

1 **Structural Silence in Relation to Article 5 ECHR:**
2 **A Comparative Analysis of Pretrial Detention Practices**
3 **in Azerbaijan and Turkey**
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6 *This paper examines the discrepancy between formal legal guarantees and*
7 *their practical implementation under Article 5 of the European Convention on*
8 *Human Rights, which guarantees the right to liberty and security. Although*
9 *the European Convention provides strong protections for the right to liberty*
10 *and security, persistent shortcomings remain with respect to pretrial*
11 *detention. Rather than being isolated violations, these shortcomings represent*
12 *deeper structural constraints affecting the enforcement of human rights*
13 *standards. This paper employs the idea of "structural silence" to analyze why*
14 *formally recognized rights do not necessarily provide an individual with real-*
15 *world protection from unreasonable treatment by the state. By comparing the*
16 *pretrial detention practices of Azerbaijan and Turkey, it demonstrates that*
17 *both countries have systemic weaknesses in judicial review and insufficient*
18 *justification for detaining individuals prior to trial. Ultimately, the results*
19 *indicate that the success of the ECHR system is dependent upon not only legal*
20 *recognition but also the existence of institutions with adequate capability to*
21 *enforce human rights standards and effective mechanisms of compliance.*
22
23

24 **Introduction**
25

26 The European Convention on Human Rights (ECHR), while widely viewed
27 as one of the most comprehensive regional frameworks for the protection of
28 fundamental freedoms¹, has, through the continued evolution of the European
29 Court of Human Rights' jurisprudence, established a sophisticated and adaptable
30 system for safeguarding individual liberty, particularly under Article 5.²

31 Despite the extensive body of international law on individual liberty
32 developed under the ECHR, a considerable gap exists between the formal
33 recognition of rights and their real-world implementation.³ This gap is most
34 evident in the context of pre-trial detention, where individuals are often held for
35 extended periods or deprived of their liberty without adequate justification.⁴
36 Although domestic legal systems generally comply with the provisions of the
37 ECHR, their application in practice reveals significant shortcomings.

38 This paper posits that such shortfalls cannot be attributed solely to isolated
39 instances of non-compliance but rather reflect systemic characteristics of
40 national legal systems that shape how individual liberties are realized in practice.
41 Accordingly, the concept of "structural silence" is proposed as an analytical tool
42 to frame this problem.

¹European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

²Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978).

³Başak Çalı, *The Authority of International Law: Obedience, Respect, and Rebuttal* (Oxford University Press 2015).

⁴Council of Europe, *Pre-trial detention and its alternatives* (2018).

1 “Structural silence” refers to situations in which rights formally exist within
 2 a legal system, yet progressively lose their functional effectiveness due to
 3 institutional practices, routinized decision-making, and limitations on judicial
 4 engagement. As Martti Koskenniemi has argued, the presence of legally
 5 recognized norms does not automatically ensure their realization in practice.⁵

6 Similarly, Sally Engle Merry has demonstrated that human rights norms
 7 undergo processes of “translation” when applied at the local level, often resulting
 8 in reinterpretation or dilution.⁶

9 Through the analysis of pre-trial detention practices in Azerbaijan and
 10 Turkey, this paper demonstrates that both jurisdictions exhibit patterns of
 11 generalized reasoning, limited judicial review, and prolonged detention without
 12 sufficient justification. These findings suggest that the issue lies not in the
 13 absence of legal standards, but in the manner in which they are implemented.

14 Ultimately, this research argues that the effectiveness of Article 5 of the
 15 ECHR depends not only on the formal recognition of rights, but also on the
 16 existence of institutional mechanisms capable of enforcing them in a meaningful
 17 way.

20 **Structural Silence as an Analytical Framework**

21
 22 The gap between law as formally recognized and its actual implementation
 23 has long been documented in both legal and socio-legal scholarship (“the
 24 implementation gap”). While the implementation gap concept represents an
 25 important step toward documenting the gap between law-in-books and law-in-
 26 action, its primary focus is on whether law is complied with, rather than on how
 27 institutional structures shape the way that laws function in practice.

28 Therefore, the purpose of this article is to move beyond this limitation by
 29 using the concept of structural silence as an analytical tool. Structural silence is
 30 defined as a situation in which a legal right is formally recognized and
 31 institutionally acknowledged, yet fails to provide meaningful protection in
 32 practice. Such failure is not simply due to isolated violations, but also stems from
 33 systemic characteristics built into legal systems and institutional structures that
 34 limit the ability of rights to protect against infringement.

35 These characteristics consist of routinized decision-making (which limits
 36 analytical flexibility), reliance on standardized reasoning processes (which
 37 preclude meaningful engagement with individual circumstances), limited
 38 judicial scrutiny of decisions (which reduces opportunities to challenge
 39 routinized reasoning), and broader structural constraints that reduce the
 40 effectiveness of legal protections

41 One of the main theoretical foundations for this approach can be found in
 42 the work of Martti Koskenniemi, who emphasizes the distinction between the

⁵Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005).ch1

⁶Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006).

1 abstract formulation of legal norms and their concrete application. He argues that
 2 even where formal legal rules exist, they are not always realized in practice, as
 3 their meaning and impact are shaped by institutional practices and interpretative
 4 processes.⁷

5 Boaventura de Sousa Santos extends this perspective by emphasizing that
 6 legal systems operate through multiple layers of interpretation shaped by social
 7 and institutional contexts. As a result, legal norms are not static, but continuously
 8 evolve through institutional practices.⁸

9 Similarly, Brian Z. Tamanaha suggests that the effectiveness of law depends
 10 on the broader social and institutional environment in which it operates. Law
 11 cannot be understood in isolation, as its practical impact is determined by
 12 structural conditions.⁹

13 This insight is particularly relevant in explaining how legal systems may
 14 demonstrate formal compliance while failing to produce meaningful protective
 15 outcomes in practice.¹⁰

16 Structural silence draws upon these perspectives by emphasizing how
 17 institutional practices shape the everyday functioning of legal norms. Rather
 18 than openly violating legal standards, institutions may comply with them at a
 19 formal level while simultaneously limiting their substantive impact.

20 When courts repeatedly apply similar forms of reasoning across cases,
 21 judicial review may formally satisfy procedural requirements while lacking
 22 substantive engagement. In such situations, review risks becoming a procedural
 23 mechanism rather than a meaningful safeguard of rights.

24 Structural silence should therefore be understood not as the absence of law,
 25 but as the gradual erosion of its practical effectiveness. The law continues to
 26 operate at a formal level, yet its capacity to influence outcomes is progressively
 27 reduced.

28 Because structural silence operates within systems that appear legally
 29 compliant, it is often difficult to detect. By providing a conceptual framework to
 30 describe this dynamic, structural silence offers a more comprehensive way of
 31 understanding why formally recognized rights may fail to produce meaningful
 32 protection in practice, while also shifting attention from isolated violations to
 33 broader institutional patterns.

34 35 36 **Legal Framework and Doctrinal Development under Article 5 ECHR**

37
38 The doctrinal standards developed under Article 5 provide the benchmark
 39 against which these structural deficiencies can be assessed.

40 Article 5 of the European Convention on Human Rights (the “Convention”)
 41 guarantees the fundamental right to liberty and security, while also defining the

⁷Martti Koskenniemi, *From Apology to Utopia* (CUP 2005).

⁸Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (2002).

⁹Brian Z Tamanaha, *Law as a Means to an End* (Cambridge University Press 2006).

¹⁰David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press 2016).

1 conditions under which an individual may be lawfully deprived of liberty.¹¹ The
2 concept of “lawfulness” under the Convention includes adherence to domestic
3 law; however, the European Court of Human Rights (“Court”) has consistently
4 held that detention must also comply with the general principles of the
5 Convention, in particular the prohibition of arbitrariness.

6 To this end, the Court has established that although detention may be
7 formally permissible under national law, it may nonetheless violate Article 5 if
8 it is arbitrary in substance. In determining arbitrariness, the Court has identified
9 factors such as lack of foreseeability, bad faith, and the use of detention for
10 purposes not permitted under the Convention.

11 Another fundamental aspect of Article 5 is the requirement of “reasonable
12 suspicion” as a basis for deprivation of liberty. Nevertheless, the Court has made
13 clear that reasonable suspicion alone is insufficient to justify prolonged
14 detention. In *Buzadji v. Moldova*, the Court held that while reasonable suspicion
15 may justify the initial deprivation of liberty, continued detention requires
16 additional “relevant and sufficient” reasons.¹²

17 This requirement reflects the temporal dimension of Article 5. As the
18 duration of detention increases, the burden on the State to provide justification
19 becomes progressively stronger. A persistent initial suspicion cannot, by itself,
20 justify continued deprivation of liberty.

21 Moreover, the Court has reinforced the requirement of individualized
22 reasoning in cases such as *Idalov v. Russia*, where it criticized the use of
23 stereotypical reasoning to justify detention.¹³ Similarly, in *Letellier v. France*, the
24 Court recognized that certain grounds—such as the risk of absconding or
25 interference with evidence—may justify detention, but must be supported by
26 individualized and concrete evidence.¹⁴

27 Judicial oversight plays a central role in ensuring compliance with Article
28 5. However, the effectiveness of such oversight depends not only on its existence
29 but also on its quality. The Court has consistently emphasized that judicial
30 review must be substantive rather than merely formal. Where courts fail to
31 meaningfully assess the necessity of detention, judicial review risks becoming a
32 procedural formality rather than an effective safeguard.

33 The requirement of prompt judicial control further reinforces this protective
34 framework. In *Brogan and Others v. the United Kingdom*, the Court held that
35 even relatively short delays in bringing a detainee before a judge may constitute
36 a violation of Article 5.¹⁵ This demonstrates that timeliness is not merely
37 procedural, but a fundamental component of effective protection.

38 Taken together, these principles demonstrate that Article 5 establishes a
39 dynamic and evolving system of protection. As detention continues, increasingly
40 stringent obligations are imposed on the State.

¹¹European Convention on Human Rights, Art. 5.

¹²*Buzadji v. Moldova* [GC], App No 23755/07 (Eur. Ct. H.R. 2016).

¹³*Idalov v Russia* [GC], App no 5826/03 (ECtHR, 22 May 2012).

¹⁴*Letellier v France*, App no 12369/86 (ECtHR, 26 June 1991).

¹⁵*Brogan and Others v United Kingdom*, App no 11209/84 (ECtHR, 29 November 1988).

1 It is precisely within this gap between doctrinal standards and institutional
2 practice that the subsequent case studies are situated.

3 4 5 **Individualized Reasoning in ECtHR Jurisprudence** 6

7 One key requirement in the jurisprudence of the European Court of Human
8 Rights (ECtHR) is that detention decisions must be based on individualized
9 assessments. Generalized or abstract rationales are insufficient, and each
10 decision must relate to the specific circumstances of the case.

11 In *Letellier v. France*, the Court recognized that certain grounds may justify
12 detention; however, these must be supported by concrete factual evidence.
13 Similarly, in *Idalov v. Russia*, the Court criticized the use of “stereotypical”
14 reasoning, noting that reliance on standardized justifications is incompatible
15 with Article 5.

16 This requirement reflects a broader principle within the Convention system:
17 restrictions on liberty must remain exceptional and subject to continuous review.
18 Where domestic courts fail to engage with the specific circumstances of each
19 case, detention risks becoming normalized rather than remaining an exceptional
20 measure.

21 22 23 **Case Studies: Azerbaijan**

24 25 *1. Routine Use of Pre-Trial Detention in Practice* 26

27 The extensive use of pre-trial detention in Azerbaijan has been repeatedly
28 noted by international monitoring bodies as exceeding its function as an
29 extraordinary measure.¹⁶ It is increasingly utilized as a regular component of the
30 criminal justice process.

31 Specifically, it is evident from cases involving political opponents,
32 journalists, and other members of civil society that detention does not serve
33 solely as a procedural safeguard, but also functions as a mechanism capable of
34 producing broader institutional and deterrent effects.¹⁷

35 An important institutional factor contributing to this trend is the routine
36 manner in which courts employ standardized reasoning when ordering and
37 extending detention. Courts often fail to evaluate each case individually, instead
38 relying on pre-determined rationales—such as the risk of absconding, potential
39 interference with evidence, or the seriousness of the alleged offence—without
40 providing a concrete factual basis.

41 The jurisprudence of the European Court of Human Rights confirms this
42 pattern. In *Farhad Aliyev v. Azerbaijan*, the Court found that domestic courts
43 failed to provide sufficient and individualized reasoning to justify continued

¹⁶Council of Europe, *Report on the use of pre-trial detention in Azerbaijan* (various monitoring reports).

¹⁷Human Rights Watch, *Azerbaijan: Crackdown on Critics* (report).

1 detention.¹⁸ Similarly, in *Muradova v. Azerbaijan*, the Court criticized the
2 reliance on repetitive and generalized justifications, emphasizing that such
3 reasoning is incompatible with the requirements of Article 5.¹⁹

4 The Court’s criticism concerns not only the absence of reasoning, but also the
5 structure and quality of judicial justification. The repeated use of nearly identical
6 reasoning across different cases indicates that detention decisions are not based
7 on the specific circumstances of each applicant, but rather on generalized
8 assumptions embedded within judicial practice.

9 Another critical aspect relates to the limited scope of judicial review.
10 Domestic courts formally review detention decisions; however, such review is
11 often superficial and focused
12 primarily on whether there have been changes to the original grounds for
13 detention. Courts rarely conduct a meaningful assessment of whether continued
14 detention remains necessary and proportionate.

15 As a result, while formal review mechanisms exist, they fail to operate as
16 effective safeguards. The temporal requirement emphasized by the European
17 Court of Human Rights—namely that continued detention must be justified by
18 increasingly strong reasons—is therefore not effectively applied in practice.

19 Additionally, reports indicate that detention is frequently prolonged without
20 the introduction of new evidence or materially changed circumstances. This
21 suggests that initial suspicion is often treated as sufficient justification for
22 continued detention, contrary to established Convention standards.

23 Collectively, these elements reveal a deeper structural issue within
24 Azerbaijan’s judiciary. While formal legal protections consistent with the
25 Convention exist, their practical implementation is undermined by routinized
26 decision-making, limited judicial scrutiny, and the normalization of detention as
27 a standard procedural response.

28 In this context, structural silence manifests not through the absence of legal
29 rules, but through their gradual loss of practical effectiveness. Legal standards
30 continue to be invoked and applied formally; however, their capacity to influence
31 outcomes is significantly reduced. The divergence between formal compliance
32 and substantive protection reflects a systemic pattern rather than isolated judicial
33 error.

34 Similar patterns can be observed in Turkey, although they emerge through
35 different institutional dynamics.

36 37 38 **Turkey**

39
40 The use of pre-trial detention in Turkey has generated significant
41 controversy, particularly in cases involving opposition politicians, journalists,
42 judges, and other civil society representatives. In many of these instances,
43 detention serves both as a procedural device for ensuring the proper functioning
44 of legal processes and as a means of producing broader institutional and political

¹⁸Farhad Aliyev v Azerbaijan, App no 37138/06 (ECtHR, 9 November 2010).

¹⁹Muradova v Azerbaijan, App no 22684/05 (ECtHR, 2 April 2009).

1 effects. This pattern is reflected in both the case law of the European Court of
2 Human Rights and the concerns expressed by Council of Europe bodies
3 regarding detention practices and judicial oversight in Turkey.²⁰

4 A key factor influencing this pattern is the role of the criminal judgeships of
5 peace. The Venice Commission has described these judgeships as central actors
6 during the investigative stage of criminal proceedings, particularly with respect
7 to ordering “protective measures,” including pre-trial detention. Appeals against
8 detention decisions are typically conducted within the same institutional
9 framework, whereby a decision rendered by one judgeship of peace is reviewed
10 by another. The Venice Commission has noted that this system has not
11 effectively reduced the duration of pre-trial detention.²¹

12 This institutional design helps explain why detention decisions may appear
13 formally judicial while lacking sufficient independent and individualized
14 scrutiny. Where review occurs within a highly standardized and internally
15 confined structure, judicial oversight risks becoming repetitive rather than
16 genuinely corrective. In this sense, the issue lies not only in the wording of
17 individual detention orders, but in the broader institutional environment within
18 which such decisions are produced.

19 The case law of the European Court of Human Rights further reflects this
20 pattern. In *Selahattin Demirtaş v. Turkey (No. 2)*, the Grand Chamber found
21 serious violations of the Convention arising from the applicant’s pre-trial
22 detention, including a violation of Article 18 in conjunction with Article 5.²² This
23 judgment indicates that detention may extend beyond ordinary criminal-law
24 purposes.

25 Similarly, in *Şahin Alpay v. Turkey*, the Court held that the applicant’s pre-
26 trial detention violated Article 5, emphasizing that detention cannot be justified
27 on vague or unsubstantiated grounds.²³

28 Taken together, these cases demonstrate that the problems surrounding pre-
29 trial detention in Turkey are not confined to isolated judicial errors, but reflect
30 recurring patterns in how detention is justified and sustained. Domestic
31 institutions repeatedly permit detention to be supported by generalized claims
32 relating to national security, terrorism, public order, or the seriousness of the
33 alleged offence, without consistently requiring concrete and individualized
34 evidence.

35 As a result, detention risks becoming normalized in politically sensitive
36 proceedings, while judicial review continues to operate at a formal level. This
37 combination of formal legality and weakened practical protection represents a
38 clear manifestation of structural silence.

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²⁰Council of Europe, Reports on Turkey’s judicial system and pre-trial detention practices.

²¹European Commission for Democracy through Law (Venice Commission), *Opinion on the duties*,

²²*Selahattin Demirtaş v Turkey (No 2) [GC]*, App no 14305/17 (ECtHR, 22 December 2020).

²³*Şahin Alpay v Turkey*, App no 16538/17 (ECtHR, 20 March 2018).

1 **Comparative Analysis of Azerbaijan and Turkey**

2 *Judicial Reasoning and the Formalization of Compliance*

3

4 Building on the case studies above, this section examines how these patterns
5 emerge through judicial reasoning. The structure of how courts reason in both
6 jurisdictions—and, therefore, where structural shortcomings emerge—lies in the
7 judicial reasoning process itself. Although domestic courts are formally
8 obligated to evaluate whether detention meets the standards outlined in Article
9 5 of the ECHR, the way in which judicial reasoning is developed reflects a shift
10 from substantive evaluation toward procedural formalism.

11 Article 5 requires that individualized, specific, and concrete reasons be
12 provided for each detainee. Domestic authorities must determine whether
13 detention is necessary based on the particular circumstances of the individual. In
14 practice, however, these requirements are not consistently applied. Detention
15 should therefore remain exceptional and proportionate. Nevertheless, in practice,
16 this obligation is regularly transformed into standardized and repetitive exercise.

17

18 *Transforming Reasoning into Formulas*

19

20 One of the most distinctive features of both jurisdictions is the
21 transformation of judicial reasoning into a formulaic process.²⁴ Domestic courts
22 frequently utilize predetermined categories of justification (e.g., flight risk,
23 obstruction of investigation, gravity of offence) without connecting these
24 categories to the specific facts of each individual case.²⁵

25 Domestic courts' reliance on predetermined categories illustrates the
26 formalization of compliance—whereby judicial decisions are structured to meet
27 the outward appearance of legality rather than its substantive purpose. As
28 Antoine Buyse notes, compliance with human rights obligations may exist at a
29 surface level, wherein procedural obligations are fulfilled while their protective
30 function is not realized.²⁶

31 Where courts consistently invoke general categories of justification without
32 reference to concrete facts, judicial reasoning ceases to operate as an evidence-
33 based evaluative process and instead functions as a discursive mechanism
34 through which legality is performed.²⁷ This transformation reduces judicial
35 discretion, limits individualized assessment, and weakens courts' ability to act
36 as effective safeguards against arbitrary detention. These patterns of reasoning
37 cannot be understood in isolation, but must be situated within broader
38 institutional dynamics.

39

²⁴Antoine Buyse, 'The Pilot Judgment Procedure at the ECtHR' (2011).

²⁵European Court of Human Rights, *Idalov v Russia* [GC], App no 5826/03 (2012).

²⁶Antoine Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges' (2009) 7(2) *Human Rights Law Review*.

²⁷Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005).

1 *Epistemic Constraints and Judicial Knowledge Production*

2

3 The patterns identified above can also be understood in epistemological
4 terms. The deficits in judicial reasoning are not only institutional but also
5 epistemological. Domestic courts operate under constrained informational
6 environments and rely heavily on narratives produced by prosecutorial
7 authorities, while lacking effective mechanisms for independent verification.²⁸

8 This creates an asymmetry in knowledge production, whereby judicial
9 reasoning is primarily shaped by the perspective of the state. As Sally Engle
10 Merry explains, legal norms undergo processes of “translation” when applied
11 within local institutional contexts, often resulting in reinterpretation or
12 attenuation.²⁹

13 In the context of pre-trial detention, this process transforms the requirement
14 of individualized assessment into a procedural formality. Domestic courts
15 continue to employ the language of rights; however, the substance of those rights
16 is diminished through practice. Judicial reasoning thus preserves the language of
17 legality while reducing its analytical depth.

18 Moreover, reliance on prosecutorial narratives introduces structural bias into
19 the decision-making process. Where courts fail to critically assess the evidence
20 presented and instead reproduce it within standardized reasoning frameworks,
21 judicial oversight risks becoming confirmatory rather than evaluative.³⁰

22

23 *Judicial reasoning as an institutional practice*

24

25 Judicial reasoning must be understood not only as an individual cognitive
26 process but also as an institutional practice. Judges operate within systems
27 shaped by procedural routines, hierarchical structures, and implicit expectations
28 regarding acceptable forms of reasoning.

29 Over time, these conditions give rise to institutionalized reasoning patterns
30 that are reproduced across cases. Once established, such patterns tend to persist
31 and constrain alternative approaches.

32 This phenomenon can be explained through the concept of institutional path
33 dependence. As particular modes of reasoning become entrenched, they generate
34 self-reinforcing effects, making deviation increasingly difficult. Even where
35 judges recognize the limitations of standardized reasoning, institutional
36 constraints may prevent meaningful departure from established practices.

37 Institutional incentives further reinforce this pattern. In contexts
38 characterized by heavy caseloads, limited resources, or politically sensitive
39 conditions, judges may prioritize efficiency, consistency, and institutional
40 stability over detailed analysis. In such environments, reliance on formulaic
41 reasoning becomes a rational response to structural pressures.

²⁸Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006).

²⁹Sally Engle Merry, *Human Rights and Gender Violence* (2006).

³⁰Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005).

1 However, this rationalization comes at the expense of substantive judicial
2 scrutiny and weakens courts' ability to protect individual liberty.

3
4 *Consequences of standardized reasoning*

5
6 Standardized judicial reasoning significantly affects the operation of Article
7 5.

8 First, it undermines the requirement of individualized assessment by
9 replacing it with generalized presumptions. Second, it reduces transparency, as
10 standardized reasoning obscures the real basis of judicial decisions.
11 Third, it weakens accountability, since insufficient reasoning limits effective
12 review by higher courts and international bodies.

13 Most importantly, it contributes to the normalization of detention. When
14 courts repeatedly rely on abstract and repetitive reasoning, detention gradually
15 loses its exceptional character and becomes a default measure.

16 In this sense, judicial reasoning becomes a central mechanism through
17 which structural silence is produced. Legal norms continue to be invoked, and
18 decisions continue to comply with formal requirements; however, the
19 substantive protection those norms are intended to provide is progressively
20 weakened.

21
22
23 **Institutional Logic and Constraints**

24
25 It would be a mistake to view the manner in which judges make pretrial
26 detention decisions entirely as a function of personal preference. Rather, the
27 reasoning employed by judges reflects the broader institutional contexts in which
28 they operate. The persistence of problematic detention practices in both
29 Azerbaijan and Turkey suggests that the issues identified are linked to broader
30 institutional logics regarding how detention is viewed, legitimized, and sustained
31 in practice.

32 From this perspective, institutional constraints are not external to the legal
33 process; they form part of it. They shape the forms of reasoning available to
34 judges, the depth of scrutiny that is applied, and whether legal safeguards are
35 treated as meaningful protection or merely procedural requirements. As a result,
36 detention decisions are influenced as much by institutional routines and systemic
37 pressures as by the formal provisions of Article 5 ECHR.

38 Although both jurisdictions exhibit structural limitations affecting the
39 practical operation of legal safeguards, the mechanisms through which these
40 limitations emerge differ. In Azerbaijan, structural constraints are primarily
41 linked to routinized judicial practice and informal standardization. In Turkey,
42 institutional design and the broader political environment play a more visible
43 role in shaping detention practices and review mechanisms.

44

1 *Azerbaijan: Routine Process and Informal Standardization*

2

3 In Azerbaijan, one of the most notable characteristics of pretrial detention
4 practice is the extent to which judicial reasoning appears to operate within
5 routine patterns. The issue is not simply that domestic courts fail to provide
6 sufficiently detailed reasoning, but that the structure of reasoning itself becomes
7 standardized, reducing the role of individualized assessment.

8 Judicial decisions frequently rely on recurring categories of justification—
9 such as flight risk, interference with evidence, or the gravity of the offence—
10 without demonstrating how these factors relate to the particular circumstances
11 of the individual. This indicates the presence of an institutional environment in
12 which predictability and consistency are prioritized over analytical depth.

13 Over time, this results in an informal standardization of judicial reasoning.
14 Decisions begin to resemble one another not because cases are identical, but
15 because the range of acceptable reasoning becomes institutionally constrained.
16 Judges operate within a framework in which deviation from established forms
17 of reasoning is limited, and where repetition becomes the norm.

18 This phenomenon reflects structural conditions rather than a series of
19 individual analytical failures. Judicial discretion is exercised within an
20 institutional setting that narrows the scope of possible reasoning, encouraging
21 reliance on familiar formulations.

22 As noted by Boaventura de Sousa Santos, legal norms are continuously
23 reshaped through the institutional and social contexts in which they are applied.
24 In this sense, the issue is not that Article 5 standards disappear, but that their
25 practical meaning is altered through repeated institutional use. What is intended
26 as individualized scrutiny becomes a formalized process.

27 Routinization also affects the temporal dimension of detention. Once
28 detention has been ordered, subsequent reviews tend to reproduce earlier
29 reasoning without substantive reassessment of whether continued detention
30 remains necessary. This creates a self-reinforcing dynamic in which initial
31 decisions shape subsequent outcomes.

32 As a result, detention becomes progressively easier to maintain. Judicial
33 review risks shifting from a process of ongoing justification to one of continued
34 affirmation.

35 Institutional culture further reinforces this pattern. An environment that
36 values predictability, consistency, and conformity reduce incentives for judges
37 to engage in detailed individualized analysis. Under such conditions, template-
38 like reasoning becomes not merely a practical shortcut, but an expected mode of
39 decision-making.

40 Thus, even where formal legal safeguards remain in place, their practical
41 effectiveness is diminished by institutional routines that prioritize repetition over
42 critical evaluation.

43

44

1 *Turkey: Institutional Design and Political Contexts*

2
3 In Turkey, structural limitations in pretrial detention practices are shaped not
4 only by routinized reasoning but also by the interaction between institutional
5 design and political context. The issue extends beyond the language of individual
6 judicial decisions and involves a broader framework within which detention
7 decisions are made and reviewed.

8 A central institutional feature is the role of criminal judgeships of peace,
9 which exercise significant authority during the investigative phase, including
10 decisions on pretrial detention. Their structural importance lies not only in their
11 powers, but also in the organization of review mechanisms.

12 As previously observed by the Venice Commission, the review of detention
13 decisions often occurs within the same institutional framework, limiting the
14 degree of independent scrutiny. Although review procedures formally exist, their
15 capacity to function as effective corrective mechanisms is significantly
16 constrained.

17 This institutional arrangement affects the quality of judicial oversight.
18 Where review is conducted within a closed and highly standardized framework,
19 the ability to critically reassess the underlying grounds of detention is reduced.
20 Judicial review may continue to operate formally, but its capacity to challenge
21 underlying assumptions becomes limited.

22 In addition to institutional design, the broader political environment plays a
23 significant role. In cases involving journalists, opposition figures, or civil society
24 actors, detention operates within a context shaped by narratives of security,
25 public order, and institutional sensitivity.

26 As argued by David Kennedy, legal frameworks often maintain an
27 appearance of neutrality while obscuring underlying relationships of power and
28 constraint. In this context, detention decisions may formally comply with legal
29 requirements while being shaped by broader institutional priorities.

30 The jurisprudence of the European Court of Human Rights further illustrates
31 this pattern. Cases such as *Selahattin Demirtaş v. Turkey* (No. 2) and *Şahin Alp*
32 *v. Turkey* demonstrate that concerns arise not only from procedural deficiencies
33 but from recurring patterns in how detention is justified and sustained.

34 The repeated occurrence of Article 5 violations in politically sensitive cases
35 suggests that detention may function beyond its procedural purpose and become
36 embedded within broader institutional dynamics. General references to national
37 security or public order may replace individualized and evidence-based
38 reasoning.

39 Accordingly, structural limitations in Turkey emerge not solely from
40 individual judicial decisions, but from the institutional environment in which
41 those decisions are produced. Formal legality remains intact; however, the
42 structure of decision-making constrains the effective protection of liberty.

43
44

1 *Institutional Path Dependency and the Persistence of Detention Practices*

2
3 Despite contextual differences, both Azerbaijan and Turkey exhibit a shared
4 structural feature: once certain patterns of judicial reasoning and review become
5 established, they tend to reproduce themselves over time. This can be understood
6 through the concept of institutional path dependency.

7 When particular forms of reasoning—such as generalized justification or
8 limited review—become routine, they generate self-reinforcing effects. Early
9 decisions shape later expectations, making deviation from established practices
10 increasingly difficult.

11 In the context of pretrial detention, this means that repeated reliance on
12 standardized reasoning and superficial review processes gradually defines what
13 is considered normal or professionally acceptable within the judiciary.

14 This dynamic helps explain why problematic detention practices persist
15 despite repeated criticism from international bodies. The issue is not simply a
16 lack of awareness of Convention standards, but the fact that these standards are
17 interpreted and applied through pre-existing institutional routines.

18 Institutional path dependency also influences incentives. In environments
19 that prioritize efficiency, consistency, and procedural stability, judges who rely
20 on standardized reasoning may be institutionally favored over those who engage
21 in detailed individualized analysis. Over time, such reasoning appears not only
22 more efficient but also professionally appropriate.

23 Furthermore, this process creates a feedback loop between law and practice.
24 Repeated decisions generate expectations about acceptable forms of reasoning,
25 shaping the arguments of prosecutors, the approach of judges, and the
26 functioning of review mechanisms. As a result, detention practices become self-
27 reinforcing.

28 Structural silence, therefore, should not be understood as a temporary
29 malfunction, but as a systemic phenomenon sustained through institutional
30 repetition.

31
32 *Structural Implications*

33
34 These patterns demonstrate that the effectiveness of Article 5 cannot be
35 assessed solely by the existence of formal safeguards. Judicial hearings, written
36 decisions, and review procedures retain formal significance, but their practical
37 impact depends on the institutional context in which they operate.

38 Both Azerbaijan and Turkey illustrate how structural constraints transform
39 rights-based guarantees into routine or formally compliant processes. While the
40 mechanisms differ—routinization in Azerbaijan and institutional design
41 combined with political context in Turkey—the outcome is similar: the practical
42 effectiveness of legal protections is diminished.

43 This underscores the importance of institutional analysis. Without
44 examining how courts are structured, how review functions, and how systemic
45 pressures influence decision-making, deficiencies in detention practices may
46 appear as isolated legal errors rather than structural phenomena.

1 Structural silence thus describes a condition in which legal norms remain
 2 formally present but are progressively weakened through their institutional
 3 application. Courts continue to function, procedures are followed, and legal
 4 language is maintained; however, the capacity of these mechanisms to provide
 5 meaningful protection is significantly reduced.

8 **Normalization and Systemic Consequences**

10 A direct consequence of the structural deficiencies identified above is the
 11 normalization of extended pre-trial detention. Pre-trial detention is formally
 12 defined under Article 5 of the European Convention on Human Rights (ECHR)
 13 as a measure of last resort.³¹

14 The transformation of extended detention into a normalized practice does
 15 not occur through formal amendments to the law, but rather through its repeated
 16 application in circumstances that fail to satisfy the criteria of necessity and
 17 proportionality. Over time, practices that were originally intended to be
 18 exceptional gradually become routine, while the threshold required to justify
 19 detention correspondingly decreases.³²

20 An essential characteristic of this normalization is the erosion of the
 21 presumption of innocence. Although the presumption of innocence remains a
 22 fundamental principle of criminal justice, the pervasive use of extended pre-trial
 23 detention — particularly where such detention is prolonged and insufficiently
 24 justified — results in a de facto treatment of defendants as guilty prior to
 25 conviction.³³ Thus, detention, instead of functioning as a preventive measure,
 26 begins to resemble a form of anticipatory punishment.

27 This shift is further reinforced by the patterns identified above. Where courts
 28 repeatedly invoke vague risks without conducting an individualized assessment
 29 of the specific circumstances of each case, detention decisions become detached
 30 from concrete facts. As a result, the distinction between justified and unjustified
 31 detention becomes increasingly blurred.³⁴

32 Moreover, the normalization process affects the distribution of power within
 33 the criminal justice system. As judicial reasoning becomes standardized and
 34 review mechanisms operate to affirm rather than critically assess detention
 35 decisions, the balance between individual liberty and state authority shifts in
 36 favour of the latter. Judicial oversight thereby risks losing its protective function
 37 and instead becomes a mechanism for legitimizing detention.³⁵

38 In parallel, accountability mechanisms are weakened. The absence of
 39 detailed and case-specific reasoning limits the ability of higher courts and

³¹European Court of Human Rights, *Letellier v France*, App no 12369/86 (1991).

³²Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the ECtHR* (CUP 2015).

³³European Court of Human Rights, *Allen v United Kingdom* [GC], App no 25424/09 (2013).

³⁴Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the ECHR* (2009).

³⁵David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press 2016)

1 international bodies to conduct effective review.³⁶ Without clear justification, it
 2 becomes difficult to determine whether detention complies with Convention
 3 standards, allowing problematic practices to persist over time.

4 Furthermore, normalization contributes to the institutionalization of
 5 detention as a default procedural response. The repeated use of detention without
 6 meaningful scrutiny marginalizes alternative measures, such as bail or reporting
 7 obligations. Consequently, deprivation of liberty ceases to function as a measure
 8 of last resort and instead becomes a routine response to criminal suspicion.³⁷

9 Taken together, these developments illustrate how structural silence
 10 operates at a systemic level. Legal norms remain formally in place, and courts
 11 continue to invoke them; however, institutional practices shape their application
 12 in ways that significantly reduce their practical effect.

13 The law does not disappear, but its capacity to meaningfully constrain state
 14 power is diminished.³⁸

15 As noted by Kanstantsin Dzehtsiarou, the effectiveness of the Convention
 16 system depends largely on the quality of reasoning provided by domestic
 17 courts.³⁹ Where such reasoning becomes superficial or repetitive, the protective
 18 value of Convention rights is correspondingly weakened.

19 Ultimately, the normalization of pre-trial detention reflects a broader shift:
 20 from exception to routine, from justification to assumption, and from substantive
 21 protection to mere formal compliance. This transformation is not the result of
 22 isolated failures, but rather of structural conditions that reshape how legal
 23 safeguards are applied in practice.⁴⁰

26 **Structural Silence and the Limits of Human Rights Law**

27
 28 These results indicate that the weaknesses evident in both Azerbaijan and
 29 Turkey cannot be explained by poor implementation or isolated judicial errors;
 30 instead, they reflect a deeper structural trend whereby the protective purpose of
 31 Article 5 is incrementally eroded from within. The importance of this finding
 32 lies in the fact that the formal legal framework remains unaltered. Courts
 33 continue to invoke legality, necessity, proportionality, and judicial review;
 34 hearings continue to take place; detention orders continue to be issued in legally
 35 compliant form; and review mechanisms continue to operate. However, the
 36 continued presence of these formal elements does not guarantee that liberty is
 37 protected in a substantive sense.

³⁶Council of Europe, *Pre-trial detention and its alternatives* (2018).

³⁷United Nations Office on Drugs and Crime, *Handbook on Strategies to Reduce Overcrowding in Prisons* (2013).

³⁸Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005).

³⁹Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015).

⁴⁰Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006).

1 It is at this point that the analytical potential of the concept of structural
2 silence becomes most apparent. Structural silence does not denote a situation in
3 which law is absent or explicitly rejected. Rather, it refers to situations in which
4 legal norms remain formally present and institutionally recognized, yet their
5 practical capacity to influence outcomes is progressively diminished. In the
6 context of pre-trial detention, this means that Article 5 continues to operate at
7 the level of doctrine and procedure, while its substantive protective force is
8 weakened through routine institutional practice. The result is not overt illegality,
9 but a form of “hollowed” legality, in which apparent compliance exists while
10 protection diminishes in practice.⁴¹

11 One of the most critical implications of this dynamic is that it challenges a
12 strictly formalistic understanding of compliance. The fact that courts cite legal
13 bases, issue written decisions, and provide access to review may create the
14 appearance of Convention compliance. However, as the comparative analysis
15 demonstrates, such formal indicators are insufficient. The decisive question is
16 not whether legal terminology is used, but how that terminology functions in
17 context. Where judicial reasoning becomes standardized and predictable, review
18 processes become repetitive and pro forma, and detention is extended without
19 genuinely renewed justification, legal guarantees are transformed into
20 procedural rituals. In such circumstances, legality is performed rather than
21 meaningfully applied.⁴²

22 From this perspective, the problem in both Azerbaijan and Turkey is not
23 merely that judges occasionally fail to reason correctly. A more profound
24 concern is that institutional environments foster forms of reasoning that are
25 structurally incapable of giving full effect to Article 5. In Azerbaijan, this occurs
26 through routinized and repetitive judicial practice, which limits opportunities for
27 individualized assessment. In Turkey, institutional arrangements combined with
28 political context—particularly in cases involving journalists, opposition actors,
29 and civil society representatives—reinforce similar tendencies. Despite these
30 differences, the outcome is comparable: detention decisions are produced within
31 institutional settings that normalize deference, standardize decision-making, and
32 limit meaningful scrutiny.⁴³

33 Structural silence also helps explain why repeated criticism by the European
34 Court of Human Rights and other international bodies has not produced
35 substantial reform. Persistent deficiencies cannot be attributed solely to
36 ignorance of Convention standards. In many instances, domestic authorities
37 possess detailed knowledge of those standards. However, this knowledge is
38 filtered through institutional routines, hierarchical structures, efficiency
39 pressures, and broader political considerations that shape how standards are
40 applied. Consequently, the gap between Strasbourg doctrine and domestic

⁴¹Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005).

⁴²David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press 2016).

⁴³Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006).

1 practice is sustained not only by resistance, but also by the ordinary functioning
2 of legal systems themselves.⁴⁴

3 Another important implication concerns the temporal logic of Article 5
4 protection. The Convention framework requires that justification for detention
5 becomes increasingly stringent over time. However, where domestic systems
6 rely on generalized and repetitive reasoning, this logic is effectively reversed.
7 Instead of continued detention requiring stronger justification, it becomes easier
8 to maintain. Initial suspicion is given disproportionate weight, while subsequent
9 reviews reproduce earlier assumptions. In this way, structural silence transforms
10 detention from an exceptional interference with liberty into a sustainable
11 administrative practice.⁴⁵

12 In addition, structural silence should be understood as a problem of
13 institutional momentum. Once detention has been ordered, various components
14 of the system begin to operate in ways that support its continuation. Prosecutorial
15 narratives acquire de facto authority; courts are reluctant to depart from prior
16 decisions; and review bodies often assess continuity rather than necessity.
17 Through this process, detention gains a form of internal stability that is difficult
18 to challenge. What begins as a legally reviewable measure gradually evolves into
19 a self-sustaining procedural status.⁴⁶

20 A broader normative implication is that rights may be eroded not only
21 through overt violations, but also through institutionalization. This is particularly
22 significant in democratic or semi-democratic systems, where the weakening of
23 rights does not necessarily occur through explicit derogation, but through
24 repetition, administrative convenience, and formally lawful procedures. These
25 characteristics make structural silence difficult to detect and address, as systems
26 may appear compliant while enabling diminished protection in practice.⁴⁷

27 The comparative findings from Azerbaijan and Turkey therefore support a
28 broader conclusion regarding the Convention system. The effectiveness of
29 Article 5 cannot be assessed solely by the existence of formal safeguards or
30 judicial review mechanisms. Its real effectiveness depends on whether domestic
31 institutions are capable of translating those safeguards into substantive decision-
32 making practices. Where reasoning becomes formulaic and review becomes
33 confirmatory rather than critical, the protective logic of the Convention is not
34 formally denied, but is materially weakened.⁴⁸

35 The value of the concept of structural silence lies in its ability to capture this
36 space between formal compliance and explicit violation. It explains how legal
37 systems may continue to employ the language of rights while diminishing their
38 practical effect. This is particularly relevant in the context of pre-trial detention,

⁴⁴Antoine Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges' (2009) 7(2) Human Rights Law Review.

⁴⁵Buzadji v Moldova [GC] App no 23755/07 (ECtHR, 5 July 2016) paras 87–102.

⁴⁶Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006).

⁴⁷Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006).

⁴⁸Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015).

1 where decisions are often justified through legally recognizable categories that
 2 may conceal the extent to which judicial scrutiny has weakened. Structural
 3 silence thus provides a framework for understanding such patterns as systemic
 4 rather than incidental.

5 Ultimately, the experiences of Azerbaijan and Turkey demonstrate that the
 6 protection of liberty under Article 5 depends not only on the existence of legal
 7 standards, but on the integrity of the institutional environments in which those
 8 standards operate. Where institutional conditions—such as routine reliance on
 9 formulaic reasoning, standardization of decisions, and limited scrutiny—favor
 10 the continuation of detention over its justification, formal safeguards remain in
 11 place but lose much of their practical effectiveness in constraining state power.⁴⁹
 12
 13

14 **Conclusion**

15
 16 This This paper has argued that the deficiencies observed in the pre-trial
 17 detention practices of Azerbaijan and Turkey should not be understood merely
 18 as instances of imperfect implementation or occasional judicial failure. Rather,
 19 they reveal a deeper structural problem concerning the relationship between
 20 formally recognized legal guarantees and the institutional environments in which
 21 those guarantees are applied. Although Article 5 of the European Convention on
 22 Human Rights establishes an extensive framework for the protection of liberty,
 23 the comparative analysis in this paper demonstrates that the existence of legal
 24 safeguards does not by itself ensure meaningful protection in practice.

25 The examination of both jurisdictions shows that the central problem lies
 26 not in the absence of legal norms, but in the way those norms are operationalized.
 27 In both Azerbaijan and Turkey, detention decisions continue to be expressed in
 28 the language of legality, necessity, proportionality, and judicial review. Yet the
 29 practical functioning of these concepts is weakened by routinized reasoning,
 30 insufficiently individualized assessment, limited scrutiny, and institutional
 31 settings that favor the continuation of detention over rigorous justification. As a
 32 result, the formal structure of rights remains visible, while their substantive
 33 protective value is reduced.

34 It is precisely this gap that the concept of structural silence helps to explain.
 35 Structural silence captures a condition in which law continues to exist, continues
 36 to be invoked, and continues to appear operative, but increasingly loses its ability
 37 to shape outcomes in a meaningful way. In this sense, the problem is not one of
 38 open rejection of Article 5, but of internal erosion. Protection is weakened not
 39 because the legal framework disappears, but because institutional practice
 40 gradually empties that framework of much of its practical force. This makes
 41 structural silence particularly important as an analytical category: it directs
 42 attention away from isolated violations and toward the systemic conditions
 43 through which rights are transformed into formalities.

⁴⁹Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006).

1 The comparative dimension of this paper further demonstrates that
2 structural silence is capable of emerging through different institutional pathways.
3 In Azerbaijan, it is most clearly reflected in habitual and repetitive judicial
4 reasoning, the routine use of generalized clearly reflected in habitual and
5 repetitive judicial reasoning, the routine use of generalized justifications, and
6 review mechanisms that often fail to reassess the necessity of detention in a
7 meaningful way. In Turkey, while similar problems of generalized reasoning and
8 weak scrutiny are present, the analysis also shows the importance of institutional
9 design and political context, especially in proceedings involving journalists,
10 opposition actors, and civil society representatives. The mechanisms are
11 therefore not identical. However, the convergence of outcomes in both
12 jurisdictions suggests that structural silence should be understood as a broader
13 institutional phenomenon rather than as a country-specific anomaly.

14 The analysis also highlights a more fundamental point about the Convention
15 system itself. The effectiveness of Article 5 depends not only on doctrinal clarity
16 at the Strasbourg level, but also on the capacity of domestic institutions to
17 internalize and apply Convention standards substantively. Where domestic
18 courts rely on formulaic reasoning, reproduce prosecutorial narratives without
19 sufficient scrutiny, or treat review as a formal repetition rather than a genuine
20 safeguard, the Convention's logic of protection is weakened from within. In such
21 circumstances, compliance is maintained at the level of appearance, but not at
22 the level of effect.

23 This is particularly visible in the temporal dimension of detention. The
24 jurisprudence of the European Court of Human Rights makes clear that
25 continued detention must be justified through increasingly specific and
26 compelling reasons. Yet the comparative findings of this paper indicate that,
27 under structurally constrained domestic conditions, this logic can be reversed.
28 Instead of prolonged detention becoming harder to justify, it may become easier
29 to sustain. Initial suspicion acquires continuing force, subsequent review
30 becomes confirmatory, and detention gradually shifts from an exceptional
31 measure into an administratively normalized response. This reversal is one of
32 the clearest illustrations of how structural silence operates in practice.

33 A further implication of the analysis is that rights may be weakened not only
34 by dramatic or openly unlawful state conduct, but also by ordinary institutional
35 processes. Repetition, efficiency pressures, bureaucratic routine, and deference
36 to established forms of reasoning may together produce outcomes that are
37 inconsistent with the substantive purpose of Article 5, even while remaining
38 formally compatible with its language. This makes the problem especially
39 difficult to detect. Systems affected by structural silence may continue to appear
40 rights-compliant, precisely because they preserve the vocabulary and procedures
41 of legality.

42 For this reason, the article suggests that the study of detention under Article
43 5 must move beyond a narrow focus on formal compliance and isolated doctrinal
44 breaches. A more complete understanding requires attention to how courts
45 reason, how review mechanisms operate, how institutional incentives shape
46 decision-making, and how certain patterns become normalized over time.

1 Without such analysis, the weakening of liberty protection may remain obscured
2 behind the formal appearance of legality.

3 While this research has shown that the problems observed in Azerbaijan and
4 Turkey cannot be explained by individual instances of noncompliance, they are
5 better understood as reflecting broader systemic influences on how legal
6 standards operate in practice.

7 Both countries have incorporated the necessary protections under Article 5
8 ECHR into their legal frameworks; however, the extent to which these safeguards
9 provide meaningful protection is significantly shaped by institutional environments
10 in which procedural correctness often outweighs substantive review.

11 The gap between legal norms and their practical application should therefore
12 be understood not simply as a problem of enforcement, but as a transformation
13 in how those norms function within institutional settings.

14 Ultimately, the comparative experience of Azerbaijan and Turkey
15 demonstrates that the protection of liberty under Article 5 is inseparable from the
16 institutional conditions in which legal standards are applied. Rights do not lose
17 their effectiveness only when they are openly denied; they may also lose
18 effectiveness when they are routinely invoked but insufficiently realized. The
19 core contribution of this paper, therefore, is to show that structural silence
20 provides a useful framework for understanding how formally recognized
21 guarantees can remain legally present yet become substantively fragile. In the
22 context of pre-trial detention, this insight is particularly significant, because it
23 reveals that the real challenge is not simply to restate legal principles, but to
24 ensure that the institutions responsible for applying them remain capable of
25 giving those principles meaningful protective effect
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