption of Innocence at International and National Level" (2025) 11(3) Athens Journal of Law 337-352.

specific alternative cannot control the identified risk, deprivation of liberty ceases to function as a measure of last resort. International guidance on prison overcrowding similarly stresses the importance of non-custodial measures and individual assessment.[38]

Accountability is also weakened by insufficient reasoning. Detailed reasons permit higher courts, the ECtHR, the parties, and the public to understand why detention was ordered and whether the same grounds remain valid. Formulaic language obscures this path. It becomes difficult to distinguish genuine assessment from copied wording, and it becomes easier for an error to pass through several stages of review without correction.

In this sense, structural silence does not mean that the law disappears. The law remains visible through hearings, orders, statutory references, and appeal procedures. Its capacity to constrain state power is weakened because the institutional process does not require the legal terminology to be connected to evidence and individual circumstances.

## Institutional Implications

The comparative findings indicate that reform should focus not only on legal texts but also on the information and reasoning that detention decisions must contain. Article 5 standards are already developed. The problem is to ensure that domestic practice makes those standards operational.

First, each ground for detention should be connected to specified facts. A court referring to flight risk should identify the circumstances supporting that risk. A court referring to interference with evidence should explain what evidence remains vulnerable and how the accused could affect it. The seriousness of an offence should not operate as a substitute for this analysis.

Second, every extension decision should contain a change-over-time assessment. It should state what investigative steps have been completed, what risks remain, what new facts have emerged, and why the reasoning in the previous order is still sufficient. Reproduction of an earlier order should be treated as an indication that genuine reassessment may not have occurred.

Third, domestic courts should answer the principal defence arguments and explain the rejection of alternatives. Stable residence, cooperation, health, family obligations, absence of a criminal record, and proposed guarantees are not automatically decisive. However, where they are specifically raised and are capable of affecting the outcome, they should receive a reasoned response.

Fourth, the structure of review should create sufficient institutional distance. The 2021 amendment partly responded to the Venice Commission's concern by moving appeals concerning detention and judicial control outside the earlier circle of same-level peace judges. The broader point remains relevant: the reviewing body should have sufficient authority and distance to reassess the original decision. The aim is not to assume bias, but to design a procedure capable of independent review.

Fifth, constitutional and appellate judgments concerning liberty must have clear and immediate practical effect. The *Şahin Alpay* case demonstrates that a successful high-court judgment is insufficient if the authority controlling detention can delay

[38]United Nations Office on Drugs and Crime, Handbook on Strategies to Reduce Overcrowding in Prisons (United Nations 2013) 51-70.

or resist implementation. Domestic procedural law should clearly identify responsibility and time limits for giving effect to release or reconsideration orders.

Sixth, implementation of ECtHR judgments should address the institutional process producing the violation. Individual compensation may not change templates, workloads, appeal structures, access to evidence, or professional routines. General measures should therefore include publication of representative decisions, monitoring of repeated wording, data concerning alternatives, and training based on the specific reasoning failures identified by the Court.

These proposals do not require a new Convention right or a general prohibition of pre-trial detention. They seek to restore the practical force of existing guarantees by ensuring that legal grounds are connected to facts, that the passage of time produces renewed scrutiny, and that review mechanisms remain capable of correction.

## Conclusion

This paper has argued that the deficiencies observed in the selected pre-trial detention cases from Azerbaijan and Turkey cannot be understood only as isolated failures to apply Article 5. The detailed case analysis demonstrates recurring situations in which domestic courts used the language and procedure of legality, while failing to connect detention to sufficiently concrete evidence, changing circumstances, or defence arguments. Structural silence describes this condition: the right remains formally present, but its ability to influence the result is weakened through institutional practice.

The comparison also demonstrates that structural silence may emerge through different paths. In Azerbaijan, the selected cases mainly reveal repeated prosecutorial endorsement and formulaic extension of detention, including in proceedings affecting civil-society actors. In Turkey, comparable problems interact with horizontal review structures, emergency and security narratives, political activity, and conflicts concerning the authority of the Constitutional Court. These differences prevent the concept from becoming a general label for any violation and show why the relevant institutional mechanism must be identified in each jurisdiction.

The findings are subject to clear limits. The cases are analytically significant but do not constitute a statistical account of all detention decisions. Structural silence is not a new test under the Convention and cannot replace the requirements of Article 5 or Article 18. Its value lies in directing attention to the point at which formal compliance stops functioning as meaningful protection.

Ultimately, the protection of liberty depends on the quality and institutional effect of judicial reasoning. Detention orders must connect risks to facts, extension decisions must demonstrate change over time, alternatives and defence arguments must be examined, and higher-court judgments must produce practical consequences. Without these conditions, rights may remain legally recognised yet become substantively fragile. The central challenge is therefore not simply to restate Article 5 standards, but to ensure that domestic institutions remain capable of giving those standards real protective effect.

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