Empirical study: Delay at the Madras High Court in Preventive Detention cases

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This study was made possible by the sincere efforts of the following Researchers:

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EMPIRICAL STUDY: DELAY AT THE MADRAS HIGH COURT IN PREVENTIVE DETENTION CASES

~ Shrutanjaya Bhardwaj[#]

I. Introduction

This paper presents empirical data on the delay at the Madras High Court in adjudication of *habeas corpus* petitions in preventive detention cases.

A. *Background: A study of the Supreme Court*

A 2020 research paper published in the NUJS Law Review conducted an empirical study of the Indian Supreme Court's alacrity in deciding *habeas corpus* petitions arising out of preventive detention cases.[1] All reported *habeas corpus* judgments of the Supreme Court in the twenty-year period from 2000 to 2019 were studied using the 'SCC Online' research tool. Based on the dates available from these judgments—i.e., date of issuance of preventive detention order, dates of actual detention, date of filing of the *habeas corpus* petition (in case of Article 32 petitions) or of the special leave petition (in case of Article 226 petitions) in the Supreme Court, and date of final disposal by the Supreme Court—the following time periods were calculated:

i. Time lapsed from the date of detention to the date of final disposal;
ii. Time taken by the Supreme Court in disposing of the *habeas corpus* petition; and
iii. Time spent in actual detention till the Supreme Court disposed of the petition.

The following 'average' figures were found for the above 3 aspects respectively:[2]

i. 953 days,

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[1] Shrutanjaya Bhardwaj, *Preventive Detention, Habeas Corpus and Delay at the Apex Court: An Empirical Study*, 13 NUJS L. REV. 2 (2020), available at http://nujslawreview.org/wp-content/uploads/2020/08/13.2-Bhardwaj-Preventive-Detention-3.pdf, last accessed on 10 September 2022.

[2] Id., p. 12.

ii. 528 days, and

iii. 344 days, of which the Supreme Court was seized of the matter for 111 days.

Since preventive detention laws permit the government to detain persons for a maximum period of one year, the delay on part of the Supreme Court is dismaying.[3]

Further, the 2020 study found 20 cases in which the Supreme Court was the first relief-granting court, i.e., the first court to quash the detention order. In 4 of these cases, the Court granted relief after the detenu had already spent one year in preventive detention. In 5 cases, the relief came after *almost* one year (between 350 and 366 days) had passed. In total 16 cases including the 9 aforementioned, the relief came after more than 6 months had lapsed.[4] On an average, in these 20 cases, a detenu spent 278 days (9 months) in illegal detention before the Supreme Court granted relief,[5] of which ninety-five days (>3 months) were spent agitating the matter at the Supreme Court level.[6]

B. <u>Choice of the Madras High Court</u>

Most *habeas corpus* petitions are presumably filed in High Courts, not the Supreme Court. A preliminary SCC Online search for High Court judgments from 2000 till January 2022 revealed approximately 14,500 results for the keyword "*habeas corpus*" used conjunctively with "*detention*"/ "*detained*" (as opposed to ~250 results for Supreme Court). Hence, for a fuller picture of judicial alacrity in preventive detention matters, the trends at the High Court-level must also be studied.

Of the aforesaid 14,500 results, an overwhelming majority—over 8,500—pertained to the Madras High Court alone. Therefore, the Madras High Court (hereinafter "**the Court**") was an obvious first choice to replicate the Supreme Court study.

[3] Id., p. 14.
[4] Id., pp. 14-15.
[5] Id.
[6] Id., p. 16.

C. *Methodology*

The Lead Researcher/Author studied the aforesaid 8,500 'SCC Online' results to filter out the judgments dealing with preventive detention.[7] 7,448 results were found matching the criterion. The names and citations of these judgments were noted in an Excel sheet. Other details including the petition nomenclature & number, the statutes involved, date of the detention, date of the judgment, and outcome of the case were also noted. The collated data was shared with the Researchers who meticulously pulled out other information from the Court's website[8] (such as date of filing of the petition, number of hearings etc.) and corrected certain inaccuracies that were present in the information collected from SCC Online.

D. *Structure*

The theoretical aspects of preventive detention law—including Article 22, statutory provisions, and the history and importance of the writ of *habeas corpus*—are discussed in the Supreme Court study referred to above,[9] and more extensively in prior literature.[10] As such, that discussion is not replicated in this paper.

The structure of this paper is as follows. Part II presents a bird's eye view of preliminary data including the year-wise, statute-wise and outcome-wise distribution of the cases under study. Part III discusses the data pertaining to the time taken by the Court in deciding *habeas corpus* petitions in preventive detention matters generally. Part IV narrows the discussion and focuses only on the time taken in deciding the "*successful*" petitions, i.e., those which result in the detention being set aside. Part V discusses the rare few (though critical) cases where the period of preventive detention—one year or six months, depending on the statute involved—lapsed while the Court was seized of the

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[7] Some of these cases did not concern preventive detention and involved unlawful detention by private parties or punitive detention by the State, e.g.

[8] Madras High Court, http://hcmadras.tn.nic.in/, last accessed on 10 September 2022.

[9] Bhardwaj, *supra* note 1, Parts II & III.

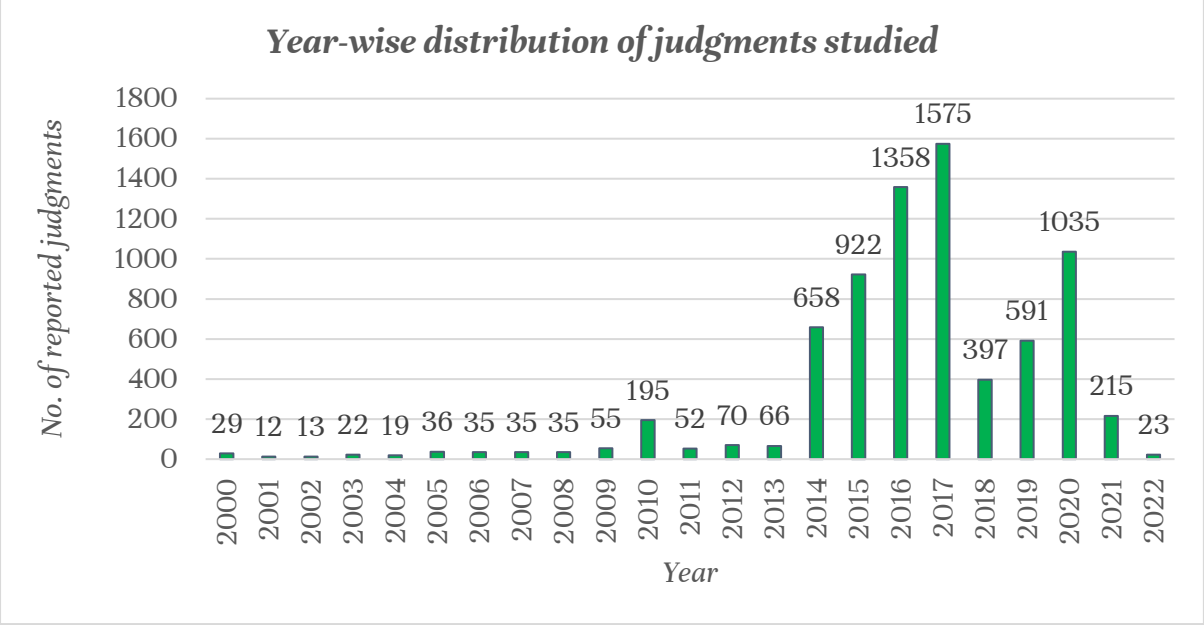
[10] *See* Pradyumna K. Tripathi, *Preventive Detention: The Indian Experience*, 9(2) AM. J. COMP. LAW 219 (1960); David H. Bayley, *The Indian Experience with Preventive Detention*, 35(2) PACIFIC AFFAIRS 99 (1962); Charles Henry Alexandrowicz, *Personal Liberty and Preventive Detention*, 3(4) JILI 445 (1961); Derek P. Jinks, *The Anatomy of an Institutionalised Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INTL. L. 311 (2001); Niloufer Bhagwat, *Institutionalising Detention without Trial*, 13(11) EPW 510 (1978).

petition. Part VI discusses the interesting category of cases in which the government "*revoked*" the detention order a few weeks or months after issuance, thus rendering the detenu's challenge before the Court infructuous.

II. Bird's eye view

As aforesaid, 7,448 cases were found relevant for the purpose of this study. A list of these 7,448 judgments with corresponding information is annexed as *Annexure-A*.

The year-wise distribution[11] of these judgments is reflected in the chart below:[12]



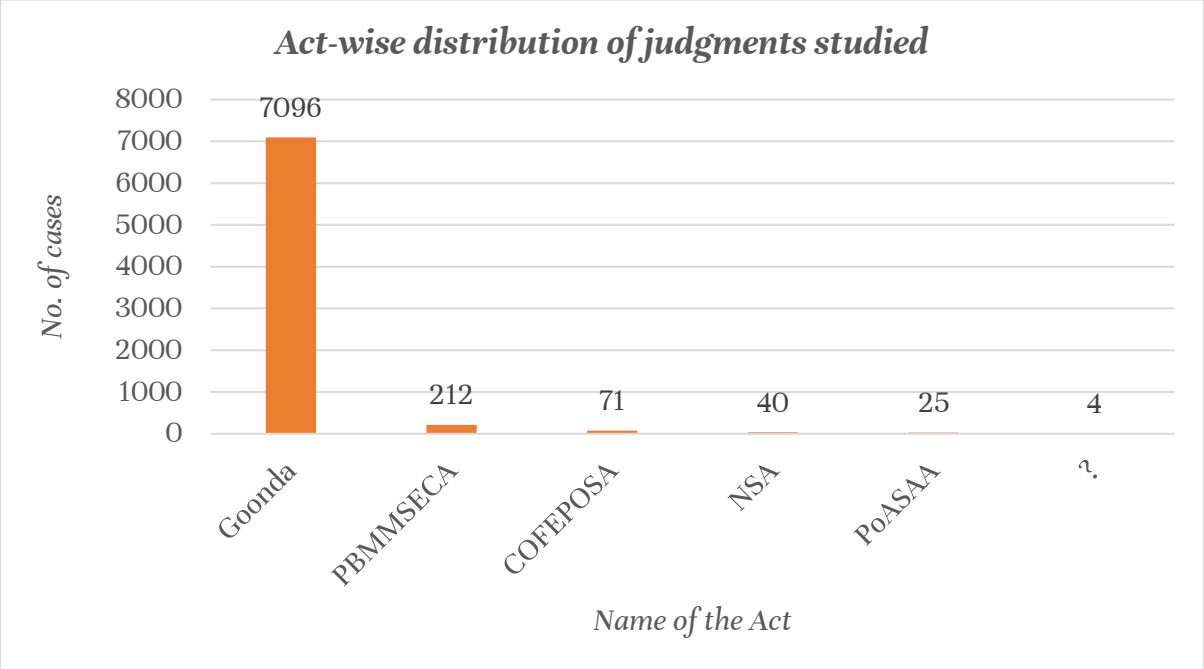
Nearly all the 7,448 cases involved preventive detention under one of the following 5 laws:

1. The Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Cyber law offenders, Drug offenders, Forest-offenders, Goondas, Immoral Traffic Offenders, Sand offenders, Sexual-offenders, Slum-grabbers and Video Pirates Act, 1982 ("**Goonda Act**");
2. The Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 ("**PBMMSECA**");

[11] For the year 2022, data was only collected for the month of January.
[12] No reason could be ascertained for the spike in the number of cases during 2014-17 and in 2020.

3. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (“**COFEPOSA**”);
4. National Security Act, 1980 (“**NSA**”); and
5. Puducherry Prevention of Anti-Social Activities Act, **2008** (“**PoASAA**”).

Additionally, for 4 cases, the name of the law under which the preventive detention powers were exercised could not be ascertained. The Act-wise distribution of cases is shown in the chart below:



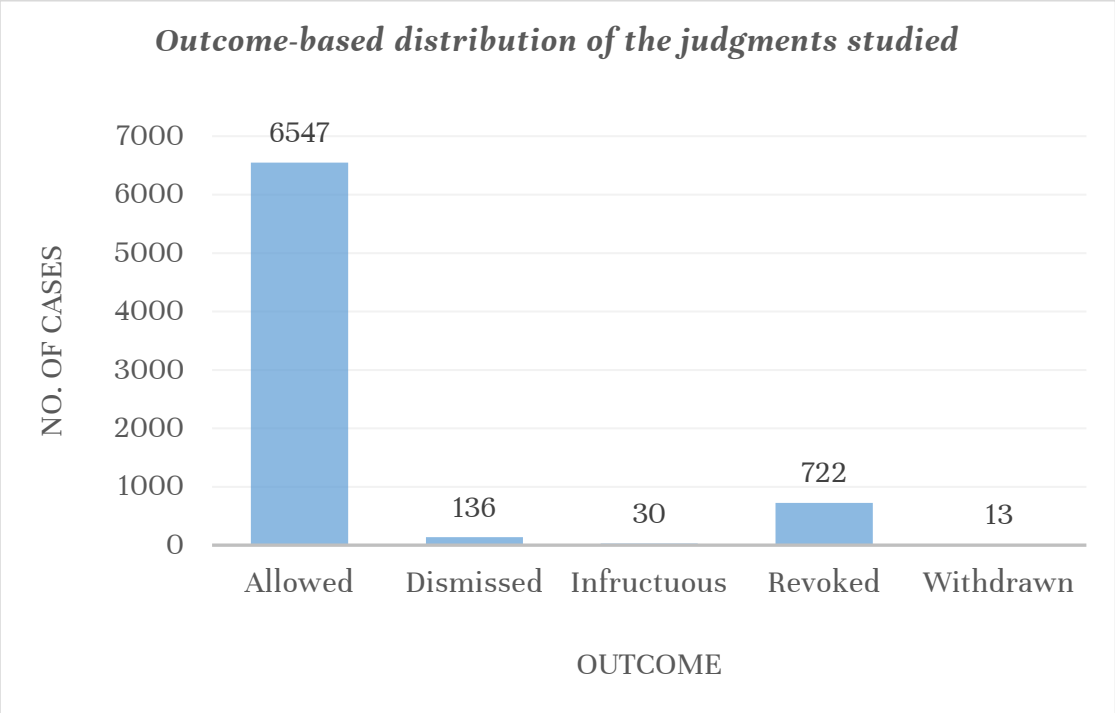
Two aspects may be noted at this juncture. First, the invocation of the Goonda Act—on which more than 95% of these cases are based—is evidently overwhelming. Second, these laws authorise different periods of preventive detention. This is important to ascertain as to what proportion of the total period of detention is being spent in agitating *habeas corpus* proceedings. The table below shows the periods of detention under the 5 aforesaid laws:

S. No.	Act	Maximum period of detention
1.	Goonda Act, 1982	Twelve months (S.13)
2.	PBMMSECA, 1980	Six months (S.13)

3.	COFEPOSA, 1974	One year or two years, depending on the allegations (S.10)
4.	NSA, 1980	Twelve months (S.13)
5.	PoASAA, 2008	One year (S.14)

In terms of outcomes, the studied cases are not evenly distributed. The Court allowed an overwhelming majority (87.9%) of the petitions by declaring the detention illegal. Only 1.8% of the petitions were dismissed on merits. A rare few petitions were withdrawn by the petitioners (for reasons unknown) and were hence dismissed by the Court as "*not pressed*". Intriguingly, 9.7% of the cases were disposed of on the ground that the detention orders were "*revoked*" by the appropriate government before the Court could decide the case on merits.

The chart below shows the distribution of the 7,448 cases based on their outcomes:



Assuming that the studied sample is representative of the larger data set, these figures indicate an abuse of preventive detention powers by governments across the years. They reflect poorly on the Executive and, as we shall see below, on the Court.

III. Evaluating the Court's speed

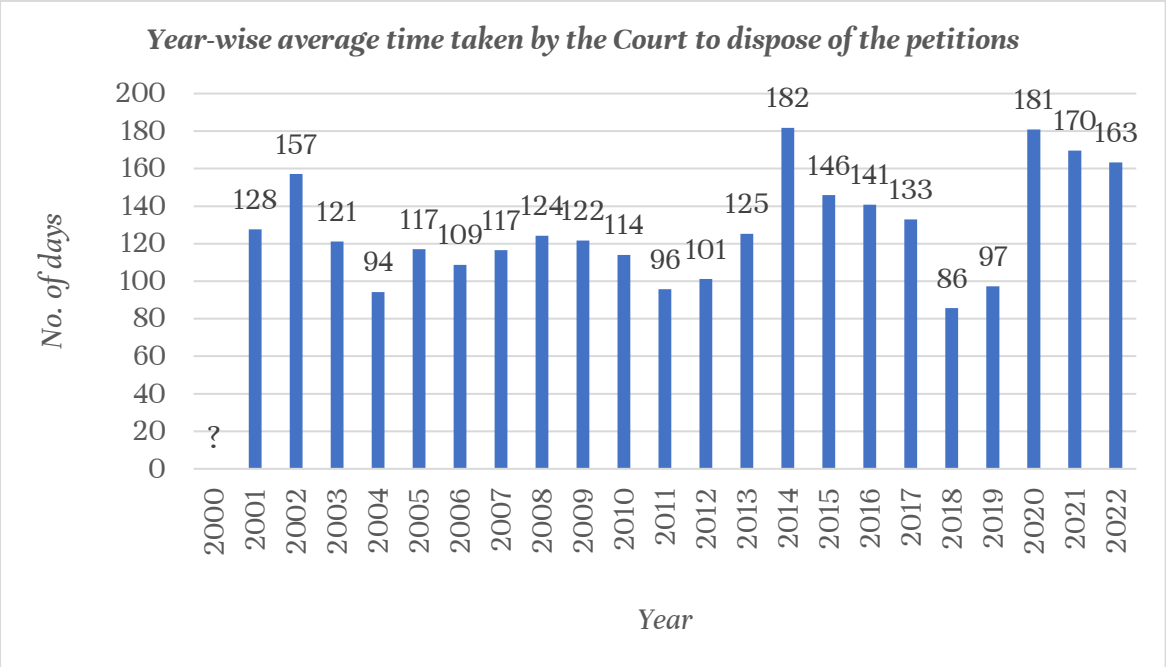
The alacrity (or otherwise) shown by the Court in disposing of *habeas corpus* petitions can be evaluated on two parameters:

i. The number of days spent from the date of filing of the *habeas corpus* petition in the Court till the date on which the Court disposes it off.

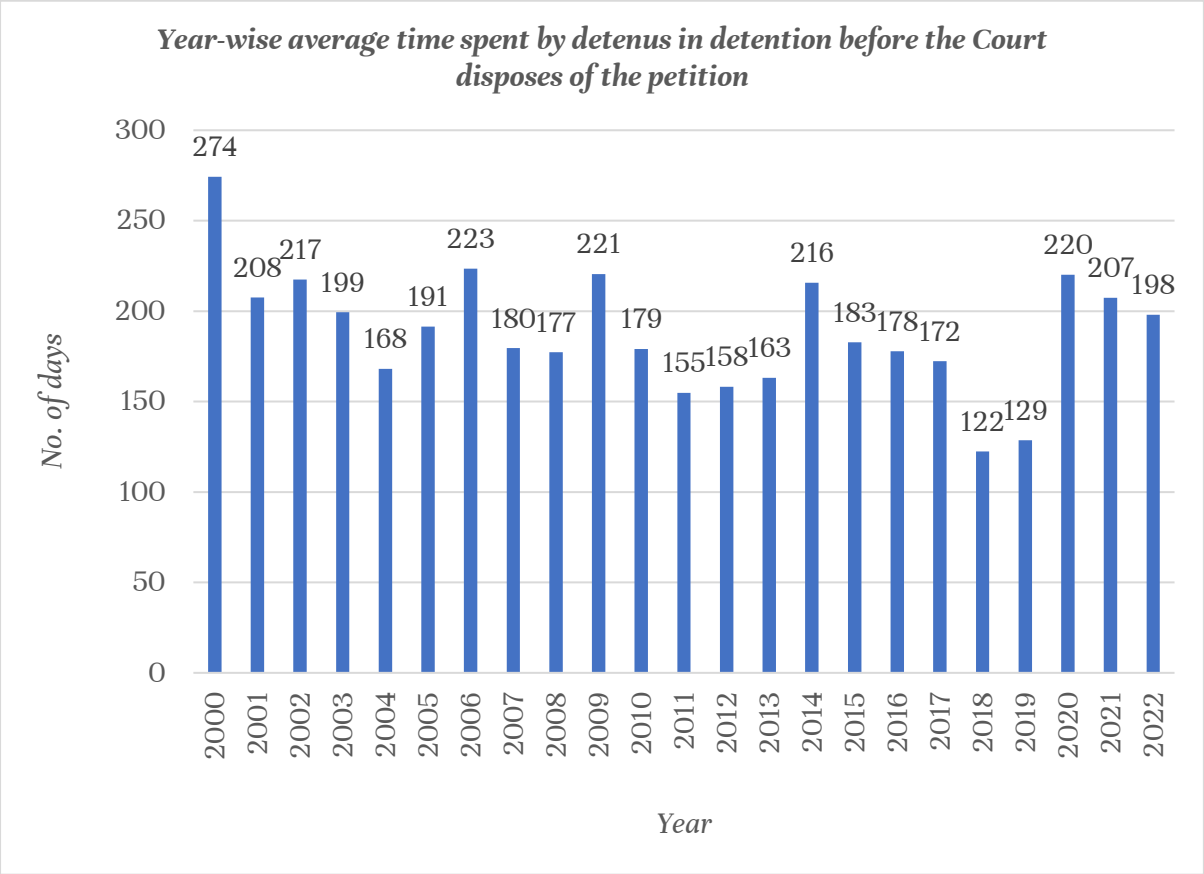
ii. The actual period spent by the detenu in preventive detention before the habeas corpus petition is disposed of by the Court.

Both parameters should be seen in context of the maximum period of detention prescribed in the 5 laws involved in these cases. This is because the detaining authority must compulsorily release the detenu after the expiry of the maximum period regardless of whether the initial detention was lawful. Hence, for the judicial process to not be reduced to an exercise in futility, the Court must swiftly decide the petition challenging the detention.

The Court's performance on this count has been dismaying. On an average over the 22 years, the Court took 141 days (a little less than 5 months) to decide a case, calculated from the date of filing of the petition. The year-wise averages range from 86 days (lowest) to 182 days, i.e., 6 months (highest) and are shown in the chart below:



Further, the average detenu spent 181 days (6 months) in detention by the time his petition was decided. Given that the maximum detention period is one year under most laws, the average detenu spent half of the maximum period in detention while agitating his challenge before the Court. The year-wise averages range from 122 days (lowest) to 274 days, i.e., 9 months (highest) and are shown in the chart below:

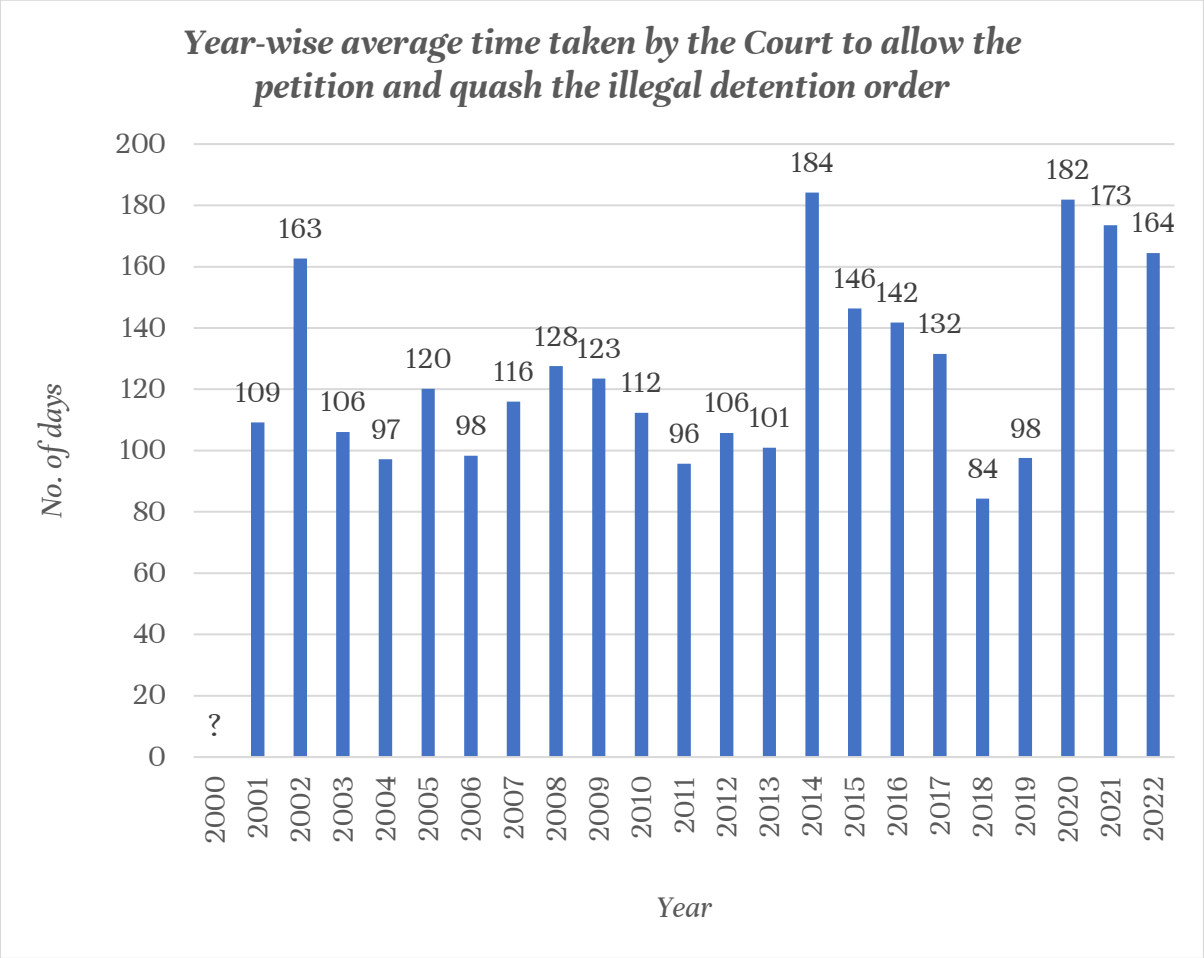


This delay is worrying by itself, but its real impact on personal liberty is better understood by studying only the "*successful*" cases, i.e., cases where the Court allowed the petition by quashing the detention order, because the delay in those cases has in fact resulted in continued deprivation of the detenu's personal liberty without lawful justification.

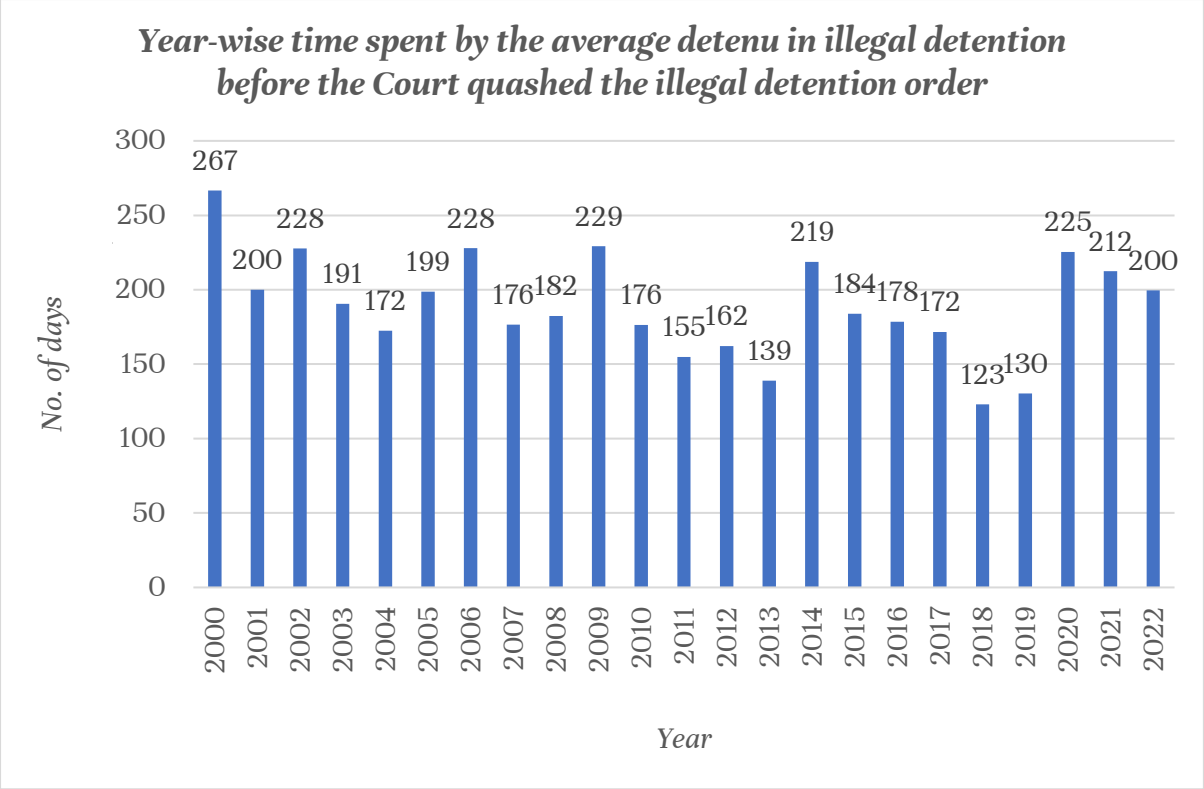
IV. The successful petitions

6,547 out of the 7.462 cases under study (87.9%) were "*successful*" in the sense that the Court allowed the detenu's challenge and set aside the detention. The average figures for the successful cases calculated over the 22-year period are similar to those calculated

for all cases under study. On an average over the 22 years, the Court took 141 days (a little less than 5 months) to decide a case, calculated from the date of filing of the petition. The year-wise averages range from 84 days (lowest) to 184 days, i.e., a little over 6 months (highest) and are shown in the chart below:



Further, the average detenu over 22 years spent 182 days (a little over 6 months) in illegal detention before the Court issued the writ of *habeas corpus* and ordered his release—awarding no compensation for the gross violation of personal liberty. The year-wise averages range from 123 days, i.e., a little over 4 months (lowest) to 267 days, i.e., a little less than 9 months (highest) and are shown in the chart below:



It deserves re-emphasis that the maximum period of detention under most laws is one year. Seen in this light, it is almost a mere lip service to allow a *habeas corpus* petition after the detenu has already undergone 9 months of illegal detention.

V. Infructuous cases

The worst examples of delayed judicial action are cases which became "*infructuous*" due to the expiry of the detention period before the Court disposed of the detenu's petition. 30 such cases were found over the 22-year period. The year-wise distribution of these cases is as under:

S. No.	Year	No. of "*infructuous*" cases
1.	2016	11
2.	2017	5
3.	2019	2
4.	2020	11
5.	2021	1

On an average, these cases were disposed of in 368 days (i.e., more than one year) per case after the date of the detention order. The Act-wise distribution of the "*infructuous*" cases is as under:

Name of the Act	**No. of infructuous cases**	**Maximum period of detention (days)**	**Average time taken from the date of filing of the petition till the date of disposal (days)**	**Average time lapsed since the date of detention till the date of disposal (days)**
Goonda	24	365	232	384
PBMMSECA	4	182	140	221
PoASAA	1	365	206	458
?	1	?	325	485

Though only a minority of detenus had the misfortune of going through the entire period of detention without redressal, these figures require urgent self-correction on the Court's part to ensure that no detenu faces a similar plight in future.

VI. The "*revocation*" cases

An intriguing phenomenon seen in nearly 10% of the cases studied is the revocation of detention orders by the appropriate government a few weeks or months after issuance. The large number of cases in which detention orders were revoked after a substantial period of detention indicates a worrying trend. The "*revocation*" frustrates the judicial process by rendering the *habeas corpus* petition infructuous before the Court can pronounce a judgment. In turn, this allows the government to get away with potentially-illegal detentions without accountability.

The table below shows the year-wise distribution of cases involving revocation of the detention order:

S. No.	Year	No. of cases rendered infructuous due to revocation of the detention order
1.	2012	4
2.	2013	1
3.	2014	36
4.	2015	36
5.	2016	139
6.	2017	124
7.	2018	35
8.	2019	104
9.	2020	214
10.	2021	28
11.	2022	1
	TOTAL	**722**

The date of revocation was available in 662 out of 722 cases. In these 662 cases, the average time spent by the detenu in potentially-illegal detention—calculated from the date of the detention order till the date of the revocation order—is 116 days, i.e., nearly 4 months. This record, coupled with the Court's nonchalant disposal of the petition without taking any action against the erring officials, is particularly worrying as it leaves open a wide door for unaccounted abuse by the Executive.

Further, on an average, 136 days (4.5 months) had lapsed before the Court disposed of the petition as infructuous. This is relevant in determining judicial alacrity because the Court presumably had no knowledge of the revocation prior to the date on which the petition was eventually disposed of citing the revocation (otherwise the petition would have been disposed of on an earlier date).

VII. Conclusions

The data collected in respect of the Madras High Court can be summarised as under:

i. On an average, the Court took 141 days to decide a *habeas corpus* petition (calculated from the date of filing of the petition). Even in the 6,547 "*successful*" cases (87.9% of the total 7.462), the time taken was 141 days.

ii. The average detenu spent 181 days (6 months) in detention by the time his *habeas corpus* petition was decided. In the 6,547 "*successful*" cases, 182 days were spent in illegal detention before the Court set aside the detention.

iii. In 30 cases, the maximum period of detention lapsed while the petition was pending before the Court. On an average, these cases were disposed of in 368 days (i.e., more than one year) per case after the date of the detention order.

iv. In 772 cases, the Government "*revoked*" the detention order a few weeks or months after issuance. In the 662 cases for which the date of revocation was available, the average time spent by the detenu in potentially-illegal detention—calculated from the date of the detention order till the date of the revocation order—was 116 days, i.e., nearly 4 months. Further, on an average, 136 days (4.5 months) had lapsed before the Court disposed of the petition as infructuous.

These figures demand immediate course correction. The Court must fast-track *habeas corpus* cases and set up short timelines for completion of pleadings (if required). There must be a self-monitoring mechanism to keep a check on any delays. Further, while fixing the schedule for hearing of the petition, the Court must be cognisant of the period already spent by the detenu-petitioner in preventive detention. And finally, to reiterate a point made in the Supreme Court study referred to above, the Court must grant compensation in cases of illegal detention and identify mechanisms to deter State authorities from abusing these extraordinary powers.

The task ahead is to undertake similar studies in respect of other High Courts and identify points of similarity and contrast.