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### Will India Implement a Uniform Civil Code?

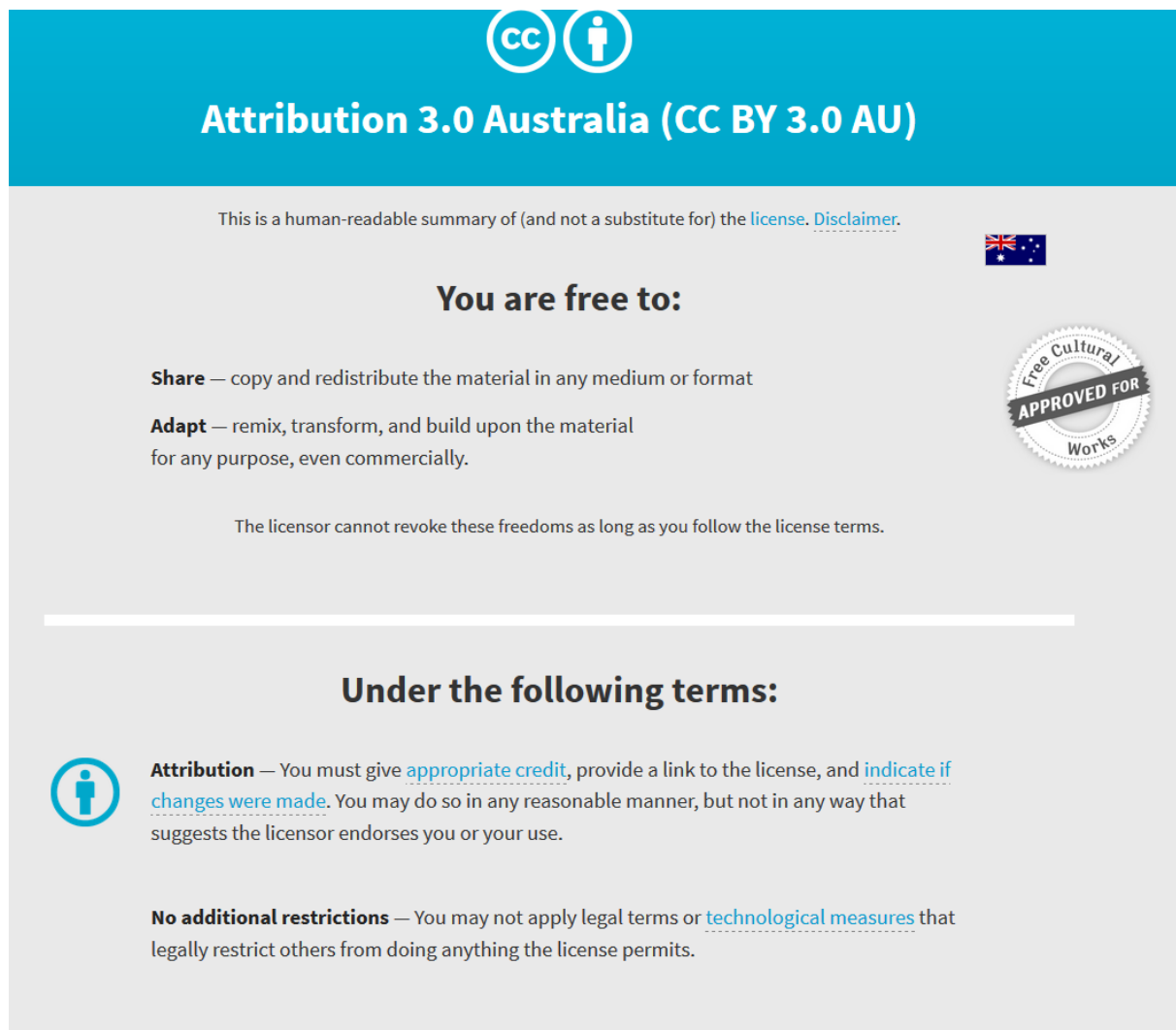
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# Australian Outlook

## In this section

### Will India Implement a Uniform Civil Code?

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By Peter Mayer and Dr Priya Chacko



**The introduction of a Uniform Civil Code (UCC) would standardise family law across India. But as religious tensions grow, a UCC may only further divide the nation.**

Within weeks of the election of Narendra Modi as Prime Minister in 2014, Kingshuk Nag revised his perceptive biography of Modi, *The NaMo Story: A Political Life*, to ask “What Will He Do?”. Nag cited the astonishingly accurate predictions of “a BJP insider” who was already looking far ahead to Modi’s re-election in 2019:

*Modi won’t take up controversial issues (like scrapping Article 370 and the uniform civil code) in his first term. ‘Modi thinks that his good performance is certain to earn him a second term... [then] he will take up these issues,’ says a BJP insider*

The issues the insider referred to have been top of the agenda of the Hindu nationalist supporters of Modi’s Bharatiya Janata Party (“The Indian People’s Party” or BJP) for many decades, and specifically affect India’s large Muslim community. The third major item on that agenda, the construction of a temple to the god Rama on the site of a 16<sup>th</sup> century mosque which was destroyed by a partisan mob in 1992, began in 2020, almost a year after Modi’s re-election.

Article 370 refers to a section of the Indian Constitution which guarantees special status to the Muslim-majority princely state of Jammu & Kashmir. When the state joined India in 1948, it was given the right to a special state flag, a separate state constitution, and autonomy in internal administration. In August 2019, shortly after the resounding victory of the BJP in national elections, the Indian parliament removed those special provisions.

Thus, under Prime Minister Modi the BJP has now implemented all its principal historic goals except the implementation of a Uniform Civil Code (UCC) — that is, a set of laws governing marriage, divorce, adoption, and inheritance which are applicable to all citizens of India.

Personal law systems govern almost a third of the world's population. These "personal laws" often create a tension between laws which apply only to certain communities and the imperative that national laws, such as criminal laws, should apply equally to all citizens. For instance, Australian law has wrestled with the place of Aboriginal traditional law within its common law system. In cases such as *R v Sydney Williams* (1976) courts have allowed a limited scope for the imposition of traditional punishments. The traditional personal laws of Jews and Muslims sit uneasily within the encompassing structure of Australia's *Family Law Act*. For instance, Jewish women have complained that if their husband refuses to grant "the Gett", under Jewish law they cannot remarry and their children are denied full participation in their community. Divorce can also pose problems for Islamic Australians, as Sharia law permits a husband to pronounce the "triple *talaq*" ("I divorce you" said three times). A woman seeking divorce must find a third party, such as a judge, willing to grant the divorce. If she cannot, then like the Jewish woman, she remains married in her own eyes and those of her community.

In India, with its pronounced linguistic regions and multitudes of religions and sects, the problems involved in unifying diverse codes of personal law are almost intractable. While tentative steps to reform the personal law of Hindus were taken under British rule, it was only after Independence in 1947 that major reforms were undertaken. The framers of the Indian Constitution aspired to bring all citizens under a single personal law, as can be seen in Article 44: "The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India." The drafters envisaged an India where minority religious communities, in particular, had sufficient trust in the government to undertake this next step. In the 1950s, despite initial resistance, the Indian Parliament passed several major unifying laws, such as the *Hindu Marriage Act*, which brought all Hindus, Buddhists, and Jains under unified laws. Sikhs were initially covered but were later removed. Also not covered were Muslims, Christians, Parsis, and Jews who retain their individual personal laws to this day.

The Congress Party, then led by Jawaharlal Nehru, soon recognised that attempting to bring other communities under a single umbrella without their consent would be highly divisive. And thus, a pragmatic status quo has existed for the past six decades.

This status quo has been criticised and faced legal challenges. The Supreme Court ruled in 2002 – and again in 2017 – that the arbitrary use of triple *talaq* without reasonable grounds for divorce and prior attempts at mediation, was invalid, as it discriminated against women and violated tenets in the Quran. Scholars have argued that the personal law system violates women's constitutionally-protected right to equality. Muslim personal law is particularly uncodified, leaving the power to interpret Sharia in the hands of dominant, and often conservative, elements of the community. There are also concerns that the personal law system impinges on religious freedom, since it recognises only some religious identities and norms, and is problematic given that India is constitutionally a secular state. Others defend the personal law system on the grounds of religious freedom and minority group autonomy, and fear that a UCC will reflect Hindu norms and entrench the "tyranny of the majority."

Seeking an alternative, some have argued for the establishment of a UCC in line with the constitutional directive, alongside a system of alternative dispute resolution for some matters such as inheritance, which would bolster the rights of women, group autonomy, and religious freedom. Others advocate reforming personal laws to make them gender-just for all communities. One early test of how uniform laws which are not sectarian might be framed may emerge in the BJP-ruled northern state of Uttarakhand which recently announced that it proposes to develop a draft UCC for its residents.

In its election manifestos, the BJP advocated for a UCC on the basis of advancing gender equality and gender justice. There are reasons to be sceptical of this claim. For instance, in 2019, the BJP government passed the *Muslim Women (Protection of Rights on Marriage) Bill*, or "Triple Talaq Bill." The government claimed to be following the Supreme Court's 2017 order to legislate against triple *talaq*. However, whereas that ruling held that declarations of triple *talaq* were invalid, the government, without consulting relevant Ministries and Departments, instead chose to criminalise the practice. While some women's groups have supported the law, others have pointed out that criminalisation – which may involve a fine, three-year jail sentence, or arrest without a warrant – could leave women without spousal and child support and vulnerable to the harassment of matrimonial families. Critics have also argued that if gender justice was truly the government's priority, then legislation should apply to spousal abandonment by men in general, given that it is an issue that faces all religious communities in India.

Indeed, the BJP's concern for gender equality and constitutional protections dissipates when it comes to discriminatory Hindu norms. In 2018, the Supreme Court overturned a ban on women between the ages of ten to 50 entering the Hindu Sabrimala temple in Kerala, declaring it a violation of constitutional guarantees to personal liberty and religious freedom. In response, the BJP, with an eye on making electoral gains in Kerala, orchestrated a campaign opposing the entry of women to the temple. In so doing, Swapan Dasgupta, a nominated BJP member of the Upper House described the Supreme Court as a "a self-perpetuating unelected oligarchy" bowing to "cosmopolitan wisdom" and "the diktats of modernity."

The BJP government's apparently contradictory stances make sense when considered within its authoritarian populist politics which constructs and pits a "Hindu people" against a left-liberal elite and religious minorities. In supporting the Supreme Court's ruling against triple talaq, the government stigmatised Muslim men, and targeted previous secular governments which it accused of pandering to Muslims. In opposing the ruling against the Sabrimala ban, the BJP deemed the Supreme Court, and the Communist Party-led government in Kerala which supported the decision, to be a domineering elite infringing the rights of the Hindu people.

If, as it appears, the BJP's prime motivators are the condemnation of Muslims, electoral advantage, and the establishment of a uniform, majoritarian Hindu state, then it may go slow in pushing for a UCC. This is because reforming Hindu personal law may expose divisions among Hindus. There are several discriminatory features of Hindu personal law which its core Hindu support base may be reluctant to reform, such as the special tax benefits available for Hindu joint families, the preference given to male heirs, and Hindu polygamy.

A further reason for the Modi government to go slow on a UCC is the wide-spread condemnation it has recently received from Muslim-majority nations in West and Southeast Asia after two prominent party spokespersons made derogatory remarks about the Prophet Mohammad. Although both were removed from their posts, the BJP may hesitate to rekindle the flames of international criticism by bringing in laws which provoke wide-spread protests from its minority communities.

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