
Article 35A and the Future of Stability in Kashmir

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A large number of political and defence analysts attribute instability in Jammu and Kashmir (J&K) to India's inability to fully integrate the state into the union. The challenges towards such integration have historical roots, dating to the circumstances under which the state, led by Maharaja Hari Singh, acceded to India, following Pakistan's attempts to annex the state through force. Historically, Pakistan has also consistently provided support to terrorist and separatist movements in J&K and has also extended such support to promote terror in other parts of the country, in furtherance of its own interests. The third factor is the imposition of Article 370 in the Indian Constitution and the addition of Article 35A, through the provisions of Article 370.

Article 35A of the Indian Constitution is an Article that empowers the J&K state's legislature to define "permanent residents" of the state and provide special rights and privileges to those permanent residents. It was added to the Constitution through a Presidential Order, i.e., the Constitution (Application to Jammu and Kashmir) Order, 1954, issued by the President of India on May 14, 1954, "in exercise of the powers conferred by" clause (1) of Article 370 of the Constitution, with the concurrence of the Government of the State of Jammu and Kashmir.¹ This special status granted to the state of Jammu and Kashmir is believed

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to be the prime inhibiting factor in the complete integration of the state with the union.

Brief History

During British rule, the map of India consisted of territories that came directly under the Crown, and also 565 Princely States, which, while not being part of the Crown possessions, were tied to it in a system of subsidiary alliances. The Princely States had control over their internal affairs, but control over defence and external affairs rested in the hands of the British government, under the Viceroy. In addition, there were several colonial enclaves controlled by France and Portugal. The Government of India Act, 1935, introduced the concept of the Instrument of Accession, wherein a ruler of a Princely State could accede his kingdom into the 'Federation of India'.

Between May 1947 and the transfer of power on August 15, 1947, the vast majority of states signed Instruments of Accession. This was facilitated by the Congress, with its leaders such as C. Rajagopalachari arguing that as paramountcy "came into being as a fact and not by agreement," it would necessarily pass to the government of independent India, as the successor of the British.² A few, however, held out. Amongst them were Hyderabad and Kashmir, which declared that they intended to remain independent. Hyderabad had a Muslim ruler and Muslim nobility in an overwhelming Hindu majority state. After "Operation Polo," an Indian military action to restore order in the state, Hyderabad acceded to India and was absorbed into the union. The state of J&K, however, posed a challenge of an altogether different nature.

1947: The Situation in J&K

At the time of the transfer of power, the state of J&K was ruled by Maharaja Hari Singh, who had announced his intent to remain independent. Sheikh Abdullah, the leader of Kashmir's largest political party, the National Conference, was opposed to Hari Singh's rule and was vociferously demanding his abdication. Pakistan, in the meantime, tried to force the hand of the Maharaja and sent in raiders, assisted by the Pakistan Army, to annex the state by force. Being confronted by a militarily hopeless situation, the Maharaja sought India's help to push back the invaders. India required the signing of an Instrument of Accession and setting up of an interim government headed by Sheikh Abdullah in return.³ The Maharaja complied, but Nehru declared that it would have to be confirmed by a plebiscite, although there was no legal requirement to seek such confirmation. That was perhaps a blunder of epic proportions. Many more would be committed in the years to come.

The Indian Army was airlifted to Srinagar and the raiders were halted a few miles from the city. Then, in a series of heroic actions, the Indian Army pushed back the Pakistan Army-assisted raiders till the onset of winter halted the operations. Nehru now declared a ceasefire and sought UN arbitration—a second blunder following the first, which effectively internationalised a bilateral issue. The UN sponsored ceasefire came into effect on January 01, 1949. At this time, parts of the state's territory were still under Pakistan's illegal occupation. With the ceasefire coming into force, the state stood effectively divided and the opposing forces took positions across a line which came to be known as the Cease Fire Line (CFL). The plebiscite was never held as Pakistan did not withdraw from the areas it had forcibly occupied—a mandatory pre-condition for holding the plebiscite. These areas are now referred to as Pakistan Occupied J&K (POJ&K), and include the Mirpur-Muzaffarabad areas and the erstwhile Northern Areas, now called Gilgit-Baltistan. When the Constitution of India came into force on January 26, 1950, special provisions were

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made for the state of J&K, in the form of Article 370, which was a temporary provision and remains so till date.

In the fluid situation that obtained immediately after independence, Sheikh Abdullah nominated a 4-member team to the Indian Constituent Assembly. They declined to sit in the Assembly but negotiated from outside the status of J&K vis-à-vis the Indian union. They insisted on acceding only those three subjects to the union that were

included in the Instrument of Accession. In the words of Ayyangar, Nehru's confidant and drafter of Article 370, "Ultimately, the will of the people through the instrument of the [J&K] Constituent Assembly will determine the Constitution of the State as well as the sphere of Union jurisdiction over the State."⁴

Due to the prevailing situation in J&K, the Constituent Assembly could not assemble. Thus, when the rest of the nation was readying to adopt the Constitution of India, there was a constitutional vacuum in J&K. To fill this vacuum, Article 370 was inserted in the Indian Constitution, in the hope that J&K would, once the situation normalised, integrate like other states of the union (hence, the use of the term "temporary provision" in the title of the Article). The terms of Article 370 were negotiated by the Kashmiri Muslims keeping only their interest and sentiments in mind, while completely ignoring the sentiments and aspirations of the people of Jammu and Ladakh Divisions, whose combined population was greater than that of the Kashmiri Muslims.⁵

With the Constitution of India coming into force on January 26, 1950, the constituent units were classified into Part A, B and C states. The former British provinces, together with the Princely States that had

been merged into them, were the Part A states. The Princely Unions, plus Mysore and Hyderabad, were the Part B states. The former Chief Commissioners Provinces and other centrally administered areas, except the Andaman and Nicobar Islands, were the Part C states. In 1956, the States Reorganisation Act⁶ reorganised the former British provinces and Princely States on the basis of language. Simultaneously, the Seventh Amendment to the Constitution removed the distinction between Part A and Part B states, both of which were now treated only as “states,” with Part C states being renamed “union territories”.

Article 370

The insertion of Article 370 was to define the applicability of the Constitution of India in the state of J&K till the Constitution of the state was finalised. It was but an additional legislative mechanism to facilitate this transition. In 1950 itself, the Government of India had clarified the effect of Article 370 in a White Paper on Indian states which among others, included the following:

- The Constituent Assembly will be convened to go into the matters in detail.
- When the Assembly will come to the decision on all the matters, it will make a recommendation to the President who will either abrogate Article 370 or direct that it shall apply with such modification and exceptions as he may specify.

The Constituent Assembly was elected in October 1951. The elections were, however, boycotted by the main political party of Jammu, the Praja Parishad. Consequently, lacking opposition, the National Conference and those sympathetic to it won all the seats unopposed. When the Constituent Assembly met for the first time on October 31, 1951, the Praja Parishad, which represented Jammu Division, remained unrepresented. There were also no observers from the Centre. This was

criminal culpability on the part of the national leadership, which imposed no stipulations or conditions to ensure that the State Constitution was in line with the basic structure of the Indian Constitution.⁷

Article 370 was drafted in Part XXI of the Constitution, which relates to “Temporary, Transitional and Special Provisions”. Clause 3 of the Article empowers the President of India on the recommendation of the J&K Constituent Assembly to issue a notification for the abrogation of Article 370. However, the J&K Constituent Assembly dissolved itself on January 25, 1957, without recommending abrogation of Article 370, leaving some people to argue that Article 370 had become a permanent fixture of the Constitution of India, despite being titled a temporary provision in the Constitution.⁸

Delhi Agreement, 1952

As the Constituent Assembly required time to produce a definitive document, Nehru, as an interim measure, decided to obtain from Sheikh Abdullah, a sense of the kind of relationship that would emerge between the Indian union and the state of J&K. A series of negotiations were held in Delhi between the representatives of J&K (representing the National Conference) and the Government of India, the results of which were encapsulated in a document called the Delhi Agreement. This was announced on July 24, 1952, though it had no constitutional validity. The eight salient points included in the agreement were as under:

- The head of the state of J&K would be a person recommended by the state legislature and recognised by the President of India and would be called the *Sadar-i-Riyasat*.
- The Indian flag would have the same status in J&K as in any part of India, but the state flag would also be retained.
- Citizenship would be common in two parts of the country, but the state legislature would have the power to define and regulate the rights and privileges of the permanent residents in Kashmir.

- The fundamental rights, as laid down in the Indian Constitution, would be extended to Kashmir, but these would not come in the way of the state's programme of land reforms.
- The power to reprieve or commute death sentence would belong to the President of India.
- The Indian President's power to declare a state of emergency in case of external danger or internal disturbances would be extended to Kashmir, but in regard to internal disturbances, it would be used only at the request of the state government.
- Residuary power would be retained by the state but the state could transfer more rights to the union.
- The Supreme Court could adjudicate in regard to disputes between the state and the Centre and other provincial governments and on fundamental rights agreed to by the state.

Article 35A

In February 1954, the Constituent Assembly ratified the state's accession to India. Thus, the assurance given to the people of India was fulfilled. In pursuance of this ratification, the President of India promulgated the Constitution (Application to Jammu & Kashmir) Order, 1954, placing on a final footing the applicability of the other provisions of the Indian Constitution to J&K and accorded legal sanctity to the Delhi Agreement. Sections 2(3) and 2(4) of the Order made Part II of the Constitution of India dealing with citizenship, and Part III dealing with fundamental rights applicable to the state of J&K. However, it conferred powers to the state legislature to make special provisions for the permanent residents of the state and for that purpose, Section 2(4)(j) of the Order inserted Article 35A in the Constitution. Thus, contrary to popular belief, it is the Presidential Order 1954 and Article 35A, leading, in turn, to the State Constitution that provide special status to the state and debar other Indians from acquiring property in the state.⁹

Article 35A violates the very concept of equality enshrined in the Constitution of India. Its treatment of non-permanent residents of J&K is akin to treating its own people as second rate citizens.

The modification made to Article 35, the inclusion of Article 35A and the fact that Articles 12 to 15 of the Indian Constitution do not apply to the state of J&K must be studied together to understand why the J&K Constitution is an attack on the secular and democratic fabric of India. Under the Constitution of India, the Right to Equality is the bedrock of democracy. This stands sacrificed in

terms of the provisions of Article 35A. J&K is the only state in the Indian union which has the powers to control the rights and liberties of other Indian citizens in J&K. This is why there is denial of judicial redressal for the non-permanent residents of J&K. Article 35A sanctifies and legitimises this basic defiance of the Indian Constitution. Most people in the legal profession remain ignorant of this aspect, since it was inserted as an Appendix, which is not a part of the official text of the Constitution. It was never presented before the Parliament as the sole authority to amend the Constitution is vested only in the Parliament of India. It is also quite astonishing that Sheikh Abdullah and his National Conference, the main architects of the State Constitution, who were determined to abolish all symbols of Dogra rule, were very keen to retain the State Subject Act, 1927, enacted by the Maharaja.¹⁰

Why Article 35A is Retrograde

Article 35A violates the very concept of equality enshrined in the Constitution of India. Its treatment of non-permanent residents of J&K is akin to treating its own people as second rate citizens. They cannot buy immovable property in J&K, are not eligible for employment by the state government, cannot contest or vote in local body or Assembly elections, cannot avail of scholarships and other grants offered by the

state government to its permanent residents and, above all, cannot seek redress in any court, local or national. Most importantly, it deters the corporate sector from investing in the state as sans the provisions to buy immovable property, such investments make little business sense. The state, thus, remains dependent on the Centre for financial assistance, its economy being dependent for the most part on government jobs and doles from the Centre to enable the state to meet its obligations.

The provisions of Article 35A also violate the principles of gender equality. Section 6 of the Constitution of J&K, which derives its power from Article 35A, discriminates against women residents of the state who marry a person from another state.

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Coupled with a lack of information related to strategic matters, the bureaucracy and political leadership ensured that they remained in power by denying information, which could be the basis of a national debate on strategic perspectives.

Earlier, women such as Parabhjit Kour Modi used to completely lose the ‘permanent resident status’. After a long legal battle, in 2002, the women of the state won the right to retain their permanent resident status after marriage. But the discrimination continues—because their children are still not eligible for the PRC, which means they cannot get admissions to professional colleges and cannot apply for state government jobs. They also cannot inherit their mother’s property or buy property themselves. Such a situation is particularly traumatic and

extraordinarily painful for women who marry ‘outsiders’ and later get widowed or divorced. They face added trauma as their children have no future in the state of J&K.

It is also a travesty of justice that the Balmikis and Gorkhas who have been staying in the state for generations as also the West Pakistan refugees have been denied the permanent resident status with all its attendant benefits. In May 2017, a petition was filed by Charu Wali Khanna, a lawyer and former member of the National Commission for Women, and Seema Razdan Bhargav, a doctor. The petitioners refer to a 2003 judgment by the Jammu and Kashmir High Court, which notes that the state legislature had not enacted any law defining permanent residents. So “under the guise of Article 370 and Article 35A, the men and women state subjects are subjected to different treatments.” The contention of the petitioners in this case is that since Article 6 supersedes her and her children’s basic rights of residence, education and employment, as guaranteed to them as “citizens” of India under Article 14 of the Indian Constitution, therefore, 35A is unconstitutional and, hence, deserves to be declared invalid.¹²

As stated earlier, it was on the strength of Article 35A that the J&K Assembly adopted Article 6 for this purpose in 1956. A Jammu based Non-Governmental Organisation (NGO), “We the Citizens,” has challenged the constitutional validity of Article 35A on the grounds that this Article was introduced in the Indian Constitution in 1954 only through a Presidential order. As per the NGO, “*Although it is within the rights of the President to pass such orders, yet any such order can become a part of the*

Indian Constitution only after it gets approval of both Houses of Parliament by a majority vote”. The NGO has accordingly questioned the intentions of the erstwhile central government for including this Article only as an “Annexure” of the Constitution and not incorporating it in the main text of the Constitution.¹³

The case is now being heard in the Supreme Court of India, which has bunched together all such petitions and convened a Constitution Bench to review the constitutional validity of Article 35A. Should Article 35A be declared unconstitutional, then the special powers of the J&K Assembly to separately formulate laws on permanent residents will be held *ultra vires* as will Article 6 of the J&K Constitution, which effectively blocks the inflow of people from other parts of the country into the state of J&K. J&K will then be treated like any other state of India, which will, over time, lead to the complete integration of the state with the Indian union. The impact of Article 35A has been to impose a sense of exclusivity and separation from the rest of the country, which has led to confrontation and religious extremism, with violence focussed against non-Muslim

The impact of Article 35A has been to impose a sense of exclusivity and separation from the rest of the country, which has led to confrontation and religious extremism, with violence focussed against non-Muslim residents of Kashmir—an unfortunate consequence of Article 35A.

Article 35A is, thus, the one defining Article which acts as a hindrance to holistic development of J&K, affecting every sector. It has created a constitutionally-approved apartheid, giving special political, administrative and legal powers to the ruling elite of J&K.

residents of Kashmir—an unfortunate consequence of Article 35A—which led to nearly half a million Pandits being forced out of their homes. To make matters worse, Pakistani infiltrators and Wahhabi Maulanas from Uttar Pradesh and Bihar made their way into the Valley, which consequently led to the radicalisation of large segments of the population.¹⁴

Article 35A is, thus, the one defining Article which acts as a hindrance to the holistic development of J&K, affecting every sector. It has created a constitutionally-approved apartheid, giving special political, administrative and legal powers to the ruling elite of J&K, and, at the same time, being discriminatory against women and the non-Kashmiri population in J&K and their supporters in the rest of India. Its repeal will go a long way righting a historical wrong and would be an important step in bringing peace to the region, though Kashmiri politicians will oppose the same.

Why Article 35A Must Go

In a situation bordering on farce, the prospect of Article 35A being struck down by the Supreme Court has brought together all political, militant, religious and other activist groups in the Valley that have been traditionally at war with each. Now, in support of Article 35A, all such disparate groups—the National Conference (NC), People’s Democratic Party (PDP), Congress Party and Hurriyat—have come together, to support the most regressive clause in the state’s history. Fearing political marginalisation, PDP leader and Chief Minister Mehbooba Mufti was the first to warn the Centre that “there will be no one left in Kashmir

to give a shoulder to the Indian tricolour if 35A is struck down”.¹⁵ Her arch rival, Farooq Abdullah, the former Chief Minister and head of the NC, had the temerity to warn New Delhi, “Kashmiris will make you

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forget the upheaval of the Amarnath movement when they rise up against nullifying of 35A.”¹⁶ Leaders of the Hurriyat and other fanatic groups too have launched a new calendar of *hartals* (public strikes) and warned New Delhi of a bloodbath if the Supreme Court gives such a verdict. Obviously, abrogation of Article 35A is seen by such people as the first step to rolling back the communal agenda followed for decades and the start of a new phase of participatory democracy, which ill suits their political purposes.

Article 35A is a symbol of “Kashmiri colonialism” over the rest of J&K. In a memorandum to the Union Home Minister and to the National Human Rights Commission, the Jammu & Kashmir People’s Forum presented cases of the communities whose fundamental rights have been “legally” snatched by the state government—the right to property; right to vote; right to employment; right to marriage by choice; right to higher education; right to be a member of a panchayat or a cooperative society; right to avail bank loans. These communities are:¹⁷

- Refugees from POJ&K who were forced to live and settle outside J&K after they crossed over to Jammu in 1947.
- Kashmiri Pandits and Sikhs who were forcibly pushed out of Kashmir Valley.
- West Pakistan Refugees (WPR) who migrated to adjoining Jammu in 1947.
- Families displaced due to regular firing along the Line of Control (LOC) with Pakistan.
- Balmiki community members who were persuaded by Sheikh Abdullah to migrate from Punjab to J&K to undertake the scavenging of night soil.

- Descendants of Gorkha soldiers of the Maharaja's Army.
- Women of J&K who married men from other states. The children born of such offspring too are denied all rights. No such provision exists for the men who marry non-state subjects, making it a gender biased issue.
- The people of Ladakh who have to live at the mercy of the Kashmiri administration.

Except for the exiled Pandit families and the people of Ladakh, all other communities mentioned in this list have been denied the status of permanent residents or state subjects because of Article 6 of the J&K Constitution, which draws its powers from Article 35A of the Indian Constitution.¹⁸

It is a matter of shame that the weakest strata of society, the Balmikis, continue to be subject to the worst form of human rights abuses. As per the rules of the state, the resident certificate issued to such persons, even if they are third or fourth generation settlers, brands them as “eligible only for the job of a scavenger”. So, even if a young lady from the community holds an MBBS degree, she can only be employed in the state as a *safai karamchhari* (cleaning staff). Such abuse would put even Hitler's Nazis to shame. But the masses in India remain ignorant of such provisions.

In 1981, the J&K State Assembly used its absolute Kashmiri majority to pass a law, the J&K Resettlement Act, which opened the doors for those Kashmiris and their descendants who had migrated to Pakistan, or POJ&K during partition in 1947, to return to J&K as its legitimate citizens and take charge of their ancestral properties. However, refugees from POJ&K and their descendants, numbering about 1.5 million today, have not only been kept out of this legal provision but the state government has consistently refused to let them or their descendants settle in J&K as “state subjects”. These communities have been demanding their right to those 24 seats in the Assembly which are left vacant in the name of POJ&K. Ironically, the Muslim refugees from Xinjiang and Tibet, who

had migrated to Kashmir following the Chinese occupation of their countries in 1949 and 1959, respectively, have been granted “state subject” status, along with voting rights in the Assembly by the J&K government. The communal agenda of previous state administrations was, thus, clear. The state was being turned into a state for Muslims only and Article 35A was the instrument used to carry out such a nefarious act.

The Future and Stability of Kashmir

In modern times, the space for regressive laws is shrinking. But abrogation of such laws will be opposed by vested interests. It has taken decades to rid the Muslim daughters of India of the evil and ignominy of triple *talaaq*—a pernicious custom whereby a Muslim male could divorce his wife by a simple rendering of the word *talaaq*, three times, by any means. Here too, the Muslim clergy, all male dominated, termed such a judgement by the apex court as an assault on their faith, conveniently forgetting that Muslim countries such as Pakistan have already enacted such laws decades ago. It is, thus, time for India to move on and not be held hostage to blackmail and threats from religious power brokers.

The addition or deletion or modification to any part of the Constitution of India amounts to an amendment to the Constitution. The power to so amend rests in Parliament as per procedures laid out in Article 368. It is a fact that Article 35A was never presented before the Parliament which *ipso facto* means that the then President bypassed the amending procedure as laid out in the Constitution and usurped the functions of Parliament.

The Muslim refugees from Xinjiang and Tibet, who had migrated to Kashmir following the Chinese occupation of their countries in 1949 and 1959, respectively, have been granted “state subject” status, along with voting rights in the Assembly by the J&K government.

It is time to repeal Article 370 and Article 35A. There will be violence instigated in the Kashmir Valley when the nation takes recourse to such action, but that cannot, and must not, deter the state from preserving the right to equality, enshrined in the Constitution.

More worrying is the fact that this amendment has been concealed from the public gaze through subterfuge, by not mentioning the same in the text of editions of the main Constitution. As an example, when a new Article on the Right to Education was added to the Constitution after Article 21, it was named Article 21A and it came up in between Article 21 and Article 22. New copies of the Constitution subsequently had Article 21, Article 21A and Article 22 in sequence. Why then does Article 35A find no place in the copies of the

Constitution printed after its enactment, when it should have been placed between Article 35 and Article 36? It is also not found in the list of Amendments to the Constitution. For some unfathomable reason, Article 35A appears in the Constitution only as an Appendix, as a result of which even legal luminaries are not aware of its existence. Jagdeep Dhankhar, a senior advocate of the Supreme Court and former Union Minister, in his keynote address at a function organised in the Nehru Memorial Museum and Library in September 2017, made the pertinent point that he too was unaware of the existence of Article 35A—an Article which outrages every word of the Preamble of the Constitution of India.¹⁹ Speaking at the same venue, the former Governor of the state, Jagmohan said, “The common people of Jammu Kashmir, the poor, no one is benefitting from Article 370 or Article 35A—whether they are Hindus or Muslims. It is only vested interests, the elite, who have been benefitting from these provisions. So called ‘experts’, such as A. G. Noorani, are misleading the people by advocating for Article 370,” and reiterated that it is high time for this law to go.

It is time to give justice to the victims of Article 35A. These are the women of J&K who choose life partners from outside the state and in doing so, lose the right for their progeny to be state citizens. These are the migrants from West Pakistan who came in 1947 and settled in Jammu Division. They are the victims of partition who still languish and long for justice. These are the Balmikis, the *safai karamcharis* who have no hope for their children other

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than to remain in this profession, regardless of the academic level of accomplishment achieved by them. These are the Gorkhas of J&K, who have lived here since the 18th century and are denied citizenship rights till date. Such abuse of human rights must end in a free and democratic India.

It is time to repeal Article 370 and Article 35A. There will be violence instigated in the Kashmir Valley when the nation takes recourse to such action, but that cannot, and must not, deter the state from preserving the right to equality, enshrined in the Constitution. If it leads to a long and bloody struggle to preserve the basic character of the Constitution of India, then we, the people of India must go through with such struggle. We must remember that in the USA, the North went to war with the South, over the issue of human rights and Abraham Lincoln won the day. For the good of the people of India and for the residents of J&K, Article 35A must be repealed forthwith as it will pave the way for the development of the state and its total integration with the union.

Notes

1. The Constitution (Application to Jammu and Kashmir) Order, 1954, Published in the Gazette of India Extraordinary Part II Section 3, May 14, 1954.
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3. *Ibid.*, pp. 247-48.
4. Anil Gupta, "Kashmir's Special Status: Contentious Constitutional Provisions," *Indian Defence Review*, available at <http://www.indiandefencereview.com/kashmirs-special-status-contentious-constitutional-provisions/>
5. *Ibid.*
6. For details, see The States Reorganisation Act, 1956, Act No. 37 [31st August, 1956] available at <https://indiankanoon.org/doc/1211891/>
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13. *Ibid.*
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15. "If Article 35A Tinkered with, There Would be no one in Kashmir to hold Tricolour: Mehbooba Mufti," *Financial Times*, July 28, 2017, available at <http://www.financialexpress.com/india-news/nobody-will-protect-tricolor-in-kashmir-if-constitutional-status-changed-mehbooba-mufti/783824/>
16. Kranti, n. 12.
17. *Ibid.*
18. *Ibid.*
19. The function was organised by the Jammu Kashmir Study Centre (JKSC), an independent think-tank dedicated to objective research and policy relevant studies on all aspects relating to the state of Jammu and Kashmir. Further details can be accessed at <http://www.newindianexpress.com/nation/2017/sep/03/article-35a-must-go-from-state-former-jammu-and-kashmir-governor-jagmohan-1652047.html>