HABEAS CORPUS IN THE SUPREME COURT'S DOCKET

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I. Introduction

This is a scoping study of all '*habeas corpus*' matters filed in the Indian Supreme Court from 2000 to August 29, 2023. *Habeas corpus* is a writ that is issued to set a person free from illegal detention. The detention which is challenged to be 'illegal' may be of several kinds:

a. Preventive Detention: The State detains an individual apprehending that she is likely to commit an offence in the near future.

b. Enforced Disappearance: A State authority, such as the police or an armed force, picks up an individual without the authority of law.

c. Continued arrest: Despite being acquitted of criminal charges by a competent court, the individual continues to be detained in jail for no reason.

d. Detention by private actors:[1] A child is removed from the custody of its parent(s), an individual is forcibly confined to prevent her from exercising her choice of marriage or relationship, etc.

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1 E.g. Nirmaljit Kaur (2) v. State of Punjab, (2006) 9 SCC 364; Rashmi Ajay Kumar Kesharwani v. Ajay Kumar Kesharwani, (2012) 11 SCC 190; Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42.

In an earlier paper, I examined the Supreme Court's behaviour in a specific kind of *habeas corpus* matters—i.e., those involving preventive detention.[2] It was found that by the time a preventive detention case was decided by the Supreme Court, the detenu would already have spent about 9-10 months in detention on an average.[3] The statistics in that paper are based on data obtained from judgments reported on 'SCC Online', a privately-owned online legal research tool.[4] However, no similar empirical study is available for *habeas corpus* matters as a class. As the above list would show, all *habeas corpus* matters implicate the fundamental right to personal liberty under Article 21 of the Indian Constitution. Therefore, Indian courts have traditionally accorded great importance to *habeas corpus* matters—for instance, the ordinary rule that writs are issued only against the State has been relaxed for *habeas corpus* matters.[5]

II. Methodology

On July 20, 2023, I applied to the Central Public Information Officer, Supreme Court of India ("**CPIO**") under the Right to Information Act, 2005 seeking a list of all Writ Petitions and Special Leave Petitions filed in the Supreme Court in or after the year 2000 under the category '*habeas corpus*'. The CPIO responded on August 29, 2023 with a list of Diary Numbers and Case Titles of all *habeas corpus* matters for the indicated period (total 1171).[6] Accordingly, this scoping study was conducted on the data received from the CPIO.

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2 Shrutanjaya Bhardwaj, 'Preventive Detention, Habeas Corpus and Delay at the Apex Court: An Empirical Study', 13 NUJS L. Rev. 2 (2020).

3 Id.

4 See 'About Us', SCC Online, available at https://www.scconline.com/about-us, last accessed March 7. 2024.

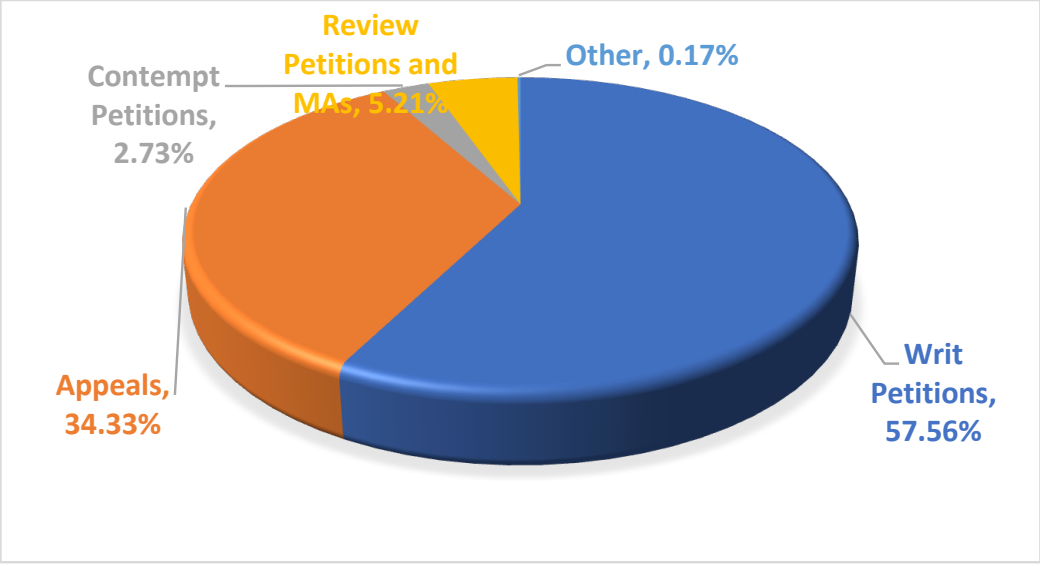
5 Mohd. Ikram Hussain v. State of U.P., (1964) 5 SCR 86, ¶12.

6 The response received from the CPIO is available on OneDrive https://onedrive.live.com/?authkey=%21AHR5McYz%5FnAflV4&id=C7D445193D6E97A7%2119262&cid=C7D445193D6E97A7&parId=root&parQt=sharedby&o=OneUp

Using the Diary Numbers in the CPIO's reply, the researchers collected further information from the website of the Supreme Court of India (main.sci.gov.in): Case Type, Date of Filing, Date of Registration, Date of Disposal, and Number of Hearings. The following parts of this paper discuss the findings of the scoping study. Readers may note that the dates of 'Filing' and 'Registration' are different because after a case is 'filed' in the Supreme Court, the Court's registry scrutinizes the case file for defects, and if any defects are found, communicates them to the filing advocate. The case gets 'registered' once the defects are cured (or if none are found). Owing to the steps involved in this process, the date of 'Registration' is mostly different from the date of 'Filing'.

III. Case Types

Of the 1171 cases studied, there are 674 Writ Petitions, 402 Appeals/SLPs,[7] 61 Review Petitions, 32 Contempt Petitions, 1 Curative Petition and 1 Transfer Petition.



7 A Special Leave Petition ('SLP') is filed under Article 136 of the Indian Constitution seeking permission from the Supreme Court to appeal against a judgment passed by another court, typically a High Court, because no right to appeal exists from such judgment.

One striking aspect is the small number of appeals and SLPs (402). In other empirical studies focussing on High Courts, approximately 9,000 judgments passed by High Courts in preventive detention matters in or after the year 2000 have been examined.[8] The figure of ~9,000 only pertains to judgments that are reported on SCC Online and is probably smaller than the actual number of judgments passed by the High Courts. In contrast, merely 402 appeals/SLPs were filed in the Supreme Court. In other words, most judgments rendered by High Courts in *habeas corpus* matters generally, and preventive detention matters specifically, are not carried in appeal to the Supreme Court. The reason for this is not clear. To speculate, however, this is likely because the High Courts allowed most of the aforesaid 9,000 petitions,[9] and the State may not have felt the need to detain the concerned individual for any further period. Alternatively, since most laws do not allow preventive detention for more than one year, and since High Courts also take more than six months to decide *habeas corpus* petitions, litigants may feel that any appeal or SLP filed before the Supreme Court may become infructuous before it is decided.

Another interesting aspect is the dominance of Writ Petitions in the docket (57.56%). Writ Petitions are filed under the Supreme Court's original jurisdiction under Article 32 of the Indian Constitution, which provides that the right to move the Supreme Court for the redressal of any fundamental right is "guaranteed".[10] The Supreme Court's understanding of this provision has changed

8 Shrutanjaya Bhardwaj, 'Empirical Study: Delay at the Madras High Court in Preventive Detention Cases', National Law School of India University Review (forthcoming 2024), available as an advance article at https://www.nlsir.com/advance-articles, last accessed March 7, 2024; Shrutanjaya Bhardwaj, 'High Courts, *Habeas Corpus* and Preventive Detention: Law and Practice', National Law School of India University (forthcoming 2024).

9 Id.

10 Constitution of India, 1950, Article 32.

drastically over time. In 1950, a six-judge bench rejected the argument that a petitioner challenging a Madras law must first approach the Madras High Court "as a matter of orderly procedure".[11] In view of the text of Article 32, the bench declared that the Supreme Court "*cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights*".[12] Another Constitution Bench affirmed this understanding in 1959, despite explicitly noting the concern that litigants may flood the Supreme Court with writ petitions.[13] Curiously, however, a new trend emerged in 1987 when smaller benches of the Supreme Court, without even referring to the earlier Constitution Bench judgments, held that writ petitioners must be relegated to High Courts.[14] In respect of *habeas corpus* petitions, a divison bench in 2002 went one step further, observing that petitioners invoking Article 32 in habeas corpus matters are "unscrupulous".[15] The Court held as under:

> "*Another aspect which has been highlighted is that many unscrupulous petitioners are approaching this Court under Article 32 of the Constitution challenging the order of detention directly without first approaching the High Courts concerned. It is appropriate that the High Court concerned under whose jurisdiction the order of detention has been passed by the State Government or Union Territory should be approached first. In order to invoke the jurisdiction under Article 32 of the Constitution to approach this Court directly, it has to be shown by the petitioner as to why the High Court has not been approached, could not be approached or it is futile to approach the High Court. Unless satisfactory reasons are indicated*

11 Romesh Thappar v. State of Madras, 1950 SCR 594 ¶3.
12 Id.
13 K.K. Kochunni v. State of Madras, 1959 Supp (2) SCR 316 ¶12.
14 Kanubhai Brahmbhatt v. State of Gujarat, 1989 Supp (2) SCC 310 ¶3; P.N. Kumar v. Municipal Corpn. of Delhi, (1987) 4 SCC 609.
15 Union of India v. Paul Manickam, (2003) 8 SCC 342 ¶22.

in this regard, filing of petition in such matters directly under Article 32 of the Constitution is to be discouraged."[16]

In view of these pronouncements, it is interesting to see the trend of filing of writ petitions over the years. The next part of this paper will study the year-wise number of habeas corpus cases filed in the Supreme Court. It will also specifically study as to what proportion of the filings every year were writ petitions.

IV. Year-wise filings

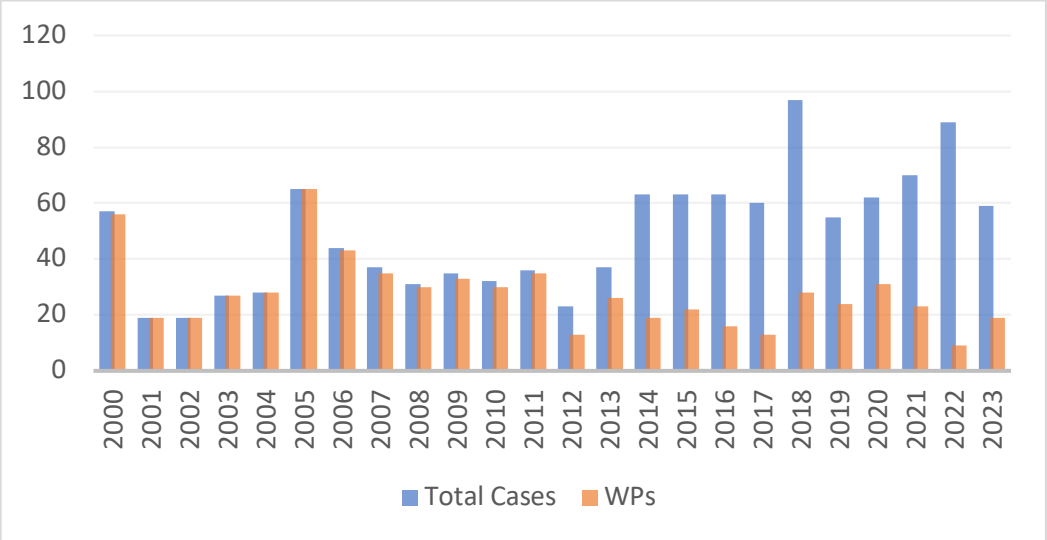
The year-wise number of *habeas corpus* cases filed in the Supreme Court are:

Year	Total cases	Writ petitions
2000	57	56
2001	19	19
2002	19	19
2003	27	27
2004	28	28
2005	65	65
2006	44	43
2007	37	35
2008	31	30
2009	35	33
2010	32	30
2011	36	35
2012	23	13
2013	37	26
2014	63	19
2015	63	22

[16] Id.

2016	63	16
2017	60	13
2018	97	28
2019	55	24
2020	62	31
2021	70	23
2022	89	9
2023	59	19

Speaking roughly, the total number of *habeas corpus* filings every year seem to have increased since the year 2014. However, no general observation is forthcoming from this data. What is more interesting is the proportion of writ petitions every year, which consistently seems to decrease after the year 2011. Until 2011, writ petitions constitute almost the entirety of habeas corpus cases filed in the Supreme Court. In the subsequent years, they are reduced to less than half—sometimes even close to only 10%—of the total cases. The following graph demonstrates this fluctuation:



There are, of course, two lessons from this data. The first is that prior to 2012, litigants barely filed appeals/SLPs against High

Court judgments in *habeas corpus* matters. That trend seems to emerge only 2012 onwards, though it is not clear why. The second is that the Supreme Court's avowed aim of "discouraging" habeas corpus petitions appears to be working.

V. Disposal time

Given that all *habeas corpus* matters implicate personal liberty in some way, it is critical for the Supreme Court to dispose of these matters with alacrity. The previous study revealed that the Supreme Court took about 5-6 months in deciding a preventive detention matter which, in most cases, was half of the maximum period of detention permitted under the relevant law.[17]

The larger dataset reveals a somewhat different picture. Taking all 1104 cases for which both the Date of Filing and the Date of Disposal were available,[18] the Supreme Court takes 213.35 days on an average to decide a case. The average figure for Writ Petitions is 225.42 days while that for Appeals/SLPs is 204.19 days. But these 'average' figures are somewhat distorted by a few cases with unusually large disposal periods, possibly because they involve questions of law that are to be decided by the Supreme Court after a detailed hearing. For example, the petitions challenging the twin bail conditions in the Prevention of Money Laundering Act, 2005 are also *habeas corpus* petitions which were filed in 2017 and are pending till date.[19] Readers may note, however, that it is not necessary for the detenu in all such cases to remain in illegal detention until the Court decides the matter.

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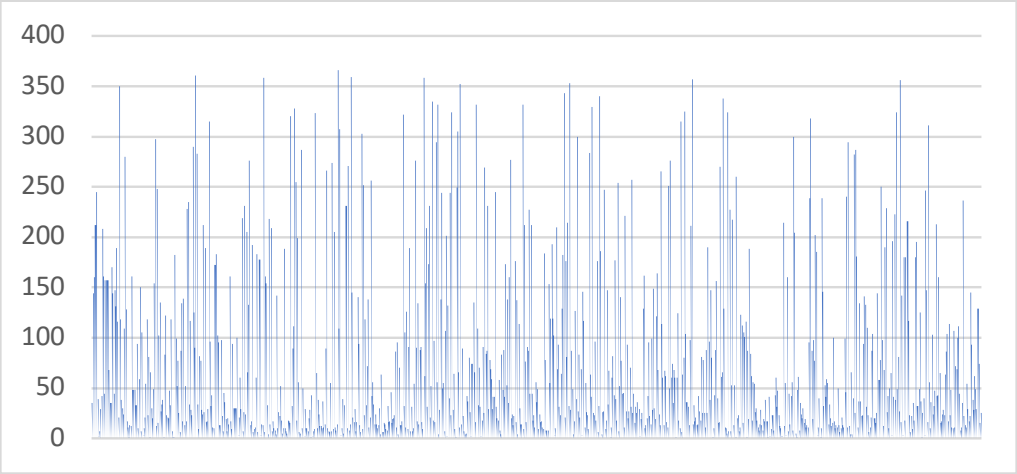
17 Shrutanjaya Bhardwaj, 'Preventive Detention, Habeas Corpus and Delay at the Apex Court: An Empirical Study', 13 NUJS L. Rev. 2 (2020).

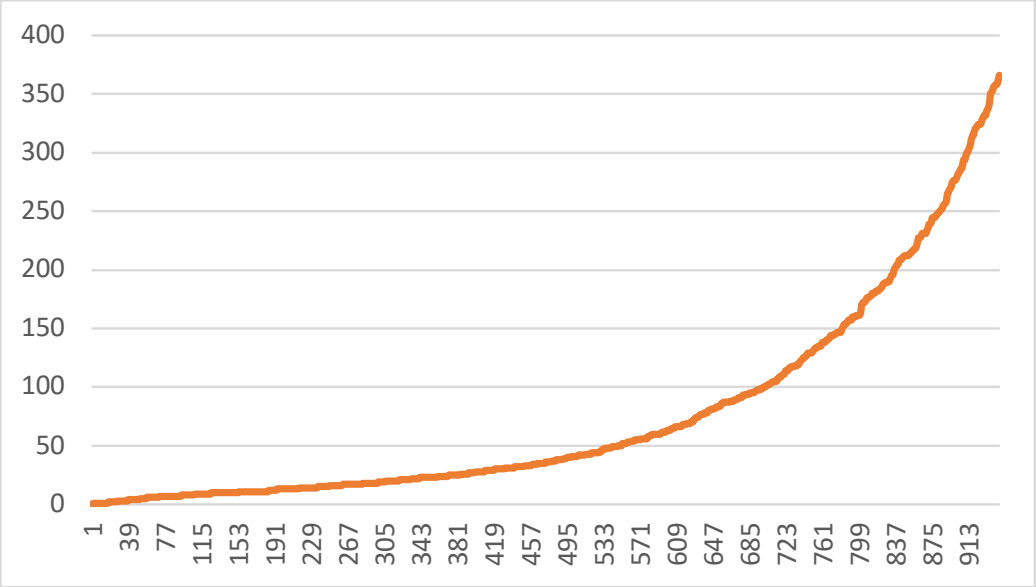
18 The other cases are either pending as on the date of writing this report, or have been 'lodged' by the registry for non-rectification of filing defects, which means that there is no official date of 'disposal' in these cases.

19 Vijay Madanlal Choudhary v. Union of India, Diary No. 21763/2017.

To get a more realistic picture of the Court's alacrity, therefore, we can reduce the dataset to study only the 938 cases where the case was disposed of within one year. A chronological plotting of these cases on a bar graph produces the following result:



The average figure for these set of cases is 75.27 days, i.e., two months and a half. For Writ Petitions, the average figure is 74.40 days, and for Appeals/SLPs, it is 70.12 days. In fact, most cases are decided in less than 50 days. At the same time, many cases touch the 350 day-mark as well. There does not seem to be any consistent increase or decrease in the Court's speed with the passing years. The information in the above graph can be re-plotted in increasing order of the number of days taken by the Court to dispose of the matter (as opposed to chronologically) to give a clearer picture of the number of cases in which the time taken is relatively higher. The following picture would emerge after the re-plotting:



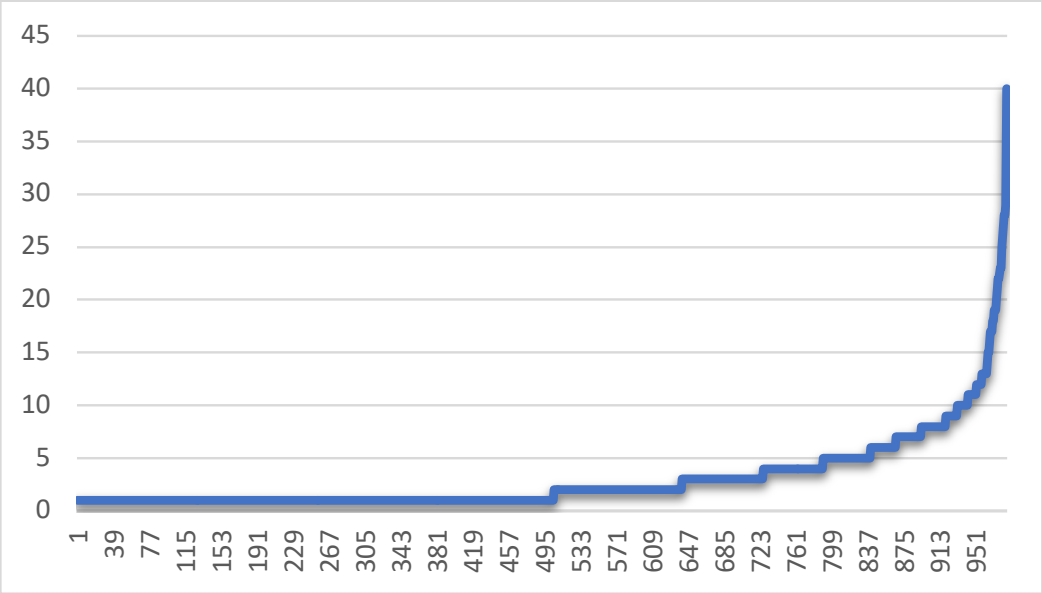
While these figures present a better picture than the figures revealed in the previous study focussed on preventive detention, there is significant scope for improvement. A Court that prioritises *habeas corpus* matters should endeavour to dispose them of within two weeks. Two months and a half are too long a time for any person to spend in potentially-illegal detention. Further, many of these cases are Appeals/SLPs filed against High Court judgments, and so the total time spent by the detenu/ person in illegal detention is likely much more than simply two months and a half. Equally so in preventive detention cases in which the detenu would have spent a few months before the Advisory Board prior to approaching the Court, even though approaching the Court is not strictly barred pending proceedings before the Advisory Board.[20]

VI. Number of hearings

Another parameter to measure the Court's alacrity is the number of hearings taken by the Court to decide a *habeas corpus* case. Of the 1171 cases, 984 cases were found to be disposed of. In these

[20] Prabhu Dayal Deorah v. Distt. Magistrate, Kamrup, (1974) 1 SCC 103 ¶16.

984 cases, the average number of hearings taken by the Court to dispose of a matter is 3.07, which could appear reasonable at first blush. If these values are plotted on a graph in ascending order, the following picture emerges:



However, on closer inspection, it emerges that most cases (504 out of 984 cases) were disposed of on the very first hearing, thus bringing down the average number of hearings for the entire dataset. It is only from the 505th case in the dataset that the number of hearings rise above 1. Equally, there are some cases with unusually large number of hearings (close to 40) which would pull the overall average in the other direction. If all the single-hearing orders are removed from the dataset, the average number of hearings in the balance cases (480 cases) is 5.25 hearings, while the median value is 4 hearings.

At least as far as preventive detention is concerned, the Court can very well decide the matter in two hearings. There should be no requirement of a "counter-affidavit" in these matters other than a simple production of the grounds of detention. This is because a counter-affidavit cannot supplement or add to the grounds of

detention.[21] In fact, if the counter-affidavit discloses new material which was not communicated to the detenu even though he was detained based on such material, the detention would breach Article 22.[22] As such, the requirement of filing a "counter-affidavit" should be dispensed with entirely in preventive detention proceedings, and the case law to the contrary should be revisited.[23]

VII. Conclusion

The purpose of this scoping study was to provide a springboard for further research into the Supreme Court's *habeas corpus* docket. Information obtained from the Supreme Court's CPIO was analysed based on the case types, year-wise distribution of case filings (including the proportional distribution of writ petitions), disposal time taken by the Supreme Court in *habeas corpus* cases over the years, and the number of hearings ordinarily spent by the Court in such cases. Some broad observations made in this paper are:

1. Most *habeas corpus* cases filed in the Supreme Court in or after the year 2000 are 'writ petitions' filed under the Court's original jurisdiction.

2. In the initial few years up to 2012, hardly any appeals/SLPs were filed in the Supreme Court against judgments passed by High Courts in habeas corpus matters. In and after 2012, the number of appeals/SLPs has suddenly shot up.

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21 State of Bombay v. Atma Ram Sridhar Vaidya, 1951 SCR 167 [Kania, C.J. (for himself and 2 others)] ¶¶9-10,17; Ramveer Jatav v. State of U.P., (1986) 4 SCC 762 ¶2.

22 Sk. Hanif v. State of W.B., (1974) 1 SCC 637 ¶¶11,14; Sasthi Keot v. State of W.B., (1974) 4 SCC 131 ¶2; Fogla v. State of W.B., (1974) 4 SCC 501 ¶¶3-4.

23 See, e.g., Sebastian M. Hongray v. Union of India, (1984) 1 SCC 339 ¶31, holding that the normal practice in habeas corpus proceedings is to issue notice and seek a counter-affidavit from the respondents. These observations should be read only as implying that notice is essential and the matter would ordinarily not be decided *ex parte*.

3. The Supreme Court's deliberate "discouragement" of writ petitions appears to have had some effect on the number of writ petitions filed after 2011-12.

4. The disposal time of *habeas corpus* cases, along with the number of hearings being spent by the Court on each case, does not paint an ideal picture and leaves a lot to be desired in terms of judicial alacrity.

Unfortunately, the brevity of the Court's orders in most cases makes it tricky to identify the precise category of *habeas corpus* case being studied (e.g., preventive detention, enforced disappearance, prolonged custody, unlawful confinement, etc.). Further research can be conducted by accessing the actual case files in these cases and studying the facts of the cases.