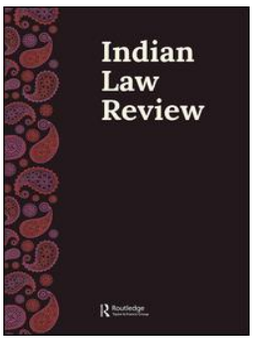

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RESEARCH ARTICLE

Judicial review of central banks: an Indian perspective

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ABSTRACT

Central banks are unique institutions of profound economic significance. Judicial review of central bank actions raises concerns regarding the appropriate zone of judicial deference. Over the last decade, the frequency of judicial review challenges before the Supreme Court of India involving the Reserve Bank of India ("RBI") appears to have substantially increased. I attempt to contextualize this trend against the evolving nature of judicial deference towards the RBI. From 1960s to late 1990s, the Court was extremely deferential towards the RBI. With the turn of the century, several exogenous factors compelled the RBI to act beyond its uncontested traditional functions, affecting stakeholders beyond its immediate jurisdiction. This explains the increase in judicial review challenges involving the RBI since 2015. This trend also provides evidence of the eroding judicial deference towards the Central Bank at least on the regulatory (process) aspects, if not as much on the substantive economic policies themselves.

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Judicial review; judicial deference; central bank; Reserve Bank of India

I. Introduction

Central banks are unique institutions. Their peculiar functions have profound implications for the economic health of modern nation states. Their precise mandates and functions differ widely across jurisdictions. Generally speaking, their main mission is to maintain price stability and financial stability.[1] Price stability typically involves meeting an inflation target. To achieve this, central banks use monetary policy. This entails varying the short-term interest rates to control supply of and demand for money in the economy, thereby influencing economic activity and inflation.[2] Financial stability refers to keeping the financial system resilient and avoiding financial crises. To achieve financial stability, central banks may act as Lenders of Last Resort ("LoLR") to overcome temporary liquidity problems in the financial sector during periods of stress.[3] They may also act as market maker of last resort addressing liquidity problems in specific markets;

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[1]Reserve Bank Staff College, Reserve Bank of India: Functions and Working, <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RWF15012018_FCD40172EE58946BAA647A765DC942BD5.PDF > accessed 1 December 2022, 2.

[2]ibid 2, 5. In India, the RBI has "to maintain price stability while keeping in mind the objective of growth". That's probably the reason why it has been suggested that the RBI's mission is "macroeconomic stability", that is, achieving stable and sustainable growth and keeping prices stable.

[3]ibid 2. Monetary policy could affect financial stability too. See also, Frederic Boissay, Fabrice Collard, Jordi Gali and Cristina Manea, "Monetary policy and endogenous financial crises" (2022) BIS Working Paper No. 991, 2 < https://www.bis.org/publ/work991.htm > accessed 12 July 2022.

provide selective credit support to steer the flow of credit to specific sectors, regions or firms; and provide emergency government financing providing needed funds directly to the government.[4] Central banks may also act as regulators for banks and other non-bank financial institutions, and use relevant tools for regulation and supervision to foster financial stability.[5] Some central banks also regulate payments and settlement systems, which form critical infrastructural pillars of financial stability.[6]

Since late 1980s, there has been growing international recognition of the importance of central bank independence ("CBI"), i.e. the need for independence of a central bank from its country's executive government.[7] The government's electoral priorities may induce it to act in short-term interests by printing excess money to artificially boost economic growth, causing inflation and imposing long-term costs on the economy.[8] This is a classic time-inconsistency problem: the government's short-term interests in inflation-based prosperity are in tension with the economy's long-term interests in avoiding the devastation that such inflation brings. CBI aims to resolve this tension.[9] It insulates the central bank from short-term political pressures so that it may effectively pursue the long-term objective of price stability with moderate growth.[10] Some jurisdictions have formally enshrined CBI in their primary legislation.[11] Effectively, central banks have

[4]Stephan Cecchetti and Paul Tucker, "Understanding how central banks use their balance-sheets: A critical categorization" (*VoxEU Column*, 1 June 2021) < https://cepr.org/voxeu/columns/understanding-how-central-banks-use-their-balance-sheets-critical-categorisation#:~:text=Central%20bankers%20use%20their%20balance,overnight%20interest%20rates)%20to%20quantities > accessed 18 September 2022.

[5]Reserve Bank Staff College (n 1) 2.

[6]ibid 122. Besides these functions, central banks often perform a host of other functions across jurisdictions. For instance, the RBI serves as a banker to the governments, performs public debt management for central and state governments, foreign exchange management, regulates non-bank finance companies, derivatives and money market instruments, in addition to other central banking functions.

[7]CBI is necessary to insulate some central bank functions from political influences. Although it was initially synonymous with *monetary policy independence*, its scope has evolved over time. See, Stanley Fischer, "Central Bank Independence" (Herbert Stein Memorial Lecture Speech, 2015) < https://www.federalreserve.gov/newsevents/speech/fischer20151104a.htm > accessed 12 July 2022; Paul Wachtel and Mario I. Blejer, "A fresh look at central bank independence" (2020) 40 Cato Journal 105 <https://www.cato.org/cato-journal/winter-2020/fresh-look-central-bank-independence> accessed 1 December 2022.

[8]Monetary policy's distributional consequences make it a politically controversial exercise. Creditors prefer higher interest rates and lower inflation. Debtors prefer lower interest rates and higher inflation. The policy rate also influences various financial activities such as how much it costs the government to service its debt, how much an ordinary citizen pays for home loan or student loan, the relative attractiveness of investments in the stock market etc. It is therefore necessary to ensure that monetary policy decisions are insulated from short-term political interests. See, Peter Conti-Brown, "The Institutions of Federal Reserve Independence" (2015) 32 Yale Journal on Regulation 257. There could be another justification for central bank independence. If interest rate is hiked, cost of servicing bloated public debt rises, thereby constricting government expenditure on other items. Therefore, governments may have a perverse incentive to allow inflation to boost nominal GDP, while the debt-GDP ratio automatically comes under control, as does the fiscal deficit ratio. See, T.N. Ninan, "Late on the ball", *Business Standard* (7 May 2022) <https://www.business-standard.com/article/opinion/what-explains-rbi-s-near-unanimous-inaction-even-as-inflation-was-rising-122050601028_1.htm> accessed 28 October 2022

[9]Fischer (n 7). Although this definition of CBI is focussed on the consequences of independence or the lack of it, CBI could also be defined from the perspective of the mechanics involved. It could be divided into "goal independence" and "instrument independence". "Goal independence" refers to the freedom to select the ends of monetary policy, while "instrument independence" refers to the freedom to select the means of pursuing the (statutorily) assigned goals of monetary policy.

[10]Conti-Brown (n 8).

[11]Conti-Brown (n 8). For instance, the Bank of England was granted *de jure* monetary policy independence in 1997. It was enshrined into legislation in 1998. Bank of England Act 1998, ss 10–14; similar *de jure* independence was granted to the RBI through legislation in 2016. RBI Act 1934, ss 45Z-45ZO; in contrast, *de facto* independence of some central banks, most prominently the US Federal Reserve, appears to be rooted in informal conventions as well as unique historical contingencies.

come to enjoy a relatively superior status – de jure or de facto – compared to other regulatory institutions in many countries.[12]

CBI is, however, only one side of the coin. In a democratic polity, a central bank ought to be accountable for its actions. Accountability does not necessarily politicize a central bank. Instead, an accountable central bank must give account, explain, and justify its actions or decisions against some tangible criteria. It must also take responsibility for any damage or consequence that follows from its actions.[13] Accountability may take various forms including, additional disclosures, parliamentary oversight, performance control, judicial review and ultimately, statutory provisions to limit delegation of powers.[14] Such accountability is extremely crucial given that a central bank's actions may have significant redistributive effects.[15] Weak accountability may cause a central bank to lose its legitimacy, weakening the basis for its independence.[16] Some scholars have, therefore, advocated for "accountable independence" of central banks.[17]

In view of their profound economic significance, relatively superior regulatory status, and need for "accountable independence", judicial review of central bank actions raises thorny issues regarding the appropriate zone of judicial deference. On one hand, the legitimacy of judicial review itself suffers when it appears to second guess actions undertaken by an "independent" central bank purportedly in the greater interest of macroeconomic or financial stability.[18] On the other hand, excessive judicial deference towards an unelected, technocratic institution such as the central bank appears incongruent with the idea of institutional accountability in a liberal democracy, based on rule of law and separation of powers.[19] Faced with these two extremes possibilities – full judicial review or full judicial deference – a less intensive standard of judicial review for some central bank actions has been suggested as a potentially workable middle ground.[20]

Judicial review of central bank actions started attracting the limelight during the global financial crisis of 2007–2008. When Northern Rock Plc ("Northern Rock") was nationalized in February 2008, its former shareholders challenged the assessment of compensation payable to them vide the Banking (Special Provisions) Act, 2008 as violative of the right to property guaranteed under the European

[12]Gillian E. Metzger, "Through the looking glass to a shared reflection: The evolving relationship between administrative law and financial regulation" (2015) 78(3) Law and Contemporary Problems 129.
[13]Charles Goodhart and Rosa Lastra, "Populism and Central Bank Independence" (2018) 29 Open Economic Review 49.
[14]Charles Goodhart and Rosa Lastra, "Central bank accountability and judicial review" (2018) SUERF Policy Note No. 32 <https://www.suerf.org/policynotes/2585/central-bank-accountability-and-judicial-review > accessed 12 July 2022.
[15]Conti-Brown (n 8). Monetary expansion tends to increase real incomes, raise inflation, and lower real interest rates. Not everyone is equally affected by these changes. This generates different sources of redistribution. See also, Adrien Auclert, "Monetary policy and the redistribution channel" (2019) 109 American Economic Review 2333.
[16]Goodhart and Lastra (n 13). Any democratic regime can alter the mandate of the central bank following the required normative procedure such as through statutory or constitutional amendment.
[17]Rosa Lastra, "The independence of the European system of central banks" (1992) 33 Harvard Int'l L. J. 475.
[18]Courts do not possess the legitimacy for second-guessing decisions involving high degrees of uncertainty about the future. See, Matthias Goldmann, "Adjudicating economics? Central Bank independence and the appropriate standard of judicial review" (2014) 15 German Law Journal 265.
[19]Paul Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press 2018).
[20]Goldmann (n 18). Goldmann has advocated for judicial review of central banks on the basis of "rationality checks", which in his view stand in between "full judicial review" and "full discretion". Similarly, Advocate General Cruz Villalon had opined that the intensity of judicial review of the ECB's activity, its mandatory nature aside, must be characterized by a considerable degree of caution. See, Commission, "Opinion of the Advocate General Cruz Villalon" (Reports of cases) COM (2015) C-62/14 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CC0062&from=EN> accessed 27 October 2022.

Convention on Human Rights. This gave the UK courts a rare opportunity to delve into the financial stability and moral hazard implications of the Bank of England's LoLR functions.[21] Subsequently, during the twin financial and sovereign debt crisis in the Eurozone, the EU member states set up the European Stability Mechanism ("ESM") through a treaty in 2012 to provide financial assistance to its member states during future crises. A challenge to the legality of this treaty gave the Court of Justice of the European Union ("CJEU") an opportunity to examine whether the ESM violated the exclusive jurisdiction of the Union on "monetary policy" matters under the Treaty on the Functioning of the European Union.[22] The Eurozone crisis also prompted the European Central Bank ("ECB") to expand its monetary policy toolkit into "unconventional measures". One of those measures was the Outright Monetary Transactions ("OMT") programme. The ECB announced the OMT in September 2012 in response to severe financial market tensions. The legality of the OMT was challenged before the German Federal Constitutional Court ("German BVerfG"), which referred the matter to the CJEU.[23] Most recently, the decision of the German BVerfG holding that the ECB's public sector purchase programme did not satisfy the proportionality test, created much controversy.[24] These decisions have piqued contemporary scholarly interest in judicial review of central bank actions.[25]

In this larger backdrop, a recent trend in India assumes significance. The frequency of judicial review of central bank actions appears to have substantially increased in the recent past.[26] Figure 1 plots the total number of matters (disposed as well as pending) filed before the Indian Supreme Court per year from 2000 to 2021, where the Reserve Bank of India ("RBI") appeared as a respondent.[27] The figure shows an increasing trend of judicial review involving the RBI since 2015, with a marked increase from 2017. The

[21] C1/2009/0453, *SRM Global Master Fund LP v HM Treasury* [2009] EWCA Civ 788. The court dismissed the judicial review. An appeal against it was also dismissed. The appellate court noted that the purpose of the compensation was to put shareholders of Northern Rock in the position they would have been had no LoLR support been provided by the Bank of England. The court found this objective to be a reasonable foundation. The court further held that the primary responsibility for Northern Rock's insolvency lay with its management and not the regulators. Even if there was any failure on the part of the regulators, there was no failure in any duty owed to shareholders of Northern Rock.

[22] Case C-370/12, *Thomas Pringle v Government of Ireland* [2012] IESC 47. The Court of Justice of the European Union concluded that grant of financial assistance to member states through the ESM did not qualify as monetary policy.

[23] *Peter Gauweiler and Others v Deutscher Bundestag* [2014] OJ C129/11. The Court of Justice of the European Union concluded that such purchase of sovereign bonds is permissible and upheld the legality of the conditional OMT programme on the ground that the European Central Bank could use its "monetary policy" mandate for "price stability" to purchase sovereign bonds of member states in the secondary market to support them during financial difficulty.

[24] Judgement of the Second Senate of 5 May 2020, 2 BvR 859/15 (Bundesverfassungsgericht (GFCC)) < https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html > accessed 12 July 2022.

[25] Goodhart and Lastra, "Central bank accountability and judicial review" (n 14); Goodhart and Lastra, "Populism and Central Bank Independence" (n 13); Goldmann (n 18); Franz C. Mayer, "To boldly go where no court has gone before. The German Federal Constitutional Court's ultra vires decision of 5 May 2020" (2020) 21 German Law Journal 1116; Lars P. Feld and Volker Wieland, "The German Federal Constitutional Court ruling and the European Central Bank's Strategy", (2021) 7 Journal of Financial Regulation 217; Peter Conti-Brown, Yair Listokin and Nicholas R. Parrillo, "Towards an Administrative Law of Central Banking" (2021) 38 Yale Journal on Regulation 1.

[26] Pratik Datta, "Need: A fine balance" *Indian Express* (11 November 2020) <https://indianexpress.com/article/opinion/columns/rbi-covid-19-loan-moratorium-supreme-court-7046727/ > accessed 12 July 2022.

[27] This data was obtained from the official website of the Supreme Court of India as on 12 January 2022. It comprises mostly judicial review petitions such as Special Leave Petitions (Civil), Civil Appeals and Writ Petitions (Civil). It also includes a few other categories of matters such as Transfer Petitions and Curative Petitions. See, the official website of the Supreme Court of India <https://main.sci.gov.in/> accessed 12 January 2022.

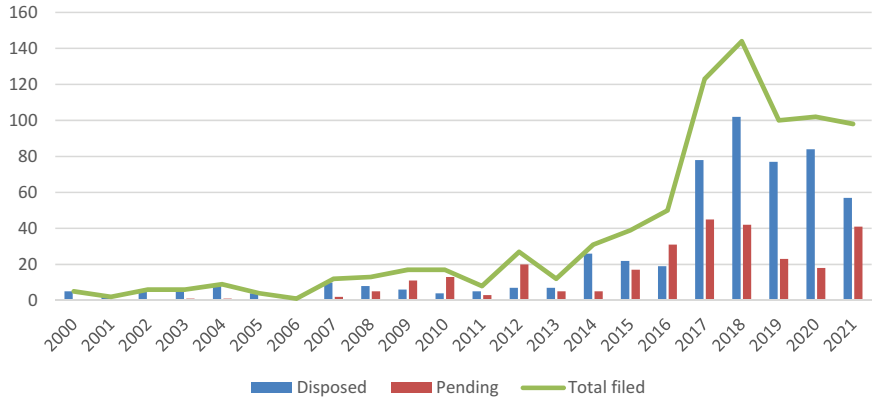

Figure 1. Matters filed in Supreme Court of India per year with RBI as a respondent (2000–2021).

2017 spike appears to have followed the demonetization exercise announced on 8 November 2016.[28] The trend appears to have been further sustained by prominent judicial review challenges against the RBI. These include challenges to the newly enacted Insolvency and Bankruptcy Code, 2016 ("IBC"),[29] the RBI imposed ban on its regulated entities from dealing or settling in virtual currencies,[30] and more recently, in relation to the loan moratorium circular issued by the RBI in the wake of Covid-19 crisis.[31]

This paper attempts to contextualize this empirical finding against the evolving nature of judicial deference shown by the Supreme Court of India towards the RBI. It seeks to contribute towards the literature on judicial deference by showing that judicial deference towards a primary decision-maker may vary over time due to exogenous factors, ie, factors beyond the immediate control of the court or the primary decision-maker.[32] The paper also aims to contribute towards the nascent literature on the administrative law of central banking.[33]

[28]Demonetization was implemented through three legal instruments, one of which was the RBI Instruction to Banks dated 8 November 2016. See, Pratik Datta and Rajeswari Sengupta, "Demonetisation needs a Parliamentary law to be fool proof" (*The Leap Blog*, 1 December 2016) <https://blog.theleapjournal.org/2016/12/demonetization-needs-parliamentary-law.html > accessed 12 July 2022.

[29]For instance, the RBI was a respondent in multiple petitions which were tagged along in prominent decisions. See, *Swiss Ribbons (P) Ltd. v Union of India* (2019) 4 SCC 17; *Dharani Sugars and Chemicals Ltd. v Union of India* (2019) 5 SCC 480.

[30]For instance, the RBI was a respondent in multiple petitions which challenged the constitutionality of the RBI imposed ban on dealing or settling in virtual currencies. See, *Internet and Mobile Association of India v Reserve Bank of India* (2020) 10 SCC 274 ("Internet and Mobile Association of India").

[31]Reserve Bank of India, "COVID-19 – Regulatory Package" (27 March 2020) <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11835&Mode=0 > accessed 28 October 2022; Reserve Bank of India, "COVID-19 – Regulatory Package" (23 May 2020) <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11902&Mode=0> accessed 28 October 2022. See also, *Small Scale Industrial Manufacturers Association v Union of India* (2021) 8 SCC 511 ("Small Scale Industrial Manufacturers Association").

[32]There is a rich strand of judicial review literature which explores normative issues around judicial deference towards the legislature, executive and administrative agencies. The factors influencing the degrees of deference in this literature could be broadly classified into spatial, constitutional, and institutional factors. See, Sidney A. Shapiro and Richard E. Levy, "Heightened scrutiny of the fourth branch: Separation of powers and the requirement of adequate reasons for agency decisions" (1987) 387 Duke Law Journal 387; Murray Hunt, "Sovereignty's Blight: Why contemporary public law needs the concept of 'Due Deference'" in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart Publishing 2003); Alison L. Young, "In defence of due deference" (2009) 72 The Modern Law Review 554; Vincent Martenet, "Judicial Deference to Administrative Interpretation of Statutes from a comparative perspective" (2021) 54 Vanderbilt Journal of Transnational Law 83.

[33]Conti-Brown *et al* (n 25) 5.

The paper is structured into two parts – Part 2 and Part 3. Part 2 argues that traditional RBI functions involving balance-sheet operations as well as regulatory actions against regulated entities have usually been uncontested, giving the Indian Supreme Court relatively fewer opportunities to review the RBI's actions. Even in the rare occasions when the RBI's regulatory actions have been challenged before the Supreme Court, judges have been extremely deferential towards it from 1960s to late 1990s. Part 3 argues that with the turn of the century, the RBI was compelled to act beyond its uncontested traditional functions due to several exogenous factors. These factors included enactment of the Right to Information Act 2005 ("RTI Act"), coupled with the credit boom from 2004–2008, followed by various subsequent events such as demonetization, enactment of the IBC, emergence of cryptocurrencies and the Covid-related financial stress. The consequent Central Bank actions directly impacted various stakeholders beyond the RBI's immediate jurisdiction, exposing the Central Bank to increasing judicial review challenges from 2015 and eroding the judicial deference that it had enjoyed earlier. Consequently, there appears to be a nascent trend of active judicial intervention in the regulatory functioning of the RBI.

A crucial limitation of this paper is that it is confined primarily to the Supreme Court's judgements dealing with judicial review challenges to the RBI's actions. It does not exhaustively analyse the Supreme Court decisions dealing with constitutionality of various parliamentary legislations related to the RBI, unless they involve judicial review of any action taken by the RBI. This paper also excludes Supreme Court's judgements that involve the RBI and relate exclusively to service laws or personal laws. Further, the paper does not exhaustively analyse the decisions of various High Courts pertaining to the RBI, nor does it analyse the various decisions of the Supreme Court pertaining to the other financial regulators such as the Securities and Exchange Board of India ("SEBI"). Therefore, whether there is a broader trend of diminishing judicial deference towards Indian financial sector regulators, guarantor institutions or other "expert" institutions in general, remains an open question for future research, beyond the scope of the present paper.[34]

II. Judicial review of RBI's actions and the development of judicial deference

Central banks rarely get exposed to judicial review.[35] The RBI has not been an exception in this regard, at least until recently.

(1) RBI actions are rarely subject to judicial review

RBI's exposure to judicial review has traditionally been limited for two reasons. First, some of the most traditional RBI functions – such as monetary policy, lender of last resort or foreign exchange interventions – rely on balance sheet operations.[36] Balance

[34]A guarantor institution is a tailor-made constitutional institution, vested with material as well as expressive capacities, whose function is to provide a credible and enduring guarantee to a specific non-self-enforcing constitutional norm or any aspect thereof. See, Tarunabh Khaitan, "Guarantor Institutions" (2021) 16 Asian Journal of Comparative Law S40, S42.

[35]Conti-Brown *et al* (n 25). For instance, the US Fed rarely finds itself hauled into court, and it rarely must go to court to get what it wants.

[36]Cecchetti *et al* (n 4). This appears to hold true for other central banks too.

sheet operations usually involve uncontested uses of regulatory authority of the Central Bank over its regulated banks or voluntary buyer-seller transactions in the asset markets. The impact of these operations on firms and individuals may be profound with significant distributional or wealth transfer effects.[37] Yet, such impact is usually generalized and indirect, operating through asset markets or regulated banks.[38] Such balance sheet operations are typically never specifically directed at any firm or individual or classes of firms or individuals. Consequently, the RBI's exposure to judicial review from its functions involving balance sheet operations is extremely low.[39]

Second, even when the RBI's actions involve specific, direct, and tangible regulatory actions through circulars, directions, notifications, and orders under statutes such as the Reserve Bank of India Act 1934 ("RBI Act"), Banking Regulation Act 1949, Foreign Exchange Management Act 1999, Government Securities Act 2006, Payments and Settlement Act 2007 etc, these are mostly directed at different types of regulated entities such as banks, non-bank finance companies, authorized dealers, card networks etc. These regulated entities usually have little incentive to challenge these instruments in a court of law and risk disrupting their cordial relationship with the regulator. Another potential reason behind their reticence is that there is no statutory right of appeal against the RBI's regulatory actions before a specialized tribunal conversant with financial matters, unlike all the other financial sector regulators.[40] The only option would be to approach a writ court, which may not quite appreciate the technicalities involved in the financial sector.[41] As a result, regulated entities generally have relatively weaker incentives to mount judicial review challenges against most regulatory actions by the RBI.

Because of these factors, traditional RBI functions involving balance-sheet operations as well as regulatory actions against regulated entities have usually been uncontested, giving the Indian Supreme Court relatively fewer opportunities to review the RBI's actions.

(2) Judicial deference towards RBI developed from 1960s to 1990s

In rare occasions when the RBI's actions have been challenged before the judiciary, judges have traditionally been extremely deferential towards the RBI. One of the earliest cases challenging the RBI's regulatory powers arose in 1960 when the RBI filed an

[37]Conti-Brown (n 8); Auclert (n 15). This appears to hold true for other central banks too. See also, Adam J. Levitin, "The politics of financial regulation and the regulation of financial politics: A review essay" (2014) 127 Harvard Law Review 1991, 1998.

[38]Conti-Brown *et al* (n 25) 5. This appears to hold true for other central banks too.

[39]This appears to hold true for other central banks too. As discussed in the Introduction, there have been some prominent instances of judicial review challenges to balance sheet operations of central banks in some western economies. However, those are rare instances. A former Deputy Governor of the Bank of England has noted that a central bank's balance sheet policy is less likely to be challenged in courts than its regulatory policy. See, Paul Tucker, "What is macroprudential policy for? Making it safe for central bankers" (2017) BIS Papers No. 91 < https://www.bis.org/publ/bppdf/bispap91_keynote.pdf > accessed 12 July 2022.

[40]The Securities Appellate Tribunal currently hears appeals against the regulatory actions of all other financial sector regulators – the SEBI, Pension Fund Regulatory and Development Authority (PFRDA), and the Insurance Regulatory and Development Authority (IRDAI).

[41]There are some statutory provisions which do provide for appeal before the central government from certain RBI actions such as refusal to issue certificate for creation of floating charge by a bank, cancellation of licence for banking business, order for removal of any director or employee of a banking company etc. Such statutory appeals before the central government cannot be equated with judicial review by a superior court or a specialized tribunal. See, for eg, Banking Regulation Act 1949, ss 10B(7), 14A(3), 22(5), 36AA(3).

application before the Kerala High Court for winding up of the Palai Central Bank Ltd. ("Palai"). Section 38(1) of the Banking Regulation Act 1949, made it mandatory for the High Court to pass an order winding up a banking company if the RBI made an application to that effect. The High Court had no discretion in such matters. Neither did the law provide the banking company with an opportunity to show cause, nor did it require the RBI to record its reasons in writing or communicate them. Additionally, there was no right of appeal against the RBI's decision to wind up a banking company. Consequently, the RBI's application was challenged before the Kerala High Court on the ground that section 38(1) was ultra vires of Articles 14 and 19 of the Constitution of India ("Constitution").[42] The High Court dismissed the challenge and ordered winding up of Palai. An appeal to the Supreme Court was dismissed because of the uniqueness and broad implications of the RBI's central banking functions. The Court reasoned that:

> there may be occasions and situations in which the legislature, with reason, think that the determination of an issue may be left to an expert executive like the Reserve Bank rather than to the courts without incurring the penalty of having the law declared void. The law thus made is justified on the ground of expediency arising from the respective opportunities for action. . . . In the present case, in view of the history of the establishment of the Reserve Bank as a central bank for India, its position as a bankers' bank, its control over banking companies and banking in India, its position as the issuing bank, its powers to license banking companies and cancel their licenses and the numerous other powers, it is unanswerable that between the court and the Reserve Bank, the momentous decision to wind up a tottering or unsafe banking company in the interest of depositors, may reasonably be left to the Reserve Bank.[43]

The sole dissenting opinion in the case was given by Justice J.L. Kapur, who observed:

> The Reserve Bank is undoubtedly an expert body with vast facilities for making enquiries into the affairs of banking companies in India. But on that account it cannot be presumed that the view of the Reserve Bank that any banking institution should be liquidated must always be correct. It cannot be said that the Reserve Bank can never act mistakenly or even negligently.[44]

Accordingly, Justice Kapur held section 38 to be unconstitutional since "if the law is constitutional then all that a court can do is to act according to the opinion of the Reserve Bank and abdicate its judicial function in favour of the opinion of an executive body".[45] Overall, the tension between the majority and minority decisions in this case encapsulated the two opposing views regarding the appropriate scope of judicial review of Central Bank actions. Accordingly, the debate was overwhelmingly settled in favour of judicial deference towards the RBI.

The next set of judicial review challenges emerged from the RBI's increasing regulation of deposit taking activities of non-bank finance companies ("NBFCs") from 1960s. The Banking Regulation Act 1949 was enacted to protect public deposits with banking companies. It did not address the unfettered growth in public deposits handled by unregulated non-banking institutions. Consequently, the RBI Act was amended in 1963 to insert Chapter IIIB. This amendment empowered the RBI to regulate deposit-

[42]The Constitution of India 1950.
[43]*Joseph Kuruvilla Vellukunnel v Reserve Bank of India* AIR 1963 SC 90 [45]-[46].
[44]ibid [84].
[45]ibid [88].

taking activities of non-bank institutions and financial institutions with the aim of protecting depositors and ensuring a more effective control of credit with a view to carry out the overall monetary policy of the government. The RBI used these newly obtained powers under sections 45 J to 45 L in Chapter III-B to issue the Non-Banking Financial Companies (Reserve Bank) Directions 1966. These directions applied to all NBFCs irrespective of whether they accepted deposits from public or not and included chit funds, hire-purchase finance, housing finance, investment loan, miscellaneous financial and mutual benefit financial companies. Further, it required these NBFCs to not hold deposits in excess of 25% of their paid up capital and free reserves. Several existing non-bank financial businesses suddenly found themselves non-compliant with these directions. Some of them challenged these directions as ultra vires of Chapter III-B of the RBI Act before the Madras High Court. The High Court outright dismissed the challenge, holding the directions to be reasonable, valid, and meant to safeguard the interests of the investing public.[46]

The RBI issued additional directions to NBFCs in 1973 and 1977. These directions imposed various restrictions on loan companies, a type of NBFC. One provision provided that no loan company shall receive or renew any deposit against an unsecured debenture or from a shareholder, if the amount of such deposit together with the amount of such other specified deposits outstanding in the books of the company exceeds 15% of its net owned funds. Additionally, NBFCs inviting deposits were prohibited from offering interest rates exceeding 15% annually. Further, the RBI Act was amended in 1974 to criminalize acceptance of deposit in contravention of directions issued by the RBI under Chapter III-B.[47] These directions were again challenged before the Madras High Court, which once again dismissed them.[48] An appeal to the Supreme Court was also dismissed, upholding the validity of the 1973 directions.[49]

Subsequently, the RBI Act was amended in 1983 to introduce Chapter III-C.[50] This chapter contained section 45S, which prohibited individuals, firms, and unincorporated association of individuals from collecting deposits from more than the specified number of depositors. The constitutionality of this provision was challenged by several businesses operating in the non-banking financial industry. The Supreme Court showed extreme deference to both the Parliament as well as the RBI on the issue and upheld the constitutionality of section 45S.[51]

In another instance, the Supreme Court allowed RBI's appeal against an order of the Calcutta High Court which had modified certain RBI directions of 1987 regulating deposit taking businesses.[52] The impugned RBI directions required the NBFCs to deposit or invest aggregate amounts of their liabilities (such as interest, premium, bonus etc.)

[46] *Mayavaram Financial Corporation Ltd. v Reserve Bank of India* (1971) 41 Com Cas 890 (Mad).
[47] The Reserve Bank of India Act 1934, s 58B(5).
[48] *A.S.P. Aiyer v Reserve Bank of India* [1984] 56 Com Cas 352 (Mad).
[49] *P.S. Subramanium v Reserve Bank of India* (1993) Supp (4) SCC 224.
[50] Banking Laws (Amendment) Act 1983.
[51] *T. Velayudhan Achari v Union of India* (1993) 2 SCC 582, upholding the judgment of Delhi High Court in *Kanta Mehta v Union of India* (1987) 62 Comp Cas 769 (Del). In a similar vein, the court had earlier upheld the constitutionality of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, which was enacted to safeguard the interests of depositors based on the recommendations of an RBI Study Group Report of June 1974. See also, *Srinivasa Enterprises v Union of India* (1980) 4 SCC 507.
[52] *Peerless General Finance and Investment Company Limited v Reserve Bank of India* (1992) 2 SCC 343 [4(e)-(j), 32] ("Peerless").

having accrued on the amounts of deposits according to the terms of contract.[53] The Calcutta High Court was of the view that this regulatory requirement would leave no amount out of the deposits for working capital to meet the expenses of these NBFCs. It would make it impossible for such NBFCs to meet reasonable expenses incurred for payment of agents' commissions, management expenses and other overhead expenses, forcing them to liquidate. Accordingly, the High Court suggested a modified definition of "liability", so that it may be possible for the NBFCs to generate working capital. While expressing its disapproval of the High Court's transgressions, the Supreme Court observed that "it is not the function of the court to amend and lay down some other directions and the High Court was totally wrong in doing so. The function of the court is not to advise in matters related to financial and economic policies for which bodies like the Reserve Bank are fully competent".[54] The Supreme Court concluded that "the RBI is right in taking the stand that if these companies want to do their business, they should invest their own working capital and find such resources elsewhere with which the RBI has no concern".[55] Clearly, the Apex Court was extremely deferential towards the RBI in matters concerning protection of depositors' interest and was loathe to interfere with the RBI's regulations in this regard.

In 1997, section 45S of the RBI Act was substituted by a new section 45S.[56] This provision completely prohibited receipt of public deposits by unincorporated bodies. The vires of this provision was challenged before the Supreme Court. The Court dismissed the challenge observing that the RBI had not acted hastily. The amendment was introduced based on recommendations of several expert committees. It held that the question of restricting financial activity by unincorporated bodies is a question of economic policy and the Court "does not interfere with decisions of expert bodies that have examined the matter".[57]

A third category of judicial review challenges against the RBI originated from the High Denomination Bank Notes (Demonetization) Act 1978 spearheaded by the Janata Party government. By virtue of this statute, banknotes of denominations INR 1000, 5000 and 10,000 issued by the RBI ceased to be legal tender from 17 January 1978. Section 4 prohibited transfer or receipt of such notes after 16 January 1978. Section 7 provided for exchange of these high denomination banknotes with valid legal tender from January 17 to 19 January 1978. Section 8 provided for exchange of such notes even after January 19 but up to 24 January 1978, provided RBI was satisfied that there was genuine ground for delay. Section 10 provided for penalties and section 11 provided for offences.[58] The Supreme Court upheld the constitutionality of this statute in 1996 on the ground that the compulsory acquisition of property was for public purpose to resolve the problem of unaccounted money. The refusal by the RBI and the Central Government to exchange the demonetized notes was also held to be reasonable since the petitioner had not satisfactorily explained how it got possession of the notes before demonetization.[59]

[53]ibid [36].
[54]ibid [36].
[55]ibid [36].
[56]The Reserve Bank of India (Amendment) Act 1997, s 9.
[57]*Bhavesh D. Parish v Union of India* (2000) 5 SCC 471 [23].
[58]Datta and Sengupta (n 28).
[59]*Jayantilal Ratanchand Shah v Reserve Bank Of India* (1996) 9 SCC 650 [10] ("Jayantilal").

The above vignette suggests that the Supreme Court was extremely deferential towards the RBI from 1960s to late 1990s. It is, however, important to recognize that this norm of judicial deference towards the RBI did not develop in isolation. Prior to 1990s, central banks were shrouded in mystery and believed that they should be.[60] The conventional wisdom was that "central banking . . . thrives on a pervasive impression that [it] . . . is an esoteric art" and "access to this art and its proper execution is confined to an initiated elite".[61] It was only from mid-1990s that the idea of greater openness in central banking started taking roots. Proponents for greater openness argued that more central bank communication would help improve the efficiency of monetary policy because expectations about future central bank behaviour provide the link between short rates and long rates.[62] In February 1994, the Federal Open Market Committee (FOMC) in the USA first started announcing its decisions on the federal funds rate target.[63] Since then central banks worldwide have gradually shifted away from secrecy towards transparency in the way they interact with the public. Communication about future policies, known as forward guidance, has become a key policy tool for central banks.[64] Given this recent shift from secrecy to transparency in central banking communication, it is not surprising that judicial deference towards the RBI developed at a time when central banking itself was perceived as an esoteric matter confined to an elite technocracy.

Additionally, the issue of judicial deference in matters of economic policy was raised before the Supreme Court in multiple cases since 1970s. The bank nationalization exercise of 1969–70 led to the first prominent case on this point, *R.C. Cooper v Union of India* ("R.C. Cooper").[65] The Supreme Court struck down the Banking Companies (Acquisition and Transfer of Undertakings) Act 1969 on the ground that the law substantially impaired the constitutional guarantee of compensation for expropriation of the undertaking of the named bank. However, the judgement clarified that it is not for the Court to consider the relative merits of the different political theories or economic policies. It only has the power to strike down a law on the ground of want of authority, but it will not sit in appeal over the policy of the Parliament in enacting a law.[66] The Court slowly started developing a higher standard of judicial deference towards the legislature in economic matters as against other areas of fundamental human rights. Around a decade after *R.C. Cooper*, in *R.K. Garg v Union of India* ("R.K. Garg"),[67] the Supreme Court was called upon to decide on the constitutionality of another important economic legislation, the Special Bearer Bonds (Immunities and Exemptions) Act 1981. This Act provided certain immunities to holders of special bearer bonds, exempting them from direct taxes in relation to such bonds, to induce disclosure of black money and

[60] Alan S. Blinder, Michael Ehrmann, Marcel Fratzscher, Jakob De Haan andDavid-Jan Jansen, "Central Bank Communication and Monetary Policy: A Survey of Theory and Evidence" (2008) 46 Journal of Economic Literature 910.
[61] ibid 910.
[62] Alan S. Blinder., *Central banking in theory and practice* (MIT Press 1998).
[63] Blinder *et al* (n 60).
[64] Jean Barthelemy, Stephane Dupraz, Gaetano Gaballo and Klodiana Istrefi, "Trends in central bank communication: from secrecy to transparency" (2019) Banque de France Bulletin 266/2 <https://publications.banque-france.fr/en/trends-central-bank-communication-secrecy-transparency > accessed 12 July 2022.
[65] (1970) 1 SCC 248.
[66] ibid [63]. See generally, Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2016).
[67] (1981) 4 SCC 675.

channelize the same for productive use in the economy. This legislation was challenged on the ground that the law discriminated against honest taxpayers by conferring immunities and exemptions in favour of black money holders. While dismissing the challenge, the Supreme Court held that "the court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved".[68]

This higher standard of judicial deference in matters of economic policies was soon extended to the executive. In *State of M.P. v Nandlal Jaiswal and Ors.*,[69] the Supreme Court dismissed a constitutional challenge to the policy decision of the Madhya Pradesh government regarding licence for construction of distilleries for manufacture and supply of country liquor. Citing its earlier decision in *R.K. Garg*, the Court held:

> What we have said in that case in regard to legislation relating to economic matters must apply equally in regard to executive action in the field of economic activities, though the executive decision may not be placed on as high a pedestal as legislative judgment insofar as judicial deference is concerned.[70]

Judicial deference towards executive actions in economic matters followed in subsequent cases during early 1990s, which coincidentally overlapped with the early days of liberalization of the Indian economy.[71] This broader trend of judicial deference towards the executive on economic policy at the time may have bolstered the norm of judicial deference towards the RBI, given its unique position in economic policymaking as the country's Central Bank.[72]

III. Eroding judicial deference and increasing judicial intervention in central bank functioning

With the turn of the century, the RBI was compelled to act beyond its uncontested traditional functions due to several exogenous factors, affecting stakeholders beyond its immediate jurisdiction. These aggrieved stakeholders increasingly challenged those RBI actions. This phenomenon ultimately led to the emergence of a nascent trend of active judicial intervention in the regulatory functioning of the RBI, which also appears to be correlated with a gradual erosion in the earlier norm of judicial deference towards the RBI.

(1) Judicial deference towards the RBI is eroding

The enactment of the RTI Act coupled with the credit boom from 2004–2008 paved the way for the first exogenous event that exposed the RBI to a serious judicial review challenge.

[68] ibid [8].
[69] (1986) 4 SCC 566.
[70] ibid [34].
[71] See for eg, *G.B. Mahajan v Jalgaon Municipal Council* (1991) 3 SCC 91 [22]; *Premium Granites and Anr. v State of Tamil Nadu* (1994) 2 SCC 691 [54].
[72] It may be useful to highlight that in extremely rare instances judicial review against the RBI did succeed. In one such instance, the Supreme Court held that the approval granted by the RBI for interest tax rounding-up was wholly without jurisdiction and *ultra vires* the provisions of the Banking Regulation Act, 1949. See for eg, *Indian Banks' Association, Bombay and Ors. v Devkala Consultancy Ltd.* (2004) 11 SCC 1 [37]-[42].

The idea of right to information had emerged much earlier, although it was in the periphery. Its journey from the periphery to the core of the Indian policy discourse has a rich and layered history. In 1989, the Central Government for the first time declared its commitment to enshrine right to information in the Constitution. In 1997, the HD Shourie Committee constituted by the Central Government recommended a Freedom of Information Bill. This draft bill underwent various changes across time and finally led up to the enactment of the RTI Act.[73]

From 2004 to 2008, India witnessed one of the biggest bank credit booms in a quarter century.[74] Embraced by a certain degree of optimism, improper credit risk decisions were made by borrowers and banks.[75] Many of these loans went into default and had to be categorized as Non-Performing Assets ("NPAs").[76] Given that many of the banks involved were public sector banks, there were allegations of corruption and crony capitalism.[77] Activists resorted to the newly enacted RTI Act, to try and draw out details of the NPA defaulters from the RBI.

The RBI refused to share copies of inspection reports of banks, warning letters it had issued to banks, list of wilful defaulters, details of show-cause notices issued, and penalties imposed on banks etc. It argued that it received such information in its "fiduciary relationship" with its regulated banks and therefore, it was exempt from disclosing such information under section 8(1)(e) of the RTI Act.[78] This refusal went beyond the traditional uncontested central banking functions and exposed the RBI to serious judicial review challenges. The Supreme Court decided against the RBI in

[73]Himanshu Jha, *Capturing Institutional Change: The case of the Right to Information Act in India* (Oxford University Press 2020).

[74]Bank credit rose roughly by 15% of GDP. Industrial credit rose by 2.61 times Loans in infrastructure and construction rose by 4.07 times, while the remainder of industrial credit rose by 2.3 times. See, Ajay Shah, "The anatomy of the Indian credit boom of 2004–08" (2015) NIPFP DEA Research Programme <https://macrofinance.nipfp.org.in/PDF/14Pr_Shah2015_credit_booms.pdf > accessed 12 July 2022.

[75]ibid 24.

[76]The policy focus on NPAs had been there since economic liberalization in 1991. The demise of the Development Finance Institutions ("DFIs") is thought to have contributed to the bad loans' crisis in early 1990s. DFIs started suffering from asset liability mismatches when cheap windows for financing were closed by the government. The peak of the wave came in 1994 when 13.71% of banking assets turned into net bad loans after provisioning. Subsequently, the 1997–98 Asian financial crisis amplified the policy focus on NPAs, prompting the Narasimham Committee II (1998) to propose a special law to empower banks to recover assets directly without recourse to courts, over and above the recourse available through the special Debt Recovery Tribunals set up under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDDBFI Act"). This ultimately led to the enactment of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. Yet the problem with NPAs persisted. See, Tamal Bandyopadhyay, *Pandemonium: The great Indian banking tragedy* (Roli Books 2021).

[77]*Common Cause v Union of India* (2010) 11 SCC 528. In 2010, the Supreme Court itself disposed of a writ petition filed in 1998 praying for appropriate directions to resolve the NPA problem. The Court observed that "reduction and control of NPAs are not within the domain of the judiciary but within the domain of the executive and the legislature under our Constitution". Yet, it went on to direct the Union Government to "ensure that the Serious Frauds Investigation Office (SFIO) is effective in detecting and preventing bank frauds by influential people". It also expressed its hope that the committee of experts constituted by the Central Government will consider its suggestion to make SFIO a statutory authority having sufficient powers and autonomy to deal with the NPA problem.

[78]*Bloomberg L.P. v Board of Governors of the Federal Reserve System*, 649 F. Supp. 2d 262 (SDNY 2009). It may be useful to highlight here that a similar development took place in the USA a couple of years earlier. During the global financial crisis in 2008, the Federal Reserve Board ("Board") refused to share information regarding emergency lending through some of its discount windows (such as details of collaterals posted, borrower details etc.) to Bloomberg under the exemptions to the Freedom of Information Act (FOIA). Bloomberg challenged the Board's decision before Court. The question before the Court was whether the relevant records qualified for exemption from disclosure under FOIA. The Court rejected the Board's argument that disclosure of such information would weaken the competitive position of the borrower in the market. It held that the exemption cannot be used by the Board to refuse disclosure of any information about a borrower that might be considered negative. Neither did the Court find any immediate risk of competitive harm that will result from disclosure since the Board was only speculating on how a borrower might enter a downward spiral of financial instability if its participation in the Board's lending programmes were to be disclosed. Moreover, the information sought to be disclosed did not provide any guidance or directives, only historical data. Accordingly, the Court decided against the Federal Reserve and ordered disclosure of the relevant information.

December 2015.[79] The Court reasoned that the RBI didn't receive the relevant information from banks on the pretext of confidence or trust and therefore, cannot refuse to share the same under RTI Act.[80] This decision marked a prominent turning point in the traditional judicial deference shown by the Supreme Court towards the RBI.[81]

A noteworthy parallel development during this period was the release of the report of the Financial Sector Legislative Reforms Commission ("FSLRC") in March 2013. Chaired by a former judge of the Supreme Court, Justice B.N. Srikrishna, the FSLRC recommended a radical overhaul of the fragmented financial sector legislative framework with a comprehensive Indian Financial Code that it had drafted.[82] One of its recommendations was that the present Securities Appellate Tribunal ("SAT") be subsumed within a proposed Financial Sector Appellate Tribunal ("FSAT"), which would also hear appeals against the RBI's regulatory actions.[83] The RBI governor at the time, Dr. Raghuram Rajan, publicly criticized this recommendation and advocated against its implementation on three grounds. First, tribunals cannot be asked to make judgements that they simply do not have the capability, experience, or information to make, especially where precise evidence may be lacking. The second danger was that easing the appellate process would invite appeals. Finally, in every country, Dr. Rajan maintained, a healthy respect for the regulator serves to keep participants on the straight and narrow. In a developing country, where private behaviour is less constrained by norms or institutions, this was especially important.[84] This prompted Justice Srikrishna to retort that Dr. Rajan was "stonewalling" the reform. Justice Srikrishna highlighted that before joining the RBI, Dr. Rajan had himself recommended in a 2009 report titled "Hundred Small Steps", that "regulatory actions should be subject to appeal to the financial sector appellate tribunal".[85] Ultimately, Dr. Rajan's opposition prevailed and the RBI was kept outside the

[79] *RBI v Jayantilal N. Mistry* (2016) 3 SCC 525 [83]-[84] ("Jayantilal N. Mistry").

[80] ibid [60].

[81] This judgment in *Jayantilal N. Mistry* is, however, likely to be reviewed by a higher bench of the Supreme Court. An earlier attempt to recall the judgment was rejected by the court on 28 April 2021. Consequently, the RBI issued directions to several banks to disclose information regarding their defaulters' list and inspection reports. These RBI directions were challenged by those banks through multiple writ petitions before the Supreme Court. A preliminary objection was raised to dismiss these writ petitions for lack of maintainability in view of the judgment in *Jayantilal N. Mistry*. A coordinate bench of the Supreme Court however rejected this plea. The court *prima facie* observed that the *Jayantilal N. Mistry* judgement did not take into consideration the aspect of balancing the right to information and the right to privacy. Therefore, the court concluded that these writ petitions are the only remedy available to the banks for protection of the fundamental rights of their customers, who are Indian citizens. See, *HDFC Bank Ltd. & Ors. v Union of India*, Writ Petition (Civil) No. 1159 of 2022 (Supreme Court, 30 September 2022); *RBI v Jayantilal N. Mistry* Transferred Case (Civil) No. 91 of 2015 (Supreme Court, 28 April 2021).

[82] Ministry of Finance, Government of India, Report of the Financial Sector Legislative Reforms Commission: Volume II: Draft law <https://dea.gov.in/sites/default/files/fslrc_report_vol2_1.pdf > accessed 12 July 2022.

[83] Ministry of Finance, Government of India, Report of the Financial Sector Legislative Reforms Commission: Volume I: Analysis and Recommendations, xxvi <https://dea.gov.in/sites/default/files/fslrc_report_vol1_1.pdf > accessed 12 July 2022.

[84] Raghuram Rajan, "Financial Sector Legislative Reforms Committee Report (FSLRC): What to do and when?" (First State Bank Banking and Economic Conclave, Mumbai, 17 June 2014) < https://rbi.org.in/SCRIPTS/BS_SpeechesView.aspx?Id=900 > accessed 12 July 2022.

[85] B.N. Srikrishna, "Raghuram Rajan is stonewalling reform by disagreeing on judicial review of regulatory decisions", *Economic Times* (26 June 2014) <https://economictimes.indiatimes.com/opinion/et-commentary/raghuram-rajan-is-stonewalling-reform-by-disagreeing-on-judicial-review-of-regulatory-decisions/articleshow/37214116.cms?from=mdr > accessed 15 July 2002. It may be useful to note here that Dr. Rajan, even as the RBI governor, was never entirely opposed to judicial review of regulatory decisions. In his speech, Dr. Rajan had also mentioned: "*So long as the Tribunal only questions administrative decisions such as the size and proportionality of penalties, I do not see a problem. But if it goes beyond, and starts entertaining questions about policy, the functioning of a regulator like the RBI, which has to constantly make judgments intended to minimize systemic risk, will be greatly impaired.*"

jurisdiction of the SAT.[86] An unintended consequence of this candid Srikrishna-Rajan debate was that the issue of judicial review of the RBI gained salience within the wider public discourse in the country.[87]

Almost a year after the Supreme Court rejected the RBI's stand on the RTI Act, on 8 November 2016, India suddenly demonetized all bank notes of Rs. 500 and Rs. 1000 denominations, amounting to around 86% of its total currency in circulation. The demonetization was initially implemented through three different legal instruments, one of which was an RBI notification on withdrawal of legal tender character of Rs. 500/- and Rs. 1000/- bank notes.[88] Subsequently, the RBI issued various other circulars to clarify or facilitate the demonetization exercise.[89] As expected, writ petitions were filed before the Supreme Court as well as various High Courts challenging the demonetization exercise.[90] These writ petitions challenged all the relevant legal instruments that facilitated the demonetization process including those issued by the RBI.[91] Consequently, demonetization was one of the crucial exogenous events that compelled the RBI to issue various legal instruments outside its usual uncontested central banking functions, exposing it to a multitude of judicial review challenges.[92]

Another exogenous event was the enactment of the IBC in May 2016. A year after its enactment, on 4 May 2017, the Central Government was legislatively empowered to give orders authorizing the RBI to issue directions to any bank to initiate IBC proceeding in respect of "a default".[93] Accordingly, the Central Government issued an order authorizing the RBI to give directions to banks.[94] On 12 February 2018, the RBI issued a circular requiring its regulated banks to compulsorily trigger IBC proceedings against corporate debtors with an aggregate debt exposure of Rs. 2000 crore or more, unless a restructuring

[86]The SAT used to initially hear appeals against regulatory actions of the SEBI. Based on FSLRC recommendations, its jurisdiction was expanded in 2014–15 to hear appeals from the PFRDA and the IRDAI. Neither was it rechristened as the FSAT, nor was its jurisdiction expanded to hear appeals from the RBI.

[87]The media had covered it extensively at the time. See for eg, Dinesh Unnikrishnan and Arup Roy, "Judicial review of decisions may make RBI 'paper tiger': Raghuram Rajan", *Livemint* (17 June 2014) < https://www.livemint.com/Politics/pZ9r8qJtGg7rxk5LBq7lpN/Raghuram-Rajan-questions-suggested-recommendations-on-judici.html > accessed 15 July 2022; Suyash Rai and Ajay Shah, "Why Rajan is wrong: What RBI needs is a good dose of Appellate Raj", *Firstpost* (26 February 2015) < https://www.firstpost.com/business/rajan-wrong-rbi-needs-good-dose-appellate-raj-2123609.html > accessed 15 July 2022.

[88]Reserve Bank of India, "RBI instruction to banks" (8 November 2016) <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10684&Mode=0 > accessed 15 July 2022.

[89]See for eg, Reserve Bank of India, "Instructions to Authorised Persons" (9 November 2016) <https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10685 > accessed 15 July 2022; Reserve Bank of India, "RBI Instruction to Banks for Changes in ATM" (9 November 2016) <https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10687 > accessed 15 July 2022; Reserve Bank of India, "Limits for Banks, Post offices, Money Changers, White Label ATMs" (10 November 2016) <https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10696 > accessed 15 July 2022; Reserve Bank of India, "Relaxation for Government Departments" (11 November 2016) <https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10697 > accessed 15 July 2022.

[90]*Vivek Narayan Sharma v Union of India* Writ Petition (Civil) No. 906 of 2016 (Supreme Court, 16 December 2016); *Vivek Narayan Sharma v Union of India* Writ Petition (Civil) No. 906 of 2016 (Supreme Court, 28 September 2022). On 16 December 2016, a three-judge bench of the Supreme Court referred these matters to a larger bench of five judges for an authoritative pronouncement. The court also stayed hearing of proceedings on the same subject matter before the various High Courts and allowed those petitioners to intervene in the writ petitions pending before the Supreme Court. The larger bench of five judges has now been constituted. The hearing in currently on-going.

[91]Datta and Sengupta (n 28).

[92]*Jayantilal* (n 59). Earlier, the Supreme Court had upheld the constitutionality of the High Denomination Bank Notes (Demonetization) Act 1978 as well as the impugned order of the currency officer of the RBI under that Act based on its reasoning.

[93]Banking Regulation Act 1949, ss 35AA and 35AB.

[94]Ministry of Finance, Government of India, "Order" (S.O.1435(E), 5 May 2017) <https://egazette.nic.in/WriteReadData/2017/175797.pdf > accessed 2 December 2022.

process in respect of such debt is fully implemented within the prescribed time.[95] This circular once again went beyond the traditional uncontested central banking functions and exposed the RBI to a deluge of judicial review challenges by aggrieved corporate debtors. In April 2019, the Supreme Court struck down the RBI circular as ultra vires section 35AA of the Banking Regulation Act 1949.[96] The Court held that section 35AA empowered the RBI to pass directions only in specific cases of default but not to issue directions to banks generally as was done through the circular. Such a strict, narrow interpretation of the RBI's new statutory powers to resolve stressed assets signalled a marked shift away from the traditional judicial deference towards the Central Bank.[97]

A further exogenous event arose from the emergence of cryptocurrencies during this period. Since 2016, serious deliberations were going on within the government and the RBI about regulating cryptocurrencies.[98] In the midst of these developments, the RBI issued a circular on 6 April 2018, prohibiting its regulated entities from dealing or settling in virtual currencies ("VCs").[99] This circular again exposed the RBI to a spate of judicial review challenges by aggrieved (unregulated) market participants. In March 2020, the Court struck down the circular for imposing a disproportionate restriction on the fundamental right to conduct trade and business in India under Article 19(1)(g) of the Constitution[100] This decision once again highlighted the continued shift away from the traditional judicial deference towards the RBI.

Covid-19 appeared as the final exogenous event till now. The economic disruption caused due to the pandemic prompted the RBI to issue a regulatory package on 27 March 2020, to mitigate the burden of debt servicing to ensure continuity of viable businesses.[101] This included permitting its regulated banks, NBFCs, and financial institutions to grant a three-month moratorium on payment of all instalments on term loans falling due between 1 March 2020 and 31 May 2020, which was subsequently extended by another three months to 31 August 2020.[102] However, instead of waiving the interest on such term loans during the moratorium period, the RBI circular stated that the "interest shall continue to accrue on the outstanding portion of the term loan during the moratorium period".[103] This effectively allowed lending institutions to charge interest on interest from the borrowers for availing the moratorium facility. Once again, this circular

[95]Reserve Bank of India, "Resolution of Stressed Assets – Revised Framework" (12 February 2018) <https://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=11218 > accessed 15 July 2022.

[96]*Dharani Sugars and Chemicals Ltd. v Union of India* (2019) 5 SCC 480 [66].

[97]On being asked about his views on the Supreme Court's decision, the finance minister at the time, Mr. Arun Jaitley, told the media: "I don't see a major crisis. This judgment is really more procedural – this is not substantive. A judgment which says procedure or your application of mind or your width of your power is inadequate can always be rectified by an appropriate action." See, Deepshikha Sikarwar and Vinay Pandey, "Supreme Court's judgment on RBI circular procedural, not a major crisis: Arun Jaitley", *Economic Times* (4 April 2019) <https://economictimes.indiatimes.com/news/economy/policy/supreme-courts-judgement-on-rbi-circular-procedural-not-a-major-crisis-arun-jaitley/articleshow/68714443.cms?from=mdr > accessed 15 July 2022.

[98]An inter-ministerial committee had even submitted its initial report along with a draft bill titled Crypto Token and Crypto Asset (Banning, Control and Regulation) Bill 2018.

[99]Reserve Bank of India, "Prohibition on dealing in Virtual Currencies (VCs)" (6 April 2018) <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11243&Mode=0> accessed 15 July 2022.

[100]Internet and Mobile Association of India (n 30). See also, Pratik Datta and Varun Marwah, "Indian Supreme Court on virtual currency: Regulatory governance implications" (*The LEAP Blog*, 10 April 2020) <https://blog.theleapjournal.org/2020/04/indian-supreme-court-on-virtual.html > accessed 15 July 2022.

[101]Reserve Bank of India, "Covid-19 Regulatory Package" (27 March 2020) <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11835 > accessed 15 July 2022.

[102]Reserve Bank of India, "Covid-19 – Regulatory Package" (23 May 2020) <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11902&Mode=0 > accessed 15 July 2022.

[103]Reserve Bank of India, "Covid-19 Regulatory Package" (27 March 2020) <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11835 > accessed 15 July 2022.

exposed the RBI to multiple challenges by aggrieved borrowers. The Supreme Court went on to direct that there shall not be any charge of interest on interest for the period during the moratorium and any amount already recovered under the same head shall be refunded to the concerned borrowers as credit or adjusted in the next instalment of the loan amount.[104]

Each of the above exogenous events compelled the RBI to react either by issuing new legal instruments (example, the circular prohibiting dealing or settling in VCs) or by refusing to take any action (example, refusing to release of information under the RTI Act). Unlike traditional uncontested central banking functions (involving balance sheet operations or regulatory actions against regulated entities), these RBI actions (and inactions) directly impacted specific persons or classes of persons beyond the immediate jurisdiction of the Central Bank, such as, corporate debtors, individual borrowers, unregulated market participants and activists. Consequently, these aggrieved stakeholders challenged these impugned RBI actions resulting in increased judicial review challenges involving the Central Bank as evident from Figure 1. As a result of some prominent instances of successful judicial review challenges against the RBI and the corresponding increase in judicial review challenges against the RBI, the judicial deference towards the Central Bank appears to have started eroding from 2015.

It is important to highlight here that erosion of judicial deference is not necessarily reflected through explicit denial of such deference in the judicial decisions. Rather, it is to be deciphered from the judicial action. In many of the above cases where the Supreme Court has exercised judicial review powers against the RBI, it has also acknowledged the expertise of the RBI and cautioned against judicial review of economic and fiscal regulatory measures. For instance, in *Small Scale Industrial Manufacturers Association v Union of India*, the Court dismissed several petitions seeking total waiver during the moratorium, extension of the moratorium period, sector wise relief, additional fiscal relief etc on the ground that judicial review cannot venture into issues of economic policy.[105] Yet, the same Court went on to direct that there shall not be any charge of interest on interest for the period during the moratorium from any borrower for any amount of loan. The Court reasoned that charging interest on interest during moratorium period stood on a different footing since the Central Government had exempted certain categories of loans up to INR 2 crores from paying interest on interest. The Court did not find any justification for the policy restricting such exemption to those specific types of loans below INR 2 crores. Accordingly, it held the conditions in the policy for such exemption to be arbitrary and discriminatory, and effectively quashed the impugned RBI Notification to the extent that it allowed lenders to charge interest on interest during the moratorium period.[106] This is one of several examples since 2015 where the Court has shown formal deference towards the RBI, while actively exercising judicial review powers against the Central Bank.

[104] *Small Scale Industrial Manufacturers Association* (n 31) [31].
[105] ibid [14–18].
[106] ibid [31–32].

(2) Active judicial intervention in the regulatory functioning of the RBI is increasing

Based on the discussion till now, judicial review challenges involving the RBI's actions could potentially arise from three different categories of central banking functions[107]

(a) Balance sheet operations (such as asset purchase and lending to banks);
(b) Issuance of currency (including withdrawal of legal tender status); and
(c) Other regulatory functions (primarily regulation of banks and other financial institutions)

The experience at the Supreme Court of India suggests that judicial review challenges with respect to category (a) has been non-existent. Judicial review challenges with respect to category (b) have arisen usually when legal tender status of bank notes has been withdrawn in 1978 and 2016. The overwhelming variety of judicial review challenges, however, appear to have arisen from category (c). In other words, the RBI faced a spectrum of judicial review challenges before the Supreme Court mainly in its role as a regulator of banks and other financial institutions. In this role, the RBI has been experiencing increasing instances of active judicial intervention since 2015, which also appears to be correlated with a gradual erosion in the earlier norm of judicial deference towards the RBI. At times, the Supreme Court has imposed higher standards of regulatory governance on the Central Bank, while on some occasions it has rewritten the RBI's regulations.

Consider the RBI's quasi-judicial functioning. While the RBI regularly imposes penalties on banks, it never publishes the penalty orders (even redacted versions) which contain the reasoning behind the imposition of such penalties. The apparent reason for such secrecy is that such penalties are imposed based on findings in the Annual Financial Inspections ("AFIs") of banks which are conducted under section 35 of the Banking Regulation Act 1949.[108] The RBI claims that the findings of such inspection are confidential in nature, intended specifically for the regulated entities and for corrective action by them. Moreover, the RBI claims that such information is received by it in fiduciary capacity and that disclosure of such information would prejudicially affect the economic interests of the State and harm the banks' competitive position. Consequently, the RBI's stance is that the relevant show-cause notice, findings, reports, associated correspondences, orders etc. are exempt from disclosure under section 8(1)(a), (d) and (e) of the RTI Act.[109] The RBI only issues a short press release to inform the public that a penalty order has been imposed against a particular bank. The RBI also remains the only Indian financial sector regulator against whose quasi-judicial orders there is no statutory right of appeal before a specialized tribunal.[110] In view of this entrenched norm of secrecy

[107]The author is extremely grateful to one of the anonymous peer reviewers from Indian Law Review for suggesting this classification.:

[108]Banking Regulation Act 1949, s 34A(1). Under the current banking laws, banks cannot be compelled by any authority in a proceeding to produce or give inspection of any of its books of account or other documents or furnish or disclose any statement or information, when the bank claims such document, statement, or information to be confidential in nature.

[109]*Jayantitilal N. Mistry* (n 79) [10], [15]. This was the position taken by the RBI in rejecting several applications under the RTI Act 2005, which ultimately led to the challenge before the Supreme Court. Although the court dismissed the RBI's appeal and upheld the impugned orders passed by the Central Information Commission, it appears that the RBI is yet to start publishing penalty orders issued to banks.

[110]See (n 40), (n 41) and (n 86).

in the Central Bank's quasi-judicial functions, one relatively less prominent order of the Supreme Court assumes significance.

In February 2017, the Supreme Court heard a writ petition challenging the RBI's inaction in taking a decision with reference to a deposit made by the petitioner. Not only did the Court direct the RBI to take a decision within five weeks through a well-reasoned speaking order, but it also clarified that it shall be open to the petitioner to assail the order so passed by the RBI.[111] This seemingly mundane order assumes significance because it held the RBI's quasi-judicial functions to the normal standards of natural justice expected of any regulator or government department.

A similar phenomenon is playing out in relation to the RBI's regulation making functions. The RBI does not have any formal legal process for framing regulations prescribed in any statute or secondary legislation.[112] This makes the RBI's regulation-making activity extremely opaque, *ad hoc*, and unresponsive. A relatively recent study measured the responsiveness of four Indian regulators – SEBI, RBI, Telecom Regulatory Authority of India ("TRAI") and Airport Economic Regulatory Authority ("AERA"). It found that between 1 January 2014, to 30 April 2016, about 4% of all the legislative instruments issued by the RBI were laid before the Parliament. During the same period, the RBI held formal public consultation for only 2% of the legislative instruments issued by it. The public consultations involved only submission of comments, no other engagement in the form of information dissemination or oral hearings for public comments was conducted. The consultation papers usually presented only one solution and did not offer merits and demerits of multiple possible solutions. No information was provided to explain the grounds for accepting or rejecting a comment. The comments received were not published. The average time lag from the date of completion of consultation to the date of issuance of the instrument was 1128 days. Overall, the paper found the RBI to be the least responsive of the four regulators under study.[113]

The Supreme Court has recently pushed back against this entrenched norm of secrecy in the RBI's regulation making process. In 2020, the Supreme Court struck down a RBI circular prohibiting its regulated entities from dealing or settling in VCs.[114] The Court held the prohibition to be disproportionate on two grounds. First, the Court observed that the RBI had not found the activities of VC exchanges to have adversely impacted any RBI regulated entity. In case any such harm was caused, the Court expected at least some empirical data about degree of harm suffered by the regulated entities, which was never produced by the RBI. Second, the Court found that the RBI did not consider the availability of any alternative regulatory response before issuing the circular imposing an absolute ban. This decision was the first instance, to the best of our knowledge, where the Supreme Court held the RBI's regulation making process to higher standards of regulatory governance.[115]

[111] *Procure Logistic Services Ltd. v Reserve Bank of India* Writ Petition (Civil) No. 77/2017 (Supreme Court, 10 February 2017).
[112] For contrast, consider section 196(1)(s) of the Insolvency and Bankruptcy Code, 2016 ("IBC") which requires the Insolvency and Bankruptcy Board of India (IBBI) to "specify mechanisms for issuing regulations, including conduct of public consultation processes before notification of any regulation". Accordingly, the IBBI issued the IBBI (Mechanism for Issuing Regulations) Regulation 2018.
[113] Anirudh Burman and Bhargavi Zaveri, "Measuring regulatory responsiveness in India: A framework for empirical assessment" (2018) 9 William & Mary Policy Review 1.
[114] *Internet and Mobile Association of India* (n 30).
[115] Datta and Marwah (n 100); Pratik Datta, "Policy, not diktat" *Indian Express* (24 June 2022) <https://indianexpress.com/article/opinion/columns/rbi-policy-india-inflation-rate-7987392/> accessed 12 July 2022.

The Supreme Court had gone one step further in 2019 when it was called upon to decide whether a person is entitled to be represented by a lawyer of their choice before they are declared as a wilful defaulter by an in-house committee of the creditor bank as per the RBI's Master Circular on Wilful Defaulters ("2015 Master Circular").[116] According to the 2015 Master Circular, the decision to classify a person as wilful defaulter is entrusted to an internal committee (First Committee) comprising the Executive Director and two senior officials of the bank. If this First Committee finds that an event of wilful default has occurred, it must first issue a show cause notice to the concerned borrower and call for his submissions. After considering his submissions, the First Committee must issue an order recording the fact of wilful default and the reasons for the same. A personal hearing may be given only if the First Committee feels that such hearing to be necessary. Thereafter, the order of the First Committee is to be reviewed by another Committee (Review Committee) headed by the Chairman/ Managing Director or CEO, in addition to two independent directors or non-executive directors of the bank. The order of the First Committee becomes final only after it is confirmed by the Review Committee.[117] As per the 2015 Master Circular, the First Committee was not required to give the order to the borrower. Neither could the borrower make any representation against the order nor was there any personal hearing before the Review Committee. The Review Committee was supposed to go through the First Committee's order itself and decide without involving the borrower at all. Considering the severe consequences of being classified as a wilful defaulter, the Supreme Court read in additional procedural safeguards within the RBI's Master Circular. The Court held that the First Committee must give its order to the borrower as soon as it is made. The borrower was also permitted to make its representations against such an order within 15 days before the Review Committee. The Review Committee was required to pass a reasoned order on such representation, which must then be served to the borrower.[118] This decision marked a novel judicial attempt at effectively rewriting the RBI's regulations to insert natural justice principles within the regulated banks' internal procedures.

This decision in *State Bank of India v M/s. Jah Developers Pvt. Ltd* ("Jah Developers") was novel because the Supreme Court had in an earlier decision in *Peerless General Finance and Investment Company Limited v Reserve Bank of India* ("Peerless") disapproved of a Calcutta High Court judgement which had modified the definition of "liability" in an RBI direction.[119] It had then categorically stated that "the court can only strike down some or entire directions issued by the Reserve Bank in case the court is satisfied that the directions were wholly unreasonable or violative of any provision in the Constitutions or any statute".[120] Rewriting or modifying an RBI regulation through a court judgement was considered a "hazardous and risky" transgression.[121] In view of this law laid down in Peerless, the Supreme Court's decision in Jah Developers was clearly a novel judicial attempt. This decision could possibly be justified since the judicial

[116] *State Bank of India v M/s. Jah Developers Pvt. Ltd*. Civil Appeal No. 4776 of 2019 (Supreme Court, 8 May 2019).
[117] ibid [6].
[118] ibid [7], [21]. However, the Court refused to acknowledge any right of the defaulter to be represented through a lawyer before the bank's in-house committee.
[119] *Peerless* (n 52).
[120] ibid [36].
[121] ibid [36].

rewriting in this case was confined only to the process aspects of the RBI's regulations and did not interfere with the substantive economic policy itself unlike the modification made by the Calcutta High Court to the meaning of "liability" in an RBI direction through its impugned judgment in Peerless.[122]

It is important to highlight here that in recent times the Supreme Court has shown subtle judicial restraint in matters pertaining to larger economic policy within the domain of the Central Bank. The Court dismissed a writ petition against the RBI praying for appropriate guidelines to control the menace of NPAs as well as grant of loans against shares. The Court reasoned that since the issues pertain to the domain of expert bodies like the RBI, "the matter is not amenable to judicially manageable standards since the court would have to travel into the policy domain".[123]

Overall, these Supreme Court decisions since 2015 suggest a nascent trend of active judicial intervention in the regulatory functioning of the RBI especially in its regulation making activities. This provides further evidence of the eroding judicial deference towards the Central Bank at least on the regulatory (process) aspects, if not as much on the substantive economic policies themselves.[124]

IV. Conclusion

Traditional RBI functions involving balance-sheet operations usually involve uncontested uses of regulatory authority over regulated entities or voluntary market transactions. They typically affect individuals and firms indirectly (through banks) in a generalized fashion, reducing RBI's exposure to judicial review. Even when the RBI's regulatory actions involve specific and direct tangible actions through circulars, directions, notifications, and orders, these are mostly directed at different types of regulated entities which usually have little incentive to challenge these instruments in a court of law and risk disrupting their cordial relationship with the regulator. Another reason behind their reticence is that there is no statutory right of appeal before a specialized tribunal conversant with financial matters. The only option would be to approach a writ court, which may not quite appreciate the technicalities involved in the financial sector. Due to these factors, traditional RBI functions involving balance-sheet operations as well as regulatory actions against regulated entities have usually been uncontested, giving the Indian Supreme Court relatively fewer opportunities to review the RBI's actions.

Even in the rare occasions when the RBI's actions were challenged before the Supreme Court, judges used to be extremely deferential towards the RBI. This jurisprudence of judicial deference towards the RBI developed from 1960s to late 1990s. During this period, central banking across the world was considered an esoteric art confined to an elite technocracy and the Supreme Court itself showed greater deference towards the executive in matters of economic policies.

[122] ibid [36].

[123] *Dr. Subramanium Swamy v Union of India* Writ Petition (Civil) No. 178/2020 (Supreme Court, 7 October 2021).

[124] This finding appears to be broadly in conformity with the general trend of judicial deference towards statutory regulators in India. Indian courts and tribunals in general show deference towards the functioning of statutory regulators except in cases of blatant disregard of process. See, K.P. Krishnan and Anirudh Burman, "Statutory Regulatory Authorities: Evolution and Impact" in Devesh Kapur and Madhav Khosla (eds), *Regulation in India: Design, Capacity, Performance* (Hart Publishing 2019).

With the turn of the century, the enactment of the RTI Act coupled with the credit boom from 2004–2008 paved the path for the first exogenous event that compelled the RBI to refuse release of information obtained from its regulated banks under the RTI Act. This was a tangible regulatory action, much beyond traditional central banking activity, that exposed the RBI to a serious judicial review challenge. In parallel, the FSLRC report and the ensuing Srikrishna-Rajan debate during 2013–14 raised the prominence of judicial review of the RBI in the public discourse. Various subsequent exogenous events such as demonetization, enactment of the IBC, emergence of VCs and the Covid-19 pandemic, compelled the RBI to issue legal instruments that directly impacted various stakeholders beyond the immediate jurisdiction of the Central Bank. These aggrieved stakeholders increasingly challenged those impugned RBI actions. This explains the increase in judicial review challenges involving the RBI before the Supreme Court since 2015 as observed in Figure 1. Increasing instances of active judicial interventions in the regulatory functioning of the RBI since 2015 also provide evidence of the eroding judicial deference towards the RBI at least on the regulatory (process) aspects, if not as much on the substantive economic policies themselves.

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Data availability statement

The data that support the findings of this study are available from the corresponding author, Pratik Datta, upon reasonable request.