

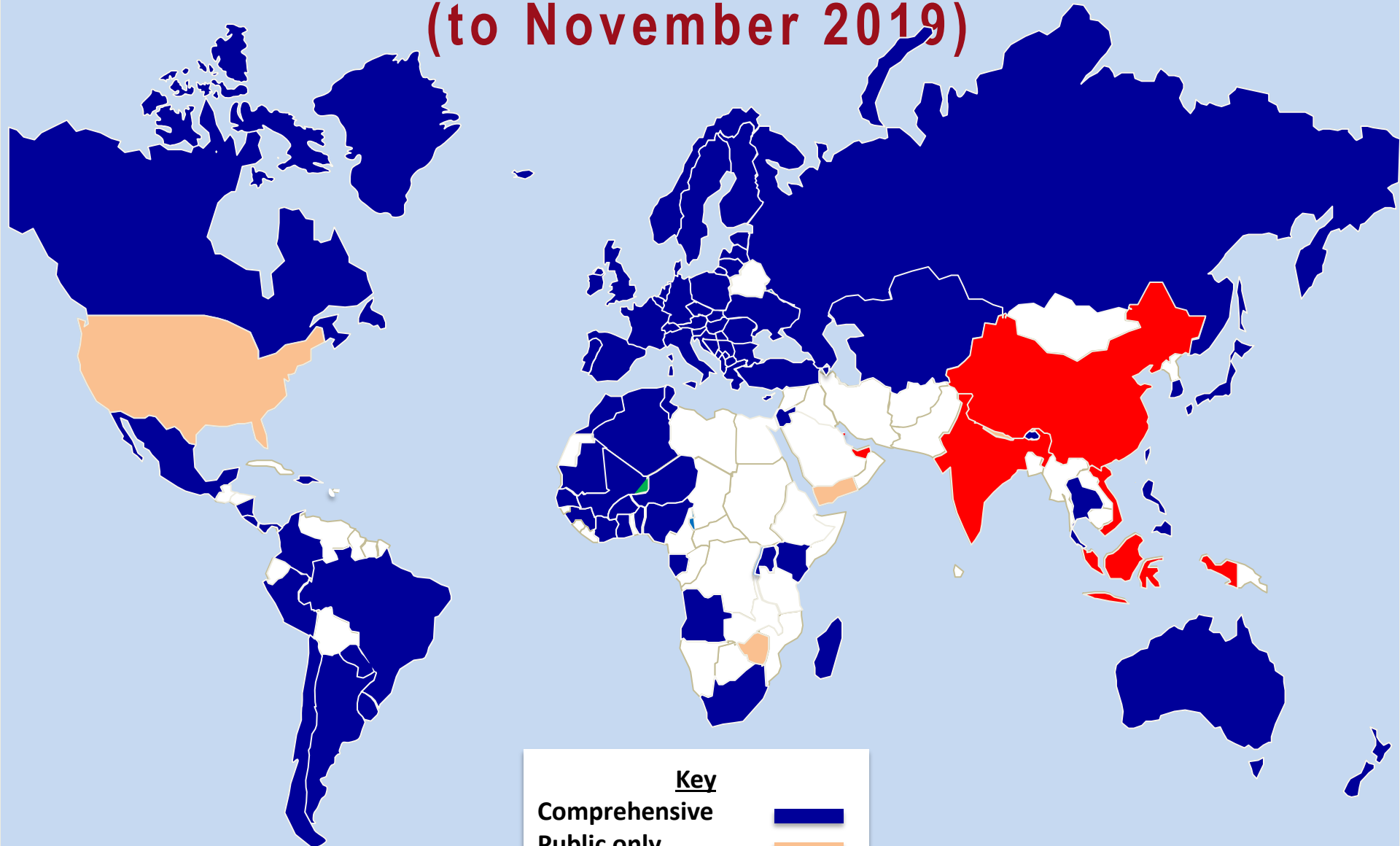
The prospects for Asian accessions to data protection Convention 108+






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137 Countries with data privacy Laws (to November 2019)



| <u>Key</u> | |
|---------------|---|
| Comprehensive |  |
| Public only |  |
| Private only |  |
| Most Private |  |
| Bills |  |

Asia's 25 jurisdictions



15/25 Asian countries have data privacy laws

1. Japan 1988 (public sector) + private sector 2003; revised. 2015
 2. South Korea 1995 (public sector) + private sector 2001
 3. Hong Kong 1995 (comprehensive); revised. 2012
 4. Taiwan 1995 (public sector + limited private sector)
 5. Thailand 1997 (public sector)
Comprehensive Law 2019
 6. Macau 2006 (comprehensive)
 7. Nepal (public sector 2007)
(Comprehensive Law 2018)
 8. Malaysia 2009 (private sector)
 9. Vietnam 2010-19 (private sector)
 10. India 2011 (private sector) Draft comprehensive Bill 2018
 11. Philippines 2012 (comprehensive)
 12. Singapore 2012 (private sector)
 13. Indonesia 2012 + Reg. 2016 (private sector) Comp. Bill 2018
 14. China 2011-19 (private sector)
 15. Bhutan 2018 (comprehensive)
- Official Bills**
16. Pakistan
 17. Sri Lanka
- No laws or official Bills**
18. Afghanistan
 19. Bangladesh
 20. Myanmar
 21. Brunei
 22. Timor Leste
 23. Cambodia
 24. Lao PDR
 25. North Korea

Starting point: Regional or National?

| Regional Structures | Europe | Asia |
|--|---|---|
| | 56 countries and territories | 23 countries + 2 SARs |
| Regional Legislatures | EU and CoE | None |
| Permanent bureaucracies | Brussels & Strasbourg | None significant (not ASEAN, APEC, nor SAARC) |
| Common privacy rights | EU Charter; Directives; GDPR; ECHR A8; Conv 108/108+ | None (only 20/25 are ICCPR parties; only 5/25 accept ICCPR Optional Protocol) |
| Regional courts | ECtHR; ECJ/CJEU | None |
| Regional DPA groupings with functions/powers | Article 29 Working Party; EU Data Protection Board (EDPB); EDPS | APPA is informal; APEC CBPR JOP approves proposals |

**I have a
feeling we're
not in
Strasbourg
anymore**



Purpose of presentation

- To discuss the potential for any of the 25 countries in Asia to accede to Conv. 108+
 - whether in the short, medium or long term
- Any assessments can only be indicative because of changing legislative or political developments, or interpretations
- Such assessments are diplomatically sensitive for officials to make, outside formal procedures
 - independent analysis is therefore useful, providing public discussion of the future of international agreements

Approach taken:

Consider 5 categories of jurisdictions

1. Laws in jurisdictions with inherent problems in acceding (not a State, or not democratic);
2. Laws of inadequate scope or lacking a data protection authority;
3. Laws requiring substantive assessment and possible amendment;
4. Countries with proposed Bills;
5. Countries with no relevant laws or Bills.

1. Laws in jurisdictions (a) not a State

- **108+ Requires:** must be a State (art. 27(1)); 'State' according to UN practice; States can accede on behalf of their territories (art. 28(1)).
 - 1 **Taiwan** is not a State, by UN practice.
 - 2 **Hong Kong** is a SAR of the PRC (not a State), with capacity under its Basic Law to enter agreements like 108+; but art. 27 requires that the PRC accede, so this capacity is not relevant.
 - 3 **Macau** SAR is in the same position

1. Laws in jurisdictions (b) not democratic

- **108+ Requires:** Not explicit, but assumes Parties are democratic societies:
 - arts. 11(1) and (3) re derogations, 14(4)(c) and (d);
 - *Explanatory Report* [73], [91]-[95], [108], [113], [117]
 - *Evaluation & Follow-up Procedure*, [7] bullet 1, ref. to democracy, democratic institutions and the rule of law'
 - Polakiewicz *Treaty Making* p. 35 on suspensions if a country 'departed from basic principles of democracy'
- 4. **China (PRC)** – not a democracy;
- 5. **Vietnam** – not a democracy;
 - Also: Neither country has separate or independent DPAs; nor do they have laws for their public sectors (next)

2. Laws of (a) inadequate scope

- **108+ requires:** laws ‘applying in the public and private sectors’ (art. 3(1)); contra EU GDPR’s allowing adequacy on a sectoral basis.
- 6. **Singapore** – law only covers private sector; no equivalent law in public sector;
- 7. **Malaysia** – law only covers private sector; no equivalent law in public sector;
 - Singapore has no announced plans to review this; scope of Malaysia’s proposed 2020 review is uncertain.
- 8. **India** – current law only covers private sector
- 9. **Indonesia** –current law only covers private sector

2. Laws (b) lacking a data protection authority

- **108+ requires:** ‘one or more’ DPAs ‘which shall act with complete independence’ (art. 15(5)).
 - Agencies with guaranteed independence are rare in Asia.
- **Singapore** – DPA part of a govt. agency, and can be given instructions
- **Malaysia** – DPA can be given instructions
- **India** – current law has no DPA – Bill proposes DPA
- **Indonesia** – current law has no DPA – Bill proposes
- 10. Bhutan** – Act is enforced through a Ministry
- 11. Nepal** – Act is enforced through a Ministry

2. Laws (b) lacking a data protection authority (cont.)

- 12.Japan** – has a law public sector law, and an independent DPA, but only for the private sector; Ministry is DPA for the public sector.
 - EU adequacy finding was only for private sector, so only public sector access was in issue, not DPA
- Each of these 7 laws may also have considerable problems reaching the substantive standards of 108+, without major amendments

3. Laws requiring substantive assessment (and possible amendment)

- **108+ requires:** Parties' domestic law must give effect to 'the provisions of this Convention' + 'secure their effective application'
 - Stronger than 108's 'basic principles'?
 - Apparent reference to *all* provisions, but generous interpretations can soften this
 - Different from EU concept of 'adequacy' (perhaps more strict), but extent still uncertain
- Necessary to consider all the provisions of 108+ that go beyond a minimum ('1st generation') law
 - Over: only listed where first appear in 108/AP/108+ (all are now found in 108+)

| II | 2 nd Generation – ‘Current global standards’ – post-1995 | EU Directive | Conv 108 , AP, and 108+ |
|------|--|------------------------|--------------------------------|
| 2.01 | <i>Minimum collection</i> necessary for the purpose (not only ‘limited’) (data minimisation) | Dir 6(1)(b),(c), Dir 7 | C108 5(c) |
| 2.02 | <i>Destruction or anonymisation of personal data after purpose completed</i> | Dir 6(1)(e) | C108 5(e) |
| 2.03 | <i>Add. protections for sensitive data</i> in defined categories | Dir 8 | C108 6 |
| 2.04 | <i>Legitimate bases for processing defined</i> [Weaker: general requirement of ‘fair and lawful processing’ (not only collection)] | Dir 7 [Dir 6(1)(a)] | – C108; C108+ 5(2) [C108 5(a)] |
| 2.05 | <i>Additional restrictions on some sensitive processing systems</i> (notification; ‘prior checking’ by DPA etc) | Dir 20 | – C108; C108+ 10(2) |
| 2.06 | <i>Limits on automated decision-making</i> (incl. right to know processing logic) | Dir 15, 12(a) | – C108; C108+ 9(1)(a), (c) |
| 2.07 | <i>To object to processing on compelling legitimate grounds, including to ‘opt-out’ of direct marketing uses of personal data</i> | Dir 14(a), (b) | – C108; C108+ 9(1)(d) |
| 2.08 | <i>Restricted data exports required</i> based on recipient country protections, or alternative guarantees | Dir 25, 26 | C108 AP 2 |
| 2.09 | <i>Independent Data Protection Authority(-ies) (DPA)</i> | Dir 28 | C108 AP 1 |
| 2.10 | <i>Recourse to the courts to enforce rights</i> (incl. compensation, 7 appeals from DPA decisions) | Dir 22, 23 | C108 AP 1(4) |

2nd generation standards in Asian laws (2019)

| 2 nd Gen. – ‘European standards’ | EU Directive | Asian laws including standard | No. |
|--|-----------------------------------|---|-----|
| Data retention limits (destruction or anonymisation) after processing achieved | EU Dir 6(1)(e) GDPR 5(1)(e) | Bhutan, HK, Indonesia, Japan, Korea, Malaysia, Macau, Philippines, Taiwan, Singapore, Thailand, Vietnam | 12 |
| Recourse to the courts to enforce data privacy rights (incl. compensation, and appeals from decisions of DPAs) | EU Dir 22, 23 GDPR 78, 79, 82 | Bhutan, China, HK, India, Indonesia, Korea, Macau, Philippines, Taiwan, Singapore, Thailand, Vietnam | 12 |
| Minimum necessary collection for the purpose (not only ‘limited’) | EU Dir 6(1)(c), 7 GDPR 5(1)(c) | Bhutan, China, HK, India, Korea, Malaysia, Macau, Taiwan, Singapore, Thailand | 10 |
| Restricted data exports based on data protection provided by recipient country (‘adequate’), or alternative guarantees | EU Dir 25 GDPR 44-49 | China, India, Japan, Korea, Malaysia, Macau, Singapore, Thailand, Taiwan | 9 |
| Specialised Data Protection Authority(-ies) (DPA) required | EU Dir 28 GDPR 51-59, 77 | Bhutan, HK, Japan, Malaysia, Korea, Macau, Philippines, Singapore, Thailand | 9 |
| Additional protections for sensitive data in defined categories | EU Dir 8 GDPR 9, 10 | Bhutan, China, Japan, Korea, Malaysia, Macau, Philippines, Taiwan, Thailand | 9 |
| Rights to object to processing, including to ‘opt-out’ of direct marketing uses of personal data | EU Dir 14(a), (b) GDPR 21 | Bhutan, China, HK, Korea, Malaysia, Macau, Taiwan, Thailand, Vietnam | 9 |
| General requirement, and exhaustive definition, of legitimate processing’ | EU Dir 6(1)(a) GDPR 5(1)(a), 6 | Bhutan, China, Korea, Malaysia, Macau, Philippines, Taiwan, Thailand | 8 |
| Prior notification to or checking by DPA of some sensitive processing | EU Dir 20 GDPR 36 | HK, Japan, Korea, Malaysia, Macau | 5 |
| Limits on automated decision-making (incl. right to know processing logic) | EU Dir 15, 12(a) GDPR 22 | China, Macau, Philippines | 3 |
| | | Av. over 14 countries = 6.1/10 principles (Nepal not included) | 86 |

| IIIA | 3 rd Generation – Common European Principles | GDPR | Conv 108+ cl. |
|------|---|--------------------|-------------------|
| 3.01 | <i>Data protection by design and by default</i> | GDPR 25 | C108+ 10(2)-(4) |
| 3.02 | <i>Demonstrable accountability by controllers</i> | GDPR 5(2) | C108+ 10(1) |
| 3.03 | <i>Data breach notification to DPA for serious breaches</i> | GDPR 33 | C108+ 7(2) |
| 3.04 | <i>Direct liability for processors as well as controllers</i> | GDPR 28-31 | C108+ 7(1), 10(1) |
| 3.05 | <i>Stronger consent requirements – including ‘unambiguous’ and unbundled; special conditions for children’s consent</i> | GDPR 7, 8 | C108+ 5(2) |
| 3.06 | <i>Proportionality required in all aspects of processing</i> | GDPR <i>passim</i> | C108+ 5(1), 10(4) |
| 3.07 | <i>DPA’s to make decisions and issue administrative sanctions incl. fines</i> | GDPR 58(1) | C108+ 12 |
| 3.08 | <i>Biometric and genetic data require extra protections</i> | GDPR 9 | C108+ 6(1) |
| 3.09 | <i>Stronger right to erasure incl. ‘to be forgotten’</i> | GDPR 17, 19 | C108+ 9(1)(d),(e) |
| 3.10 | <i>DPA’s must cooperate with other DPA’s in resolving complaints with international elements</i> | GDPR 50 | C108+ 16-21 |

| # | 3 rd Gen. Common Eur. Principles | Asian Laws | # |
|------|--|--|----|
| 3.01 | <i>Data protection by design and by default</i> | – | 0 |
| 3.02 | <i>Demonstrable accountability by controllers</i> | – | 0 |
| 3.03 | <i>Data breach notification to DPA for serious breaches</i> | China, Korea, Philippines, Thailand, Vietnam | 5 |
| 3.04 | <i>Direct liability for processors as well as controllers</i> | Thailand | 1 |
| 3.06 | <i>Proportionality required in all aspects of processing</i> | – | 0 |
| 3.05 | <i>Stronger consent requirements (incl. unambiguous and unbundled)</i> | Korea, Thailand | 2 |
| 3.07 | <i>DPA's to make decisions and issue administrative sanctions incl. fines</i> | Japan, Korea, Singapore, Taiwan, Thailand | 5 |
| 3.08 | <i>Biometric and genetic data require extra protections</i> | Japan, Thailand | 2 |
| 3.09 | <i>Stronger right to erasure incl. 'to be forgotten'</i> | Indonesia, Thailand | 2 |
| 3.10 | <i>DPA's must cooperate with other DPA's in resolving complaints with international elements</i> | Japan | 1 |
| TTL | Av. over 14 countries = 2/10 principles | (Nepal not included) | 17 |

3. Laws requiring substantive assessment (and possible amendment)

- As of 2019, only 2 countries could hope to accede with only modest amendments (neither has stated intention to do so)

13. South Korea (at least 12/20 elements) – Bills strengthening laws (esp. indep. DPA) may be enacted by end-2019

14. Thailand (13/20 elements) – 1st post-GDPR Asian law; potential issues of democracy and DPA independence

15. The Philippines (only 7/20 elements) – would require much more substantial amendments

3. Laws requiring substantive assessment (and possible amendment)

- India and Indonesia have proposed Bills involving major amendments to existing laws:
- **India**
 - Existing law has no substance: EU twice rejected
 - Will government implement Srikrishna C'tee Bill?
 - It contains most key GDPR/108+ features, including a DPA
 - Some obligations only apply to 'significant' controllers

3. Laws requiring substantive assessment (and possible amendment)

- **Indonesia**

- Existing law is very limited, with no DPA
 - 2018 government comprehensive draft Bill
 - not yet before Parliament; new IT Minister says it is priority
 - Bill includes a DPA, and many GDPR-like elements
- As 2nd & 3rd most populous Asian countries , either would be great success for 108+

4. Countries with proposed Bills

- Two countries have no law, but Bills proposed

16. Sri Lanka

- Ministry-proposed comprehensive draft ‘final’ Bill 2019, with strong GDPR-influenced features
- DPA to be nominated by government, but no guarantee of independence

17. Pakistan

- 2018 government Bill with modest principles which would need strengthening
- Does include a DPA with independence

5. Countries with no relevant laws/Bills

This leaves 8 states with neither laws nor proposed Bills:

2 democratic States:

18. Bangladesh

19. Timor Leste (constitution guarantees data protection)

3 States with questionable democratic claims:

20. Afghanistan

21. Myanmar

22. Cambodia

3 States with no democratic claims:

23. Brunei

24. Laos

25. North Korea

Convention 108+ prospects in Asia

Result: 10/25 Asian countries are accession possibilities

- Of countries with laws
 - **South Korea** will present the best prospect, if its current Bills are passed;
 - **Thailand's** current law only requires modest amendments
 - **Japan**, the **Philippines** and **Malaysia** require assessment of current laws, and probably significant amendments
 - **India** and **Indonesia** depend on passage of major draft Bills
- Of countries with no laws, but Bills:
 - **Sri Lanka's** Bill is worth assessment
- Of countries with no laws or Bills:
 - **Bangladesh** or **Timor Leste** may be feasible, in time

References

- Greenleaf, G *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (OUP, 2014)
- Greenleaf, G 'Asia's Data Privacy Dilemmas 2014-19: National divergences, cross-border gridlock' (2019) No 4, *Revista Uruguaya de Protección de Datos Personales* (Revista PDP), August 2019, 49-73. Available at SSRN: <https://ssrn.com/abstract=3483794>