

# Jammu & Kashmir's constitutional status: Constitutional bargain and 'erosion' of Article 370

- Zaid Deva\*

## Introduction

Knowledge and knowledge production can never be achieved in silos. Disciplines interact and mould each other in ways that make interdisciplinary studies not just essential but inevitable.<sup>1</sup> That is one of the purposes of this project – to highlight the importance of interdisciplinary legal research in the Indian context and enable future research on topics that have remained underexplored – and mine is a modest contribution to the set of essays published in this volume.

In this chapter, I look at Kashmir from a constitutional lens<sup>2</sup> and specifically explore why scholarship on Kashmir will gain if constitutional realities of Kashmir are taken into account. By constitutional realities I mean the nature and dynamics of constitutional systems in place in Kashmir before accession to India and the systems enacted post-accession.<sup>3</sup> One of the limitations of the existing constitutional scholarship on Kashmir is that any question on its constitutional status tends to inevitably and singularly focus on Article 370 of the Indian constitution.<sup>4</sup> In doing that, the constitution of 1939<sup>5</sup> (which governed Kashmir at the time of accession) and later on the presidential orders of 1950<sup>6</sup> and 1954<sup>7</sup> and the state constitution of 1957 (and how these constitutional documents interact with the Indian constitutional space)<sup>8</sup> are overlooked. Another problem (this is an outcome of the aforementioned limitation) that this strain of scholarship suffers from is that there is an inherent presumption that the relation between India and Kashmir is

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<sup>1</sup> Lydia Nkansah and Victor Chimbwanda, *Interdisciplinary Approach to Legal Scholarship: A Blend from the Qualitative Paradigm* (2016) 3(1) *Asian Journal of Legal Education* 56, 59-60.

<sup>2</sup> In recent times, there has been a significant literature on Kashmir from an international law lens, but constitutional analysis of the dispute has remained minimal. Exception to this remains Noorani's works in the Indian context and Hayat's recent work in the Pakistani context. See generally A G Noorani, *Article 370: A Constitutional History of Jammu & Kashmir* (Oxford University Press 2011) and Javaid Hayat, *Azad Jammu & Kashmir: Polity, Politics, and Power-Sharing* (Oxford University Press 2020). On international law analyses of the Kashmir dispute and its varied facets, see, Fozia Lone, *Historical Title, Self-determination, and the Kashmir question* (Brill Nijhoff 2018).

<sup>3</sup> For J&K's Instrument of Accession, see, Venkatesh Nayak, 'The Backstory of Article 370: A True Copy of J&K's Instrument of Accession' *The Wire* (5 August 2019) <<https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india>> accessed 20 December 2021.

<sup>4</sup> See Madhav Khosla, *The Indian Constitution* (Oxford University Press 2012) 74. See also Louise Tillin, 'Asymmetric Federalism' in Sujit Choudhry, Madhav Khosla and Pratap B Mehta (eds), *Oxford Handbook of the Indian Constitution* (Oxford University Press 2017) 576–78.

<sup>5</sup> See The Constitution Act of 1939 in MK Teng, RK Bhatt & S Kaul, *Kashmir: Legal & Historical Documents* (Light & Life Publishers 1977) 66.

<sup>6</sup> See The Constitution (Application to Jammu & Kashmir) Order 1950 as quoted in Ministry of States, Government of India, White Paper on Indian States (1950) <<https://archive.org/details/in.ernet.dli.2015.207474/mode/2up>> accessed 21 December 2021 378–83.

<sup>7</sup> See The Constitution (Application to Jammu & Kashmir) Order 1954 <<https://egazette.nic.in/WriteReadData/1954/E-2227-1954-0111-103041.pdf>> accessed 23 December 2021.

<sup>8</sup> For an analysis of how the documents interact, see Zaid Deva, 'Basic without structure?: The Presidential Order of 1954 and the Indo-Jammu & Kashmir constitutional relationship' (2020) 4(2) *Indian Law Review* 180-194.

federal<sup>9</sup> in nature. And, federalism, even though it may be asymmetrical in the context of Kashmir as is argued, tends to be hierarchical.<sup>10</sup>

What is idiosyncratic about Kashmir's constitutional status that arguably might keep it outside the federal union? And, how would one go about describing (without over-doing) a Kashmir-centric constitutional account but at the same time remaining conscious of the Indian constitutional realities? While there are multiple ways of doing this, in this chapter I rely on bargain theory and set theory to first point out that constitutional orders<sup>11</sup> in Kashmir and India are independent of each other and at once interactive but the latter one does not subsume the former,<sup>12</sup> and second, by 'eroding' Article 370, Kashmir's constitutional space is brought within the sphere of India's constitutional space leading up to the events of August 5 2019. Even though the terminology in vogue has been erosion/amendments/changes of Article 370,<sup>13</sup> the object of analysis has remained this one provision and not the consequences its erosion has had on Kashmir's constitutional space or the skewed shifting of surplus value after such changes are imposed on the original bargain.

The scheme of the chapter is as follows: in part I, I describe the constitutional relations between Kashmir and India using bargain theory and make my argument that there are two legal orders at work, building on my previous work on the topic. In Part II, I use set theory to illustrate how the two constitutional orders work independently of each other while at the same time interacting with each other. This is divided into six phases to study the tilt in the surplus allocation in favour of India that leads to slow and steady incorporation and dissolution of Kashmir's legal space in India's. Part III concludes.

## **Sheikh, Nehru and bargain theory**

### *Law and history*

We start, not from 1947 or 1935 but from 1939, when the constitution act of Jammu & Kashmir was enacted.<sup>14</sup> This marked the ruler's 'first adventure to democratise the state'.<sup>15</sup> The constitution vested the ruler with inherent and absolute powers to make laws in the state. Even though the government of India Act of 1935<sup>16</sup> had no applicability, paramourty of the British crown operated

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<sup>9</sup> Federalism as understood in the Indian context which sought to create a unified and a centralized legal order, see, Khosla (n 4) and Tillin (n 4).

<sup>10</sup> See *State Bank of India v Santosh Gupta & Others* (2017) 2 SCC 538 where the court concluded that J&K's constitution was subordinate in nature to the Indian constitution. Anand in his commentary of the J&K constitution goes one step further and points out that power to 'confer' special status on J&K flows from Section 2 of the Indian constitution, see, Ashok Desai, 'The Constitution of Jammu & Kashmir: Its Developments and Comments by A. S. Anand' (1995) 37(3) *Journal of the Indian Law Institute* 409. This completely overlooks the implications of the IoA on the future constitutional relationship and misses the point that the special status was not conferred but rather was inherent in the state or at least negotiated between the two parties.

<sup>11</sup> I use the term constitutional orders, legal orders and constitutional spaces interchangeably to mean the spaces that the constitutions create in which the legal regime exists.

<sup>12</sup> Provincial constitutions tend to form part of the federal legal order, see, Cheryl Saunders, 'The Constitutional Credentials of State Constitutions' (2011) 42 *Rutgers Law Journal* 853. However, this logic cannot be extended to India-J&K shared constitutional space.

<sup>13</sup> The recalibration of the relationship through abuse of Article 370 was first described as 'erosion' by Jawaharlal Nehru, see, Jawaharlal Nehru on the 'Erosion' of Article 370, *Lok Sabha*, vol XII *Lok Sabha Debates*, 27 November 1963.

<sup>14</sup> See *The Constitution Act of 1939* (n 5).

<sup>15</sup> Desai (n 10) 408.

<sup>16</sup> *Government of India Act 1935*, <<http://www.legislation.gov.uk/ukpga/Geo5and1Edw8/26/2/contents>> accessed 21 December 2021.

vis-à-vis J&K through informal and formal arrangements both.<sup>17</sup> Therefore, internal matters were governed by the ruler, and subjects like foreign affairs and defence came under the jurisdiction of the British.<sup>18</sup> Even though the demarcation could be fluid at times, but the roles were performed in two spaces hence the establishment of two legal orders.

Until 1947, the two legal orders were interacting informally. With the implementation of the Cabinet mission plan through the Indian Independence Act, British paramountcy over the princely states ended and the powers exercised by the British vis-à-vis princely states returned back to the states.<sup>19</sup> This logic applied to J&K as well, hence the need for standstill agreements.<sup>20</sup> With the end of paramountcy, the interface between the two legal orders ceases and the two become separate from each other. From the end of paramountcy and the signing of accession, many have argued, including the SC in *Prem Nath Kaul* that the state existed as an independent entity.<sup>21</sup> This is the point at which the bargain theory becomes relevant. Before proceeding, it's worth pointing out that even though the object of analysis here are the two legal orders, the interests that govern the bargain are those of Sheikh Abdullah and Jawaharlal Nehru. Even though Nehru's interests in integrating J&K in India were shared by many (the means differed though),<sup>22</sup> Sheikh's interests in J&K's accession to India was restricted to himself and his close aides in the National conference.<sup>23</sup> Therefore, the two parties I use in describing Article 370 as a constitutional bargain are not India and J&K, but Nehru and Sheikh.

Foreseeing the consequences of a divided polity, the Indian state undertook a humongous task of integrating the princely states within the union.<sup>24</sup> The terms of the initial bargain were set by the Indian state by demanding instruments of accession from princely states that would vest India control over defence, foreign affairs, and communications.<sup>25</sup> Under duress, the ruler of J&K signed the IoA giving control to India over the three subjects.<sup>26</sup> But at the time the instrument was executed, the 1939 constitution that vested the ruler with absolute powers was still in force in J&K. So, what would become of the IoA? The J&KHC answered this question in a lesser-known case by holding that the IoA only 'created' legislative power in the Indian dominion over the three subjects while the ruler continued to retain full ambit of the same power himself as well.<sup>27</sup>

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<sup>17</sup> On paramountcy, see, Report of the Indian States Committee 1928-1929 (London, 1929).

<sup>18</sup> Josef Korbel, *Danger in Kashmir* (Gulshan Books 2021) 14.

<sup>19</sup> See Indian Independence Act 1947, s 7 <<http://www.legislation.gov.uk/ukpga/Geo6/10-11/30/contents>> accessed 12 December 2021.

<sup>20</sup> Had the paramountcy been inherited by the Indian or the Pakistani state, then there would have been no reason to sign standstill agreements with the two dominions calling for continuation of existing arrangements until a final settlement could be made. While Pakistan agreed to a standstill agreement, India wanted more deliberations, see, VP Menon, *Integration of the Indian States* (Orient BlackSwan 1956) 395. For J&K-Pakistan standstill agreement, see, Teng et. al (n 5) 231.

<sup>21</sup> *Prem Nath Kaul v State of Jammu & Kashmir* (1959) Supp (2) SCR 270.

<sup>22</sup> See Nehru (n 13). Also see, Aynagar's speech to the Rajya Sabha where he stated that Article 370 could be 'wiped off the Constitution' as quoted in Sheikh Abdullah's letter to Nehru dated 28 June 1953 in Noorani (n 2) 230.

<sup>23</sup> Sheikh Abdullah, *Jammu & Kashmir Constituent Assembly Debates*, vol I (5 November 1951). On why Sheikh's stance was limited to him and his party ilk, see generally, Pandit Prem Nath Bazaz, *The History of Struggle for Freedom in Kashmir* (Naya Hindustan Press 1954).

<sup>24</sup> See generally, Menon (n 20); Also see, White Paper on the Indian states (n 6).

<sup>25</sup> See White Paper on the Indian states id. This also meant that the relationship between the princely states and the Indian dominion was inherently unequal.

<sup>26</sup> See the IoA (n 3). Also see, Puralal Lakhanpal, *Essential Documents and Notes on Kashmir Dispute* (2nd edn., International Books 1965) 47.

<sup>27</sup> *Rehman Shagoo and Ors. v. State of Jammu and Kashmir* 1958 CriLJ 885.

Therefore, as per Shagoo no power was ceded to the union, rather the IoA only lead to a concurrent exercise of law-making over the three subjects. In the Prem Nath Kaul case, the SC, on similar lines, held that neither the IoA nor Article 370 affected the legislative, executive, or judicial powers of the ruler which he possessed after the lapse of paramountcy.<sup>28</sup> In fact, the court also recognised that there are two independent legal orders at work by observing: *It would not be permissible or legitimate to hold that, by implication, this Article sought to impose limitations on the plenary legislative powers of the Maharaja. These powers had been recognised and specifically provided by the Constitution Act of the State itself; and it was not, and could not have been, within the contemplation, or competence of the Constitution-makers to impinge even indirectly on the said powers.*<sup>29</sup> As I argue elsewhere, this implied that the two orders derived authority from different sources and were interlocked due to elements like the IoA or Article 370 without one order fully controlling (or subsuming) the other.<sup>30</sup> This acts as the premise of my argument and develops into how the J&K legal order was eventually and systemically subsumed in the Indian legal order.

By 1949, seeing no progress with the UNSC involvement in the Kashmir dispute, the governments of J&K and India began negotiations over a provision that would govern the relationship in the future constitutional setup.<sup>31</sup> Many drafts were discussed between the two sides and the final draft that was passed in the Indian constituent assembly was very different from the first one proposed by the government of J&K.<sup>32</sup> It's worth noting that Article 370 is only a procedural provision and remains substantive only to the extent that it applies itself and Article 1 of the Indian constitution to J&K. It lays down a scheme for extending of Indian legal authority over J&K. For extending Indian legal authority in J&K in respect of subjects that are covered under the IoA, the Indian president is required to consult the state government before. And, for subjects that go beyond the IoA, concurrence of the state government is required. A similar drill is required to be followed for the Indian constitutional provisions: consultation with state government for provisions corresponding to the IoA and concurrence for provisions going beyond the IoA. Further, the provision also specifies that anything done under concurrence of the state government would be required to be placed before the constituent assembly of J&K whenever it would convene for drafting the state constitution for any decision it may take thereon. Finally, when the constitution-making process would be over, it was envisaged that the constituent assembly would recommend to the Indian president to cease the operation of Article 370 or continue its operation with modifications. Since no such recommendation was made, the Indian president has from time to time ever since employed Article 370 to extend the Indian jurisdiction over the state and finally, the provision was abrogated in 2019.<sup>33</sup>

### *The bargain*

Now I turn to bargain theory and show how Article 370 establishes the bargaining zone by surplus allocation in the form of legislative competences and making provision for application of the Indian constitution in J&K. A functional account of the bargain theory would mean that two parties enter into a contract because both gain from such bargain thus creating a net surplus for

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<sup>28</sup> Prem Nath Kaul (n 21).

<sup>29</sup> *id.*

<sup>30</sup> Deva (n 8) 179-180.

<sup>31</sup> See Noorani (n 2) 50-63.

<sup>32</sup> See the first draft of the provision as prepared by the government of J&K in *id.* 52.

<sup>33</sup> See Noorani (n 2) 303-316.

each other.<sup>34</sup> To agree to a bargain, the parties have to identify their reservation points and the bargaining zone.

Reservation point is the maximum amount that a buyer and the minimum amount a seller would be willing to pay for a service.<sup>35</sup> And, if the reservation point of the buyer is higher than the seller's, the distance between the two points is called the bargaining zone.<sup>36</sup> Therefore, the bargaining zone is fixed by the reservation points of both the parties.<sup>37</sup> For example, if A is willing to pay 5 lacs for a car to B, while B prefers anything over 4 lacs, then the bargaining zone of 1 lac is created between the two prices. The reservation point for Nehru is defined in the IoA (since the subjects enumerated in the union list of the Indian constitution mostly pertain to the three subjects<sup>38</sup>) and includes the probability of widening the quantum of accession eventually.<sup>39</sup> For Sheikh, the reservation point are also the same three subjects as he understands the limitations of his position as the prime minister, and the need for patronage of the Indian state for continuing his authority.<sup>40</sup> Both reservation points are reflected in Article 370 as, one, it reinforces the IoA's distribution of competences and two, at the same time provides pathways for widening the jurisdiction of the Indian state. Looking at Article 370, the bargaining range is the maximum value desired by Nehru and the minimum value attainable by him against the maximum value desired by Sheikh and the minimum value attainable by him.<sup>41</sup> Quite contrary to the example of A and B stated above, the reservation points of both the parties are flexible and are liable to change as both wanted to avoid a no-bargain scenario when Article 370 was being drafted.

The reservation points of Nehru and Sheikh are set off against the costs of 'No bargain'. Here, the costs of no bargain are the very ground realities of J&K<sup>42</sup> and the possibility of holding of a plebiscite in the region that has the potential to threaten both Nehru and Sheikh's positions.<sup>43</sup> Hence, the individual interests that define the bargain and get transposed on the two legal orders are in essence attempts at self-preservation. In case of a no bargain scenario, for Nehru, India loses a strategic region. For Sheikh, in case a plebiscite is held, and J&K votes in favour of Pakistan (which many suspected it would), he loses his position of power as in his own words he expected a 'short shrift' from Jinnah in case J&K went to Pakistan.<sup>44</sup> The bargain here is therefore the aggregate of the costs of no bargain that are saved and shared between both the parties. The bargain zone therefore becomes the respective minimum target surplus value possible for both the parties having taken the costs of no bargain into consideration. Also referred to as the ZOPA, it is the range in which the respective minimum targets of the parties overlap. When ZOPA is broad

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<sup>34</sup> See Todd Lowry, 'Bargain and Contract Theory in Law and Economics' (1976) 10(1) *Journal of Economic Issues* 6.

<sup>35</sup> Russell Korokbin, 'A positive Theory of Legal Negotiation' (1999) 88 *The Georgetown Law Journal* 1792.

<sup>36</sup> *id.* 1792.

<sup>37</sup> *id.* 1797.

<sup>38</sup> The idea being that J&K should almost be similarly placed with respect to the union as other states.

<sup>39</sup> Of course, the reservation point for Nehru increases as he eventually demands widening of the quantum of the accession i.e., vesting of more subjects in the union and applicability of more provisions of the Indian constitution. See Sheikh Abdullah's letter to Maulana Azad dated 16 July 1953 as quoted in Noorani (n 2) 232-236.

<sup>40</sup> On Sheikh's precarious position as the prime minister, see, Aijaz Ashraf Wani, *What happened to governance in Kashmir* (Oxford University Press 2019) 117.

<sup>41</sup> Korokbin (n 35).

<sup>42</sup> See Bazaz (n 23).

<sup>43</sup> As Noorani has pointed out, Nehru was all long dishonest about plebiscite in Kashmir, see, A. G. Noorani, 'Review: How and Why Nehru and Abdullah Fell Out' (1999) 34(5) *Economic and Political Weekly* 268.

<sup>44</sup> Wani (n 40) 117.

the parties design strategies to influence distribution in the ZOPA range. As the ZOPA range reduces it becomes more difficult to identify terms of the bargain in which both gain.<sup>45</sup> The changing ZOPA from a broad to a narrow one and finally to a position of negative bargaining zone is identified post 1953.

### *Implementing the bargain*

With the passage of Article 370 in the Indian constituent assembly, the processes of constitution-making in J&K were initiated.<sup>46</sup> On the eve of the adoption of the Indian constitution, the Regent of J&K issued a proclamation which read as follows: *[T]he Constitution of India shortly to be adopted by the Constituent Assembly of India shall in so far as it is applicable to J&K govern the constitutional relationship between this State and the contemplated Union of India.*<sup>47</sup> This has two implications: One, the Indian constitution, in so far as it is applicable i.e., Article 370, performs the function of governing the constitutional relations between India and J&K. Two, the Indian constitution does not comprise of J&K's constitutional space and therefore J&K cannot be considered as federal unit (since in federal relations generally, the legal order tends to remain the same<sup>48</sup>). But, are the two legal orders created as a result of Article 370 or do the constitutions exist in a continuum? What I mean by that is, is the new legal order in J&K succeeding the previous one just like the Indian legal order enacted in 1950 replaced the GOI Act of 1935?

Firstly, the origins and the source of authority are different. While in the case of India, the source of authority for the creation of the new legal order was the Indian Independence Act of 1947,<sup>49</sup> in the case of J&K, the source of authority was the ruler and his proclamation calling for the constituent assembly in J&K.<sup>50</sup> Secondly, similar to how the Indian constitution ended the authority of the GOI Act of 1935 and the Indian Independence Act of 1947,<sup>51</sup> the state constitution of 1957 ended the constitution act of 1939 and abolished monarchy.<sup>52</sup> Article 370 could not have envisaged to do that as it was merely a procedural provision and was limited in scope and content. Finally, the seamless transition of sovereignty from the princely order to the constituent assembly does not involve the Indian legal order. I will unpack this point below using Article 370.

The provision makes a distinction between subjects based on whether state government's 'consultation' or 'concurrence' is required. And, the consultation/concurrence distinction is premised on the distribution of competences enumerated in the IoA. Subjects that have been transferred to the union by the ruler under his sovereign decision-making are beyond the review of the J&KCA (however the J&KCA did revisit the 1950 order and made alterations to the subjects

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<sup>45</sup> See Mariusz Jerzy Golecki, 'Bargaining within the shadow of Fairness: Economic Analysis of Article 4.109 of the Principles of European Contract Law' (2009) 4 International Journal of Economic Policy Studies 162.

<sup>46</sup> Proclamation of the Regent calling for a constituent assembly in J&K, 1951 as quoted in Noorani (n 2) 95-96.

<sup>47</sup> Proclamation for the State of Jammu & Kashmir, 25 November 1949 as quoted in White Paper on Indian States (n 6) 371-72.

<sup>48</sup> Cheryl Saunders, 'The Constitutional Credentials of State Constitutions' (2011) 42 Rutgers Law Journal 854.

<sup>49</sup> See Indian Independence Act of 1947 (n 19).

<sup>50</sup> See the Regent's proclamation (n 47).

<sup>51</sup> See Article 395 of the Indian constitution. By ending the authority of these colonial-era legislations, the constitution marked a break from the colonial legal order.

<sup>52</sup> See Section 157 of the J&K constitution. On the abolition of monarchy, see, Mirza Beg, vol I J&K Constituent Assembly Debates (10 November 1952) and The Constitution (Application to Jammu & Kashmir) Order, 15 November 1952 passed under Article 370 (3) in Noorani (n 2) 225.

that had been applied on consultation of the state government which were technically speaking outside the authority of the constituent assembly<sup>53</sup>). Whereas for subjects other than the ones mentioned in the IoA, for which concurrence is required, the J&KCA is the final arbiter. This implies that as sovereignty shifted from the monarch to the constituent assembly, there was in some sense a continuity and a discontinuity as well. In so far Article 370 under the assumption that the sovereign's decision need not be revisited by the future sovereign, made a distinction between consultation and concurrence based on the nature of subjects to be applied to the state, there exists a seamless of transition of sovereign authority from the monarch to the J&KCA. But, since a sovereign cannot limit a future sovereign's authority and, in that sense, marks a discontinuity between two consecutive sovereigns, to that extent also, the J&KCA fulfils the criteria of a sovereign since it did revisit the subjects applied on consultation of the state government and made some alterations to them. Not just restricted to making changes, under the J&KCA's authority the 1950 order was revoked and superseded, and the all the subjects applied to the state through the 1954 were applied on concurrence of the constituent assembly. Therefore, whatever distinction existed because of the concurrence/consultation processes were at once done away with, when the 1954 order was passed in the J&KCA.<sup>54</sup>

Therefore, the constitutional regime existing in J&K comprises of the state constitution of 1957 and the 1954 order. It's worth noting that as per the Regent's proclamation, the 1954 order is purposed for governing the constitutional relations with the Indian union.<sup>55</sup> This means that the provisions contained in the 1954 order exist in J&K's constitutional space but are not indigenous to it. There are two kinds of provisions in the 1954 order: 1) provisions that are applied to J&K without any modifications and 2) provisions that are applied with modifications and exceptions and as a consequence are not in force in the Indian constitutional space. The existence of the two constitutional orders and the distinction between the provisions in the 1954 order will become clearer with the help of the set theory and Venn diagrams.

### **Set theory and the two legal orders**

Set theory<sup>56</sup> is applied to formulate the genesis of the bargain relation between India and J&K and the evolving bargain relation between the two. Set theory complements the argument about bargain theory because it allows us to mark a distinction between the two legal order and illustrate how they exist independent of each other while at the same time showing how the surplus application keeps tilting towards India constantly. The use of set theory also allows us to make a distinction between the two kinds of provisions in the 1954 order as pointed before and situate them in the two legal spaces. As sets are 'well-determined collections'<sup>57</sup> the elements included in each set studied here are the constitutional documents governing the two entities. The point here being that J&K's constitutional set is not a subset of the Indian constitutional set.<sup>58</sup> Another point to be noted here is that even though there might be multiple overarching documents governing

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<sup>53</sup> Many subjects that were applied to J&K on consultation of the state government were modified with the 1954 order by the J&KCA as pointed out by the SC in Prem Nath Kaul (n 21).

<sup>54</sup> See the preamble to the Constitution (Application to Jammu & Kashmir) Order, 1954 (n 7).

<sup>55</sup> See the Regent's proclamation (n 47).

<sup>56</sup> Joan Bagaria, 'Set Theory' Stanford Encyclopedia of Philosophy < <https://plato.stanford.edu/entries/set-theory/> > accessed 21 December 2021.

<sup>57</sup> id.

<sup>58</sup> A subset is a set whose elements are part of the another set as well. For example, if A includes 1, 2, 3 and B includes 1, 2, 3, and 4, then A is called a subset of B.

the two spaces, legislations, executive orders, ordinances, I consider them part of the constitutional order and therefore they are included in the two constitutional regimes.

Coming to the phases in which the set theory is employed: Phase I - is situated in the pre-independence phase which was governed by formal (by formal arrangements I mean treaties etc.) and informal arrangements between the Ruler of J&K and the British Crown; Phase II - the lapse of paramountcy and how it impacts the two legal orders; Phase III – the execution of the IoA and the resultant bargain along with the distribution of surplus value through Article 370; Phase IV looks at the relationship by taking into account the 1954 order and the state constitution; Phase V is the phase of the dissolution of J&K Constituent Assembly and the ensuing ‘erosion’ of Article 370. Phase VI is the abrogation of Article 370 and how it impacts the original bargain.

### Phase I

In phase I, the elements of two sets include the proto-constitutional documents governing J&K and India.

Set I – {Government of India Act, 1935}

Set J&K – {Constitution Act of 1939}

Even though both exist independent of each other, paramountcy connects the two through formal and informal arrangements. Therefore, the intersection of the two sets includes paramountcy that itself entails authority over defence and foreign affairs of J&K.<sup>59</sup>

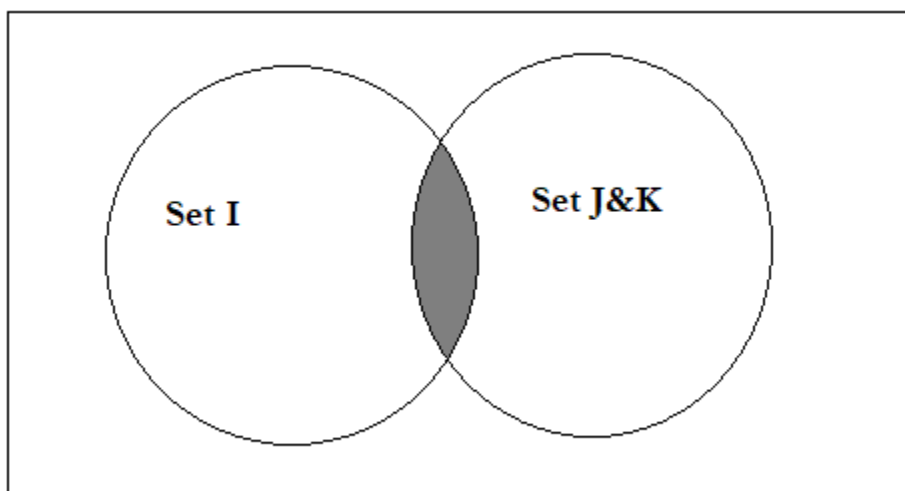


Fig. 1 illustrates

the intersection of the two sets I and J&K during the colonial rule.

The two sets when looked at from the point of the legal orders that exist, share the same law and policy on foreign affairs and defence. So, even though the princely states and British Indian provinces were conceptually very different from each other, on matters such as these, the two were on the same plane and hence this intersection. Apart from control on the two subjects, paramountcy also ensured that the princely states functioned under the overall supervision of the British government. So even though legally speaking, the two had separate rules of government,

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<sup>59</sup> See Korbel (n 14). Intersection of sets implies the common elements comprising two sets.

practically speaking both were under the control of the British (the control was direct in the case of provinces and indirect in the case of princely states).<sup>60</sup>

### Phase II

This phase covers the period in which the British paramountcy had ended and just before the IoA had been signed by the ruler. As pointed out by many scholars<sup>61</sup> and by the SC<sup>62</sup> as well, this was the period in which, J&K existed as an independent entity since its legal linkages with the British had ended as a consequence of the Indian Independence Act. Recall that paramountcy was not inherited by either of the dominions, hence the need for the standstill agreements. While J&K was able to execute one with Pakistan, India wanted more deliberations.<sup>63</sup> Therefore, in this period the sets of the two legal orders would appear as follows:

Set I – {Government of India Act, 1935 and the Indian Independence Act, 1947}

Set J&K – {Constitution Act of 1939}

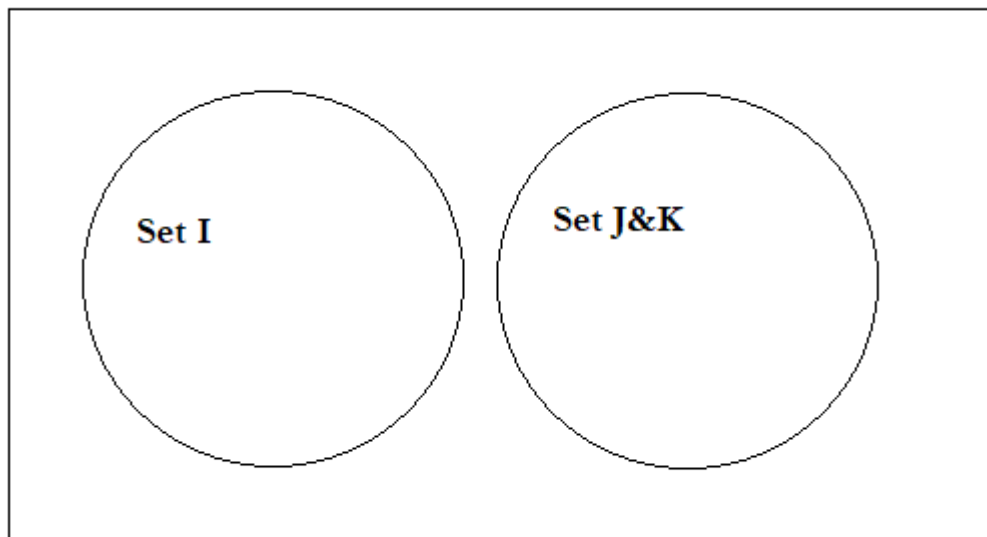


Fig. 2

illustrates the disappearance of the grey area implying the end of paramountcy and those informal and formal arrangements that kept J&K under the control of the British.

The separation of the two legal orders in this phase also buttresses the point that it is not Article 370 that gives rise to the two legal orders, but the very existence of two legal orders necessitate the creation of a provision like Article 370. The two sets, therefore, in this phase become a disjoint set.<sup>64</sup>

$$\text{Set I} \cap \text{Set J\&K} = \emptyset$$

### Phase III

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<sup>60</sup> See generally the White Paper on Indian states (n 6).

<sup>61</sup> Noorani (n 2).

<sup>62</sup> Prem Nath Kaul (n 21).

<sup>63</sup> See Teng (n 20); Also see Menon (n 20).

<sup>64</sup> A disjoint set is a pair of sets in which none of the elements are common.

The third phase looks at IoA and its impact on the two legal orders. Legally speaking, the IoA only lead to transfer of law-making powers on the three subjects to the Indian dominion.<sup>65</sup> As per Shagoo however, it wasn't a transfer of law-making powers (since the ruler retained these powers), but only creation of legislative power in the Indian parliament.<sup>66</sup> In this phase, the two legal orders start interacting again, much like they did in Phase I. The difference here being that the interaction was governed by a formal instrument and not an informal arrangement. This also implied that the interaction would be limited since the limits would be imposed by the formal instrument whereas informal arrangements would keep the limits fluid. The two sets would comprise of:

Set I – {Government of India Act, 1935 and the Indian Independence Act, 1947}

Set J&K – {Constitution Act of 1939, relevant parts of the GOI Act of 1935}

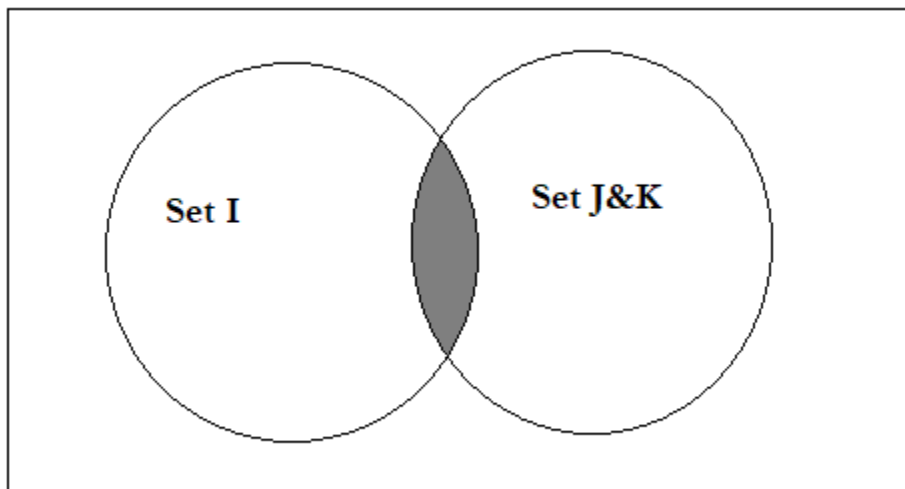


Fig. 3 illustrates

how the India-J&K shared constitutional space comes into being in the aftermath of the execution of the IoA. Here the grey area represents the same shared constitutional space.

Therefore,  $\text{Set I} \cap \text{Set J\&K} = \{\text{relevant portions of the GOI Act of 1935}\}$

Even though the IoA makes this linkage possible, the shared constitutional space is not occupied by this instrument alone. In the main, this space gets occupied by the intersection of the two sets i.e., the relevant parts of the GOI Act of 1935 that become applicable to J&K as a consequence of the IoA.<sup>67</sup> Once Article 370 is inserted in the Indian constitution and the 1950 order is passed by the Indian president on consultation of the state government, there is a change in the elements of the two sets and the shared constitutional space. But, as the SC has pointed out in Prem Nath Kaul, the status of J&K after the IoA and after the insertion of Article 370 remains the same.<sup>68</sup> Therefore, the area occupied by the shared constitutional space is constant because the 1950 order was complying with the IoA and Article 370.

The two sets, however reflect as follows:

<sup>65</sup> Prem Nath Kaul (n 21).

<sup>66</sup> Rehman Shagoo (n 27).

<sup>67</sup> See clause 2 of the IoA (n 3).

<sup>68</sup> Prem Nath Kaul (n 21).

Set I – {Constitution of India, 1950}

Set J&K – {Constitution Act of 1939, Article 370 of the Constitution of India, 1950 (1950 order)}

There are certain modifications that are made to the provisions of the Indian constitution through the 1950 order which do not exist in the Indian constitutional space, but since the 1950 order got superseded by the 1954 order, I consider the impact of such modifications on the two legal orders in the next phase.

Phase IV

In the fourth phase, the elements of J&K's set are replaced by the post-colonial constitutions. The 1950 order gets superseded by the 1954 order which increases the quantum of the accession by increasing the legislative power of the Indian parliament. Therefore, the two sets appear as follows:

Set I – {Constitution of India, 1950}

Set J&K – {The Presidential Order of 1954, Constitution of J&K, 1957}

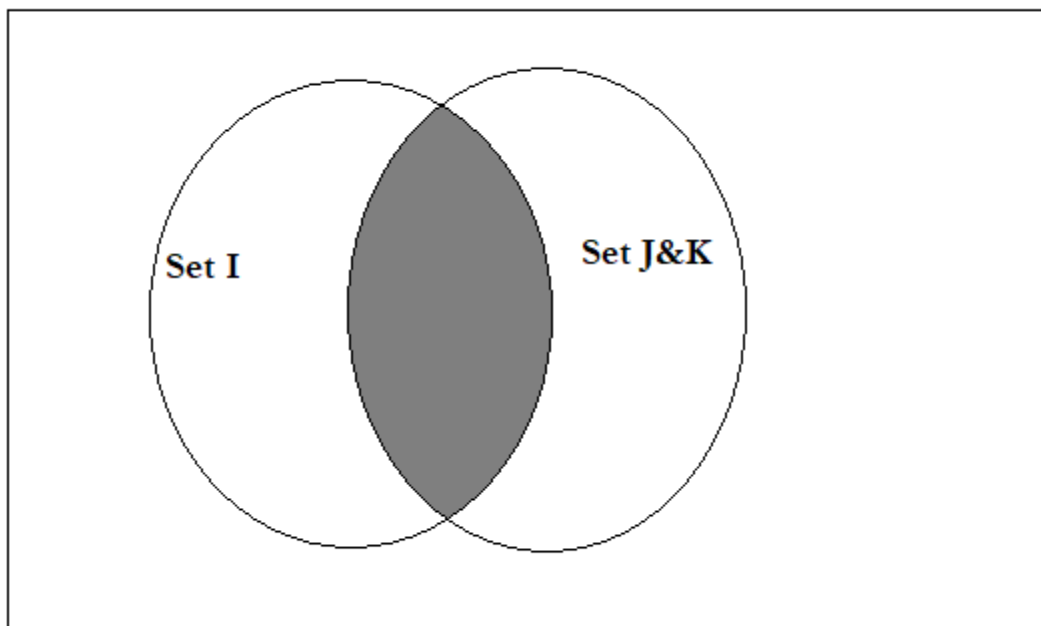


Fig. 4 illustrates the increase in the quantum of accession as a result of the enactment of the 1954 order and the state constitution of 1957.

And, the intersection (the grey area in fig. 4) of the two sets yields those provisions of the Indian constitution that are applicable to J&K without any modifications (P1) plus the provisions that are applied with modifications (P2). The latter part of the provisions enjoy a dual existence. Even though they are lumped together in the term 'Constitution of India as applicable to J&K', functionally, they are not part of the Indian constitution and do not find place in the Indian constitutional space. Therefore, I have represented them separately from those provisions that have been applied without modifications.

$$\text{Set I} \cap \text{Set J\&K} = \{P1 + P2\}$$

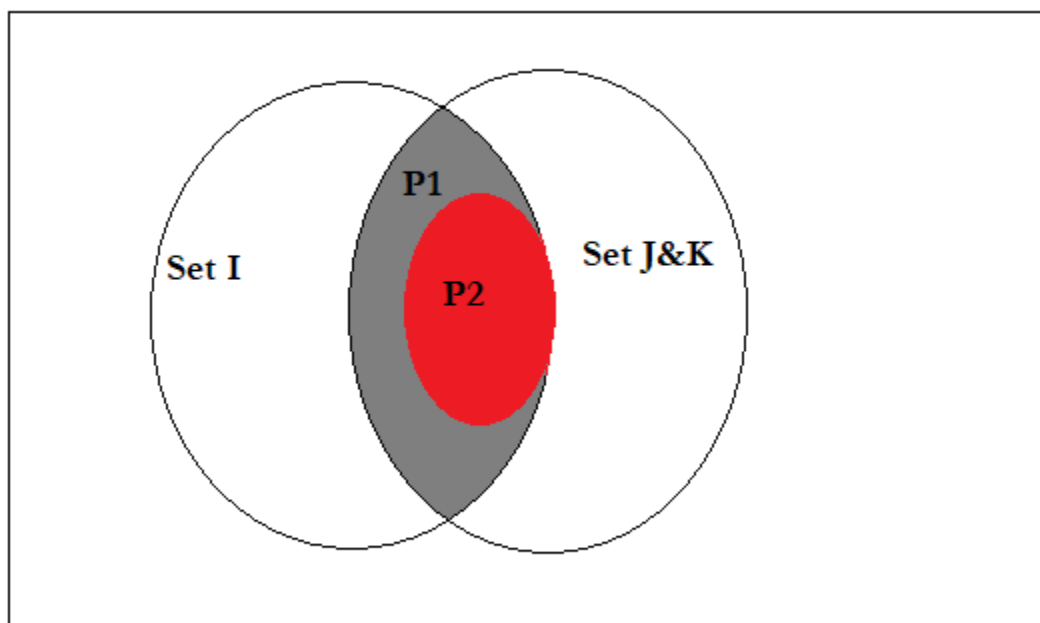


Fig. 5

illustrates the difference between the P1 and P2. Even though both form part of the shared constitutional space, certain features of P2 demand this distinction from P1.

P1 here also includes Article 370. Because of this distinction between P1 and P2, Article 370 could not have been employed to affect any change to Article 367 (that formed part of P2) that had the effect of changing Article 370 itself.<sup>69</sup> This is not to say that Article 370 can be used to change the P1 provisions once they have been applied. In fact, under Article 370, there is no scope for promulgating amendment orders.<sup>70</sup> These powers have been read into the provision using a statute that remains an extrinsic aid to interpretation.<sup>71</sup> It is also worth pointing out that even though P2 provisions are seen as amendments to the Indian constitution (like Article 35A), for J&K's constitutional space, they are part of the constitution as originally applied in 1954, and hence are not considered as amendments but an original provision of the constitution.

#### Phase V

In phase V, the systemic erosion of Article 370 is studied and its impact on the two legal orders. With the execution of more than 50 presidential amendment orders, the constitutional space of J&K was squeezed out and J&K's legal authority was also limited. In its place, the Indian constitution and Indian legal authority came to occupy the space. This erosion is effected by expanding the scope and content of the 1954 order and at the same time limiting the content and authority of the state constitution. Therefore, the shared constitutional space gets burgeoning, and the original bargain is replaced by a negative bargaining zone. In essence every amendment that was passed post dissolution of the J&K CA amounted to a unilateral decision in violation of the original bargain. As the surplus of J&K eroded so did the ZOPA incrementally reduce. When

<sup>69</sup> See 'The Constitution (Application to Jammu and Kashmir) Order 2019' (5 August 2019) <<http://egazette.nic.in/WriteReadData/2019/210049.pdf>> accessed 22 December 2021.

<sup>70</sup> The 'erosion' of Article 370 has been carried out by promulgating such amendment orders. See Noorani (n 2) 337-388.

<sup>71</sup> *Sampat Prakash v The State of Jammu and Kashmir and Anr.* 1969) 2 SCR 365.

ZOPA reduces from a broad range to a narrow range, negotiations break down and the bargain moves into the Negative Bargaining Zone (NBZ).

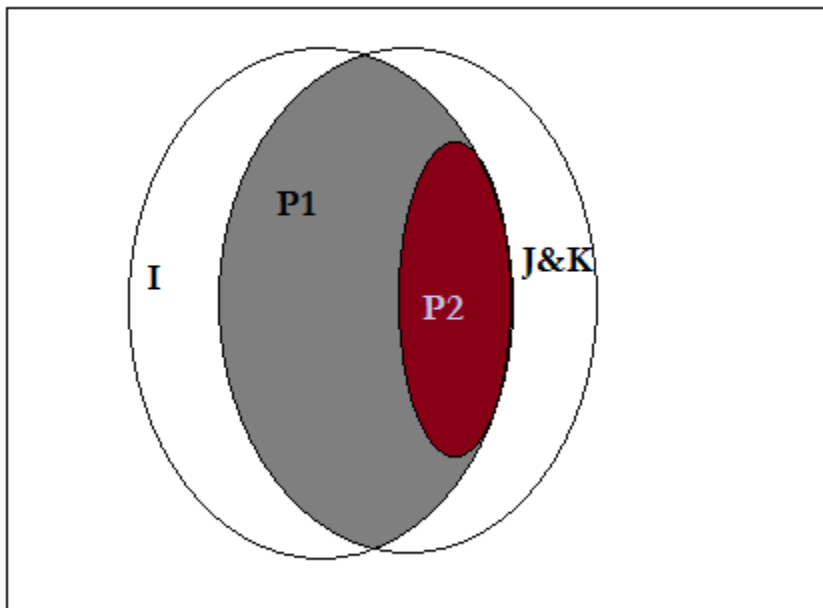


Fig. 6 illustrates the burgeoning of the shared constitutional space the squeezing out of the J&K's own constitutional identity.

With the application of the second amendment order of 1958<sup>72</sup> and the second amendment order of 1965,<sup>73</sup> the entire Indian constitution (as it then stood) was applied to J&K while retaining the P2 provisions and the J&K's own constitution. Once this happens, J&K's own legal order as a separate entity ceases to exist while P1 becomes Set I. The Set J&K becomes part of the Set I. Even though there are provisions of the constitution that are still not applicable to J&K, its existence as a separate set ends because the rules of the game are changed at this stage. J&K's legal authority gets steadily reduced while at the same time the Indian legal authority over J&K is systematically increased. Even though the set elements remain the same, the quantum of the 1954 order keeps steadily increasing. In many ways, the 1954 order is repurposed from governing constitutional relations between J&K and India to becoming the dominant constitution in J&K's constitutional space.

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<sup>72</sup> See Noorani (n 2) 339.

<sup>73</sup> See Noorani (n 2) 351.

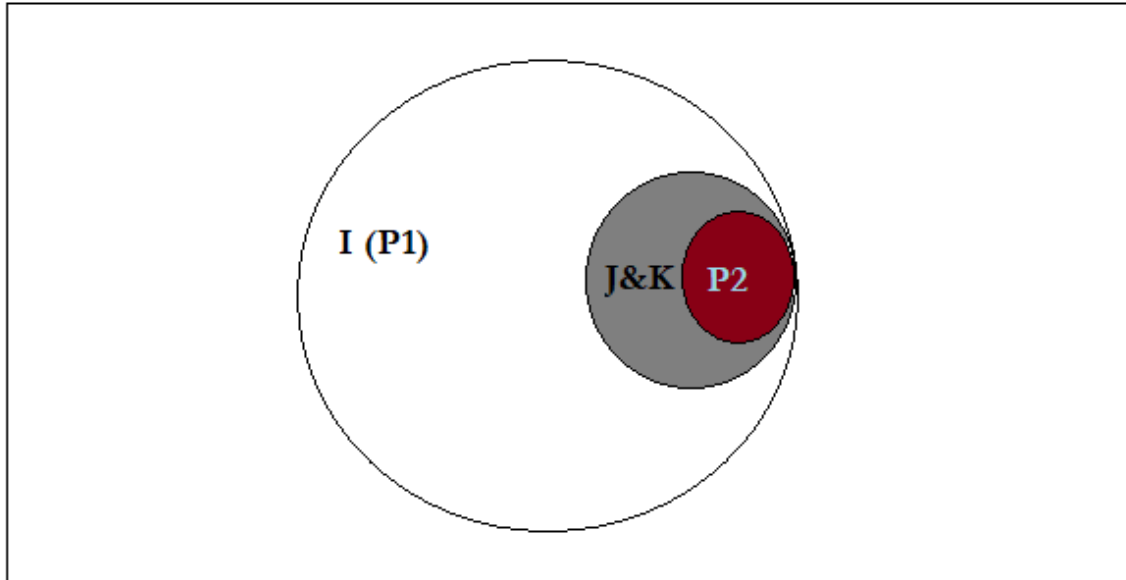


Fig. 7 illustrates how the J&K legal order was incorporated in the Indian one.

As more and more amendment orders are enacted, J&K's legal space shrinks. Terming this process as 'erosion of Article 370' therefore is a mask that keeps this sinister and systemic process hidden.

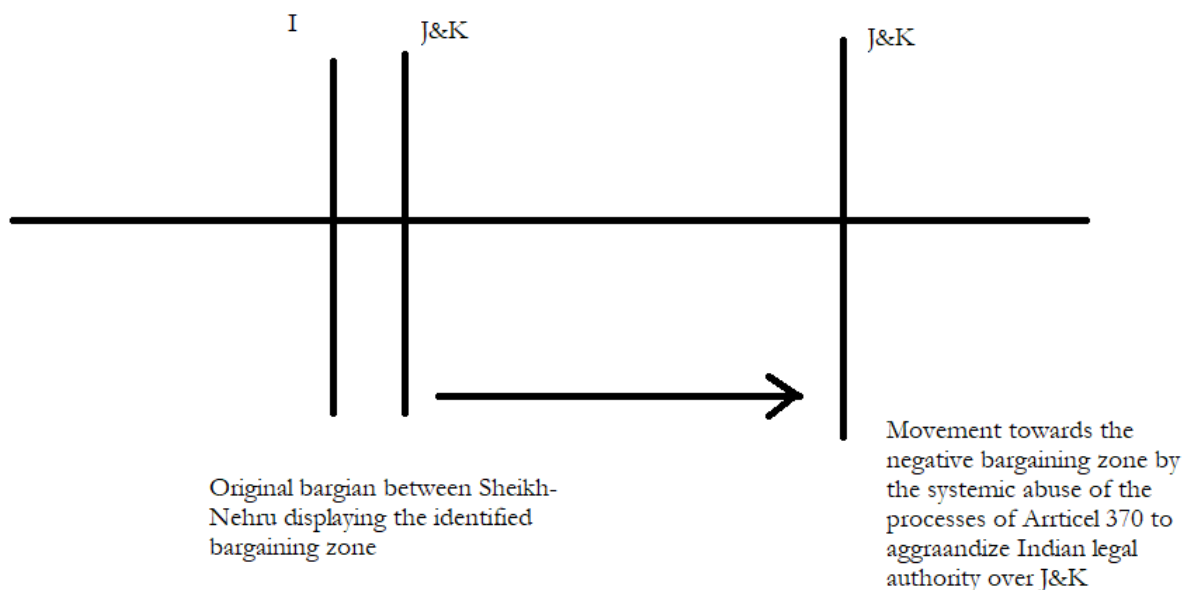


Fig. 8 illustrates the establishment of the negative bargaining zone

Phase VI

In Phase VI looks at the post-abrogation of Article 370 impact on Set I and subset J&K. Article 370, as such, has no implications since it is a procedural provision and not a substantive one. Therefore, what is abrogated, in essence, are the state constitution of 1957 and the 1954 order.

Here, the bargain formally enters the negative bargaining zone. The subset J&K disappears here and the Set I reigns supreme.

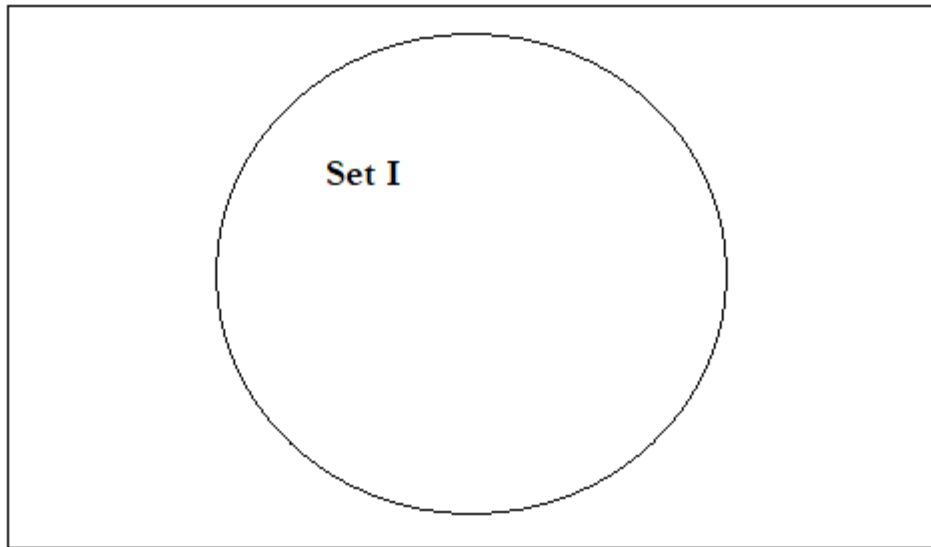


Fig. 9 illustrates the end of J&K's legal order and the formal occupation of the legal space by the Indian legal order.

Its worth pointing out that had just Article 370 been abrogated, then the two sets would have become disjoint once again on lines of phase II. This is because the shared constitutional space would no longer exist. But since abrogation of Article 370 was accompanied by (or rather primarily driven by the motivation to) to abrogate the state constitutional law and apply the Indian constitution in totality, J&K's own constitutional space disappears as a consequence.

### **Conclusion**

The ideal outcome for Nehru would have been to have J&K merged into the Union and the ideal outcome for Sheikh would have been to continue J&K's complete autonomy after the British relinquished its suzerainty. The compelling conditions for both made them come together in a strategic cooperative bargain in the form of Article 370. Article 370 involved erosion in individual gains (Nehru would have preferred wider application of federal jurisdiction and Sheikh would have preferred autonomous status for J&K) but by inserting Article 370 and through it limiting the Indian legal authority, a bargaining range was identified. However, this range subsequently entered the negative bargaining zone once Sheikh was dismissed from office and arrested allowing Nehru to initiate the 'erosion' of Article 370. As I pointed out in this chapter, terming this abuse as merely 'erosion of Article 370' is misleading since it masks what actually is happening underneath i.e., aggrandizement of the Indian legal authority at the cost of J&K's legal authority.

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